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IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. KRISTI DEJONG, Defendant-Appellant, Petitioner on Review.	Baker County Circuit Court Case No. 16CR52264 CA A165504 SC S068065

PETITIONER'S BRIEF ON THE MERITS

Review the decision of the Court of Appeals
On an appeal from a judgment of the Circuit Court for Baker County
Honorable Gregory L. Baxter, Judge

Opinion Filed: July 8, 2020
Author of Opinion: DeHoog, Presiding Judge
Before: DeHoog, Presiding Judge, DeVore, Judge, and Aoyagi, Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions and Statutes

Other Authorities

PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

This case arises from defendant's conditional guilty plea to one count of unlawful delivery of methamphetamine, ORS 475.890, following the trial court's denial of her motion to suppress. The police unlawfully entered and seized defendant's home, applied for a search warrant relying, in part, on evidence gained during the unlawful seizure, and eventually discovered evidence of methamphetamine possession and delivery in defendant's home during the warrant search. The unlawful seizure lasted for hours and persisted until the police performed the warrant search. Defendant argued below and on appeal that Article I, section 9, of the Oregon Constitution required suppression of the evidence discovered during the warrant search because it was tainted by the unlawful seizure.

The trial court denied suppression after concluding that the search warrant was supported by probable cause even after suppressing the evidence directly obtained from the unlawful seizure and excising that information from the search warrant affidavit. The Court of Appeals affirmed after concluding that defendant failed to satisfy her initial burden of showing a "but-for" "factual nexus" between the unlawful seizure and the challenged evidence. *State v. DeJong*, 305 Or App 325, 335-38, 469 P3d 253 (2020), *rev allowed*, 367 Or

496 (2021). This court allowed review to evaluate defendant's motion and the trial court's and appellate court's rulings.

SUMMARY OF ARGUMENT

On review, this case presents the issue of which party bears what burden when a defendant seeks to suppress evidence discovered during a warrant search after the defendant has established that the search was preceded by an unlawful seizure. In *State v. Johnson*, 335 Or 511, 73 P3d 282 (2003), this court required that a defendant first establish a "but-for" factual nexus between an unlawful seizure of property and the evidence discovered during the execution of a subsequent warrant to seize and to search the property. If the defendant makes that showing, the burden shifts to the state to establish that the challenged evidence was untainted by the prior illegality.

This court should disavow the factual nexus requirement from *Johnson*. In adopting that requirement from federal courts, the court did not consider that, unlike the Fourth Amendment to the United States Constitution, the Article I, section 9, exclusionary rule (hereinafter Oregon's exclusionary rule) seeks to vindicate an individual's rights. Correspondingly, it failed to consider whether imposing *any* burden on the individual who had suffered an unlawful seizure and who's rights the exclusionary rule sought to vindicate undermined that purpose.

Rather, the *Johnson* court adopted the federal factual nexus requirement based on the principle that a search and seizure pursuant to a warrant carries a presumption of regularity, and, thus, the defendant should bear some initial burden. The presumption of legality that a warrant carries descends from the fact that a neutral magistrate has determined that there is probable cause to search. However, that determination speaks only to a confined issue: whether a search or seizure was authorized. It does not address whether the warrant itself, or the evidence discovered during its execution, was *tainted* by a prior illegality.

In summary, rather than examine the principle animating Oregon's exclusionary rule, this court adopted the federal factual nexus requirement based on a principle that was immaterial to the question it faced. The *Johnson* court's analysis was thus flawed.

Furthermore, the *Johnson* but-for factual nexus requirement cannot be squared with this court's reasoning in *State v. Unger*, 356 Or 59, 333 P3d 1009 (2014). After *Unger*, warrantless actions carry no presumption of regularity and evidence discovered following such an action is presumed tainted unless the state purges the taint. The mere existence of a warrant cannot—by itself—purge the taint of a preceding illegality. Thus, when an unlawful warrantless search or seizure comes first in time, the only presumption is that evidence obtained following that violation is subject to suppression, unless the state

proves otherwise. The existence of a warrant certainly may bear on that determination. But the subsequent issuance of a warrant only speaks to the lawfulness of a later search or seizure, not whether the evidence is derived from a prior illegality. Thus, it should not alter the presumption that evidence discovered following that prior illegality is tainted or relieve the state of its burden to prove otherwise.

Additionally, just as in *Unger*, imposing the nexus requirement here is unnecessary because the question of whether the evidence was independent of or attenuated from the previous illegality already necessarily considers the causal connection between the possessory and privacy rights transgression and the evidence. And requiring defendants to show a factual nexus would prove no less confusing for litigants and courts than it does in consent cases.

Alternatively, if the factual nexus requirement should survive—eliminated from all other Article I, section 9, analyses but remaining in this one setting—then this court must re-examine the rigor of that requirement. It should hold that defendant established the necessary nexus below, because the warrant affidavit contained the fruits of the unlawful seizure and the police unlawfully possessed the challenged evidence until the moment the warrant search occurred. Those connections between the unlawful seizure and the challenged evidence were sufficient to shift the burden to the state. If this court

decides either of those issues in defendant's favor, it should reverse the ruling of the Court of Appeals.

Moreover, this court should reverse the trial court's ruling that the state satisfied its burden of purging the taint of the prior police illegality because the warrant could have issued without the affidavit including fruits of the unlawful seizure. First, even if the warrant could have issued absent the illegality, the police still used the fruits of the unlawful seizure to locate evidence in defendant's home and to connect that evidence to her. Second, in order to purge the taint of the illegality, the state was also required to prove that, absent the unlawful seizure, the police would have discovered the evidence through the warrant search. Because the state's evidence established a likelihood that, absent the unlawful seizure, some—if not all—of the incriminating evidence would not have been present during the execution of the warrant, the trial court should have suppressed evidence obtained during the warrant search.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First Question Presented

When seeking to suppress evidence under Article I, section 9, of the Oregon Constitution, does a defendant have any further burden if she has established that an unlawful warrantless search or seizure preceded a search or seizure of the same property pursuant to a warrant?

Proposed Rule of Law

No. When the state violates a defendant's Article I, section 9, rights, subsequently discovered evidence is presumed to have derived from that violation. The state bears the burden of overcoming that presumption. The subsequent issuance of a lawful warrant does not alter the presumption that flows from the prior violation. So far as *Johnson*, 335 Or 511, holds otherwise, this court should disavow that holding as analytically flawed and inconsistent with this court's more recent pronouncements under Article I, section 9.

Second Question Presented

If a defendant bears the burden of showing a minimal factual nexus in this setting, does she satisfy that burden by establishing that (1) police officers used the fruits of their unlawful warrantless seizure in their warrant affidavit, or (2) that officers continued to unlawfully possess the evidence until the moment they searched it pursuant to a warrant?

Proposed Rule of Law

Yes. If a defendant has any burden in this setting, it is minimal, requiring only some factual connection between the police illegality and the discovery of the challenged evidence. Establishing that evidence unlawfully obtained during the seizure was used in the subsequent search warrant affidavit, and that, through the unlawful seizure, the police maintained control of the challenged evidence until the warrant search satisfies a defendant's burden.

STATEMENT OF FACTS

I. Historical Facts

Initial investigation

On August 19, 2016, an informant named who had been working with Baker City Police Officer Daniel Pelayo regarding defendant's suspected involvement in an "illegal drug enterprise," contacted Pelayo and informed him that she had purchased methamphetamine from defendant several times that month. Tr 48-49, 79; *Affidavit in Support of Application for Search Warrant*, ER 1-20.[1]

told Pelayo that defendant had a "decent amount methamphetamine and she was selling it." also reported that she had been at defendant's home earlier that day. During that visit, defendant was sitting at her computer desk, which had a set of digital scales on it, and defendant's housemate, was sitting on the couch. ER-12. Defendant pulled a medium size baggie containing approximately one ounce of methamphetamine out of her purse and sold "$40 worth" of methamphetamine to for $20. ER 12-13.

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[1] Defense counsel attached the search warrant affidavit, search warrant, and warrant return to her memorandum in support of defendant's motion to suppress. Defendant sets those documents out separately in the excerpt of record for ease of reading.

stated that defendant offered to use methamphetamine with her, but defendant did not have a pipe and did not want to use the drug intravenously. instead purchased a small amount of marijuana from defendant. ER-13.

Pelayo had send defendant a text message asking to purchase methamphetamine. texted defendant at approximately 4:00 p.m. saying, "Hey I got someone look in for $50th u got that." Defendant eventually replied, "[y]es," and the two set up for the purchase to take place at defendant's home in "[a]bout an hour." Tr 79-82; ER 12-13.

told Pelayo that defendant is "kind of flakey," and that, "if you're not right on it after she agrees to sell methamphetamine * * * she would disappear or just not answer her phone." Tr 92. also stated that she "had some indication that [defendant] was going to go camping or something that day." Tr 92. Based on statements, Pelayo was concerned that, "if we don't go talk to [defendant] right now she's going to leave." Tr 92-93.

Seizure of defendant's home

At approximately 6:00 p.m., Pelayo and six other officers went to defendant's home. Tr 66-69. Pelayo's plan was for he and the police chief to talk to defendant casually, and, if defendant cooperated, the police "would go that route[;] [i]f not, then [the police] would secure the residence." Tr 69.

Pelayo had enough officers in place "to be able to go in and clear the residence safely[.]" Tr 69.

The officers knocked on the front door, and defendant came out of her home. Defendant did not want to talk to the police, so the officers arrested her. Tr 68.

At that point, Pelayo believed that seizing defendant's home was necessary for "safety," to avoid the destruction or movement of evidence, and to protect defendant's property:

> "[PELAYO:] Evidence destruction is one of our concerns if there's other people inside the residence they can destroy or conceal evidence. Also, for our safety; we were going to be there so we want to make sure that we know who's there and that they're not armed, this type of stuff.
>
> "And * * * keeping it secured * * * is to make sure that no one comes in and plants anything, takes anything. And it's pretty common for -- especially in this area I've seen it time and time again where someone goes to jail and their friends come and clean them out. So that's another concern. I mean, we're kind of -- we're responsible for the property.
>
> "[PROSECUTOR:] You've seen them steal from them?
>
> "[PELAYO:] Yeah.
>
> "[PROSECUTOR:] Did you say 'clean them out'?
>
> "[PELAYO:] Yeah. Sorry; steal all their stuff, yes."

Tr 93.

As part of "securing" her residence, four to five officers, including Pelayo, went inside defendant's home after arresting her. Tr 70. They entered

the living room where the couch and desks were. Tr 101. The living room leads into the kitchen. Tr 101. Some officers went upstairs, walking past the couch and the desks. Tr 101-02. The officers "looked" in every room and bathroom in the house, which included eight rooms. Tr 71. They took out of the house after they found her in the basement. Tr 72. had methamphetamine in her possession. Tr 101.

After they seized officers were posted at every door and in the adjacent alley so that no one could go into the home, and they taped off the entire perimeter of the house with caution tape. Tr 70-71, 75, 97; ER 14-15.

During the seizure, a man stopped his vehicle in the road in front of defendant's house. Pelayo and one of defendant's neighbors had seen the vehicle frequently at defendant's home. Tr 96. The man asked what was going on and about defendant. Pelayo told him that "there was a search warrant," and he asked if the man had any drugs in his possession. The man "didn't really want to stick around anymore" after that. Tr 96-97. Later, another man came to defendant's house with the stated intent to enter the house to retrieve a bicycle. Pelayo "ran the guy," discovered that he had a warrant for his arrest, and arrested him. Tr 97.

Penrod interview

Pelayo interviewed at defendant's residence and at the police station. Tr 72, 100-101. told Pelayo the following: had

purchased methamphetamine from defendant in the past; defendant also often would give her small amounts of methamphetamine because would pay the electric bill or buy defendant beer and cigarettes. ER-15. The drugs that defendant provided to always came from the top desk drawer. ER-16.

Earlier that day, had seen and defendant "snorting a line together" in defendant's house, and had asked defendant for "a $20." Defendant gave a baggie of methamphetamine worth approximately $30. ER-15. put the methamphetamine in her purse, which also contained some syringes and a pipe. The purse was in the basement next to a green lamp. ER-16.

was aware that —a man who had told Pelayo that he lived on the same street as defendant but would not say where—had been bringing items into defendant's basement frequently for the last several months. believed that some of the items were stolen. She also believed that had been "supplying [defendant] with methamphetamine prior to him being arrested for dealing drugs." ER-16. Finally, told Pelayo that "there [are] a lot of people coming and going all the time" in defendant's house and that she "see[s] a lot of scumbags coming through." ER-16.

After she was interviewed, the police did not allow back onto defendant's property, other than to care for her dogs in her RV, because of "evidence destruction" and "safety" concerns. Tr 72, 94.

Warrant search of defendant's home

Pelayo waited until after his interview with to apply for a search warrant because he wanted to "get the full story," and, through the interview, he "learned some important stuff about * * * what was going on at the house." Tr 95. At around 8:00 p.m., Pelayo began drafting a search warrant affidavit and a search warrant for defendant's residence. Tr 76-77.

In the affidavit, Pelayo listed the evidence that he had gathered that gave him reason to believe that defendant was dealing drugs out of her home. He included statements, the text message exchange between and defendant, statements, including those about defendant's drug sales and the location of evidence in the house, and various other reports from unnamed sources and officers. ER 8-17. He also stated that "[t]he decision was made to contact [defendant] and remove any of the occupants and lock down the residence with officers staged outside" to ensure "that no one entered while this warrant was being written and applied for." ER 14-15.

A judge signed the search warrant, and the officers began searching defendant's house at 11:06 p.m. *Search Warrant*, ER 21-24; Tr 76-77. The house remained in police custody for the approximately five hours between when officers first knocked on defendant's door and the warrant search. Tr 75.

During the search, officers seized a bindle baggie of methamphetamine, digital scales, two baggies, and a methamphetamine pipe from inside

defendant's desk; a sunglasses bag with syringes, baggies with methamphetamine, and a pipe from inside a purse on the floor on the right side of the couch; a floral print box of drug paraphernalia from a bedside table; a glass pipe and bottle with residue from a shelf near a bed; and a pill from above a sink. Tr 77-78; *Return of Search Warrant*, ER 25-26. They also took a cell phone from the house, but it is unclear where it was discovered.[2]

II. Procedural background

Defendant's motion to suppress

Prior to entering her conditional plea, defendant moved to suppress the evidence obtained "as the result of an unlawful search and seizure," and she moved to controvert Pelayo's affidavit. *See Motion to Suppress*, ER-27; *Motion to Controvert*, TCF. Defendant argued that the police unlawfully seized her residence because no exigent circumstances justified the warrantless seizure. *Memorandum in Support of Defendant's Motion to Suppress*, ER 34-37. She asserted that there was no exigency because the police waited over 90 minutes after set up the drug deal with defendant before traveling to defendant's home, and because the police could have obtained a warrant in that time. Tr 103-05.

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[2] According to defendant's memorandum in support of her motion to suppress, the cell phone was found in the desk, the purse containing the sunglasses bag belonged to and the floral print box containing drug paraphernalia was found in area of the house. ER-34.

Defendant further argued that "the evidence seized and derived from [the] unlawful 'freezing of the premises' should be suppressed." ER-37; Tr 124. She contended that the search warrant was "essentially fruits of the illegal search and therefore did not vitiate the illegal entry in the first place." Tr 12. Defendant noted that the illegal seizure of and entry into the residence allowed the police to seize and interview and that they "wouldn't have that evidence but for the illegal search by securing the premises in the first place." Tr 104-05. She also argued that "all of that evidence that they obtained should be [suppressed] pursuant to that unlawful entry." Tr 105.

Defense counsel pointed out that the police sealed off the premises and she asserted that "keeping anyone from entering or leaving is important in this case. It is not important that [defendant] * * * never tried to return. She couldn't. They arrested her and took her to jail. She had no ability to exercise her rights." Tr 105-06.

The state responded that exigent circumstances supported the seizure of defendant's house because had a reason to "destroy" or "remove" evidence because she also faced prosecution. Tr 116-117; *State's Response to Defendant's Motion to Controvert and Motion to Suppress*, ER-60. The state also contended that, "[r]egardless, the police gained nothing by securing the residence and thus there is no privacy right to vindicate as is the purpose of the law with regards to the exclusionary rule in Oregon." ER-62.

In support of its argument that "[t]he police gained nothing" through the seizure, the state asserted that defendant had been arrested so she could not return to the house, and "[n]o one else was going in. The only person that wanted to go in was going in to get a bike, and they also had a warrant, were not going to be able to go in." Tr 115. As for statements, the state remonstrated that defendant did not have a "privacy interest" in the statements, and that the police would have inevitably obtained them anyway. Tr 116.

The trial court's letter opinion

The trial court took the matter under advisement and later issued a written opinion. *Opinion Re: Motions to Suppress & Controvert*, ER 64-73. In its written opinion, the court concluded that exigent circumstances did not justify the seizure of defendant's house. It also concluded that the police created "further exigency" by confronting defendant but that that exigency could not be used to circumvent the warrant requirement:

> "[THE COURT:] There was probable cause to believe that evidence would be found at [defendant's] residence. However, there were not exigent circumstances to justify the seizure. The only exigent circumstance was the possibility that the defendant could have gone camping if the deal was not completed at the agreed upon time. That alone was not sufficient to justify the seizure of [defendant's] residence.
>
> "Law enforcement created further exigency by going to the defendant's door and confronting the defendant. Law enforcement created exigency cannot be used to circumvent the warrant requirement. *State v. Fondren*, 285 Or 361, 367, [591 P2d 1374, *cert den*, 444 US 834] (1979)."

ER-69.

The trial court found that the police gained statements as a result of the unlawful seizure and that the statements were used in the warrant affidavit. Based on that finding, it concluded that the statements must be suppressed and excised from the affidavit:

> "[THE COURT:] [T]he Oregon Supreme Court clarified that the purpose of the exclusionary rule is not to penalize police for illegal conduct but rather to put defendants in the same position they would have been in but for the illegal conduct. *State v. Sargent*, 323 Or 455[, 918 P2d 819] (1996); *State v. Smith*, 327 Or 366[, 963 P2d 642] (1998). Accordingly, only the evidence gained from the illegal conduct should be suppressed. *State v. Smith*, [327 Or] at 379.
>
> "Pelayo gained the statements of [as a result of the illegal seizure. statements flowed from the illegal seizure of the residence. If the officers had not illegally seized the residence, cleared the residence and located the state would not have her statements.
>
> "The seizure of [defendant's] residence pending application for search warrant was unlawful. statements were illegally obtained. Therefore, her statements are suppressed.
>
> "The illegally obtained statements were used in Pelayo's search warrant affidavit. Illegally obtained evidence should be excised from the affidavit and the affidavit should be reexamined to determine if probable cause existed at the time the original warrant issued. *State v. Binner*, 128 Or App 639, 645-46[, 877 P2d 642, *rev den*, 320 Or 325] (1994)."

ER 69-70.

After concluding that the illegal seizure required suppression of statements, the court identified what it considered the only outstanding issue

based on that illegality: " statements will be excised and the affidavit will be reexamined to determine if there was probable cause." ER-70.[3] The court concluded that, even with those excisions, the affidavit still established probable cause to support issuance of the search warrant. Therefore, the court denied defendant's "motion to suppress evidence seized pursuant to the search warrant." ER-73.

Following the trial court's ruling, defendant entered a conditional guilty plea to one count of unlawful delivery of methamphetamine. This appeal followed.

Appeal

> "On appeal, [defendant] assign[ed] error to the trial court's denial of her motion to suppress the evidence obtained during the warrant search of her house. Specifically, defendant argue[d] that the evidence discovered in that search was tainted by the unlawful seizure that preceded it. Defendant acknowledge[d] that, under [*Johnson*, 335 Or 511], the burden was initially on her to establish a factual nexus between the unlawful police conduct and the discovery of the evidence she sought to have suppressed. Defendant contend[ed], however, that she satisfied that burden in two ways: by proving that (1) but for the unlawful securing of her home, Pelayo would not have had statements to include in his search warrant affidavit, and (2) but for the seizure, the house and its contents would not have been under police control. Thus, defendant argue[d], under *Johnson*, she successfully shifted the burden to the state to establish that the police did not exploit

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[3] The court also excised the parts of the affidavit containing unnamed informant hearsay, finding that Pelayo had failed to demonstrate the declarants' basis of knowledge, and it considered and rejected arguments regarding staleness and reliability. ER 70-72.

> their unlawful conduct to obtain the evidence that they ultimately discovered during the warrant search. 335 Or at 521.
>
> "Defendant further contend[ed] that the state failed to meet that burden and argue[d] that, for two reasons, any contrary argument by the state [was] unavailing. First, she argue[d], although the search warrant affidavit establishes probable cause even without statements, the presence of those statements in the original affidavit contributed to the initial finding of probable cause. Second, defendant reason[ed], 'without the police seizing the house, there was no guarantee that the challenged evidence would have remained in place, such that it would have been there for the police to discover hours later upon issuance of the warrant.' Defendant conclude[d] that the trial court's suppression of only statements was therefore insufficient."

DeJong, 305 Or App at 330-31 (brackets and footnote omitted; brackets added).

The state conceded that the use of statements in Pelayo's affidavit established a factual nexus "between evidence obtained from the residence * * * and the seizure of the residence." Resp Br 4-5. But it argued that "the seizure of defendant's residence did not taint the subsequent procurement of the drug evidence from defendant's residence in the course of the lawful search," because the trial court excised statements from the affidavit and still found probable cause to support the warrant, and because no one would have removed the drug evidence from defendant's house had the police not unlawfully seized it. Resp Br at 2, 5-8; *DeJong*, 305 Or App at 331.

The Court of Appeals affirmed. It first concluded that this court's opinion in *Unger*, 356 Or at 75, "did not * * * overrule *Johnson*, nor * * * did it cast doubt on *Johnson*'s rationale for requiring a defendant in a search warrant

case to establish a 'minimal factual nexus'" between the unlawful seizure and the challenged evidence. *DeJong*, 305 Or App at 334. It then went on to conclude that defendant had failed to establish that nexus. *Id.* at 338.

It reasoned that, although statements were used in Pelayo's affidavit, the statements did not serve as a factual nexus between the unlawful seizure and warrant search because the trial court excised those statements and still found that probable cause supported issuance of the search warrant. *Id.* at 334-36. It also determined that there was no "nonspeculative basis on which to find that the unlawful seizure of the house was causally related to the ultimate discovery of the drug evidence inside[,]" because, *inter alia*, "defendant offered no evidentiary support for her theory that evidence might have been removed had the house not been seized[.]" *Id.* at 336-38. That is, the Court of Appeals concluded that *defendant* had not carried *her* burden to establish that, had the police not unlawfully seized her residence, the incriminating evidence *would not have been obtained* during the execution of the warrant.

ARGUMENT

Article I, section 9, of the Oregon Constitution protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure[.]" As illustrated by the fact that it explicitly names "houses," Article I, section 9, is particularly protective of the home.

State v. Louis, 296 Or 57, 60, 672 P2d 708 (1983). In fact, the home is "the quintessential domain protected by the constitutional guarantee against warrantless searches [and seizures]." *Id.*; *State v. Cocke*, 334 Or 1, 6, 45 P3d 109 (2002).

When the police violate a person's rights under Article I, section 9, by, for example, unlawfully invading and seizing her home, a constitutionally-mandated "exclusionary rule" is triggered. That rule serves to vindicate the defendant's personal rights. *State v. Hall*, 339 Or 7, 24, 115 P3d 908 (2005), *overruled in part on other grounds by Unger*, 356 Or 59; *see also Unger*, 356 Or at 67 (relying on *Hall* to so state).

In other words, the right to be free from unreasonable searches and seizures under Article I, section 9, also encompasses the right to be free from the use of evidence obtained in violation of that provision. *Unger*, 356 Or at 67; *Hall*, 339 Or at 24 (citing *State v. Davis*, 313 Or 246, 249, 834 P2d 1008 (1992)). In that vein, the aim of the Oregon exclusionary rule is to restore a defendant to the same position as if officers had stayed within the law. *Unger*, 356 Or at 67; *Hall*, 339 Or at 24.

Search and seizure cases under Article I, section 9, thus contain two "central issues": (1) whether the police searched or seized a person, house, or effect unreasonably and thus unlawfully, and, if so, (2) whether subsequently

discovered evidence was the direct product of that illegality or discovered through exploitation of the unlawful police conduct. *Unger*, 356 Or at 76.

Here, the trial court found that the police unlawfully entered and seized defendant's home prior to seeking a search warrant, and the state did not, nor does not, challenge that ruling. Said differently, the trial court found that the police warrantlessly and unlawfully invaded the "quintessential domain" protected by Article I, section 9, for five hours. *See Louis*, 296 Or at 60 (describing a defendant's living quarters as such). Accordingly, this case concerns only the second question—whether the challenged evidence should be suppressed because it was the product of the police's unlawful conduct.

As discussed above, the trial court and the Court of Appeals answered that question in the negative, albeit for different reasons. The trial court concluded that the unlawful seizure and the challenged evidence were factually connected through the police's use of statements in the warrant affidavit, but that suppression was not required because, absent those statements, the warrant was still supported by probable cause. The Court of Appeals, relying on *Johnson*, 335 Or at 520-21, held that defendant was required to establish a factual nexus but failed to do so. *DeJong*, 305 Or App at 334, 338.

In parts I-IV of her argument section, defendant addresses the Court of Appeals' factual nexus conclusion, arguing that she bore no burden below, and

that, even if she was required to establish a factual nexus, she did so. In part V, defendant challenges the trial court's ruling, arguing that the state failed to satisfy its burden of showing that the challenged evidence was untainted by the prior Article I, section 9, violation. Specifically, the state failed to purge the taint of statements and failed to show that the police would have lawfully seized the evidence absent the prior unlawful seizure.

I. In *Johnson*, this court adopted the federal burden-shifting framework for examining whether evidence discovered pursuant to a warrant is tainted by a prior Article I, section 9, violation, requiring defendant to establish a factual nexus before shifting the burden to the state to establish that the evidence is not tainted.

In *Johnson*, this court faced the same operative question as this case: what party bears the burden "when * * * the evidence in question first was seized unlawfully and without a warrant and the defendant asserts that a later, warranted 'reseizure' is tainted by the unlawful, warrantless seizure." 335 Or at 520. Because the Court of Appeals relied on it and it bears on every section of defendant's argument, *Johnson* is the natural starting point for this case. Defendant turns to it now in detail before reviewing this court's subsequent caselaw.

Johnson arose from an aggravated murder prosecution. Officers investigating the crime found a shoe print left by a work boot at the victim's house and spoke to a witness who had seen a man matching the defendant's description wearing a denim jacket and acid washed jeans leaving the house.

Id. at 513. The police arrested the defendant on an unrelated probation violation and noticed that his work boots and clothes were consistent with the print at the crime scene and the witness's description. *Id.* at 513-14. They seized his clothes (including his boots) as part of the murder investigation and placed them in an evidence locker. *Id.* at 514.

Defendant moved to suppress the clothing and the trial court granted the motion, ruling that an exigency did not support the seizure of the clothes and the police would not have inevitably discovered the items. *Id.* at 514-15. Following that suppression ruling and while the clothes were still in the evidence locker, the police obtained a warrant to seize and search the clothes. *Id.* at 515.[4] The affidavit supporting the warrant stated that the police had seized the clothes and continued to retain them in their evidence locker. *Id.*

The defendant again moved to suppress the evidence, arguing that it was tainted by the prior unlawful seizure and that the belated warrant did not purge that taint. *Id.* at 516. He emphasized that the police had held the property in their own evidence room, had denied his request to return the property, and had

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[4] The state also appealed the trial court's initial suppression order but abandoned that appeal after the Court of Appeals affirmed. *See State v. Johnson*, 177 Or App 244, 35 P3d 1024 (2001). In that case, the Court of Appeals held that the state had failed to establish with the necessary degree of certainty that the police inevitably would have obtained the evidence by other, legal means. *Id.* at 252-53.

sought a warrant only after the court suppressed the evidence. *Id.* The defendant also argued that "it was only due to the original illegal seizure that the police were able to identify the location of the evidence for purposes of obtaining the warrant." *Id.* (internal quotation marks omitted).

The state responded that, because the police had obtained the warrant without using illegally obtained information, there was no taint to purge. *Id.* It also argued that, because the defendant had not sought to obtain release of the clothes, they were in police custody pursuant to an independent source. *Id.*

The trial court again suppressed the evidence. It found that the defendant had sought return of the clothes through his girlfriend and that, nonetheless, the police would not have returned them anyway. *Id.* at 517. It also concluded that the warrant and the seizure pursuant to the warrant "were not independent of the previous illegal seizure" because the police had possession of the clothes due to the seizure and because, if the property had gone with the defendant to the jail, it would have been released to the defendant's girlfriend and would not have been available for the later seizure. *Id.* at 517, 522.

The state moved for reconsideration, arguing that the trial court had failed to address its argument that the warrant "purged the taint" of the illegal seizure. *Id.* at 517 (internal quotation marks omitted). The state also argued that, if the evidence had been released to the defendant's girlfriend, the police would have been able to reseize it pursuant to the warrant. *Id.*

As for the latter point, the trial court determined that there were "too many ifs" with respect to whether the police would have been able to discover and reseize the evidence had it been released to the defendant's girlfriend. *Id.* at 525-26 (internal quotation marks omitted). Therefore, the seizure pursuant to the warrant was not independent of the previous illegal seizure, and the court adhered to its ruling suppressing the clothing. *Id.* at 518.

The state appealed, arguing that the seizure of the clothes pursuant to the warrant operated as an independent source that purged the taint of the prior unlawful seizure. *Id.* at 519. In other words, the state asserted that the defendant's clothes "would not be subject to suppression, if, after the initial seizure, they were reseized pursuant to a lawful warrant that was entirely independent of, and was not obtained by exploitation of, the previous illegality." *Id.* Specifically, the state contended that officers would have found and seized the evidence even if it had not been seized and retained unlawfully in the police evidence lockers. *Id.*

In considering that argument, this court paused to analyze the parties' respective burdens under the circumstances—*i.e.*, when a defendant alleges that evidence seized pursuant to a warrant is tainted by a prior unlawful, warrantless seizure. Finding that no Oregon cases had addressed the issue, this court turned to federal cases for guidance, noting that federal courts impose a bifurcated

burden of proof when analyzing whether evidence is tainted by a Fourth Amendment violation:

> "Federal cases suggest that, when a defendant seeks to suppress evidence on a theory that the evidence derives from, or is 'tainted' by some earlier constitutional violation by government agents, a bifurcated burden of proof should apply: Although a defendant seeking suppression 'must go forward with specific evidence demonstrating taint,' the government has 'the ultimate burden of persuasion to show that its evidence is untainted.' *Alderman v. United States*, 394 US 165, 183, 89 S Ct 961, 22 L Ed 2d 176 (1969). The federal courts have described the defendant's burden in terms of establishing a 'factual nexus' between the unlawful police conduct and the challenged evidence—at a minimum, the existence of a 'but-for' relationship. *See U.S. v. Kandik*, 633 F2d 1334, 1335 (9th Cir 1980) (describing the defendant's burden); *U.S. v. DeLuca*, 269 F3d 1128, 1132 (10th Cir 2001) (same); *U.S. v. Nava–Ramirez*, 210 F3d 1128, 1131 (10th Cir), *cert den*, 531 US 887 (2000) (same). The same courts have indicated that, if a defendant makes that initial showing, then the burden of proof shifts to the government to show that the unlawful conduct has not tainted the evidence, 'either by demonstrating the evidence would have been inevitably discovered, was discovered through independent means, or was so attenuated from the illegality as to dissipate the taint of the unlawful conduct.' *DeLuca*, 269 F3d at 1132."

Johnson, 335 Or at 520.

The court then concluded "that the federal courts' approach to allocating the burden of proof in such circumstances is a reasonable one" and that it is "not inconsistent" with the general rule that, when state agents have acted under authority of a warrant, the burden is on the defendant to prove the unlawfulness of a search or seizure. *Id.* at 520-21 (citing *Sargent*, 323 Or at 460). It, thus, adopted the federal approach for this circumstance. *Id.* at 521.

Turning to the facts, this court determined that the defendant had established a minimal factual nexus between the unlawful seizure and the challenged evidence because "the police used information derived from that earlier unlawful seizure, *viz.*, the fact that the clothes could be found in a police evidence locker, when they later applied for a search warrant." *Id.* "[T]hat factual connection [was] sufficient to shift the burden of persuasion regarding taint to the state." *Id.*

The court then considered whether the state met its burden of purging the taint, which it had attempted to do "by showing that the warranted search was wholly independent of the earlier unlawful one." *Id.* The court noted that the trial court had decided that the state's evidence was unpersuasive on that point and that such a finding was binding on appeal:

> "It is familiar doctrine that we are bound by a trial court's findings of fact, if there is evidence in the record to support them. *Ball v. Gladden*, 250 Or 485, 487, 443 P2d 621 (1968); *State v. Miller*, 300 Or 203, 227, 709 P2d 225 (1985), *cert den*, 475 US 1141 (1986). Although this court never has had occasion to say so expressly, we think that it follows from the foregoing rule that it equally is true that we are bound by a trial court's 'finding' that a party's evidence is not sufficiently persuasive. We believe that that rule follows, because it incorporates the same judicial respect for the trial court's weighing of the evidence. Thus, unless the evidence in a case is such that the trial court as finder of fact could decide a particular factual question in only one way, we shall in the future consider ourselves equally bound by a trial court's acceptance or rejection of evidence."

Id. at 523.

It then reviewed the state's evidence below that the police would have obtained the defendant's clothes through lawful means, noting that it was mixed—although the state presented evidence that the police would have tracked the location of evidence that they released to the defendant's girlfriend, there was also evidence that the defendant's girlfriend had moved to places unknown to the police during the relevant time period, had given at least some of the defendant's property to another person whom she could not identify, and often lost things in her home. *Id.* at 524-26. This court thus determined that the evidence was insufficient to overturn the trial court's findings, and affirmed the trial court's ruling "that the state failed to meet its burden of showing that the seizure of the clothes pursuant to the later-obtained warrant purged the taint of the prior warrantless and unlawful seizure." *Id.* at 526.

II. In *Unger*, this court held that, in circumstances not involving a warrant, evidence discovered following an Article I, section 9, violation is presumed tainted and the state is required to defeat that presumption.

Following *Johnson*, this court addressed Oregon's exclusionary rule in cases about defendants consenting to searches. In *Hall*, 339 Or at 25, this court extended application of the *Johnson* burden-shifting framework from just cases involving search warrants to cases where an unlawful search or seizure preceded a defendant's consent to search. There, this court held that,

> "after a defendant establishes the existence of a minimal factual nexus—that is, at minimum, the existence of a 'but for'

> relationship—between the evidence sought to be suppressed and prior unlawful police conduct, the state nevertheless may establish that the disputed evidence is admissible under Article I, section 9, by proving that the evidence did not derive from the preceding illegality."

Id. To make that showing, the state must prove that either (1) the police inevitably would have obtained the disputed evidence through lawful procedures even without the violation; (2) the police obtained the disputed evidence independently of the violation; or (3) the preceding violation has such a tenuous factual link to the disputed evidence that it cannot be viewed as the source of that evidence. *Id.*

Nine years later, this court decided *Unger*, 356 Or at 75-83, where it disavowed the factual nexus aspect of *Hall* and modified the considerations for determining if a defendant's voluntary consent was attenuated from a prior unlawful seizure. As for the former, the court reasoned that *Hall*'s reliance on *Johnson* was misplaced because, unlike searches supported by a warrant, warrantless searches carry no presumption of regularity for defendants to overcome, and, "thus, there is no need for a threshold showing by the defendant to shift the burden to the state. The state already has the burden to prove that the warrantless search was valid." *Unger*, 356 Or at 75. Indeed, "[b]y statute, whenever a defendant challenges evidence seized following a warrantless

search, the state bears the burden of proving 'by a preponderance of the evidence the validity of the search.'" *Id.* (quoting ORS 133.693(4)[5]).

It further reasoned that the "exploitation analysis already considers the existence of a 'minimal factual nexus,' because determining whether the police exploited their unlawful conduct to gain the disputed evidence necessarily requires an examination of the causal connection between the police conduct and the defendant's consent." *Id.* at 76. Therefore, the minimal factual nexus test "is not analytically significant" in determining whether a defendant's consent derived from the illegal police conduct. *Id.*

Finally, the court suggested that the test had become obstructive by requiring parties to first focus on whether a "minimal factual nexus" existed before examining "the more central issues" of whether the police had acted unlawfully, and whether the later consent to search and subsequently discovered evidence were obtained through exploitation of that illegality. *Id.*

In summary, because the minimal factual nexus test in *Hall* did not have "a firm grounding" in this court's caselaw, ran counter to the state's burden to

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[5] ORS 133.693(4) provides,

> "Where the motion to suppress challenges evidence seized as a result of a warrantless search, the burden of proving by a preponderance of the evidence the validity of the search is on the prosecution."

prove the validity of warrantless searches, and was "confusing to litigants and courts[,]" this court disavowed it. *Id.*

III. This court should disavow the factual nexus requirement announced in *Johnson* because it rests on faulty analysis and because it is incompatible with this court's decision in *Unger*.

This case represents a return to *Johnson*'s factual setting and, thus, an opportunity to revisit the analytical underpinnings of *Johnson*'s factual nexus requirement, as well as its validity, in light of *Unger*.[6]

This court considers three categories of errors that justify reconsidering a prior constitutional case: (1) cases in which prior pronouncements amounted to dictum or were adopted without analysis or explanation; (2) cases in which the analysis that does exist was clearly incorrect—that is, it finds no support in the text or history of the relevant constitutional provision; and (3) cases that cannot be fairly reconciled with other decisions of this court on the same constitutional provision. *Horton v. OHSU*, 359 Or 168, 186-87, 376 P3d 998 (2016) (citing

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[6] Defendant acknowledges that she treated the factual nexus aspect of *Johnson* as controlling in the Court of Appeals. However, any contrary approach would have been futile because the Court of Appeals could not overrule this court's holding in *Johnson*. More importantly, the Court of Appeals squarely addressed the validity of *Johnson*'s factual nexus requirement after *Unger*. *See DeJong*, 305 Or App at 333-34. Regardless, this court is "duty-bound" to correctly interpret the constitution, notwithstanding the parties' arguments or "lack thereof." *State v. Vallin*, 364 Or 295, 300, 434 P3d 413, *adh'd to as modified on recons*, 364 Or 573, 437 P3d 231 (2019). And it granted review to answer the question of whether a defendant must show a factual nexus in this setting.

Couey v. Atkins, 357 Or 460, 485, 355 P3d 866 (2015)); *see also State v. Lien/Wilverding*, 364 Or 750, 779-80, 441 P3d 185 (2019) (citing *Horton*, 359 Or at 186-87, for the proposition that a case may be considered wrongly decided based on (1) inadequate analysis or (2) because the legal or factual context of the prior decision has changed in a way that seriously undermines the reasoning or the result of the earlier decision).

This court should revisit and disavow the minimum factual nexus requirement of *Johnson* because it is based on inadequate analysis and because it cannot be reconciled with the reasoning of *Unger*.

A. *Johnson* adopted the federal factual nexus requirement without examining the Oregon exclusionary rule's goal of vindicating personal rights, relying instead on a principle that has no bearing on the issue of whether evidence is tainted.

The *Johnson* court was tasked with applying Oregon's exclusionary rule to novel circumstances—when a defendant claims that the fruits of a warrant search are tainted by a prior police illegality. 335 Or at 520 (stating that "[n]o Oregon cases of which we are aware expressly address the question as to which party carries the burden of proof under those circumstances"). When this court applies Article I, section 9, to unique circumstances, it considers "'the specific wording of Article I, section 9, the case law surrounding it, and the historical circumstances that led to its creation.'" *State v. Carter*, 342 Or 39, 42, 147 P3d 1151 (2006) (brackets omitted) (quoting *Priest v. Pearce*, 314 Or 411, 415-16,

840 P2d 65 (1992)). The purpose of that historical analysis is to use "relevant underlying principles" to inform this court's "application of the constitutional text to modern circumstances." *State v. Davis*, 350 Or 440, 446, 256 P3d 1075 (2011). Similarly, a question concerning the "breadth of the exclusionary rule" is, "fundamentally, a question of the rationale behind that rule." *State ex rel Juv. Dept. v. Rogers*, 314 Or 114, 118-19, 836 P2d 127 (1992).

Prior to *Johnson*, this court had confirmed that Oregon's exclusionary rule sought to vindicate an individual's rights, not to deter police misconduct. *See id.* at 119 ("This court has consistently reaffirmed that personal rights underlie the Oregon exclusionary rule."); *State v. Davis*, 295 Or 227, 237, 666 P2d 802 (1983) (stating that, "since *State v. Laundy*, [103 Or 443, 204 P 958 (1922)]," this court has "maintained the principle" that Article I, section 9, is "to be given effect by denying the state the use of evidence secured in violation of those rules against the persons whose rights were violated"). That is a fundamental distinction between Article I, section 9, and the deterrence-based federal approach to the Fourth Amendment. *Rogers*, 314 Or at 119; *State v. Tanner*, 304 Or 312, 315, 745 P2d 757 (1987).

The *Johnson* court did not examine that "relevant underlying principle." Nor did it consider whether imposing *any* burden on the defendant—the individual who had suffered an unlawful seizure and who's rights the exclusionary rule sought to vindicate—contravened it. Rather, it looked

directly to federal courts, adopting their burden-shifting framework for analyzing whether evidence is "fruit of the poisonous tree" of a Fourth Amendment violation (*see, e.g.*, *Alderman*, 394 US at 183), an analysis unconcerned with the vindication of personal rights. *See United States v. Janis*, 428 US 433, 446, 96 S Ct 3021, 49 L Ed 2d 1046 (1976) (holding that "the prime purpose of the [Fourth Amendment exclusionary] rule, if not the sole one, is to deter future unlawful police conduct" (internal quotation marks omitted)). That methodological mistake, alone, signals that this court should disavow the factual nexus requirement. *Johnson*'s reasoning for imposing the requirement confirms as much.

The court adopted the federal approach because requiring the defendant to establish a factual nexus between the unlawful misconduct and the challenged evidence was "reasonable" and because it aligned with the general rule that, "when state agents have acted under authority of a warrant, the burden is on the party seeking suppression (*i.e.*, the defendant) *to prove the unlawfulness of a search or seizure*." *Johnson*, 335 Or at 520 (emphasis added) (citing *Sargent*, 323 Or at 460); *see also State v. James*, 339 Or 476, 489-90, 123 P3d 251 (2005) (describing this court's reasoning for adopting the burden-shifting framework in *Johnson*). That rule derives from "the presumption of regularity that arises out of the fact that, in a warranted search, an independent magistrate already has determined that probable cause exists." *Johnson*, 335 Or

at 521 (citing Wayne R. LaFave, 5, Search and Seizure, § 11.2(b), 17 (3d ed 1996)); *see also* Wayne R. LaFave, 6, Search and Seizure, § 11.2(b), 50-52 (6th ed 2020) (stating that the "warrant-no warrant dichotomy" is explained on the ground that, when the police have acted with a warrant, a magistrate has already made an independent determination of probable cause, thereby giving rise to a presumption of legality).

But there is no alignment between the presumption that a warrant search is valid and requiring the defendant to prove that the evidence discovered was connected to a prior illegality. A neutral magistrate's probable-cause determination speaks only to the legality of the police's later act of searching or seizing evidence. Correspondingly, the presumption of regularity associated with a warrant search is limited to the lawfulness of the warrant search itself. It does not reach the issue of whether the search or the fruits of the search are tainted by a separate unlawful action.

Nor could it, as a judge analyzing whether a warrant should issue is examining the evidence to see if the probable cause threshold has been met, not whether the evidence or the fruits of the eventual search are connected to another unlawful police action. This case illustrates as much. The judge that signed the warrant was presumably unaware that the police's ongoing seizure of defendant's home was unlawful, as that was a determination made later by the trial court. Why then would that judge's probable-cause determination speak to

the relationship between the unlawful seizure, the evidence that the judge was considering, and the soon-to-be seized evidence? It would not.

Accordingly, while the existence of a warrant justifies requiring a defendant *to disprove* the lawfulness of the warrant search *qua* warrant search (*e.g.*, Was the warrant supported by probable cause? Was the warrant sufficiently specific and particular? Was the warrant executed lawfully?), it does not justify requiring the defendant *to prove* that evidence obtained during the execution of the warrant was tainted by a separate *preceding* illegality.

This court's consent cases provide an apt analogy of why a valid warrant does not speak to the issue of whether the evidence is the product of a prior violation. A trial court may determine that a defendant voluntarily and lawfully consented to a search, meaning a valid exception permitted a warrantless search. But that does not separately answer whether that consent or the evidence derived from it were the product of an earlier violation. *See Unger*, 356 Or at 73-74, 86 (holding that evidence gained through a voluntary consent search still may require suppression if the defendant's consent to search derived from prior illegal police contact); *Hall*, 339 Or at 27-28 (same); *see, e.g.*, *State v. Musser*, 356 Or 148, 159, 335 P3d 814 (2014) (holding that suppression was required where the defendant's consent, although voluntary, was the unattenuated product of an unlawful seizure).

The same applies in this setting. The issuance of a warrant provides a presumption that a search or seizure pursuant to that warrant is lawful, but it goes no further. It does not and cannot speak to whether the warrant or the warrant search is tainted by prior police misconduct. Through that lens, it is apparent that, although the legal premise that this court relied on to adopt the federal factual nexus requirement was correct, it was inapposite to the question at hand.

In summary, rather than taking stock of the animating principle of Oregon's exclusionary rule—the vindication of a defendant's personal rights—the *Johnson* court relied on the warrant-no warrant dichotomy to impose the factual nexus requirement. That dichotomy was immaterial to the issue it faced. Because the court's adoption of the factual nexus requirement was built on an incomplete and flawed analysis, it should be disavowed.

B. The *Johnson* factual nexus requirement is incompatible with the reasoning in *Unger*.

Since *Johnson*, the legal landscape has changed such that adhering to the factual nexus requirement here would be untenable. *See Horton*, 359 Or at 186-87 (stating that this court considers whether a rule can be fairly reconciled with other decisions on the same constitutional provision); *Lien/Wilverding*, 364 Or at 779-80 (stating that a prior case may be considered wrongly decided because

the legal or factual context of the prior decision has changed in a way that seriously undermines it).

In *Unger*, 356 Or at 75-76, this court eliminated the minimal factual nexus component of the *Hall* test. It held instead that, following an unlawful search or seizure, the state bears the burden of proving that evidence is not the product of that illegality. That holding broadly applies to all Article I, section 9, violations, not just those followed by consent searches. *See State v. Kreis*, 365 Or 659, 671 n 12, 451 P3d 954 (2019) (citing *Unger* for the proposition that, when determining whether evidence must be suppressed as the product of an unlawful seizure, the state bears the burden of proving that the evidence was not tainted by that violation); *State v. Suppah*, 358 Or 565, 578, 369 P3d 1108 (2016) (applying *Unger* in a case where the defendant argued that his false statement and a later confession to that false statement should be suppressed because they were the product of an unlawful traffic stop). Thus, whenever the state has obtained evidence following the violation of a defendant's Article I, section 9, rights, it is presumed that the evidence was tainted by the violation and must be suppressed. *Unger*, 356 Or at 84; *State v. Delong*, 357 Or 365, 388, 350 P3d 433 (2015) (Brewer, J, concurring) (citing *Unger*, 356 Or at 84).

Here and in *Johnson*, the first police action was a warrantless seizure. Meaning it carried no "no presumption of regularity" for defendant to overcome, and it was the state's burden to prove that it was valid. *Unger*, 356

Or at 75; ORS 133.693(4) (stating that the burden of proving the validity of a warrantless search is on the prosecution). The trial court determined that the state did not satisfy that burden and that the seizure was unlawful.

Accordingly, under *Unger*, evidence discovered following that violation was presumed to be the product of it, and it was state's burden to overcome that presumption. The issuance of a subsequent warrant does not support reversing that presumption, because a probable-cause determination does not speak to the relationship between the first seizure and the discovered evidence; it only shows that a later seizure of the same evidence met the substantive and procedural requirements for obtaining a warrant. Moreover, the existence of a rebuttable presumption that a warrant search was executed lawfully does not speak to whether evidence obtained during the execution of the warrant nonetheless derived from the preceding illegality.

This court's remaining reasons for disavowing the minimal factual nexus requirement in *Unger* are also equally applicable here. The question of whether the evidence was independent of or attenuated from the previous illegality necessarily considers the causal connection between the misconduct and evidence. *Unger*, 356 Or at 76. If the evidence is unconnected to the unlawful seizure, it is necessarily "independent" of it and "attenuated" from it.

Finally, the factual-nexus requirement would be no less confusing in this setting than in cases concerning consent searches. *See id.* (disavowing the

minimal factual nexus test because, among other reasons, it is "confusing to litigants and courts"). Indeed, applying the requirement in cases with both unlawful seizures and warrants will likely prove more confounding for trial courts and litigants. That concern is amplified by the fact that, although the factual nexus requirement has been eliminated from all other applications of the exclusionary rule, it continues to exist in this one setting.

In summary, because this court adopted the factual nexus requirement without considering the purpose of Oregon's exclusionary rule and relied, instead, on an immaterial principle, and because the requirement cannot be reconciled with the reasoning in *Unger*, this court should disavow it. Because the Court of Appeals affirmed based on defendant's failure to satisfy that requirement, this court should reverse that decision.

IV. Even if defendant was required to establish a factual nexus in this case, she did so.

If a factual nexus test remains good law in a warrant search context (and "assuming that the issuance of the warrant was proper"), the requirement is satisfied "if the defendant is able to show that the evidence obtained therefrom is connected to some prior governmental misconduct." *Johnson*, 335 Or at 521. Here, the trial court found that statements provided a sufficient nexus between the unlawful seizure and the warrant, and that finding is supported by the record. Defendant also established a factual nexus because the police

unlawfully seized the evidence until they discovered it pursuant to the warrant. At that point, *the state* bore the burden of establishing that, had the police not unlawfully seized defendant's residence, the evidence *would have been discovered* during the execution of the warrant.

A. The trial court found that statements provided a sufficient nexus between the unlawful seizure and the warrant, and that finding was amply supported by the record.

A trial court's findings of historical fact are binding on appeal if constitutionally sufficient evidence in the record supports them. *Ball*, 250 Or at 487-88. This court is also bound by a trial court's "'finding'" that a party's evidence is or is not "'sufficiently persuasive.'" *James*, 339 Or at 483 (quoting *Johnson*, 335 Or at 523). Thus, unless the evidence is such that the trial court as finder of fact could decide that factual question in only one way, this court is bound by that determination. *Id.*

Here, the trial court found that "Pelayo gained the statements of [as a result of the illegal seizure[,]" and that officers would not have her statements absent the seizure. ER 69-70. And it found that the statements were used in Pelayo's search warrant affidavit, requiring excision. ER-70. The trial court's recognition of a connection between the unlawful seizure and the warrant through statements was a factual nexus finding. The remainder of the court's ruling illuminates as much.

The court went on to excise statements from the warrant affidavit to see if a warrant could have still issued without them. ER-73. That was akin to an analysis of whether the subsequently discovered evidence was independent of or attenuated from the prior illegality—a burden that the state was required to carry *after* defendant established a factual nexus. *See State v. Johnson*, 340 Or 319, 327-28, 131 P3d 173 (2006) (concluding that the state purged the taint of an unlawful search of the defendant's residence because observations made during the unlawful search, which were subsequently included in an affidavit for a second search warrant, "were not necessary to establish probable cause" for the issuance of the second warrant). The trial court's citation to *State v. Binner*, 128 Or App 639, 877 P2d 642 (1994), and *Smith*, 327 Or at 379, confirm that conclusion. *See* ER 69-70.

In *Binner*, the Court of Appeals held that, when a search warrant application "includes *constitutionally tainted* information, the correct action is for the magistrate and reviewing court to excise from the application all such information and to determine whether the remaining information is sufficient to establish probable cause." 128 Or App at 646 (emphasis added). In short, *Binner* stands for the proposition that excision is a way for the court to determine if the taint has been "purged"—a task for which the state bears the burden only *after* a defendant has established a minimal factual nexus. *Johnson*, 335 Or at 520-21; *see also Unger*, 356 Or at 75 (describing *Johnson*).

Similarly, according to this court in *Hall*, *Smith* stands for the principle that, "*after a defendant establishes the existence of a minimal nexus*[,]" the state "may establish that the disputed evidence is admissible under Article I, section 9," by proving that "the police obtained the disputed evidence independently of the violation of the defendant's rights." *Hall*, 339 Or at 25 (citing *Smith*, 327 Or at 379-80) (emphasis added). In summary, the bifurcated nature of the trial court's ruling—first, determining that tainted evidence was used in the affidavit and, second, excising that evidence—shows that it found a factual nexus.

That nexus finding was also amply supported by the record. Absent the police's entry into and seizure of defendant's house, they would not have found and interrogated statements were thus the direct fruit of the seizure. And they appear throughout Pelayo's affidavit. ER 15-16. That created a "but for relationship" between the illegality and the warrant: but for the unlawful seizure, the state would not have had statements to identify the location of evidence in the home and to increase the quantum of proof against defendant when seeking a warrant.

Such a connection between the illegality and the warrant affidavit was sufficient to shift the burden to the state in *Johnson*, where "the police used information derived from [the] earlier unlawful seizure, *viz.*, the fact that the clothes could be found in a police evidence locker, when they later applied for a search warrant." 335 Or at 521. Here, the connection is even stronger because

Pelayo "used information derived from [the] earlier unlawful seizure" to pinpoint the precise location of evidence in the home *and* as proof that defendant was selling drugs. ER 15-16.

B. Defendant also established a nexus because, due to the unlawful seizure, the challenged evidence was under the police's control until the warrant search.

The police's continued possession of the challenged evidence up until the warrant was executed was also a factual nexus sufficient to shift the burden to the state. To review, four to five officers went inside defendant's home and entered every room. They then cordoned off the home until the warrant search, and they pointed to their ongoing possession of the home in the warrant affidavit. Tr 70-72, 75, 97, 101-102; ER 14-15.

Through their ongoing seizure of defendant's home and all of the evidence within it, the officers created a "but for relationship" between their conduct and the challenged evidence: but for their unlawful seizure, the police would not have had possession of the evidence until the warrant search, and they would not have been able to report that possession in their search warrant affidavit. That "factual connection" between the illegality, the warrant, and the fruits of the warrant search was enough to shift the burden to the state. *See Johnson*, 335 Or at 521.

C. In concluding that defendant did not establish a factual nexus, the Court of Appeals conflated defendant's burden with the state's burden.

Despite this case presenting more of a factual connection between the police illegality, subsequent warrant, and challenged evidence than in *Johnson*, the Court of Appeals concluded that defendant failed to establish a minimal factual nexus. Specifically, the court held that defendant did not satisfy her burden because she did not prove that a warrant could not have issued without statements and because she did not provide "evidentiary support" for the possibility that evidence would have been removed from the house had it not been unlawfully seized prior to the warrant search. *DeJong*, 305 Or App at 334-38.

As for the former, this court stated in *Johnson*, that "even *assuming that the issuance of the warrant was proper*, if the defendant is able to show that the evidence obtained therefrom is connected to some prior governmental misconduct, * * * the burden of proof fairly may be shifted to the government to show that the evidence is not tainted by the misconduct." *Johnson*, 335 Or at 521 (emphasis added); *see also Unger*, 356 Or at 75 (stating that, under *Johnson*, "the defendant had an initial burden to establish a 'factual nexus' between prior illegal police conduct and the evidence gained pursuant to *an independently valid warrant*" (emphasis added)). Under that formulation, courts can assume that a valid warrant would have still issued despite the earlier

violation while still finding a sufficient nexus and shifting the burden to the state. That is because the *legal* determination that the warrant may have issued without tainted evidence does not negate the *fact* that tainted evidence still linked the seizure to the warrant itself.

Similarly, the possibility that the evidence may have remained in place if the seizure had not occurred does not negate the fact that the evidence was in police custody at the time of the warrant search because of the police's unlawful conduct. Indeed, if defendant was required to prove that, absent the seizure, the evidence would have moved such that the state would have been unable to discover it, there would be no need for the state to prove in *Johnson* that the police would have been able to gain possession of the challenged clothes through lawful means, as this court required it to do. *Johnson*, 335 Or at 523-26. Rather, it would have been the defendant's burden to prove that the state *would not* have been able to reseize the clothes.

By making the minimal factual nexus standard more rigorous, the Court of Appeals seemingly required defendant to prove that the discovered evidence was not independent or attenuated from the earlier violation rather than merely that the evidence was factually connected to it. Yet, proving that evidence is independent of or only tenuously related to a prior Article I, section 9, violation is the state's burden. *Unger*, 356 Or at 84; *Hall*, 339 Or at 35; *Johnson*, 335 Or

520-21. Thus, the Court of Appeals erroneously increased defendant's burden, while correspondingly reducing the state's burden.

In summary, if this court chooses not to disavow the factual nexus requirement of *Johnson*, it should, nonetheless, conclude that defendant met her burden of establishing a nexus between the unlawful seizure and the challenged evidence in this case, and that the Court of Appeals erred in concluding otherwise.

V. The state failed to establish that the challenged evidence was not tainted by the unlawful seizure of defendant's home.

Because either defendant was not required to show a minimal factual nexus or she met that burden, the remaining issue is whether the state proved that the challenged evidence was "not tainted" by the prior illegality. *Johnson*, 335 Or at 521. The state could satisfy that burden by demonstrating that the evidence was discovered through independent means, that it would have been inevitably discovered, or that it was attenuated enough from the illegality to dissipate the taint of the unlawful conduct. *Hall*, 339 Or at 25; *Johnson*, 335 Or at 520.

A. The state failed to prove that the challenged evidence was discovered independently of the unlawful seizure or that it would have inevitably been discovered through lawful means.

"The independent source doctrine permits the introduction of 'evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from activities untainted by the initial illegality.'"

Johnson, 335 Or at 519 (quoting *Murray v. United States*, 487 US 533, 537, 108 S Ct 2529, 101 L Ed 2d 472 (1988)). The inevitable discovery doctrine permits the state to purge the taint of illegally obtained evidence by proving that the police inevitably would have discovered the evidence, absent the illegality, through proper and predictable investigatory procedures. *Miller*, 300 Or at 225. It is not enough that the state might have discovered the evidence lawfully; rather, the state must prove that it would have. *See id.* (explaining that it is not sufficient for the state to simply show that evidence "might or could have been otherwise obtained" (internal quotation marks omitted)). And, "[i]n the case of a warrantless entry into premises," the court must consider "the possibility that, if police had not made the illegal entry into the premises, evidence might have been disposed of or hidden." *Id.* at 227.

The state argued that "the police gained nothing by securing the residence and thus there is no privacy right to vindicate." ER-62; Tr 115-17. In essence, the state's position was that the challenged evidence was not the product of the unlawful seizure, but rather was discovered independently of it.

The trial court denied defendant's motion to suppress after excising statements from the warrant affidavit and determining that the affidavit still provided probable cause to support the warrant. ER-73. The court's conclusion affirmatively answered one question: Could the police have obtained a warrant absent the unlawful seizure? But that was not enough to

purge the taint of statements. The police exploited those statements to know the precise location of evidence in defendant's home, as well as the relationship of that evidence to defendant. Although those things spoke to probable cause, they also served a separate function in helping the police locate evidence connected to defendant. That, alone, was enough to show that the discovery of the evidence was not independent of the unlawful seizure.

More importantly, the court's ruling did not answer if the police necessarily *would* have discovered the challenged evidence through the warrant search absent the unlawful seizure. Without affirmatively answering that question, the trial court could not conclude that something "independent" of the police illegality produced the evidence or that the police would have inevitably discovered the evidence. *See Johnson*, 335 Or at 523-26 (affirming the trial court's suppression order because the state failed to prove that it would have been able to locate and seize the defendant's clothing, absent the unlawful seizure); *see, e.g.*, *State v. Dimmick*, 248 Or App 167, 176, 273 P3d 212 (2012) (applying *Johnson* in a case where the police unlawfully seized a backpack and then searched it pursuant to a warrant, and stating that the state failed to prove that the evidence was not tainted "because it did not argue that it would have been able to obtain a warrant or search the backpack had it not already been in the state's possession").

Nor did the trial court's exigency ruling answer that question in the state's favor. Exigent circumstances exist if the situation "requires the police to act swiftly * * * to forestall a suspect's escape or the destruction of evidence." *State v. Stevens*, 311 Or 119, 126, 806 P2d 92 (1991). That includes, among other things, situations in which "immediate action is necessary to prevent the disappearance, dissipation, or destruction of evidence." *State v. Meharry*, 342 Or 173, 177, 149 P3d 1155 (2006).

In arguing that the seizure was unlawful, defendant asserted that the time between texts with defendant and the police's seizure of defendant's house defeated any alleged exigency. Tr 103-05. The state responded that exigent circumstances supported the seizure of the house because, after defendant's arrest, was still free and had reason to destroy evidence of her own crimes. ER-60; Tr 116-117. The trial court concluded that Pelayo's concern that defendant would leave before completing the drug transaction with was insufficient to justify the seizure of defendant's residence. ER-69. It also concluded that the police "created further exigency by going to the defendant's door and confronting the defendant[,]" but that the state could not rely on that "[l]aw enforcement created exigency" to circumvent the warrant requirement. ER-69.

In context of the parties' arguments and the appropriate standard, the trial court's ruling thus included two pertinent findings. It found that defendant was

not going to imminently move or destroy evidence at the time the officers first went to her home. However, it also found that the police's act of confronting and arresting defendant *did* create an exigency—meaning there was a risk that evidence could be destroyed or disappear—but the state could not rely on that exigency to justify the seizure. Accordingly, through the second part of its ruling, the trial court explicitly recognized a risk that the evidence could be destroyed or moved following defendant's arrest. Correspondingly, the court's ruling did not include an implicit finding that neither nor anyone else would have removed evidence, or that police officers would have found all of the evidence that they did during the execution of the warrant, had they not unlawfully seized defendant's residence.

Nonetheless, even if the trial court did implicitly conclude that the state satisfied its burden to show that, absent the unlawful seizure, the evidence would have been available for the police to discover approximately five hours after defendant's arrest,[7] that was error, because the state—as the party with the burden to prove as much—presented only evidence that supported the opposite proposition.

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[7] The police arrested defendant at approximately 6:00 p.m. and they executed the search warrant at 11:06 p.m.

Pelayo testified that the officers' seized defendant's house, in part, to prevent evidence being destroyed or taken following defendant's arrest, and that he had frequently seen suspects' friends come "clean them out" in similar situations. Tr 93. Validating Pelayo's concern, stated that "there [are] a lot of people coming and going all the time" in defendant's house and that she "see[s] a lot of scumbags coming through." And that defendant's former drug supplier, had access to the house because he stored stolen items there. ER-16.

Indeed, two men approached the house during the seizure despite the large police presence. The first man was involved in Pelayo's investigation and he left after Pelayo asked him about possessing drugs. The second man requested property from defendant's house and the police eventually arrested him on a warrant. Tr 96-97.

Finally, even despite her cooperation, the police did not allow back to the property after they seized and interviewed her, other than to care for her dogs, because they were concerned that she would destroy evidence. Tr 94.

In summary, the state's evidence suggested that, had the police not seized the house, there would have been *at least* four unrestrained individuals (and the two men that approached) with access or potential access to the house, three of which had some connection to the police's investigation and one of which the police believed would destroy or conceal evidence. Those

facts showed that there was a real and substantial risk that the evidence would not remain in place. That is especially true considering that the challenged evidence was drugs and drug paraphernalia, which, by nature, is mobile and easily concealed or destroyed. Accordingly, the state did not prove that the police would have discovered the challenged evidence without seizing defendant's house.

That, as well as the nature of the seizure, distinguishes this case from *Smith*, 327 Or 366, and *Sargent*, 323 Or 455. In *Smith*, the police unlawfully padlocked the defendant's storage unit while they applied for a search warrant. 327 Or at 369. After receiving a warrant, an officer searched the storage unit and found marijuana. *Id.* The defendant moved to suppress the marijuana, and the trial court denied the motion, concluding that, "even if padlocking the unit were an unlawful seizure, that illegality was unrelated to the later search and seizure conducted pursuant to the warrant." *Id.*

On review, this court held that, although, "in some circumstances, the act of securing certain property may permit the police to obtain evidence that otherwise would not be available to them[,] * * * in the present case, it clearly did not." *Id.* at 379-80. The court reasoned that "[n]o one attempted to gain access to the unit to remove the evidence before the search warrant was executed. As such, the padlock, although unlawful, was irrelevant. The

evidence would have been obtained even in the absence of the unlawful police conduct." *Id.* at 380.

In *Sargent*, police officers entered the defendant's apartment to arrest the defendant's wife on a warrant. 323 Or at 458. While in the apartment effectuating the arrest, the officers viewed evidence of drug sales. *Id.* at 458-59. After the defendant's wife was arrested and the defendant left, officers remained in the apartment to "secure it" while they obtained a search warrant. *Id.* at 459 (internal quotation marks omitted). Seven or eight hours later, while the warrant search was occurring, the defendant returned to the apartment. *Id.* The trial court ruled that police officers' presence in the apartment was unlawful from the point after police had executed the arrest warrant, and it suppressed all evidence obtained pursuant to the search warrant. *Id.* at 460.

On review, this court held that the police's trespass—which took place only after the defendant's wife was arrested—did not result in the discovery of any item of evidence mentioned in the trial court's suppression order. The court reasoned that the observations that contributed to the search warrant affidavit were seen prior to the point that the officers' presence in the apartment turned unlawful. *Id.* at 459-60, 462-63. And the officers' unlawful presence in the apartment following the arrest was "not connected to discovery or availability of any evidence seized during the later search pursuant to the search warrant." *Id.* at 462-63. Thus, there was no item of evidence from the search

warrant tainted by the trespassory conduct and, therefore, no item to suppress. *Id.* at 463.

Here, unlike *Smith*, where no one approached the storage unit, and *Sargent*, where the defendant did not return to the apartment until well after the warrant search had commenced, two individuals approached the house—one associated with the drug investigation and another with an open warrant—despite a heavy police presence surrounding defendant's house. Another individual, who had a motive to destroy or conceal evidence, was located and arrested *because* of the unlawful seizure and restricted from accessing the house. And a final individual with access to the house and a connection to the drug trade was unaccounted for. Additionally, instead of placing a padlock on the door or merely remaining inside an apartment following an arrest, officers surrounded and taped off defendant's house, likely dissuading any other individual from approaching the house.

Thus, unlike *Smith* and *Sargent*, the state failed to prove that the unlawful seizure did not allow the police to obtain evidence that "otherwise would not be available to them." *Smith*, 327 Or at 380; *Sargent*, 323 Or at 463 (concluding that suppression was not required because the police trespass was unconnected to the "discovery or availability" of any evidence seized during the later search pursuant to the search warrant). *I.e.*, it failed to establish that it would have

independently or inevitably discovered the evidence through lawful means. *Johnson*, 335 Or 520-21.

B. The state failed to prove that the challenged evidence was attenuated from the unlawful seizure.

The state also did not prove that the evidence was attenuated from the unlawful seizure. To evaluate whether evidence is attenuated from a police illegality, this court considers the totality of the circumstances, including the temporal proximity between the unlawful police conduct and the discovery of the challenged evidence; the presence of intervening or mitigating circumstances; the nature, extent, and severity of the constitutional violation; and the purpose and flagrancy of the unlawful police conduct. *Unger*, 356 Or at 86-88.[8]

The police entered defendant's home, ventured into every room, seized defendant's housemate, and then seized the house for five hours until officers began searching it. Said differently, the seizure was severe and extensive, and nothing temporally separated it from the search and the discovery of the evidence. Furthermore, the police's purpose was investigatory rather than

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[8] Defendant reads *Unger*, 356 Or at 81-82, as announcing that the "purpose and flagrancy" of the police's misconduct are relevant to determining whether a defendant's consent is attenuated from a prior illegality because more egregious police conduct is more likely to influence a defendant to consent. She does not understand them to be factors that are applied in cases where a defendant's consent is not at issue. Nonetheless, she addresses them here because they militate towards suppression.

benign—they sought to lock the house's contents in place in order to assure that they would be able to later discover incriminating evidence against defendant. Finally, the seizure was flagrant; it represented a lengthy invasion into the "quintessential domain" protected by Article I, section 9. *See Louis*, 296 Or at 60. While the issuance of a warrant may present a significant mitigating, or intervening, circumstance in some cases, here, Pelayo relied on unlawfully obtained information to obtain the warrant, identify the evidence sought, and sus out defendant's incriminatory relationship to it. The warrant perpetuated, rather than purged, the taint.

CONCLUSION

Defendant bore no burden to show a minimal factual nexus between the police's unlawful seizure of her home and the evidence discovered during the subsequent warrant search. Alternatively, she satisfied that burden by showing that the police used the fruits of their unlawful seizure in the warrant affidavit and maintained control of the challenged evidence until the warrant search. For those reasons, defendant respectfully requests that this court reverse the judgment of the Court of Appeals.

Additionally, because the state failed to purge the taint of the unlawful seizure, this court should reverse the judgment of the trial court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05 and (2) the word-count of this brief is 13,958 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes.

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on March 15, 2021.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Petitioner's Brief on the Merits will be eServed pursuant to ORAP 16.45 on Benjamin Gutman #160599, Solicitor General, attorney for Respondent on Review.

Respectfully submitted,

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