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 No. 16CR52264 CA A165504 SC S068065

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals on Appeal
from a Judgment of the District 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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INTRODUCTION

This case sits at the intersection of two bedrock principles of criminal procedure under Article I, section 9, of the Oregon Constitution. On the one hand, a defendant challenging evidence obtained from a warranted search must overcome the presumption of regularity to show that the search was unlawful despite the warrant. On the other hand, warrantless searches and seizures are *per se* unreasonable, and as a result, the state bears the burden of proving their lawfulness or that the challenged evidence should not be subject to the exclusionary rule.

This court in *State v. Johnson*, 335 Or 511, 73 P3d 282 (2003), considered the tension between those principles that arises when a defendant seeks to suppress evidence obtained pursuant to a warrant that is otherwise lawful, but which the defendant asserts was the product of exploitation of an unlawful warrantless search or seizure. And to resolve it, this court struck a reasonable balance by allocating to a defendant the initial burden of proving a causal connection between the evidence obtained in the warranted search and the previous unlawful search or seizure before shifting the burden to the state to show that the challenged evidence should not be suppressed.

There is no basis to undo that balance in this case. Rather, this court should assess whether defendant met her initial burden of proving that but for the

warrantless seizure of her residence the police would not have discovered and obtained the drug evidence through the later warranted search of the house. And this court will find the evidence lacking on that front.

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question Presented: When police officers discover evidence during a warranted search but after a warrantless search or seizure, does the exclusionary rule require the state to disprove any possibility that the discovery was tainted?

Proposed Rule of Law: No. A warrant based on a magistrate's probable cause determination is entitled to a rebuttable presumption of regularity. Thus, the defendant bears the initial burden of proving a factual nexus between evidence obtained through a warranted search and a previous illegality—a burden that may be met by offering evidence supporting a reasonable, nonspeculative inference that but for the illegality the evidence of a crime would not have been discovered during the warranted search. If the defendant makes that showing, then the burden shifts to the state to show that the evidence should not be suppressed.

HISTORICAL AND PROCEDURAL FACTS

After an 18-month investigation into defendant's operation of an "illegal drug enterprise" at her residence, Officer Pelayo received information from an informant that, while purchasing marijuana from defendant, the informant observed defendant selling methamphetamine to Ms. who lived in the basement of the house. (ER-8; Tr 85, 93-94). The informant contacted the officer

later that day, explaining what happened during the drug sale and providing background information about her previous methamphetamine purchases from defendant. (Tr 86).

Officer Pelayo had the informant send text messages to defendant to set up a purchase of methamphetamine. (Tr 79). Defendant agreed by text message to sell the informant methamphetamine at defendant's residence roughly an hour later. (Tr 80). Officer Pelayo saw the text messages and believed that he had probable cause that defendant had committed unlawful delivery of methamphetamine, "conspiracy to commit the crime of unlawful delivery," and possession of methamphetamine. (Tr 88).

The informant explained to Officer Pelayo that defendant was "kind of flakey if you're not right on it after she agrees to sell methamphetamine or they're not right there to go buy it that she would disappear or just not answer her phone." (Tr 92). And defendant had indicated to the informant that defendant "was going to go camping" that day. (Tr 81, 92). As a result, Officer Pelayo was concerned that defendant would leave the house before the officer could contact her. (Tr 92-93).

Roughly an hour and a half later, officers arrived at defendant's house. (Tr 67-68). Officer Pelayo knocked on the door, and defendant answered. (Tr 68). The officer asked defendant to step outside and asked whether she would talk to him, but she refused to talk or cooperate. (Tr 68, 69). Officer Pelayo told

defendant that the officers were "going to clear the house." (Tr 68-69). He arrested defendant, and the officer along with four others went inside. (Tr 70). The officers proceeded to "secure the residence," looking "for any people in there" to ask them "to come outside." (Tr 70-71). The officers walked through the house for a "couple of minutes" and found Ms. the only person in the house, in the basement. (Tr 71-72, 74).

Officer Pelayo asked Ms. "to come talk with [him] and she agreed." (Tr 72). He interviewed Ms. who disclosed that defendant had given and sold methamphetamine to her in the past. (Tr 72; ER-15-16). Defendant was transported to a jail, and Officer Pelayo transported Ms. to the police station where he interviewed her further and sought a warrant to search defendant's residence for evidence of drug crimes. (Tr 70, 72, 75). In the meantime, the police secured the residence by placing an officer by each of its two entrances, which were "taped off * * * with police caution tape." (Tr 75; ER-14). The purposes of securing the property were "to make sure that no one comes in and plants anything" or steals anything, which was "pretty common" in that area. (Tr 93).

Before Officer Pelayo left the area, a man in a vehicle that had been seen on previous occasions at defendant's residence "drove by and stopped in the middle of the road." (Tr 96). The man asked "what was going on," and the officer "told him that there was a search warrant" before asking the man whether he possessed any

drugs. (Tr 96). The man "didn't really want to stick around anymore" and left. (Tr 96).

Officer Pelayo encountered another man who "wanted a bicycle that he said was his," but the officer refused to let him onto the property to retrieve the bicycle, which was stored in an outbuilding, because he did not know whether the man was trying to steal defendant's property. (Tr 97; ER-16). The officer "ran the guy" and discovered that he had an outstanding arrest warrant. (Tr 97). The man was arrested and transported to jail. (Tr 97).

Officer Pelayo began the application for a search warrant at 7:51 p.m. and submitted the application at 10:08 p.m. (Tr 76-77). No one entered the house before Officer Pelayo and other officers executed the search warrant at 11:06 p.m., roughly five hours after defendant's arrest. (Tr 75-76, 98). The officers discovered drug evidence in the house: a "bindle bag; digital scales; two baggies; a meth pipe; a black sunglass bag with syringes; a glass pipe and small bottle; * * * a white half pill; and a cell phone." (Tr 77-78).

Before her trial on drug-related charges, defendant moved to controvert the warrant affidavit, seeking to excise the informant's statements to Officer Pelayo, and to suppress the drug evidence. (ER-34-36). Among other points, defendant argued that the risk that she was going to leave her house while waiting for the informant did not constitute an exigent circumstance justifying the warrantless seizure of her residence. (ER-36-37; Tr 103-04). Defendant also argued that

"[t]here was no reason to believe evidence was going to be destroyed, which is what the State's arguing, despite there's no testimony to that effect." (Tr 104).

In response, the state argued that exigent circumstances justified the seizure because Ms. may have "potentially destroy[ed] evidence, remove[d] evidence; do[ne] something with evidence." (Tr 117; ER-60). Alternatively, the state argued that, "[e]ven if there was not a valid exigent circumstance[,] the police gained nothing from securing the residence that they would not have otherwise had." (ER-60). The state refined that point during the suppression hearing: "[N]othing was gained by [the] unlawful seizure. And that is the whole basis of the Oregon constitution; the exclusionary rule is putting the defendant back in the position" that she would have otherwise been in. (Tr 115-16, 117).

The trial court ruled that "there were not exigent circumstances to justify the seizure." (ER-69). Addressing part of defendant's exigency argument, the court explained that the mere possibility that defendant would go camping "alone was not sufficient to justify the seizure," when considered with the fact that "[l]aw enforcement created further exigency by going to the defendant's door and confronting the defendant." (ER-69).

The trial court further concluded that Ms. statements were the product of the unlawful seizure, and it suppressed those statements. (ER-69-70). Because those statements had been included in the affidavit for the search warrant, the trial court excised them from it and determined that the affidavit still provided

probable cause. (ER-70, 72-73). The trial court denied defendant's motion to suppress the evidence obtained through the warranted search. (ER-73).

The ensuing appeal involved one issue: whether the trial court correctly concluded that the exclusionary rule did not require the suppression of the drug evidence. *State v. DeJong*, 305 Or App 325, 330-31, 469 P3d 253 (2020), *rev allowed*, 367 Or 496 (2021). Relying on the burden-shifting analytical framework set out by this court in *Johnson* and pursuant to which the parties had framed their arguments, the court concluded that defendant had failed to meet her burden of proving a factual nexus between the unlawful seizure of the residence and the discovery of the drug evidence through the warranted search. *Id.* at 330-31, 336. In support of that conclusion, the court rejected defendant's central argument that "there is 'no guarantee' that the evidence would have remained at the house absent the unlawful seizure," concluding "nothing in the record suggests that anyone who had the ability and authority to remove items from defendant's home either attempted to do so or would have done so had the officers not secured the premises." *Id.* at 337.

This court granted review of that decision.

SUMMARY OF ARGUMENT

The officers in this case discovered drug evidence while performing a search of defendant's residence pursuant to a warrant and after they had seized the residence without a warrant. Because a magistrate determined that the officers had

probable cause to search the residence in issuing the warrant, defendant's effort to suppress the drug evidence triggered the presumption of regularity that attaches to warranted searches. But the officers' warrantless seizure of the residence before the warranted search triggered the principle that warrantless searches or seizures are *per se* unreasonable unless they meet an exception to the warrant requirement.

Balancing both the presumption of regularity and the principle of *per se* unreasonableness, this court in *Johnson* established the hybrid framework required for resolving suppression challenges in the unique context of evidence obtained from a warranted search that a defendant contends was the product of exploitation of a prior unlawful search or seizure. Specifically, the defendant has the initial burden of proving a factual nexus between the challenged evidence and the illegal seizure, and if the defendant meets that burden, the state bears the burden of proving that the evidence should not be suppressed.

This case requires nothing more than application of that settled framework to the facts. That is so because the burden-shifting framework continues to represent the best way to resolve the tension between the presumption of regularity and the *per se* unreasonableness principle, and defendant fails to affirmatively show otherwise. The framework (1) serves the rationale underlying the exclusionary rule for Article I, section 9, which is to vindicate an individual's rights; (2) implements the presumption of regularity triggered for warranted searches that applies even when a defendant contends that the probable cause determination was

based on improper facts; and (3) has not been called into doubt by this court's case law after *Johnson*.

A defendant can meet his or her initial burden by offering evidence supporting a reasonable and nonspeculative inference that but for the unlawful search or seizure the officers would not have discovered the challenged evidence during the warranted search. Tailored to the facts of this case, defendant could have met her burden by demonstrating that but for the seizure of her residence (1) someone would have removed the drug evidence from her house before the warrant was executed or (2) the police would not have learned the location of the drug evidence. But defendant offered no evidence of that sort. She did not demonstrate that any of the four identified individuals who conceivably could have removed or destroyed the drug evidence had the ability, authority, or intent to do so. And the officers had the information about the location of the drug evidence from the informant before the seizure occurred. Because defendant offered nothing but speculation that without the unlawful seizure the police would not have obtained the evidence, she did not rebut the presumption of regularity to shift the burden to the state.

And even if she had met her burden, the state established that the drug evidence would have inevitably been discovered regardless of the seizure. The officers would have continued their ongoing investigation and obtained a search warrant based on the information that they had obtained from other sources if the

seizure had not occurred. Moreover, the drug evidence would have remained in the residence for the officers to find during the warranted search. Accordingly, the evidence satisfied the elements of the inevitable discovery doctrine, and the drug evidence would not have been suppressed.

ARGUMENT

Neither party challenges the trial court's conclusions that (1) there were no exigent circumstances based on Ms. removing or destroying the drug evidence that would have justified the warrantless seizure of the residence; (2) Ms. statements should be suppressed as the product of that unlawful seizure; and (3) after excising the information obtained from Ms. from the affidavit for the search warrant, it nonetheless provided probable cause justifying the issuance of the warrant. Thus framed, the dispute centers on the narrow issue whether the discovery of the drug evidence through the warranted search was tainted by the seizure to an extent warranting suppression and the concomitant question whether defendant bore the initial burden of proof.

A. The *Johnson* burden-shifting framework strikes a reasonable balance between the presumption of regularity and the *per se* unreasonableness principle.

A challenge to evidence obtained pursuant to a search warrant differs from a challenge to evidence obtained through a warrantless search because the former type of challenge must overcome the presumption of regularity. For that reason, this court in *Johnson* set out a burden-shifting framework to resolve a defendant's

suppression effort directed at evidence obtained through a warranted search but after a prior illegality, allocating to the defendant the initial burden of proving a factual nexus between the illegality and the results of the warranted search. And defendant provides no legitimate reason to do away with the careful balance struck by the *Johnson* framework.

1. A rebuttable presumption of regularity attaches to police actions undertaken pursuant to a warrant.

A search conducted pursuant to the authority of a warrant enjoys a rebuttable "presumption of regularity that arises out of the fact that, in a warranted search, an independent magistrate already has determined that probable cause exists." *State v. Walker*, 350 Or 540, 554, 258 P3d 1228 (2011) (internal quotation marks omitted). That presumption of regularity with respect to a warranted search drives the allocation of the burden of proof for purposes of resolving whether Article I, section 9, requires suppression of the evidence obtained through such a search. *Walker*, 350 Or at 554; *see also* Wayne R. LaFave, 6 *Search and Seizure* § 11.2(b) (6th ed 2020) ("The warrant-no warrant dichotomy is typically explained on the ground that when the police have acted with a warrant an independent determination on the issue of probable cause has already been made by a magistrate, thereby giving rise to a presumption of legality, while when they have acted without a warrant the evidence comprising probable cause is particularly

within the knowledge and control of the arresting agencies." (Internal quotation marks omitted.)).[1]

Specifically, "[w]hen the police 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." *Walker*, 350 Or at 553 (internal quotation marks omitted); *see also State v. Sargent*, 323 Or 455, 461, 918 P2d 819 (1996) (explaining that the burden "shifts to the defendant to prove unlawfulness when the state's agents act under authority of a warrant"). That allocation of the burden of proof and the rationale for it is not unique to Oregon. *See* LaFave, 6 *Search and Seizure* § 11.4(b) ("[M]ost states follow the rule utilized in the federal courts: if the search or seizure was pursuant to a warrant, the defendant has the burden of proof; but if the police acted without a warrant the burden of proof is on the prosecution."); *State v. Sheperd*, 204 Vt 592, 608, 170 A3d 616, 627 (2017) (allocating to a defendant the "burden of proving that warrant is not supported by

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[1] The presumption of regularity attaching to evidence discovered during a warranted search incentivizes law enforcement officers to obtain a warrant and put the issue of probable cause to an independent magistrate rather than making the decision in the field. And the failure to obtain a warrant serves as the animating reason for the principle that warrantless searches or seizures are *per se* unreasonable. *Cf. Katz v. United States*, 389 US 347, 357, 88 S Ct 507, 19 L Ed 2d 576 (1967) ("Over and again this Court has emphasized that the mandate of the (Fourth) Amendment requires adherence to judicial processes and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment." (Internal quotation marks and citation omitted.)).

probable cause" because, "[w]hen the police conduct a search pursuant to a warrant, an independent determination on the issue of probable cause has already been made by a magistrate, thereby giving rise to a presumption of legality" (internal quotation marks omitted)).[2] And it reflects practical considerations:

> Once the state establishes that a search occurred pursuant to [a] warrant, it makes more sense to place the onus on the defendant to establish what went wrong with the issuance or execution of the warrant than to require the state to anticipate the many possible ways that the execution of the warrant could have gone awry, but did not in a particular case.

Walker, 350 Or at 554; *see also* LaFave, 6 *Search and Seizure* § 11.2(b) ("[W]here the prosecution shows the evidence was acquired pursuant to a warrant, it is then more economical to require the defendant to assert what went wrong with respect to the issuance or execution of the warrant than to call upon the state to establish that of all the things which might go wrong, none are present in the instant case.").

In contrast, when a search lacks the imprimatur of a warrant authorizing it, it is *per se* unreasonable unless the state proves that it was justified by an exception to the warrant requirement. *Walker*, 350 Or at 553; *see also State v. Fulmer*, 366

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[2] Numerous other states allocate the burden to a defendant. *E.g.*, *State v. Ryan*, 116 NE3d 170, 176 (Ohio Ct App 2018); *Hourin v. State*, 301 Ga 835, 844, 804 SE2d 388, 396 (2017); *State v. Bivins*, 226 NJ 1, 11, 140 A3d 524, 529 (2016); *State v. Davis*, 159 Idaho 491, 494, 362 P3d 1087, 1090 (Idaho Ct App 2015); *State v. Coursey*, 136 A3d 316, 322 (Del Super Ct 2016); *Jones v. State*, 139 Md App 212, 226, 775 A2d 421, 428 (2001).

Or 224, 230, 460 P3d 486 (2020) ("In the absence of a warrant, the state bears the burden of establishing that the search or seizure falls under one of those exceptions.").[3] And under Oregon's exclusionary rule, the state bears the burden of proving that evidence is not the product of exploitation of an unjustified warrantless search or seizure. *State v. Unger*, 356 Or 59, 72-73, 76, 333 P3d 1009 (2014); *see also State v. Rodriguez*, 317 Or 27, 40, 854 P2d 339 (1993) ("[E]vidence obtained during [a consent] search should be suppressed only in those cases where the police have exploited their prior unlawful conduct to obtain that consent. Only where such exploitation occurs can it be said that the evidence discovered subsequently was "obtained in violation" of a defendant's rights under Article I, section 9.").

2. To effectuate the presumption of regularity, this court in *Johnson* assigned to a defendant the initial burden of proving a minimal causal connection between a prior illegality and evidence seized pursuant to a lawful warrant.

In *Johnson*, this court crafted a reasonable balance between the different burdens of proof implicated when a warranted search or seizure follows an unwarranted search or seizure. Police officers in *Johnson* arrested the defendant on a probation-violation warrant and seized the clothing that he was wearing,

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[3] The legislature in ORS 133.693(4) codified the burden of proof for challenges to evidence obtained because of a warrantless search: "Where the motion to suppress challenges evidence seized as the result of a warrantless search, the burden of proving by a preponderance of the evidence the validity of the search is on the prosecution."

believing that they had probable cause and exigent circumstances to seize them as evidence of a murder, and stored them in an evidence locker. *Johnson*, 335 Or at 513-14. When the defendant was released on the probation violation two months later, the police arrested him for murder. *Id.* at 514. During the ensuing criminal prosecution, the defendant moved under to suppress his clothing as evidence because the police had seized them without a warrant. *Id.* As part of its response, the state applied for a "search warrant authorizing a new seizure of the clothes, which continued to be housed in an evidence locker at the Salem Police Department," and the trial court issued a search warrant authorizing the seizure from that location. *Id.* at 515.

The defendant in *Johnson* challenged the seizure pursuant to the warrant, arguing that "the evidence was tainted by the first, unlawful seizure and that the belated warrant did not purge that taint because it was not a genuinely independent source of the evidence." *Id.* at 516. The trial court granted the motion, concluding, among other things, that the state had failed to prove "that the seizure of evidence pursuant to the * * * search warrant either purged the taint of the previous illegal seizure of evidence, or alternatively, that the evidence is in state custody pursuant to an independent source." *Id.* at 518 (internal quotation marks omitted).

This court in *Johnson* addressed the parties' respective burdens, noting that the "allocation of the burden to the state might seem to be contrary to the oft-cited

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." *Id.* at 520. This court acknowledged, "[I]t is uncertain whether and how that general rule applies when, as here, 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." *Id.*

To resolve that uncertainty, this court in *Johnson* looked to decisions by federal courts describing the allocation of burdens in identical situations and explained that federal courts had settled on a "bifurcated burden of proof": If a defendant seeking suppression meets the initial burden of proving a "factual nexus between the unlawful police conduct and the challenged evidence," 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." *Id.* (internal quotation marks omitted). This court concluded that "the federal courts' approach to allocating the burden of proof in such circumstances is a reasonable one." *Id.* at 521.

Framing that conclusion in the context of the typical burdens of proof for warranted and warrantless searches and seizures, this court explained that the allocation of the burden to a defendant to challenge the validity of a warranted

search "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." *Id.* But if the defendant shows that the discovery or seizure of the evidence pursuant to the warrant "is connected to some prior governmental misconduct, the presumption of regularity is undermined and the burden of proof fairly may be shifted to the government to show that the evidence is not tainted by the misconduct." *Id.*

That reasoning shows that this court in *Johnson* settled on the bifurcated burden of proof as a reasonable framework that respected the presumption of regularity attaching to a warranted search but allowed the defendant to rebut the presumption—and shift the burden to the state—by offering evidence demonstrating that a factual nexus exists between a prior illegality and the warranted action. In doing so, this court recognized that suppression issues involving both warranted and warrantless actions require a unique analytical framework blending the burdens of proof for challenging evidence obtained through a warranted search or seizure and an unwarranted one.

The hybrid analytical framework reflects that police officers acting pursuant to a warrant are acting under the authority of a magistrate who has assessed whether probable cause supports the action. Because that authority derives from the judicial process, a challenge to the lawfulness of the discovery of evidence of a

crime through a warranted search must receive different treatment than challenges to warrantless ones.

This court explained as much in *Unger*. In *Unger*, this court considered whether it should adhere to its previous decision in *State v. Hall*, 339 Or 7, 115 P3d 908 (2005), which extended the *Johnson* framework to warrantless police conduct to create a "two-part test for determining whether evidence acquired from a voluntary consent search must be suppressed because the consent was derived from an illegal seizure." *Id.* at 74-75. This court disavowed *Hall*'s application of the *Johnson* framework to warrantless consent searches, reasoning that the *Johnson* test derived from the "presumption of regularity when the police act under authority of a warrant," whereas no similar presumption arises for warrantless searches:

> When the police perform a search and seize evidence without a warrant, as in *Hall* and in this case, there is no presumption of regularity to overcome, because there was no warrant 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.

Id. at 74-75; *see also State v. James*, 339 Or 476, 490-91, 123 P3d 251 (2005) (rejecting the state's argument that the *Johnson* burden-shifting framework should apply to custodial interrogation issues "because there is no presumption of regularity of government action during a custodial interrogation").

As the reasoning in *Unger* and *James* demonstrates, the presumption of regularity attaching to a warranted search demands a different analysis than other suppression issues.[4] That differentiation motivated this court in *Johnson* to determine how to give effect to the presumption of regularity and the *per se* unreasonableness principle in situations involving a warranted action and a warrantless one.

This court struck a reasonable balance between those conflicting principles by crafting the hybrid burden-shifting framework. That balance incentivizes officers to obtain judicial pre-authorization of a warrant while ensuring that the state must still justify unlawful actions when the discovery of evidence is causally connected to those actions. The incentive furthers the overarching and significant preference for warrants. *See* LaFave, 6 *Search and Seizure* § 4(a) (explaining preference for warrants expressed by the United States Supreme Court and a "great many commentators" on the basis that "the warrant process interposes an orderly procedure involving judicial impartiality whereby a neutral and detached magistrate can make informed and deliberate determinations on the issue of probable cause" (internal quotation marks and footnotes omitted)). And such a

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[4] Indeed, eliminating the role of that presumption would call into question whether the reasoning in both cases—predicated on the differentiating effect of the presumption—was correct.

preference benefits the subject of a search, who will be "better off if his [or her] person, premises or effects ha[s] never suffered [an unlawful] intrusion." *Id.*

3. *Stare decisis* considerations counsel in favor of adhering to the *Johnson* framework.

Despite the careful balance that the analysis in *Johnson* reflects, defendant contends that this court should disavow its consideration of the presumption of regularity and eliminate a defendant's initial burden to prove the factual nexus. That contention implicates the doctrine of *stare decisis*, which plays an essential role in ensuring that the law remains stable, predictable, and fair. "[I]ndividuals and institutions act in reliance on this court's decisions, and to frustrate reasonable expectations based on prior decisions creates the potential for uncertainty and unfairness. Moreover, lower courts depend on consistency in this court's decisions in deciding the myriad cases that come before them." *Farmers Ins. Co. v. Mowry*, 350 Or 686, 698, 261 P3d 1 (2011). "*Stare decisis* does not permit this court to revisit a prior decision merely because the court's current members may hold a different view than its predecessors about a particular issue." *Couey v. Atkins*, 357 Or 460, 485, 355 P3d 866 (2015). For those reasons, this court "begin[s] with the assumption that issues considered in [its] prior cases are correctly decided, and the party seeking to change a precedent must assume responsibility for *affirmatively* persuading [the court] that [it] should abandon that precedent." *Mowry*, 350 Or at 698 (emphasis added; internal quotation marks omitted).

Although "[p]recisely what constitutes an error sufficient to warrant reconsideration of a constitutional precedent cannot be reduced to a neat formula," this court has identified three typical categories of such cases: (1) "cases in which a prior pronouncement amounted to *dictum* or was 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 the 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." *Couey*, 357 Or at 485-86 (internal quotation marks omitted).

The *Johnson* factual nexus requirement and burden-shifting framework were not *dicta* or adopted without analysis or explanation, nor was the analysis "clearly incorrect." Defendant does not argue otherwise. (App BOM 31-32). Rather, defendant attempts to fulfill her responsibility for affirmatively persuading this court that it should abandon those aspects of the *Johnson* decision because, according to defendant, (1) this court in *Johnson* did not expressly mention the policy rationale underlying the prohibition against unreasonable searches and seizures in Article I, section 9; (2) this court in *Johnson* incorrectly considered the presumption of regularity; and (3) this court's decision in *Unger* cannot be reconciled with *Johnson*. (App BOM 33-34, 37). As explained below, none of those points withstand scrutiny, much less provide an adequate justification for abandoning the *Johnson* framework.

a. The factual nexus requirement is consistent with the policy rationale underlying Oregon's exclusionary rule.

As defendant correctly notes, the exclusionary rule under Article I, section 9, rests on the policy of vindicating an individual's right to not be subject to unreasonable searches and seizures, whereas the exclusionary rule under the Fourth Amendment rests on the policy of deterring misconduct by law enforcement officers. *State v. Tanner*, 304 Or 312, 315, 745 P2d 757 (1987). And defendant is correct that this court in *Johnson* adopted the burden-shifting framework from federal case law. But from those premises, defendant leaps to the conclusion that the absence of an express discussion of the vindication rationale in this court's reasoning in *Johnson* means that this court should disavow that reasoning. (App BOM 34).

But *Johnson*'s allocation of the burden of proof is consistent with vindicating individual rights. Indeed, the factual nexus test is rooted in that rationale. To that end, in *State v. Smith*, 327 Or 366, 377, 379, 963 P2d 642 (1998), this court considered whether evidence obtained through a warranted search after a prior warrantless seizure must "necessarily" be suppressed. That premise derived from this court's decision in *State v. Hansen*, 295 Or 78, 664 P2d 1095 (1983), in which this court concluded that the warrantless seizure of the defendant's residence necessarily required the suppression of drug evidence obtained during a later warranted search because the drug evidence was "primary

evidence, *i.e.*, the very evidence the officers were seeking when they committed the illegality." *Smith*, 327 Or at 377-78.

But as this court explained in *Smith*, it had employed a different analysis in its subsequent decision in *Sargent* where this court "reversed a suppression order on the ground that there was no logical connection between the unlawful securing of the residence and the discovery of what was, indisputably, primary evidence" during a subsequent warranted search. *Smith*, 327 Or at 378. According to this court in *Smith*, the use of that "logical connection" or factual nexus test in *Sargent* meant that "*Sargent* must be read as tacitly rejecting *Hansen*, at least to the extent that *Hansen* holds that unlawful seizure of property necessarily triggers suppression of any evidence contained therein, whether or not the police subsequently obtain lawful authority to search that property." *Id.* at 379. And that rejection was not "surprising" because the *Hansen* analysis reflected "an attempt to vindicate the 'police deterrence' rationale of the Fourth Amendment—that is, to prevent the police from deriving any benefit from the unlawful practice of seizing a residence in mere anticipation of obtaining a warrant to search for evidence of suspected crimes." *Id.* In contrast, the factual nexus requirement utilized in *Sargent* reflected the vindication rationale by ensuring that suppressed evidence was "only evidence that is *actually obtained* out of an illegal search or seizure." *Id.* (emphasis in original); *see also Johnson*, 335 Or at 520 (relying on *Sargent*).

Thus, this court has made clear that the very impetus for the *Johnson* rule that defendant challenges—the need for a causal connection between evidence obtained pursuant to a warrant and some prior illegality—promotes Oregon's vindication rationale. *See State v. Thompkin*, 341 Or 368, 379, 143 P3d 530 (2006) (recognizing that Oregon exclusionary rule is predicated on the vindication of an individual's rights before noting that "the methodology" of the relevant inquiry for the Oregon exclusionary rule "was explained in [*Johnson*]"). And a rule that does not require a factual nexus, like the one utilized in *Hansen* and proposed by defendant, departs from that rationale and instead serves the deterrence one. Removing the factual nexus requirement would punish law enforcement officers rather than placing a defendant in the same position that he or she would have occupied if the warrantless search or seizure had not occurred before the warranted search or seizure. But the vindication of an individual's rights occurs when a defendant meets the burden of demonstrating that warrantless police action placed him or her in a different position than he or she otherwise would have occupied without the action.

Furthermore, defendant fails to explain why a rule other than the one set forth in *Johnson* is necessary to vindicate a defendant's rights. (App BOM 33-37). Instead, she contends that this court should disavow the *Johnson* framework because this court "did not examine" the vindication rationale or "consider" whether the framework "contravened it." (App BOM 33). Put differently,

defendant argues that this court should overrule one of its decisions not because some identifiable oversight in the analysis undercuts it but, rather, based on its silence on the uncontroversial point that Oregon's exclusionary rule is based on the vindication of an individual's rights. That argument falls short of defendant's burden to affirmatively establish that this court should overrule a central part of its *Johnson* decision.

b. This court in *Johnson* correctly considered the presumption of regularity in crafting the burden-shifting framework.

Defendant also contends that this court should not have relied in *Johnson* on the presumption of regularity in crafting the burden-shifting framework because "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." (App BOM 35). But the central premise of defendant's argument—that the presumption of regularity falls away if the defendant claims that the magistrate considered impermissible facts—is incorrect.

For example, just as a magistrate's determination of probable cause could be based on a search warrant affidavit infected by facts derived from previous unlawful police conduct, so too could the determination be tainted by untrue or inaccurate facts recited in the affidavit. Nonetheless, in deference to the magistrate's probable cause determination—even on facts that a defendant

contends should not have been considered—the presumption of regularity attaches to the resulting warranted search. And for that reason, the burden of proof rests on a defendant to overcome that presumption to controvert the warrant based on the untruthfulness or inaccuracy of those facts. *See, e.g.*, *State v. Harp*, 299 Or 1, 9, 697 P2d 548 (1985) (explaining that to resolve motion to controvert "[t]he judge * * * evaluates whether the defendant has proven by a preponderance of the evidence that the evidence upon which the magistrate relied was inaccurate"); *State v. Hitt*, 305 Or 458, 464, 753 P2d 415 (1988) ("A criminal defendant may challenge an affiant's accuracy and truthfulness, as well as good faith, in reporting the statements and information contained within the affidavit."); ORS 133.693(3) (same).

Similarly, a warranted search could be challenged on the ground that the executing officers exceeded its scope in discovering evidence of a crime. Although such a discovery would derive from a search not authorized by the warrant—or a functionally warrantless search—the presumption of regularity still applies and dictates that the defendant bears the burden of proving that the search exceeded the scope. *See Walker*, 350 Or at 554-55 (rejecting the defendant's contention that a search exceeding the scope of a warrant is "essentially warrantless," such that the state should bear the burden of proving its lawfulness, and concluding based on presumption of regularity, among other reasons, that the defendant bore the burden of proving that the search was unlawful); *see also State*

v. Mansor, 279 Or App 778, 789, 381 P3d 930 (2016), *aff'd*, 363 Or 185 (2018) (explaining that burden of "proving the unlawfulness of a warranted search" derives from presumption of regularity and that "that burden pertains even when a defendant asserts that circumstances rendered a search effectively warrantless" (internal quotation marks omitted)).

Put simply, neither potential defects with the facts relied on in determining probable cause nor potential issues with a search exceeding the authority of a warrant to become essentially warrantless change the applicability of the presumption of regularity and the corresponding burden allocation. Thus, this court in *Johnson* correctly appreciated that the presumption applied for warranted searches even where the probable cause determination justifying the presumption may have been based on the consideration of evidence obtained during an unlawful search or seizure.[5]

The reliance on the presumption of regularity in *Johnson* was not only correct for doctrinal reasons; the practical considerations underlying the rule also support it. Again, the presumption of regularity stems from economical considerations bound up in a defendant's superior position to prove "what went wrong" with a warranted search. *See Walker*, 350 Or at 554 (explaining that

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[5] In this case, Officer Pelayo provided a detailed explanation in the affidavit for the search warrant about the officers sweeping the residence and seizing it. (ER-14-15).

practical considerations favoring placing burden on a defendant to challenge evidence discovered pursuant to a warrant include that "it is the defendant who ordinarily will have the better access to the facts that are relevant to a contention that the execution of the warrant was unlawful"). A defendant has the same superior position to prove that a previous warrantless search or seizure has a causal link to a subsequent warranted search or seizure.

The circumstances of this case bear that out. Defendant is in a unique position to know what would or could have happened if the officers had not seized her residence. She knew who had authority and permission to enter the house and to access areas of it, including her desk. She knew whether any of those individuals were planning on coming to her house during the time period of the seizure. For example, she may have been planning to have someone meet her at her house after she met with the informant but that person avoided the house because of the officers' presence. Or there may have been someone who routinely comes to her house during the hours of the day that the house was seized. The information about how the seizure interfered with the possible events that would have otherwise occurred is uniquely within defendant's knowledge and would have been almost impossible for the officers to know.

In sum, for practical and doctrinal reasons, this court in *Johnson* correctly appreciated that a framework for resolving whether evidence obtained through a

warranted search should be suppressed must account for the presumption of regularity.

c. This court in *Unger* reconciled its decision with the *Johnson* decision.

As explained above, this court in *Unger* disavowed its decision in *Hall* to apply the *Johnson* burden-shifting framework to consent searches that did not involve warrants. (Res BOM 18-19). Two legal reasons and a practical one served as the bases for that disavowal: (1) the presumption of regularity does not apply to warrantless searches or seizures; (2) ORS 133.693(4) allocates to the state the burden of proof for warrantless searches; and (3) "the application of the [factual nexus component of the *Hall*] test has been unclear in [this court's] cases since *Hall* and has proved confusing to litigants and the courts." *Unger*, 356 Or at 74-76.

Defendant seizes on this court's analysis in *Unger* for disavowing the factual nexus component for consent searches to argue that this court should disavow the same component of the *Johnson* test for warranted searches. First, he contends that *Unger* cannot be reconciled with the *Johnson* framework. (App BOM 37-39). But this court in *Unger* did just that; it explained why the *Johnson* framework should not apply to consent searches—because consent searches are not performed pursuant to a warrant and do not implicate the presumption of regularity—without insinuating that the *Johnson* framework itself was flawed. And contrary to

defendant's assertion that *Unger* stands for the premise that all "evidence discovered" after an alleged constitutional violation is "presumed to be" tainted and it is the state's burden to prove otherwise, this court has consistently explained that under *Johnson* a different presumption—the presumption of regularity—applies when evidence is ultimately obtained pursuant to a warrant. *E.g.*, *Walker*, 350 Or at 553-54; *State v. Makuch/Riesterer*, 340 Or 658, 665, 136 P3d 35 (2006). In addition to the presumption of regularity, this court in *Unger* also explained that the use of the factual nexus test for consent searches failed to "take into account" ORS 133.693(4), which places the burden on the state for warrantless searches. That statute does not apply to warranted searches.

Defendant also invokes the practical reason that the court in *Unger* disavowed the factual nexus component of the *Hall* test—the confusion of lawyers and judges in applying it—as a basis to overrule the *Johnson* test. (App BOM 39-40). But that practical concern does not apply to the *Johnson* test for two reasons. First as it did in *Unger*, this court had acknowledged the difficulties that it encountered in applying the factual nexus component of the *Hall* test to warrantless searches. *See State v. Ayles*, 348 Or 622, 649 n 5, 237 P3d 805 (2010) (Kistler, J., dissenting) ("It is worth noting that the procedural paradigm that the court announced in *Hall* is difficult to square with the reasoning in both *Hall* and other cases."). No such expression of confusion has been made regarding the factual nexus component of the *Johnson* test when applying it. *See Sargent*, 323

Or at 462 (concluding that Oregon exclusionary rule does not require suppression because, "[a]s a matter of logic, * * * there is no item of evidence from the search warrant tainted by the potentially trespassory conduct and, therefore, no item to suppress"). Nor has the Court of Appeals expressed confusion. *See, e.g.*, *State v. Dimmick*, 248 Or App 167, 176, 273 P3d 212 (2012) (concluding that the defendant established a "factual nexus between the unlawful seizure and the subsequent search warrant" by showing that police would not have had possession of seized evidence or information about seized evidence for inclusion in affidavit for search warrant without unlawful seizure).

Second, the application of the factual nexus component of the *Johnson* test applies to events with a clearer line of demarcation—the line between the issuance of a warrant, and the actions taken pursuant to it, and the actions taken without the warrant. Thus, the *Johnson* test does not create the same confusion that judges and lawyers may have experienced in ascertaining at what point a defendant had proved the requisite factual nexus to shift the burdens when assessing a warrantless search based on consent and a previous warrantless act.[6]

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[6] Indeed, the state in *Unger*—who was the party with an interest in upholding the test—acknowledged in its briefing that the factual nexus step of the *Hall* test had proved confusing to litigants and trial courts. Appellant's Brief on the Merits at 14-15, *State v. Unger*, 356 Or 59, 333 P3d 1009 (2014) (SC S060888).

In sum, defendant has failed to affirmatively show that this court should disavow the *Johnson* framework. Rather, this court should uphold that framework as a reasonable balancing of the different principles—the presumption of regularity and the *per se* unreasonableness of warrantless searches or seizures—implicated when challenged evidence is discovered through a warranted search but after some warrantless action.

B. Defendant failed to establish a causal connection between the seizure of her residence and the discovery of the drug evidence during the warranted search.

Under the *Johnson* framework, defendant bore the initial burden of establishing a factual nexus between the drug evidence discovered and obtained during the warranted search and the unlawful seizure of defendant's residence. To meet the factual nexus standard, a defendant must demonstrate at least a "but for" causal connection. *Hall*, 339 Or at 25 (equating the minimal factual nexus with "at minimum, the existence of a 'but for' relationship"); *see also United States v. DeLuca*, 269 F3d 1128, 1132 (10th Cir 2001) (explaining that factual nexus standard requires "[a]t a minimum, [the defendant] must adduce evidence at the suppression hearing showing the evidence sought to be suppressed would not have come to light but for the government's unconstitutional conduct" (internal quotation marks omitted; first alteration in original)).[7] Thus understood, the issue

[7] This court in *Johnson* relied on the *DeLuca* decision in crafting the burden-shifting framework. *Johnson*, 335 Or at 520.

becomes whether but for the unlawful seizure of the residence the officers would not have obtained the drug evidence.

This court's analysis in *Sargent* demonstrates the relevant types of causal connections implicated by the circumstances of this case. In *Sargent*, police officers received information that drug dealing was occurring from an apartment where the defendant and his wife lived. *Sargent*, 323 Or at 458. The officers learned that the defendant's wife was subject to an outstanding arrest warrant, but "[r]ather than acting immediately on [it]," the officers conducted surveillance on the apartment, confirming their information about drug dealing. *Id.* The officers later entered it pursuant to the arrest warrant. *Id.* After arresting the defendant's wife and observing needle caps, needles, syringes, and other indicia of drug use and dealing in the apartment, officers were posted inside the apartment to "'secure' it while a search warrant was being obtained." *Id.* at 459. The defendant left the apartment. *Id.*

A police officer used the observations from inside the apartment in the affidavit for the search warrant. *Id.* at 459-60. Roughly six hours after the search warrant had been issued, the officers inside the apartment were told that "they should start searching the apartment," which they did. *Id.* at 460. The officers found drug evidence. *Id.*

In reviewing the trial court's decision to suppress the drug evidence, this court in *Sargent* acknowledged that the occupation of the apartment before the

execution of the warrant was "arguably unlawful." *Id.* at 460, 462. But this court reasoned that the "potentially trespassory conduct did not result in, produce, or lead to discovery of any item of evidence mentioned in the trial court's written suppression order. As a matter of logic, then, there is no item of evidence from the search warrant tainted by the potentially trespassory conduct and, therefore, no item to suppress." *Id.* at 462 (footnote omitted). In support of that conclusion, this court further explained, "Any invasion of privacy that occurred after the arrest warrant was executed is not connected to *discovery or availability* of any evidence seized during the later search pursuant to the search warrant." *Id.* at 462-63 (emphasis added).

Similarly to the arrest of the defendant's wife in *Sargent* and the "posting" of officers inside the defendant's apartment to secure it before executing a search warrant and discovering drug evidence, Officer Pelayo arrested defendant and officers secured her residence from the outside before discovering drug evidence during a warranted search. Given the close similarities between the type of seizure and the subsequent discovery of moveable evidence during a warranted search, the types of causal connections considered by this court in *Sargent* focus the inquiry here: but for the seizure, would the drug evidence have been available or discovered?

1. Defendant offered no evidence supporting a nonspeculative inference that the drug evidence would not have been discovered but for the seizure of the residence.

Beginning with the availability of the drug evidence, the record lacks factual support for the inference that someone would have made unavailable the drug evidence if the residence were not secured by the police. Specifically, the record identifies four people who even conceivably *could* have removed or destroyed the drug evidence, but there was no evidence suggesting nonspeculatively that any of them *would* have done so.

The first person was defendant, but after her arrest, which she does not challenge, defendant would not have been able to move or dispose of the drug evidence.

The second person was the man driving a vehicle who left when Officer Pelayo asked if he possessed any drugs. The man did not indicate that he wanted to enter the residence, much less that he had authority or permission to do so. Rather, he appeared to be a passerby. Without an indication that the man had a desire or permission to enter the house, the evidence does not support a nonspeculative inference that the man would have removed or destroyed the drug evidence.

The third person was the man who expressed an interest in entering the property to retrieve a bicycle, but that item was not located in the same building, much less the same vicinity, as the drug evidence. Instead, Ms. informed

Officer Pelayo that bicycles were being stored on the property in an outbuilding—a different structure from the one in which the drug evidence was located. (ER-16). Thus, even if the man had permission or authority to enter the property, which is not clear from the record, there was no evidence that he would have entered—or intended to enter—the area where the officers found the drug evidence. And he was arrested on an outstanding warrant before he could attempt to enter the property. That evidence does not provide a factual basis for a nonspeculative inference that the man would have removed or destroyed the drug evidence.

Finally, Ms. the only person other than defendant who lived in the house and would have authority to enter parts of it, did nothing to suggest that she would have removed the drug evidence. Instead, her statements to Officer Pelayo, including her disclosure that defendant had previously sold her drugs and her identification of where she believed the drug evidence to be located, showed that she was not interested in assisting defendant escape criminal liability. Indeed, as explained below, the trial court concluded that her continued presence in the house and potential to destroy or otherwise prevent the officers from finding the drug evidence did not constitute an exigent circumstance justifying the seizure of it. (Res BOM 49-50). The underlying implicit finding that Ms. would not have destroyed or removed the drug evidence combined with the evidence showing her compliance with Officer Pelayo renders speculative any inference that she would have made unavailable the drug evidence but for the seizure.

In addition to the fact that the record permits nothing more than speculation that any of the identified individuals would have moved the drug evidence, it is also notable for what it lacks. Defendant presented no evidence regarding the individuals and whether they were authorized or permitted to enter defendant's house, areas of it, or the desk—evidence that could have been developed through testimony from Ms. among other sources. And defendant presented no evidence that anyone other than the four individuals discussed above would have entered the house had it not been seized.

In addition to testimony about other individuals, defendant failed to call Ms. as a witness to explain the actions that she would have or could have taken if she were not removed from the house. For example, defendant could have questioned Ms. about whether she had permission to access defendant's portion of the house or the drawers of defendant's desk without her being there. She also could have testified about whether she would have given permission to others, including the two unidentified men, to enter the residence or defendant's portion of it. She could have testified about the location of the bicycles if that were different than what the search warrant affidavit reflected.

Put simply, defendant failed to carry her burden of proving a causal connection between the availability of the drug evidence and the seizure of the residence. And that conclusion comports with this court's decision in *Smith*.

In *Smith*, an informant provided information to police that the defendant was using a unit in a storage facility to store marijuana. *Smith*, 327 Or at 368. Based on other information from the informant and evidence discovered during a search of the defendant's residence, police officers arrested defendant. *Id.* 368-69. Police officers travelled to the storage facility with a drug-sniffing dog, and the dog "'alerted' at [the] defendant's unit, suggesting the presence of illegal drugs." *Id.* The officers then "asked the manager to place a lock on [the] defendant's unit while they applied for a search warrant," and the manager did so. *Id.* An officer returned with a search warrant "[s]everal hours later" and searched the storage unit, finding and seizing drug evidence. *Id.*

Among other issues, this court addressed whether the drug evidence should have been suppressed because the evidence was derived from an unlawful seizure—the padlocking of the storage unit. *Id.* at 375-76. This court held that it should not have been suppressed, reasoning that "it is sufficient to suppress only evidence that is *actually obtained* out of an illegal search or seizure" and that "[t]he police may gain some degree of control over the contents of private property when they 'secure' that property, but they do not obtain *evidence* out of such a seizure." *Id.* at 379 (emphasis in original). After acknowledging that, "in some circumstances, the act of securing certain property may permit the police to obtain evidence that otherwise would not be available to them," this court in *Smith* explained that "[n]o one attempted to gain access to the unit to remove the

evidence before the search warrant was executed" and concluded that the drug evidence "would have been obtained even in the absence of the unlawful police conduct." *Id.* at 379-80.

Similarly to *Smith*, no one attempted to enter defendant's residence to remove the drug evidence during the "several hours" before the officers executed the search warrant. Like the defendant in *Smith*, defendant had been lawfully arrested and could not access the residence for that reason. And although one individual did attempt to retrieve an item from another building on the property, there was no indication in the record that he had authority or permission to enter defendant's residence. Moreover, although Ms. may have had access to items in the residence, defendant presented no evidence about what she would have done if she were not questioned by Officer Pelayo, much less that she would have moved or removed any property inside or had authority or permission to access defendant's desk.

Thus, like the padlocking of the storage unit in *Smith*, the officers' act of securing defendant's residence did not contribute to the discovery of the drug evidence. Rather, as the Court of Appeals concluded, "nothing in the record suggests that anyone who had the ability and authority to remove items from defendant's home either attempted to do so or would have done so had the officers not secured the premises." *DeJong*, 305 Or App at 337.

2. Defendant failed to prove that, while securing the residence, the officers gained any information that they needed to discover the drug evidence.

Defendant fares no better when assessing whether the discovery of the drug evidence was casually connected to information obtained from the unlawful seizure. At the outset, the officers gained no visual insights about the location of the drug evidence from their initial "sweep" of the house for occupants. When the officers were securing defendant's residence, they did not conduct a search beyond looking into rooms to see whether there were occupants located in them. There is no indication that the officers conducted any type of search for, or observed, the drug evidence during that process.

The only information that the officers gained because of the seizure was the information from Ms. —information that the officers already had. Specifically, Ms. told them that she had seen defendant store drugs in her desk and that Ms. had drug evidence in her purse. (ER-15-16). But Officer Pelayo already knew from the informant that those locations were ones where drug evidence was likely to be found and the officer intended to search in areas in the residence where the drug evidence could be concealed. To that end, the search warrant affidavit contained statements (1) that Officer Pelayo's training and experience had taught him that a drug trafficker "commonly conceal[s]" the trafficked drugs in "his/her residence" and (2) that the informant had observed on the day of the search that defendant had roughly an ounce of methamphetamine in

a purse and a digital scale "sitting on her computer desk." (ER-2-3, 12). In a search within the scope authorized by the warrant, the officers discovered the relevant drug evidence in the locations that the informant identified—the defendant's computer desk and a purse—and in locations that neither the informant nor Ms. had identified—a bedside table and a shelf near a bed. (ER-21, 26; Tr 77-78).

Not only does the record not show that Ms. statements affected the warranted search and discovery of the drug evidence, but defendant did not question Officer Pelayo about whether the search was so affected. For example, she did not ask whether the officer began the warranted search with defendant's desk or otherwise deviated from a typical search based on the statements. Indeed, defendant hardly questioned the officer at all about the search. (Tr 77-78). Further, defendant could have called Ms. as a witness to ask if she told the officer more details than what the affidavit reflects.

Put simply, defendant failed to establish a causal connection between the information obtained from the seizure of the residence—Ms. statements—and the officers' ultimate discovery of the drug evidence while conducting the warranted search.

This court's analysis in *Johnson* does not counsel otherwise. In that case, the officers relied on the location of the seized clothing evidence in applying for the search warrant. *Johnson*, 335 Or at 521. Specifically, the affidavit for the

search warrant "stated that the police had seized the clothing and had retained it at the Salem Police Department because of 'exigent circumstances.'" *Id.* at 515. And the "circuit court judge granted the application for a search warrant * * * , authorizing the police to seize and analyze *specified* items of clothing '*located at the Salem Police Department*.'" *Id.* (emphasis added). From those facts, this court concluded that "it is clear that [the] defendant did meet his burden of showing a factual nexus between the evidence at issue and the prior unlawful conduct, and that he succeeded in shifting the burden of persuasion on the issue of taint to the state." *Id.* at 521.

Unlike *Johnson*, the officers in this case did not know the exact location of the drug evidence and they had information that the drug evidence could be in the desk or a purse independent of Ms. statements. And, more importantly, the search warrant was not directed at a specific location—unlike the evidence locker specifically identified in the warrant in *Johnson*—that the officers knew because of the seizure, much less a location that the drug evidence would not have been but for the seizure. Rather, the officers made the discovery through what appears to have been a typical search in the general location of defendant's residence for concealed evidence.

3. Because the trial court excised Ms. statements, there is no causal connection between them and the officers' authority to conduct the warranted search.

In arguing that she showed a factual nexus between the discovery of the drug evidence through the warranted search and the unlawful seizure of defendant's residence, defendant shifts the focus of the analysis from the drug evidence to Ms. statements. (App BOM 41). With that focus, she contends that "but for the unlawful seizure, the state would not have had statements to * * * increase the quantum of proof against defendant when seeking a warrant." (App BOM 43).

But the trial court excised Ms. statements, and that severed any nexus between those statements and the drug evidence found pursuant to the warrant. Specifically, the trial court appreciated that Ms. statements, which would not have been obtained without the unlawful seizure, should not have been included in the probable cause calculus for issuing the search warrant and excised them. The trial court then determined that probable cause justified the issuance of the warrant without the statements—a determination that defendant does not challenge.

The trial court's approach to the issue was correct. *See State v. Castilleja*, 345 Or 255, 264, 266, 192 P3d 1283, *adh'd to on recons*, 345 Or 473 (2008) (explaining that issue presented when a search warrant affidavit contains information derived from an unlawful search is whether "the affidavit (excluding

the excised parts) provide[s] sufficient information to permit the issuing magistrate to find probable cause for the search"). Indeed, Professor LaFave has noted the possibility of the situation facing the trial court:

> Especially because a warrant-issuing magistrate is not required to raise, *sua sponte*, possible constitutional problems, it sometimes happens that upon a motion to suppress evidence obtained in execution of a search warrant, a showing is made for the first time that some of the information in the affidavit presented to the warrant-issuing magistrate was acquired in a prior illegal search.

LaFave, 6 *Search and Seizure* § 11.4(f) (footnote and internal quotation marks omitted). And he explained the appropriate resolution of that issue: "The question then becomes how this affects the status of the search warrant, which courts have often answered by saying that the warrant is nonetheless valid if it could have issued upon the untainted information in the affidavit (though there was later added the requirement that the police would otherwise have sought the warrant)." *Id.* (footnote omitted).[8]

Consistently with that suggested resolution and the directives of Oregon law, the trial court suppressed Ms. statements and concluded that the search warrant was valid and provided the officers authority to search defendant's residence. As a result, the inclusion of Ms. statements in the affidavit did not establish a factual nexus between the discovery of the *drug evidence* during the

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[8] Defendant does not contend that Officer Pelayo would not have sought the warrant without Ms. statements.

warranted search and the seizure of defendant's residence because the warrant authorized the search without those statements.[9] And defendant failed to demonstrate that the statements led to the discovery of the drug evidence during the search or otherwise affected the search. Accordingly, defendant did not meet her initial burden of proof.[10]

C. The state demonstrated that the seizure did not require suppression of the drug evidence.

Even if defendant had satisfied her initial burden of proving the factual nexus, Oregon's exclusionary rule did not bar admission of the drug evidence. The state bore the burden of showing "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

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[9] Even if defendant were correct that the inclusion of Ms. statements in the affidavit established the factual nexus, it would be the *only* nexus. And the trial court's excision of the statements and conclusion that the warrant remained nonetheless valid would satisfy the state's burden of showing that the statements did not taint the discovery of the drug evidence during the warranted search. Because defendant does not challenge the trial court's conclusion that the warrant was based on probable cause without the statements, the exclusionary rule would, therefore, not require the suppression of the drug evidence.

[10] Similarly, to prove the invalidity of a warrant itself, a defendant does not meet his or her burden by proving that a fact should not have been included in the affidavit if that fact, when excised, does not defeat probable cause. Rather, the defendant must prove that, without that fact, the affidavit fails to establish probable cause.

the illegality as to dissipate the taint of the unlawful conduct." *Johnson*, 335 Or at 520; *see also Hall*, 339 Or at 25 (same).

The inevitable discovery doctrine "permits the prosecution to purge the taint of illegally obtained evidence by proving, by a preponderance of the evidence, that such evidence inevitably would have been discovered, absent the illegality, by proper and predictable police investigatory procedures." *State v. Miller*, 300 Or 203, 225, 709 P2d 225 (1985), *cert den*, 475 US 1141 (1986). The doctrine has two elements: "(1) that certain proper and predictable investigatory procedures would have been utilized in the instant case, and (2) that those procedures inevitably would have resulted in the discovery of the evidence in question." *Id.* at 226. "When considering the actual police procedures the court is inquiring into whether or not alternative action would have been taken by the people involved. The second aspect deals with the probability of success of the alternative action and takes into account factors outside the control of the investigators." *Id.* at 226 (internal quotation marks omitted).

1. Officer Pelayo would have pursued a warrant to search defendant's residence regardless of the seizure.

The evidence satisfies the first element. The application for the warrant to search defendant's residence was the culmination of an 18-month investigation into defendant's "illegal drug enterprise." Officer Pelayo utilized an informant to set up a drug transaction with defendant at her residence consistently with the

informant's purchase of drugs from defendant earlier that same day, ensuring both that defendant was engaged in such activities and that defendant would have the drugs in her residence. After defendant had confirmed the transaction, Officer Pelayo had all the information that he would need to establish probable cause for a search warrant, as the trial court concluded after excising Ms. statements, and the officer believed that he had probable cause that defendant had committed various drug crimes. The officer displayed his intent to investigate defendant's criminal activities by arresting her and, after she refused to cooperate in the officer's further investigatory efforts, procuring the search warrant. That evidence established that Officer Pelayo would have continued his investigation and employed proper and predictable investigatory procedures by seeking the warrant and searching defendant's residence for drug evidence pursuant to it regardless of the seizure. *See* LaFave, 6 *Search & Seizure* § 11.4(a) ("Circumstances justifying application of the 'inevitable discovery' rule are most likely to be present if these investigative procedures were already in progress prior to the discovery via illegal means[.]").

2. The officers would have found the drug evidence during the warranted search.

That search would have inevitably resulted in the discovery of the drug evidence. That element of the inevitable discovery doctrine draws on similar considerations to the analysis whether defendant had proved a factual nexus based

on the availability of the challenged evidence with an important difference. Specifically, "[i]n the case of a warrantless entry into premises, the two-part test * * * require[s] consideration of the possibility that, *if police had not made the illegal entry into the premises*, evidence might have been disposed of or hidden." *Miller*, 300 Or at 227 (emphasis added).

Put in the context of this case, the issue is whether there was a likelihood that someone with the ability and authority to enter the residence would have removed or hidden the drug evidence after defendant had been lawfully arrested. Defendant could not access the drug evidence. The first unidentified man did not say or do anything suggesting that he wanted to access the house. The second unidentified man sought to access an outbuilding on the property to retrieve a bicycle, not the drug evidence or something within its vicinity in the house, before he was arrested. And finally, the evidence of Ms. cooperation with Officer Pelayo during questioning and the absence of any indication that she would have removed or destroyed the drug evidence showed that she would not have made unavailable the drug evidence. Thus, the evidence showed that no one would have removed or destroyed the drug evidence if there were no seizure.[11]

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[11] Although Officer Pelayo indicated that he was concerned with someone breaking into defendant's house and stealing her property after her arrest, his concerns did not require the state to show more than that the concerns were unfounded because the four individuals who could have accessed the house would not have removed the drug evidence.

And the trial court's analysis of the exigency issue bolsters that showing as it pertains to Ms. Specifically, during the suppression hearing, the state argued that Officer Pelayo's warrantless seizure of the residence was justified by exigent circumstances—the likelihood that Ms. the only identified person with the ability and authority to be in part of the residence, would have removed or otherwise prevented the officers from finding the drug evidence. *See, e.g.*, *State v. Meharry*, 342 Or 173, 177, 149 P3d 1155 (2006) ("Exigent circumstances include, among other things, situations in which immediate action is necessary to prevent the disappearance, dissipation, or destruction of evidence."). The trial court disagreed, concluding that exigent circumstances did not provide a basis for the warrantless seizure. By rejecting the state's argument, the trial court reached the implicit finding that Ms. would not have disposed of or otherwise prevented the officers from finding the drug evidence. *See Ball v. Gladden*, 250 Or 485, 487, 443 P2d 621 (1968) ("If findings are not made on all such facts, and there is evidence from which such facts could be decided more than one way, we will presume that the facts were decided in a manner consistent with the ultimate conclusion * * * made by the trial court or jury."). That implicit finding supports the inference that the officers would have inevitably found the drug evidence.

In advancing the contrary argument, defendant misconstrues the exigency issue that the trial court considered based on the parties' arguments during the hearing. (App BOM 50-51). The state's argument on that front was that the

warrantless seizure of defendant's residence was justified based on exigent circumstances because Ms. had been involved in defendant's drug crimes and, thus, had an incentive "to potentially destroy evidence, remove evidence; do something with evidence." Consistently with defendant's response that "[t]here was no reason to believe evidence was going to be destroyed," the trial court concluded that "there were not exigent circumstances to justify the seizure."

The trial court also explained that "[t]he only exigent circumstance was the possibility that the defendant could have gone camping" and that "[t]hat alone" could not justify the seizure of defendant's residence. The court further clarified that by going to the residence and confronting defendant, the officers "created further exigency," which "cannot be used to circumvent the warrant requirement." The trial court's response to defendant's exigency argument—that her potential flight did not constitute an exigent circumstance—did not limit the trial court's decision from applying to the state's exigency contention. Moreover, the court's observation about law enforcement exacerbating the exigency should be read in the context of the court's previous statement about defendant leaving the property. Thus understood, the trial court was providing additional reasoning for its acceptance of defendant's argument that the risk of defendant fleeing could not constitute exigent circumstances because it could be attributable to the police arriving at the residence.

Defendant also contends that, "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," that conclusion "was error, because the state—as the party with the burden to prove as much—presented only evidence that supported the opposite proposition." (App BOM 51). Putting aside the fact that defendant has never assigned error to the trial court's resolution of the exigency issue in her favor, the evidence does not support her argument. As explained above, the record reflects four individuals who could have possibly entered defendant's residence—defendant, Ms. and the two unidentified men who came by the house—and supports the reasonable inference that none of them could or would remove or destroy the drug evidence. (Res BOM 35-38).[12]

That conclusion comports with this court's decisions in *Smith*, where there was no evidence that someone attempted to access the padlocked storage locker for "several hours" while the officers obtained the warrant, and *Sargent*, where no one

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[12] Defendant refers to an individual named Mr. as someone who (1) had permission to enter the house, according to Ms. and (2) could have removed the drug evidence. (App BOM 52). Although Ms. appears to have discussed him generally with Officer Pelayo, there is no indication in the record that Mr. came to the house or would have come to the house during the time period of the seizure. (ER-16). The state's burden does not require it to show that every person who may have had permission to enter defendant's house would not have removed the drug evidence after defendant's arrest without such an indication.

tried to enter the apartment after the defendant left it and while police officers were inside securing it. And it comports with *Johnson*.

In *Johnson*, the trial court found that the "defendant had requested the return of the [seized] clothing through [his girlfriend] and that, in any event, the police would not have released the clothing." *Johnson*, 335 Or at 517. From that finding, the trial court in *Johnson* "concluded that the warrant and the seizure pursuant to the warrant therefore were not independent of the previous illegal seizure because the police had possession of the clothes due to the previous illegal seizure" and because without the seizure, the evidence would have been taken by the defendant's girlfriend. *Id.* Relying on the trial court's findings and conclusions, this court concluded that the state had failed to prove that it "inevitably would have seized the clothes lawfully." *Id.* at 526.

Unlike *Johnson*, the trial court in this case made no finding that someone had attempted to enter the house to remove the drug evidence, much less that such an attempt was thwarted, and no one expressed an intent to obtain the drug evidence from the residence akin to the defendant's girlfriend's attempt to obtain the clothing. Moreover, there were no legal conclusions counter to the state on the issue.[13] Thus, the result in *Johnson* is inapposite here.

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[13] If this court were to conclude that the trial court failed to make any necessary findings or legal conclusions on the inevitable discovery issue, then this court should remand this case for the trial court to do so.

CONCLUSION

This court should affirm the trial court's judgment.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on May 4, 2021, I directed the original Brief on the Merits of Respondent on Review to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Mark J. Kimbrell, attorneys for appellant, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(1)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b) and (2) the word-count of this brief (as described in ORAP 5.05(1)(a)) is 12,952 words. I further 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 as required by ORAP 5.05(3)(b).

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