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 REPLY BRIEF ON THE MERITS

Review of 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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STATEMENT OF THE CASE

When the state warrantlessly intrudes upon a protected privacy or possessory interest and a defendant moves to suppress evidence based on that intrusion, a two-step analysis takes place. First, the state attempts to overcome the presumption that the police action was unlawful, *e.g.*, by showing that a warrant exception applied to justify the intrusion. If the state cannot satisfy that burden, evidence discovered following the violation is presumed tainted by the unlawful police conduct. At that point, the state has an opportunity to prove that the challenged evidence is not the product of the violation. If it fails, suppression is required. *State v. Unger*, 356 Or 59, 75, 84, 333 P3d 1009 (2014).

Under *State v. Johnson*, 335 Or 511, 521, 73 P3d 282 (2003), a *warranted* search or seizure that follows an *unlawful* search or seizure alters the second half of that analysis—the defendant must establish a factual nexus between the Article I, section 9, violation and the challenged evidence before the state is required to purge the taint of the prior violation.

In her brief on the merits, defendant argues that she should have no burden and that this court should disavow the factual nexus requirement. Pet BOM at 31-40. If it declines to do so, defendant argues that she nonetheless

satisfied that burden. Pet BOM at 40-47. And she further asserts that the state failed to establish that the evidence did not derive from the unlawful seizure. Accordingly, the trial court erred in denying her motion to suppress. Pet BOM at 47-57.

The state asks this court to adhere to a causational "but-for" factual nexus requirement. It argues that, after a defendant endures an unlawful warrantless search or seizure and moves to suppress evidence pursuant to that illegality, so long as the state garners a warrant for the evidence following the illegality, the defendant should be required to produce evidence establishing a "nonspeculative" "but-for" connection between the challenged evidence and the prior violation. Specifically, the defendant must show that the evidence *would not* have been discovered without the violation. Resp BOM at 2. If the defendant falls short of proving that inflexible "but-for" connection, the state—the party that unlawfully violated the person's right to be free from unreasonable search or seizure—need not prove a thing.

According to the state, that methodology—which erases the presumption of taint that normally follows an Article I, section 9, violation and which places an initial and potentially dispositive burden on the defendant—better serves to vindicate the rights of individuals who have suffered an unlawful search or seizure at the hands of the state. And the state cites the presumption that warrant searches are lawful to justify the methodology—a justification that this

court has not questioned in its exclusionary rule cases following *Johnson*. Resp BOM 8-9, 18-19, 22-27, 29-30.

Applying that framework here, the state contends that defendant failed to satisfy her burden because she neither established a nonspeculative inference that the evidence "would have" moved or been destroyed if not for the unlawful seizure, nor did she prove that the officers gained anything from the unlawful seizure that "they needed to discover the drug evidence." Resp BOM at 35, 40.

It also argues that, even if defendant established a nexus and, thus, shifted the burden to the state, it purged any taint with proof that the police inevitably would have discovered the evidence. Resp BOM at 47-52. Specifically, it asserts that the trial court, through its exigency ruling, implicitly found that the officers would not have been prevented from discovering the drug evidence. Resp BOM at 49-50.

Summary of Argument

None of the state's arguments for upholding the nexus requirement have merit. The presumption that a warrant search is lawful provides no support for imposing a factual nexus requirement on defendants who identify a preceding illegality because the presumed regularity of warrants does not bear on the issue of whether evidence is the product of that separate unlawful police action. This court's failure to hold as much is not significant because, prior to this case, it has not had cause to scrutinize the *Johnson* court's reasoning for adopting the

nexus requirement. Further, removing the factual nexus requirement would relieve the party who endured an unlawful seizure of an initial burden but still allow the state to use evidence that *it proves* is not the product of the violation. That result would better serve the animating principle of Oregon's exclusionary rule: vindicating a person's right to be free from unlawful government intrusion by not allowing the state to use evidence against the person without proof that the evidence is not tainted by the violation.

Additionally, even if the nexus requirement holds, in arguing that defendant failed to establish a nexus, the state's analysis requires more than the factual connection that this court found sufficient in *Johnson* to shift the burden to the state. Regardless, even under the state's too-strict formulation of the standard in this setting, the record supports a factual nexus.

Finally, in arguing that it established that the evidence would have been inevitably discovered, the state misapprehends the trial court's exigency ruling. By concluding that the officers created an exigency by confronting defendant, the trial court recognized the risk that the evidence would be moved or destroyed following defendant's arrest. That finding aligned with the state's evidence and it defeats the state's inevitable discovery theory.

Argument

I. This court should disavow the factual nexus requirement.

A. The presumption that a warrant search is lawful is immaterial to whether seized evidence is the product of an earlier violation.

The state describes *Johnson* as announcing a "hybrid analytical framework" that it adopted from "federal courts describing the allocation of burdens in identical situations." Resp BOM at 16-17. It asserts that this court rightfully allocated the initial burden of proving a factual nexus to the defendant due to the presumption that warrant searches are lawful. Resp BOM at 17-19, 25-27. And it analogizes the complications posed by a preceding unreasonable search or seizure to motions to controvert a warrant affidavit based on inaccurate or untruthful facts in an affidavit and motions to suppress based on officers exceeding the scope of a warrant. Resp BOM at 25-27. In both situations, the warrant's presumption of legality persists, and the defendant is required to carry a burden. Resp BOM at 27. The state contends that "defendant's superior position to prove 'what went wrong' with a warranted search" similarly supports imposing a burden here. Resp BOM at 27-28 (quoting *State v. Walker*, 350 Or 540, 554, 258 P3d 1228 (2011)).

However, *Johnson* did not adopt the nexus requirement from federal cases with "identical situations." The federal cases the *Johnson* court relied on featured *warrantless* actions with one exception. *See Johnson*, 335 Or at 520 (citing *Alderman v. United States*, 394 US 165, 183, 89 S Ct 961, 22 L Ed 2d

176 (1969) (holding that the trial court must give the defendants access to the information gained through illegal (warrantless) surveillance so that they could attempt to show that the government used the fruits of the unlawful eavesdropping to secure their convictions); *United States v. DeLuca*, 269 F3d 1128, 1132 (10th Cir 2001) (considering whether the police's warrantless discovery of methamphetamine in a vehicle was tainted by the warrantless and unlawful seizure of the vehicle and its occupants); *United States v. Nava-Ramirez*, 210 F3d 1128, 1131 (10th Cir), *cert den*, 531 US 887 (2000) (same)). Only one of the cases contained a warrant search, and an invalid warrant at that. *Johnson*, 335 Or at 520 (citing *United States v. Kandik*, 633 F2d 1334, 1335 (9th Cir 1980) (considering whether witness testimony was tainted by a search performed pursuant to an invalid warrant)).

In each case, the federal courts required the defendants to establish a factual nexus between the Fourth Amendment violations and challenged evidence, showing that federal courts *always* apply the factual nexus requirement *regardless of if a warrant was involved*. The federal approach that this court adopted in *Johnson* had little to nothing to do with the presumption of regularity that warrants carry.

That is to say that the federal courts understand that any presumption that a *search or seizure* is lawful does not bear on the relationship between the intrusion and the evidence. *United States v. Leon*, 468 US 897, 906, 104 S Ct

3405, 82 L Ed 2d 677 (1984) ("Whether the exclusionary sanction is appropriately imposed in a particular case * * * is an issue separate from the question whether the Fourth Amendment rights of the party seeking invoke the rule were violated by police conduct." (Internal quotation marks omitted)). The same principle is true for Article I, section 9. *See State ex rel Juv. Dept. v. Rogers*, 314 Or 114, 118, 836 P2d 127 (1992) (holding that an unreasonable search or seizure is unlawful "regardless of how the government seeks to use any unlawfully obtained evidence"); *State v. Musser*, 356 Or 148, 159, 335 P3d 814 (2014) (illustrating that evidence found during an otherwise valid consent search can be suppressed as the product of an earlier unlawful seizure).

This court's treatment of motions to controvert and challenges to the execution of a warrant do not suggest otherwise. "Under Oregon law, the allocation of the burden of proof regarding the *lawfulness of a search* under Article I, section 9, depends on whether the search was conducted pursuant to a warrant." *Walker*, 350 Or at 553 (emphasis added); *see also* ORS 133.693 (setting burdens for establishing or contesting the validity of a search or seizure). A motion to controvert and a motion based on the scope of the warrant both challenge the lawfulness of the *warrant search* itself, *i.e.*, whether the intrusion was justified by probable cause or was executed within the bounds of that probable cause. *See, e.g.*, *State v. Keeney*, 323 Or 309, 318-20, 918 P2d 419 (1996) (citing *State v. Harp*, 299 Or 1, 8-9, 697 P2d 548 (1985)) (holding

that, when an affidavit is controverted, the trial court should reexamine it to see if it provided probable cause to support a lawful warrant search absent the inaccurate statements or uncredible portions). Therefore, those challenges to the *warrant search* must overcome the presumption of lawfulness. *Walker*, 350 Or at 553-54.

But the legality of the warrant search is not at issue in this circumstance—at least at this point in the litigation. Defendant is no longer asserting that something "went wrong" during execution of the warrant search. She is arguing that something "went wrong" during a previous unwarranted seizure, and that *that violation* tainted the evidence that the state claims was obtained only through execution of the warrant. *See, e.g.*, Tr 16 (defendant arguing that, if the trial court concluded that the seizure of her house was unlawful and the challenged evidence derived from that seizure, it need not address her motion to controvert the warrant affidavit).

The relationship between the evidence discovered during the warrant search and the prior intrusion (one that carries a presumption of illegality and taint) is the central focus. A perfectly valid warrant search can lead to the discovery or seizure of evidence that is the product of a prior illegality. And a defendant can seek suppression pursuant to a separate police action without questioning the validity of the warrant or the warrant search. The question here

is whether the defendant bears the burden of establishing "taint" before the state bears the burden of purging any taint.

B. *Unger* and *James* do not demonstrate that the nexus requirement was justified in *Johnson*.

The state reads *Unger*, 356 Or 59, and *State v. James*, 339 Or 476, 123 P3d 251 (2005), as demonstrating that "the presumption of regularity attaching to a warranted search demands a different analysis than other suppression issues." Resp BOM at 18-19. And it specifically points out that *Unger* distinguished the *Johnson* framework without insinuating that the framework itself was flawed. Resp BOM at 29-30.

But in both cases this court had no reason to do anything beyond distinguish *Johnson* in the most obvious way—by noting that the presumption of regularity attendant to *a warrant*, which the *Johnson* court relied on to impose the factual nexus requirement, was absent. In *Unger*, this court needed only to find fault with the adoption of that requirement for cases involving only warrantless intrusions in *State v. Hall*, 339 Or 7, 25, 115 P3d 908 (2005). *Unger*, 356 Or at 75. In *James*, it needed only to find fault with the state's argument that the *Johnson* burden-shifting framework should apply to motions to suppress based on violations of the defendant's right to counsel. *James*, 339 Or at 489. In both instances, it could readily rely on the absence of the presumption of regularity to do so without determining—much less

questioning—whether that presumption should have driven the allocation of burdens in *Johnson*. *See Unger*, 356 Or at 74-76; *James*, 339 Or at 489-91. The court did not weigh in on *Johnson*'s reasoning for imposing the nexus requirement in these circumstances because it had no cause to, not because it approved of that reasoning.

C. Placing the burden on the state to establish that evidence is not tainted by a prior unlawful seizure better serves the Oregon exclusionary rule's purpose of vindicating individual rights.

Finally, the state disputes that this court in *Johnson* failed to consider the purpose of Oregon's exclusionary rule when adopting the factual nexus requirement. Instead, it contends that the nexus requirement "promotes Oregon's vindication rationale" because it ensures that only evidence "'*actually obtained* out of an illegal search or seizure'" is suppressed. Resp BOM at 22-24 (citing *State v. Smith*, 327 Or 366, 379, 963 P2d 642 (1998)) (emphasis in *Smith*). Correspondingly, the state asserts that "[r]emoving 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." Resp BOM at 24. That, according to the state, would mark a return to the police-deterrence model seen in *State v. Hansen*, 295 Or 78, 664 P2d 1095 (1983), an approach that this court rejected in *Smith*, 327 Or at 379, as a departure from the vindication of individual rights rationale. Resp BOM at 24.

In making those arguments, the state ignores two obvious points. First, removing a barrier to suppression (such as the factual nexus requirement) can do nothing but *increase* the likelihood that an individual's rights will be vindicated. Such a change would eliminate the possibility that a defendant, a private citizen without investigatory resources, would lose out on suppression because she is unable to uncover the ways in which the police used their violation to produce the challenged evidence.

Second, removing the initial burden on the defendant would "punish law enforcement officers," rather than return the defendant to the same position that she would have occupied without the warrantless seizure, *only if* the state chooses to not satisfy its burden of showing that the evidence is not the product of the violation. Said differently, relieving defendants of their burden is not synonymous with suppression. Instead, it means shifting the burden to the state to show the absence of a factual connection. *See Unger*, 356 Or at 76 (holding that 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 evidence).

Shifting the burden to the state would not mark a return to *Hansen*, where this court required the suppression of evidence that police discovered during a warrant search, because it was the "*primary* evidence" that officers were seeking when they unlawfully seized the defendant's home prior to the warrant.

Smith, 327 Or at 378 (describing *Hansen*) (emphasis in original). Indeed, it would not alter the standard for exclusion at all—only evidence that derives from an illegality would be subject to suppression. The only change would be that the state (as the party that violated the defendant's Article I, section 9, rights and who has the vastly superior investigative resources), rather than the defendant (the individual who suffered the violation and who may not know what happened behind the blue curtain), would be responsible for assuring that that standard is satisfied.

If the *Johnson* court had considered those points, it would have understood that placing the burden on the state better effectuated the purpose of Oregon's exclusionary rule. This case presents an opportunity to do just that.

II. In arguing that defendant did not establish a factual nexus, the state elevates that requirement, transferring the burden to purge the taint to defendant, and it ignores the impact of its own evidence in satisfying the requirement.

After arguing that the factual nexus requirement should persist, the state asserts that defendant failed to satisfy that burden because she did not establish that either the evidence "would have" moved or been destroyed, or that the officers gained anything from the seizure that "they *needed* to discover the drug evidence." Resp BOM at 35, 40 (emphasis added). The state is wrong because that is more than is required, and, regardless, defendant made those showings.

A. Defendant established that the officers had possession of the evidence due to the unlawful seizure. That was a sufficient nexus. Regardless, the record supported a non-speculative inference that the evidence would have moved or been destroyed following defendant's arrest.

Defendant established that, absent the unlawful seizure, the police would not have had possession of the challenged evidence and would not have been able to report that possession in their search warrant affidavit. *See* Pet BOM at ER 14-16, ER 69-70. Under *Johnson*, that was a "factual connection * * * sufficient to shift the burden of persuasion regarding taint to the state." *Johnson*, 335 Or at 521.

In arguing that defendant was required to show that the evidence would have moved absent the seizure, the state requires defendant to establish the inverse of inevitable discovery—that the police *could not* have inevitably discovered the evidence. That is illustrated by the fact that the state uses substantially the same analysis to argue that defendant did not establish a nexus and that police inevitably would have discovered the evidence. *Compare* Resp BOM at 35-37, *with* Resp BOM at 47-48.

Regardless, in applying its own more rigorous nexus standard, the state ignores the evidence that *it* presented supporting an inference that someone would move or destroy the evidence. Pelayo testified that, after police arrest someone in defendant's "area," it is "pretty common" for their friends to "come and clean them out[,]" and that he had seen that scenario occur "time and time

again." Tr 93. similarly told Pelayo that she "see[s] a lot of scumbags coming through" defendant's house. Pet BOM at ER-16.

Applying Pelayo's and experience, at the time of defendant's arrest, there were four known individuals available to "clean [her] out" along with some unknown number of "scumbags" who frequented the property. Of the four known individuals, three were connected to the drug trade (and the man who had been seen at defendant's house frequently and who left when Pelayo asked him about drugs), one actually attempted to access the property (the man inquiring about the bicycle),[1] one was already inside the house (and another resided on defendant's street and regularly entered her basement (Pet BOM at ER-16; Tr 72, 94, 96-97.

That constellation of evidence supported a nonspeculative inference that the evidence "would have" moved or been destroyed had the police arrested and transported defendant to jail but not unlawfully seized her home. Accordingly,

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[1] The state dismisses any risk posed by this individual because " informed [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." Resp BOM at 35-36. However, told Pelayo that was keeping two solar-powered bicycles in an outbuilding; she did not state that all bicycles on the property were stored exclusively in an outbuilding. Pet BOM at ER-16. In fact, Pelayo mentioned the man when asked if "anyone else tr[ied] to come to the house at all[,]" stating that he was not going to "let him take [defendant's] stuff, potentially." Tr 97.

even under the state's proposed standard, the record shows a factual nexus between the unlawful seizure of defendant's house and the challenged evidence.

B. Defendant established that information from the seizure was used in the warrant affidavit. That was enough to establish a nexus. Regardless, information from the unlawful seizure was also used to locate evidence and connect it to defendant's drug sales.

As mentioned, the state argues that defendant was alternatively required to show that officers gained something from the seizure that "they needed to discover the drug evidence." And that she failed to satisfy that burden because

statements were not needed to discover evidence. Resp BOM at 40-41.

Once again, the state demands more than *Johnson* does. In finding a factual nexus, the *Johnson* court relied on the fact that "information derived" from the seizure was used in the warrant affidavit. 335 Or 521. The court specified that the "information" in that case concerned the location of the evidence, but it neither held nor suggested that information about the location of evidence was the only form of "information" that would satisfy the nexus requirement. Rather, the court concluded that the police merely using that information when seeking the warrant satisfied defendant's burden to establish a "factual connection":

> "[I]t is clear that 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. In so holding, we rely on the fact

> that 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. The existence of that factual connection is sufficient to shift the burden of persuasion regarding taint to the state."

Id.

Regardless, many of statements spoke to the location of evidence. told Pelayo that defendant kept her drugs in her top desk drawer. And that more than half of the methamphetamine that she had purchased from defendant was in her purse along with syringes and a pipe. Pet BOM at ER 15-16. The state did not already have that information.[2] did not know what did with the methamphetamine that she had purchased from defendant. And did not tell Pelayo that defendant kept her drugs in her top desk drawer. Instead, she stated that defendant had pulled a bag of methamphetamine from out of her purse. Pet BOM at ER-12.

Just as described, the officers found methamphetamine and paraphernalia in defendant's desk, and they found a purse with methamphetamine, syringes, and a pipe. Tr 77-78; Pet BOM at ER 25-26. Accordingly, statements provided "information" from the seizure that the police used in the warrant affidavit to obtain the warrant, *and* that

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[2] Indeed, Pelayo noted that he "learned some important stuff" from Tr 95.

information aided the state in locating and connecting drug evidence to defendant.

In summary, under both *Johnson* and the standards advocated for by the state, the record supports a factual nexus in this case sufficient to shift the burden to the state.

III. In arguing that the police would have inevitably discovered the evidence, the state misapprehends the trial court's exigency ruling, which, properly understood, forecloses its argument.

The state abandons any argument that the evidence was discovered independently of the unlawful seizure of defendant's home or that it was attenuated from it. Rather, the state relies exclusively on the inevitable discovery doctrine. Resp BOM at 9-10, 46. In doing so, it argues that, by concluding that the exigency exception to the warrant requirement did not justify the seizure of defendant's home, the trial court implicitly found that " would not have disposed of or of otherwise prevented the officers from finding the drug evidence." And it asserts that "[t]hat implicit finding supports the inference that the officers would have inevitably found the drug evidence." Resp BOM at 49.

The state acknowledges that the trial court ruled that, by going to defendant's house and confronting her, the officers "created further exigency," which could not be used to "circumvent the warrant requirement." But it contends that the trial court was merely referring to defendant potentially

fleeing the house in response to the officers' arrival. Resp BOM at 50. That is an unreasonable and strained reading of the trial court's ruling.

To review, defendant's arguments were focused on the lack of an exigency *prior* to defendant's arrest. Tr 103-104; Pet BOM at ER 36-37.[3] Whereas, the state's argument was focused on the risk that would destroy or move evidence *after* defendant's arrest. Tr 116-17; Pet BOM at ER-60.

The only logical reading of the trial court's ruling is that it addressed and aligned with those arguments. First, the court agreed with defendant that, prior to the officers confronting defendant, there "were not exigent circumstances to justify the seizure." Second, it agreed with the state that the evidence in the house was at risk after the police went "to the defendant's door and confront[ed

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[3] Although defendant at one point stated that "there was no reason to believe evidence was going to be destroyed[,]" that statement, in context, appears similarly focused on the time period prior to her arrest:

> "[DEFENSE COUNSEL:] We'd argue that the delay from 4:30, when that text message was sent, until 6 o'clock goes against the State's argument that there was exigency. In addition, I think it contradicts what the affiant was saying, that there was some need because the Defendant was leaving. There 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.
>
> "In addition, they get to the residence at 5:57 p.m., and then the timeline from thereafter is important * * *."

Tr 104.

her,]" but it concluded that that "[l]aw enforcement created exigency" could not be used to "circumvent the warrant requirement." Pet BOM at ER-69.

The second finding was supported by the substantial evidence that the state presented, primarily through Pelayo, that the drug evidence was at risk of being moved or destroyed following defendant's arrest. And it defeats any argument that the state satisfied its burden of showing that the police inevitably would have discovered the evidence in defendant's house.

CONCLUSION

For the above reasons and those in her brief on the merits, defendant respectfully asks this court to reverse the judgments of the Court of Appeals and the trial court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05

Brief length

I certify that (1) submitted with this brief is a Motion for overlength brief which complies with ORAP 5.05 and (2) the word-count of this brief is 4,504 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 Reply Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on May 24, 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 Reply Brief on the Merits will be eServed pursuant to ORAP 16.45 on Benjamin Gutman #160599, Solicitor General, attorney for Plaintiff-Respondent.

Respectfully submitted,

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