
IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,)
) Trial Court No. CR030112
 Plaintiff-Appellant,)
 Cross-Respondent,) Appellate Court No. A128263
 Petitioner on Review,)
 vs.)
) Supreme Court No. S056237
 ANTHONY DOUGLAS KIRKEBY,)
)
 Defendant-Respondent,)
 Cross-Appellant,)
 Respondent on Review.)

RESPONDENT'S BRIEF ON THE MERITS

Review of the Decision of the Court of Appeals
on appeal from a judgment of the Circuit Court for Yamhill County
Honorable Ronald W. Stone, Judge

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Author of Opinion: Armstrong, J.
Concurring Judges: Haselton, PJ; and Rosenblum, J

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BRIEF ON THE MERITS

Statement of the Case

The Attorney General petitioned for review in this case and several other cases to challenge Court of Appeals rulings ordering the suppression of evidence obtained by police during the course of traffic stops. This court allowed review in this case and *State v. Rodgers*, 219 Or App 366, 182 P3d 209, *rev allowed* 345 Or 301 (2008), and consolidated the two cases for argument.

The Attorney General acknowledges that Article I, section 9, places limitations on police personnel who conduct traffic stops, but the state fails to offer a functional, helpful test for identifying the permissible boundaries of police action during a traffic stop. The centerpiece to the state's constitutional test is the proposal that an officer may ask any question and request consent to search so long as the questioning or consent requests do not unreasonably delay the traffic stop. Yet, the state does not offer a workable definition for "unreasonable delay" that will provide meaningful guidance to police, the bench or the bar, or provide rational predictability to police-motorist encounters in the traffic stop context.

Defendant responds that Article I, section 9, of the Oregon Constitution places clear limitations on police-motorist encounters. When an officer seizes a motorist for a non-criminal vehicle code violation (such as occurred in this case), the constitution limits the officer to investigatory questions about the vehicle code

violation, unless the officer develops reasonable suspicion or probable cause to believe that the motorist has committed or is committing another offense.

Questions Presented and Proposed Rules of Law

First Question. Can “mere conversation” occur during a seizure?

First Proposed Rule. No, the terms “mere conversation” and “seizure” describe mutually exclusive concepts, as a matter of law.

The term “mere conversation” describes the legal relationship between an officer and a person who is *not* seized, that is, a person who is free to end the interaction and walk away from the officer.

A traffic stop is a seizure for constitutional purposes. A stopped motorist is compelled to interact with the officer and is not free to end the encounter and leave without the officer’s assent. Consequently, “mere conversation” does not occur during a traffic stop.

Second Question Presented. Is it constitutionally permissible to design an administrative scheme to obtain evidence for use in a criminal prosecution?

Second Proposed Rule. No. By definition, the purpose of an administrative scheme is to advance civil policy objectives through civil processes and procedures separate from criminal law and criminal law sanctions.

The purpose of a traffic stop is to enforce a civil administrative scheme; the purpose of a criminal stop is to investigate the commission of a crime.

Third Question Presented. When may an officer lawfully expand the nature of a seizure from a civil administrative seizure into a criminal investigatory seizure?

Third Proposed Rule. An officer may lawfully expand an administrative traffic seizure into a criminal investigatory seizure when the officer develops reasonable suspicion or probable cause to believe that the stopped motorist has committed or is in the process of committing a crime.

Summary of Argument

State Law Argument

A stopped motorist is legally obligated to interact with the stopping officer and may not leave until the officer ends the stop and permits the motorist to leave. By contrast, the term “mere conversation” describes a non-seizure, when the individual is free to end the encounter with an officer at the individual’s choosing. The terms “mere conversation” and “seizure” are mutually exclusive terms for Article I, section 9, purposes.

A seizure is constitutionally reasonable when it is justified. A traffic stop for an administrative, non-criminal purpose is justified to enforce the vehicle code. Inquiries and requests for consent to search during a traffic stop are reasonable

when they are related to the administrative reason for the seizure. Inquiries and requests for consent are unjustified and unreasonable when they are unrelated to the reason for the seizure and are unsupported by independent reasonable suspicion or probable cause to believe that the motorist has committed or is committing a different offense.

The officer in this case conducted a valid non-criminal stop for a traffic code violation. But the officer expanded the scope of the traffic stop without justification when he asked for consent to frisk defendant and asked for consent to search items that he felt during the frisk, even though (1) the items were unrelated to the reason for the stop, (2) the officer knew the items were not weapons, and (3) the officer knew defendant did not pose a threat to the officer. By expanding the scope of the traffic stop beyond the vehicle code reasons for the stop, the officer exceeded the statutory authority in ORS 810.410 to investigate traffic code violations.

However, should this court conclude that the officer was within the statutory authority of ORS 810.410 when he obtained consent to search the items in defendant's pockets, then whatever part of the 1997 amendments to ORS 810.410 that authorized the officer's request for consent to search is unconstitutional, because the Oregon District Attorneys' Association proposed the 1997 amendments for an impermissible purpose—to detect and obtain criminal evidence unrelated to the administrative law purposes of the vehicle code.

Federal Law Argument

The Attorney General can not obtain reversal of the Court of Appeals decision in this case because it failed to argue on appeal or on review that it obtained the evidence in compliance with the Fourth Amendment.

Should the court reach the merits of the Fourth Amendment issue, the evidence should be suppressed because the officer unlawfully extended the duration of the traffic stop by initiating and conducting an investigation that was unrelated to the traffic code reason for the stop.

Additionally, the Fourth Amendment places a subject-matter limit on stops. An inquiry or a request for consent is justified when it is related to the reasons that justified the warrantless seizure or when an officer develops reasonable suspicion or probable cause to believe that the stopped person has committed or is committing another offense. In this case, the officer unjustifiably changed the nature of the stop from an inquiry into an administrative violation into a criminal investigation when he inquired about items in defendant's possession that were unrelated to the traffic stop without having reasonable suspicion or probable cause for doing so.

Statement of Critical Facts

Defendant does not dispute the Court of Appeals version of the facts but offers the following thumbnail sketch of critical facts outlining the interaction between the officer and defendant. Part A of the chronology contains the sequence of events facially authorized by ORS 810.410(3). Part B continues the chronology with events that were facially unauthorized by ORS 810.410(3).

[A. The Interaction Facially Authorized by ORS 810.410]

The officer knew the defendant from an “extensive history” of prior contact with him. *State v. Kirkeby*, 220 Or App, 177, 180, 185 P3d 510 (2008).

Defendant had never been violent or threatening and had never pulled a weapon during the prior contacts. *Id.*

The officer saw defendant driving with a passenger in the car; the officer knew that defendant was driving with a suspended license, ORS 811.175, a traffic violation (not a crime). *Id.* at 179. The officer checked with dispatch before stopping defendant and learned that defendant did not have any outstanding warrants. *Id.* at 179.

The officer activated the patrol car’s overhead lights to conduct the stop, and the overhead lights remained on throughout the traffic stop. *Id.* at 179. Defendant exited the car, met the officer, handed his driver’s license to the officer when asked, and was cooperative and businesslike. *Id.* at 179-180. The officer

had all the information he needed to issue a traffic citation, though he had not requested the vehicle registration and proof of insurance. *Id.* at 180.

The officer asked whether defendant had weapons on him or in the car, and defendant said no. *Id.* at 180.

[B. The Interaction That Was Unauthorized by ORS 810.410]

The officer next asked for consent to frisk defendant for weapons, and defendant agreed. *Id.* at 180. During the frisk, the officer felt miscellaneous items in defendant's pockets. *Id.* at 180. The officer was confident that defendant did not have any firearms, but asked to see the items because he wanted to know what they were. *Id.* at 180. One of the items was a small cylindrical container. The officer asked whether he could look inside, and defendant said he had just found the container. The officer asked for consent to look inside, and defendant agreed. The officer unscrewed the top of the container and found two baggies containing a residual amount of methamphetamine. *Id.* at 181.

Argument

In the state law section of the brief defendant will (1) identify the faulty premise to the state's argument, (2) explain the ineffectiveness of the state's proposal, (3) describe what is constitutionally permissible to enforce a civil, administrative scheme that intrudes into constitutionally protected interests in a

non-criminal, non-emergency context, and (4) analyze ORS 810.410 within that constitutional framework.

In the federal law section of the brief defendant will explain that the trial court and Court of Appeals rulings can be affirmed on a procedural basis because the state has failed to address the Fourth Amendment analysis in both the Court of Appeals and this court. Should this court reject that procedural argument, defendant includes a federal law analysis explaining that the police conduct in this case violated the Fourth Amendment.

I. State Law Analysis

A. “Mere Conversation” and “Seizure” are Mutually Exclusive Terms: A Person in Mere Conversation with an Officer Can End the Encounter at any Time, While a Stopped Motorist is Legally Obligated to Remain and Interact with the Officer

The Attorney General argues that because an officer may approach an individual on the street and question him about incriminating matters without effecting a seizure, an officer may similarly question a motorist during a traffic stop about incriminating matters unrelated to the traffic stop without effectuating an “unconstitutional seizure, unless the questioning unreasonably extends or expands the traffic stop.” State’s Brief on the Merits (BOM) at 2. In the Attorney General’s view, there is “[nothing] inherent in the traffic-stop context [that] warrants creating a separate rule, one that prohibits officers from asking

individuals who are the subject of lawful traffic stop[s] the same questions that are permissible if asked of a citizen on the street.” State’s BOM at 3.

Based on that premise, the Attorney General proposes the following rule: During the course of a traffic stop, officers acting without reasonable suspicion to believe that the stopped motorist has committed or is committing a crime may ask incriminating questions and request consent to search for incriminating evidence unrelated to the reason for the traffic stop so long as the questioning or consent request “create[s] only a *de minimis* delay during an otherwise lawful traffic stop.” State’s BOM at 15.

The state’s argument is fundamentally unsound, as a matter of law. The terms “mere conversation” and “seizure” have specific and mutually exclusive meanings for purposes of Article I, section 9, of the Oregon Constitution.¹

This court has identified three categories of encounters between police personnel and members of the public: “(1) arrest, justified only by probable cause; (2) temporary restraint of the citizen's liberty (a “stop”), justified by reasonable suspicion (or reliable indicia) of the citizen's criminal activity; and (3) questioning without any restraint of liberty (*mere conversation*), requiring no justification.”

¹ Article I, section 9, provides:

“No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probably cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.”

State v. Warner, 284 Or 147, 161, 585 P2d 681 (1978) (emphasis added; footnote omitted); *see also*, *State v. Holmes*, 311 Or 400, 407, 813 P2d 28 (1991) (using the term “mere encounter” to describe the same concept as “mere conversation”). “Mere conversation” or “mere encounter” refers to an interaction between an officer and a person who is not seized. In other words, “mere conversation” only occurs during a non-seizure, when the person can end the encounter and walk away at any time.

By contrast, a traffic stop is a seizure for constitutional purposes. *State v. Matthews*, 320 Or 398, 402 n 1, 884 P2d 1224 (1994). An officer who stops a motorist temporarily “deprives an individual of that individual’s liberty or freedom of movement.” *Holmes*, 311 Or at 409-410. Consequently, an officer and a stopped motorist are not and can not be in a “mere conversation” posture, as a matter of law. Rather, the stopped motorist is in the legal control of the officer and is legally obligated to comply with the officer’s traffic stop investigation, under penalty of law.

For example, a driver who refuses on officer’s direction to stop is criminally liable for attempting to elude. ORS 811.535; ORS 811.540.² A

² ORS 811.535 provides:

“(1) A person commits the offense of failing to obey a police officer if the person refuses or fails to comply with any unlawful order, signal or direction of a police officer who:

“(a) Is displaying the police officer’s star or badge; and

“(b) Has lawful authority to direct, control or regulate traffic.

stopped motorist who fails to comply with an officer's request to produce his license is criminally liable for the class C misdemeanor of failure to carry or produce a license. ORS 807.570.³ And ORS 807.620 makes it a Class A misdemeanor offense if "the person knowingly uses or gives a false or fictitious name, address or date of birth to any police officer who is enforcing motor vehicle

"(2) The offense described in this section, failing to obey a police officer, is a Class B traffic violation.

ORS 811.540(1) provides:

"(1) A person commits the crime of fleeing or attempting to elude a police officer if:

"(a) The person is operating a motor vehicle; and

"(b) A police officer who is in uniform and prominently displaying the police officer's badge of office or operating a vehicle appropriately marked showing it to be an official police vehicle gives a visual or audible signal to bring the vehicle to a stop, including any signal by hand, voice, emergency light or siren, and either:

"(A) The person, while still in the vehicle and knowingly flees or attempts to elude a pursuing police officer; or,

"(B) The person gets out of the vehicle and knowingly flees or attempts to elude the police officer."

³ ORS 807.570(1) provides:

"(1) A person commits the offense of failure to carry a license or to present a license to a police officer if the person either:

(a) Drives any motor vehicle upon a highway in this state without a license, driver permit or out-of-state license in the person's possession; or

(b) Does not present an deliver such license or permit to a police officer when requested by the police officer under any of the following circumstances:

(A) Upon being lawfully stopped or detained when driving a vehicle.

(B) When the vehicle that the person was driving is involved in an accident."

* * *

"(5) The offense described in this section, failure to carry a license or to present a license to a police officer, is a Class C misdemeanor."

laws.” Those statutes are part of the legal construct surrounding traffic stops requiring motorists to comply with officer requests under color of law. *See, e.g., Hiibel v. Sixth Judicial District of Nevada*, 542 US 177, 124 S Ct 2451, 159 L Ed2d 292 (2004) (Nevada statute that criminalizes a custodial suspect’s refusal to provide name does not violate the Fourth or Fifth Amendments).

The crucial difference between a person engaged in “mere conversation” and a person subjected to a traffic stop is that the person involved in mere conversation may refuse to interact with the officer and terminate the encounter at any time and walk away. *State v. Holmes*, 311 Or 400. By comparison, a stopped motorist is under the legal control of the officer and is legally *obligated* to interact with the officer during the course of the traffic stop investigation. A person who is obligated to interact with an officer under penalty of law is subject to lawful coercion, in stark contrast to a person who can end the encounter at any time.

B. Article I, Section 9, Places a Subject Matter Limitation on Traffic Stops; Questions Related to the Reason for the Traffic Stop are Reasonable, while Incriminating Questions and Requests for Consent that are Unrelated to the Reason for the Stop are Unreasonable, Unless Supported by Independent Reasonable Suspicion

The Attorney General argues that the reasonableness of an officer’s questioning or request for consent to search during a traffic stop turns on whether the questioning “unreasonably” extends the *temporal duration* of the traffic stop. Yet, the Attorney General also uses the term “scope” in some of its formulations,

though without defining the term. *See, e.g.*, Brief on the Merits at 15 (“Questions or requests for consent during the course of a lawful stop are permissible so long as the questions or the request for consent do not unreasonably extend *the length or scope of the stop.*” (Emphasis supplied.))

It is unclear to defendant whether the Attorney General employs “scope” as a euphemism for temporality, or whether “scope” refers to different aspects of the questioning, such as the spatial and subject-matter components of the questioning. In other words, it is unclear whether the state’s measure of reasonableness is exclusively temporal (was the stop unreasonably delayed?), or whether the state would also measure reasonableness by reference to the spatial and subject-matter components of the questioning (for example, an officer’s request to search a motorist’s home or business or a request to conduct a body cavity search without reasonable suspicion).

Assuming the state reasonableness analysis focuses primarily on the temporal duration of the stop, the state’s test is functionally inadequate, incomplete, and ultimately unworkable. Does the state’s model presume a normative model traffic stop? Should a traffic stop take five, ten, fifteen or more minutes? Does the reasonable temporal duration of a traffic stop depend upon the particular violation at issue (for example, speeding versus failure to signal)? Does reasonableness depend upon the individual officer’s practice, such that a quicker more efficient officer is expected to conduct the traffic stop more quickly for constitutional purposes than a slower, more deliberate officer? And, is the

time it takes to engage in the voluntary questioning or the search part of the reasonableness calculation? For example, is the request reasonable if the motorist voluntarily agrees to a four-hour search of his car?

Similarly, are space and intensity factored into the state's reasonableness analysis? Is the request reasonable if the motorist agrees to a search of his residence or business several miles away? Is an officer's request that the motorist come to the station for questioning reasonable? Is the request reasonable if the motorist agrees to a body-cavity search? The state's proposal fails to answer those questions.

1. *The rule from State v. Jackson and State v. Carter/Dawson: A de minimis temporal delay in processing a traffic stop—without questioning, without requests for consent, and without an impermissible search—does not, by itself, automatically represent a constitutional violation*

The Attorney General cites *State v. Jackson*, 296 Or 430, 677 P2d 21 (1984) for support, *see*, State's Brief on the Merits at 13, because the court held that the officer in that case did not impermissibly extend the duration of the traffic stop by walking from the driver's side to the passenger's side of the car. But, as will be explained below, the constitutional rule of law employed in *Jackson* actually supports defendant's position, because it prohibits the exploitation of a traffic stop to conduct a criminal investigation through questioning, requesting consent or otherwise bringing the weight of the seizure to bear on the motorist to generate evidence of reasonable suspicion or probable cause of a different offense.

Before addressing *Jackson*, defendant provides a detailed description of the *Carter/Dawson* opinions because the Court of Appeals opinion and this court's opinion in *State v. Carter/Dawson*, 34 Or App 21, 578 P2d 790 (1978), *aff'd*, 287 Or 479, 488, 600 P2d 873 (1979), heavily inform the *Jackson* opinion.

In *Carter/Dawson* an officer noticed and followed a car with young men because he thought they might be connected to recent burglaries, though he lacked reasonable suspicion to stop them for burglary. He eventually stopped the car for speeding and ultimately searched the car and found 20 pounds of marijuana. To determine whether the officer had exceeded statutory or constitutional limits on a traffic stop, the Court of Appeals analyzed case law and synthesized the following legal rule:

“The constitutional and statutory law [ORS 131.615 (1973)] blends into a single rule: Traffic stops should be the minimum possible intrusion on Oregon motorists, and not an excuse to begin questioning, searching or investigating that is unrelated to the traffic reason for the stop.”

State v. Carter/Dawson, 34 Or App at 32.

But, after articulating the controlling legal principle, the Court of Appeals indicated it could not resolve the suppression issue because the record was susceptible of two possible factual scenarios, one legally permissible and the other impermissible. Accordingly, the Court of Appeals ordered the case remanded to the trial court, with instructions for resolving the suppression issue depending on

the trial court's resolution of the factual issues. *State v. Carter/Dawson*, 34 Or App at 33.

The first and constitutionally permissible factual scenario was as follows. The officer stopped defendants' vehicle for speeding, the driver (Carter) got out of the car and met the officer between the two vehicles, and the officer asked for and obtained the driver's license and the vehicle registration. The passenger (Dawson) also got out, and the officer obtained the passenger's identification, as well. *While* the officer was asking for and obtaining the identification, he looked into the car and saw marijuana and marijuana paraphernalia in plain view, which prompted the officer to inquire about the contents of the car and seek and obtain consent to search. *State v. Carter/Dawson*, 34 Or App 24.

Under the second and constitutionally impermissible factual scenario, the officer stopped the car for speeding, obtained the vehicle registration and Carter and Dawson's identification, and ran a records check. The record check came back "clear" for the defendants and the car. *State v. Carter/Dawson*, 34 Or App 21, 23-24, 578 P2d 790 (1978). The officer then asked questions about the contents of the car (such as, "Is there anything in the car that shouldn't be there?"), and the officer ultimately obtained consent to search the car. *Carter/Dawson*, 34 Or App at 24-25. The officer found a marijuana cigarette in the ashtray, stems and seeds on the floor, rolling papers, and, after a more thorough search, the 20 pounds of marijuana. *Id.*

The Court of Appeals explained that if the first factual scenario had occurred (that is, if the officer saw the marijuana in plain view *while* he was investigating the traffic infraction), “Officer Miller was authorized to inquire and search further.” *Carter/Dawson*, 34 Or App at 32. However, if the second scenario had occurred, the officer had violated the rule articulated above and the evidence was properly suppressed. The court reasoned that the officer “could not begin questioning or an investigation that had nothing to do with the objective reason for the stop (speeding). If he did so, the officer extended the duration of the stop without legally sufficient articulated cause.” *Carter/Dawson*, 34 Or App at 33.

On review, this court indicated that although it had allowed review to address the “intrusiveness” issue (the expansion of the traffic stop into a criminal investigation), it agreed with the parties that the only issue properly raised in the state’s petition for review was the validity of the initial stop, and not the Court of Appeals rule governing the conduct of traffic stops. *State v. Carter/Dawson*, 287 Or 479, 488, 600 P2d 873 (1979). But this court also noted that remand was unnecessary because the trial court had made the “necessary finding” to resolve the case. *State v. Carter/Dawson*, 287 Or 479, 487, 600 P2d 873 (1979). That is, the trial court found that the officer made his inquiries *after* conducting the traffic portion of the stop. Consequently, this court affirmed the trial court’s order suppressing the evidence because “the result, under the facts found by the trial court and the rule adopted by the Court of Appeals, was correct.” *Id.* at 488.

This court revisited the *Carter/Dawson* rule in *State v. Jackson*. In *Jackson*, an officer made a valid stop after defendant drove the wrong way on a one-way street. During the stop, the officer walked from the driver's side to the passenger side of defendant's van, shined a flashlight through the window on the van's sliding side door, saw open beer containers, and entered the van to investigate an open container violation. He searched the van and discovered controlled substances.

The exact location of the cans in the van and whether the cans were upright or on their side and empty (and, apparently, not a violation) were factual issues that the trial court had not resolved because it concluded that the officer had impermissibly extended the stop and violated the *Carter/Dawson* rule by walking to the passenger side of the van.

The opinion refers to the permissible scope of a traffic stop as the "intrusiveness issue," *Jackson*, 296 Or at 437, 438, 440, and it addresses two discrete aspects of the stop under the intrusiveness umbrella: (1) whether the officer impermissibly extended the duration of the traffic stop by walking from the driver side to the passenger side of the van, and (2) whether the officer committed a warrantless search when he looked through the window on side of the van.⁴

As to the second issue, the court cited *State v. Louis*, 296 Or 57, 672 P2d 708 (1983) and *Texas v. Brown*, 460 US 730, 103 S Ct 1535, 75 L 2d 502 (1983)

⁴ The opinion makes clear that the use of a flashlight as a possible technological enhancement was not at issue in the case. *State v. Jackson*, 296 Or at 438 n 4.

to hold that the officer did not engage in a search by looking into the interior: “An officer who has lawfully stopped a vehicle does not violate any occupant’s rights in walking around the vehicle and looking through the windows of the vehicle to observe that which can be plainly seen.” *Jackson*, 296 Or at 438 (footnote omitted).

To resolve the first issue, the court reviewed the *Carter/Dawson* opinions. After noting that the Court of Appeals rule from *Carter/Dawson* was not directly before this court when *Carter/Dawson* was on review (*see, Jackson*, 296 at 435), the *Jackson* court nonetheless employed the rule to resolve the issue.⁵ First, it rejected the defendant’s strict construction of the Court of Appeals rule to prohibit any temporal extension whatsoever:

“Were the defendant to prevail here, an interpretation of the Court of Appeals standard would seem to dictate that once an officer returns an operator’s license to the driver of a stopped vehicle, he or she must execute an abrupt about-face and march directly back to the police vehicle. Such an interpretation would not be reasonable.”

Jackson, 296 Or at 438.

It then compared the facts of *Jackson* with the facts in *Carter/Dawson* and concluded that the nature of the officer’s conduct in *Jackson* was significantly different from and not as intrusive as the officer’s conduct in *Carter/Dawson*:

⁵ The *Jackson* court also noted that (1) ORS 131.615 was inapplicable because that statute applies to criminal stops and the case before it involved a motorist, and (2) former ORS 484.353(2)(b), which governed traffic stops (and is the predecessor to ORS 810.410), was inapplicable because it was enacted six months after the stop at issue. *Jackson*, 296 Or at 437.

“The officer’s conduct in the instant case clearly is different than that of the officer in *Carter/Dawson*. The significant time for the duration of the stop in the case at bar appears to be the brief time during which the officer walked from the driver’s side of the van around the front of the van to the passenger side. This is apparently the critical point of the defendant’s case. We agree with the Court of Appeals decision in this case that this delay was ‘de minimis’ and did not constitute a violation of Oregon statute, nor violate any state or federal right.”

Jackson, 296 Or at 438.

In other words, *Jackson* approved both the rule and the result of *Carter/Dawson* for constitutional law purposes, while disagreeing with the defendant’s and the trial court’s interpretation and application of the rule to the facts in *Jackson*. Its full holding reads as follows:

“We hold that the officer’s actions in this case were not illegally intrusive. *They were not based on an excuse to begin searching or investigating for contraband or other crime evidence unrelated to the traffic reason for the stop and, therefore, did not violate Article I, section 9, of the Oregon Constitution. State v. Caraher*, 293 Or 741, 653 P2d 942 (1982).”

State v. Jackson, 296 Or at 438-49 (emphasis supplied).

As opposed to the officer in *Carter/Dawson*, who used the traffic stop to question the driver about the contents of the car and obtain consent to search, the officer in *Jackson* acted constitutionally because he *did not question* the motorist about matters unrelated to the stop *until* he observed a separate violation. The officer in *Jackson* was more like the hypothetical officer in scenario number one in *Carter/Dawson*. He did not question the defendant, did not seek consent to

search, and did not otherwise bring the weight of the traffic stop to bear directly on defendant to develop incriminating evidence of a separate offense. Rather, he observed evidence of a different offense from a lawful vantage point outside the car before investigating the second offense.

Again, questioning a motorist about matters unrelated to the traffic stop to generate evidence of reasonable suspicion or seek consent to search is unconstitutional when no separate grounds support the questioning. The *Jackson* court employed the *Carter/Dawson* rule to reason that the officer's observation from a lawful vantage point of a different offense—and again, without bringing the weight of the seizure to bear on the motorist through questioning, unfounded requests for consent, or unauthorized searches—would authorize the officer to investigate the second offense.

Ironically, the *Jackson* court (like the Court of Appeals in *Carter/Dawson*) ordered the case remanded to the trial court for additional factual findings because the record was “capable of different interpretations whether an open container violation was ‘immediately apparent.’” *Jackson*, 296 Or at 440. Specifically, this court instructed the trial court to identify the location and posture of the beer cans to determine whether they were, indeed, in plain view, such as to authorize the subsequent investigation: “If the trial court makes findings of fact that justify a conclusion that a violation of law was ‘immediately apparent,’ the officer’s subsequent search and seizure of evidence must be evaluated in light of

defendant's other unresolved contentions." *Jackson*, 296 Or at 440-41; *see also*, *id.* at 433 n 2 (listing defendant's challenges to the subsequent investigation).

2. *The constitutional rule: Investigatory questioning and requests for consent to search that are unrelated to the traffic reason for the stop are unconstitutional*

At bottom, one has to wonder why the state thinks it is reasonable for an officer acting without reasonable suspicion to ask a person stopped for jaywalking whether the person is in possession of drugs, has recently committed a burglary, or has recently committed a murder. As opposed to the state's proposal that contemplates a kind of free-for-all period of questioning and consent requests during every traffic stop, the simple and commonsense rule that has conceptual integrity, is functional and faithful to a reasonableness analysis, and is easy to administer by officers in the field and the bench and bar is as follows:

Investigatory questions and requests for consent to search that are related to the reason for the traffic stop are reasonable, while questions concerning criminal activity and requests for consent to search that are unrelated to the reason for the stop are unreasonable, unless independent reasonable suspicion supports the questioning.⁶ *See, e.g.,* Wayne R. LaFare, 4 *Search and Seizure: A Treatise on*

⁶ To be sure, not every police-initiated exchange that is unrelated to the reason for the stop is constitutionally significant. For example, questions and dialogue about the weather, the Trail Blazers and similar small talk do not implicate constitutional concerns. Rather, the issue is whether the police questioning objectively suggests that the officer is conducting an investigation under authority of law.

the Fourth Amendment, § 9.3(e), 397 (4th ed 2004) (supporting a subject-matter limitation to questioning and consent requests during traffic stops, “without regard to whether the inquiry and subsequent search ‘may also have extended the duration of the traffic stop.’” (Citing, *State v. Fort*, 660 N.W. 2d 415 (Minn. 2003)).

The next section of the brief explains why the simple rule fits the state administrative law model when state action implicates constitutionally protected property and privacy interests in non-criminal, non-emergency situations.

C. A Seizure to Enforce a Civil, Administrative Scheme Must be Narrowly Tailored to Achieve Legitimate State Interests without Unnecessarily Infringing on Article I, section 9, Interests

The nature of the stop informs the permissible or “reasonable” contours of the stop. Generally, the time, scope and intensity of a permissible seizure or search are dependent on the reason for the seizure or search: “The gravity of the reason for the search or seizure, which may be expressed in the legislature’s classification of an offense or otherwise, doubtless bears on what is unreasonable.” *State v. Weist*, 302 Or 370, 377, 730 Or 26 (1986).

On a statutory level, the limits of a criminal investigatory stop are codified in ORS 131.615.⁷

⁷ ORS 131.615 provides:

“Stopping of persons. (1) A peace officer who reasonably suspects that a person has committed or is about to commit a crime may stop the person and, after

Of critical importance, though, is the recognition that an administrative seizure or search is not a criminal investigation. Rather, the purpose of an administrative seizure or search is to enforce a legitimate, politically identified *civil* goal: “There are occasions when state officials (such as police officers, agriculture inspectors, health and safety inspectors) have an administrative or civil duty, authority or responsibility to take custody of personal property.” *State v. Atkinson*, 298 Or 1, 8, 688 P2d 832 (1984).

The Oregon Vehicle Code contains two types of offenses: crimes and civil violations. *See*, ORS 801.545 (defining traffic crime as a “traffic offense that is punishable by a jail sentence.”); ORS 801.557 (a violation is “punishable by a fine but is not punishable by a term of imprisonment.”); and ORS 153.018 (“The penalty for committing a violation is a fine.”) For example, driving under the influence of intoxicants (DUII), ORS 813.010, is a crime punishable by

informing the person that the peace officer is a peace officer, make a reasonable inquiry.

“(2) The detention and inquiry shall be conducted in the vicinity of the stop and for no longer than a reasonable time.

“(3) The inquiry shall be considered reasonable if it is limited to:

“(a) The immediate circumstances that aroused the officer’s suspicion;

“(b) Other circumstances arising during the course of the detention and inquiry that give rise to a reasonable suspicion of criminal activity; and

“(c) Ensuring the safety of the officer, the person stopped or other persons present, including an inquiry regarding the presence of weapons.

“(4) The inquiry may include a request for consent to search in relation to the circumstances specified in subsection (3) of this section or to search for items of evidence otherwise subject to search or seizure under ORS 133.535.

“(5) A peace officer making a stop may use the degree of force reasonably necessary to make the stop and ensure the safety of the peace officer, the person stopped or other persons who are present.” (Emphasis added.)

incarceration, while failing to signal a turn is a violation, ORS 811.335, punishable only by a fine.

Enforcement of the DUII statute implicates the full constitutional and statutory procedures associated with criminal investigations and prosecutions, largely because of the penal consequences attendant to a successful prosecution for a DUII offense. *See, State v. Fish*, 321 Or 48, 893 P2d 1023 (1995) (given the compelling nature of the “advice and consequences” warning prior to the administration of field sobriety tests, probable cause must exist to give the test and the testimonial answers to the test are inadmissible absent prior administration of the *Miranda* warnings).

By contrast, the basis for the stop in this case was driving with a suspended license, a violation. ORS 811.175.⁸ A traffic stop for the purpose of enforcing the civil, administrative provisions of the vehicle code is not a criminal stop and should not have the appearance or procedures of a criminal stop. For example, in *Brown v. Multnomah County District Court*, 280 Or 95, 570 P2d 52 (1977), the

⁸ ORS 811.175 provides in part:

“(1) A person commits the offense of violation driving while suspended or revoked if the person does any of the following:

“(a) Drives a motor vehicle upon a highway during a period when the person’s driving privileges or right to apply for driving privileges have been suspended or revoked in this state by a court or by the Department of Transportation.

“* * * * *

“(4) The offense described in this section, violation driving while suspended or revoked, is a Class A traffic violation except as otherwise provided in ORS 811.182.”

court grappled with a legislative attempt to decriminalize the first offense of driving under the influence of intoxicants (DUII). The legislature had hoped to remedially address the problem of intoxicated drivers without having to provide the significant and costly constitutional procedural protections afforded criminal defendants (such as the right to a jury trial and the right to counsel).

To determine whether the legislature had successfully decriminalized the first DUII offense, this court articulated and applied several factors to determine whether the offense was civil or criminal. Those factors included: the penalty for the offense, the collateral consequences of adjudication, and the type of seizure authorized during the investigation and prosecution of the offense. Ultimately, this court determined that the legislature's attempt to decriminalize the first DUII offense was unsuccessful, noting, *inter alia*, that "detention beyond the needs of identifying, citing, and protecting the individuals or 'grounding' him, especially detention for trial unless bail is made, comports with criminal rather than with civil procedure * * * ." *Brown* at 108; *see also, Easton v. Hurita*, 290 Or 689, 697, 625 P2d 1290 (1981) ("We have consistently noted that detention beyond the minimum necessary for identification and citation must be supported by further grounds and that procedures regarding minor traffic infractions must be designed so that only the least onerous conditions necessary to insure a defendant's appearance are imposed.")

A routine traffic stop to investigate a traffic violation is not a criminal investigatory stop; rather, it is a seizure to enforce a civil, administrative motor

vehicle code provision. This court has consistently held that state action that implicates constitutionally protected interests in the non-criminal context must generally satisfy the administrative model described in *State v. Atkinson*, 298 Or 1, 688 P2d 832 (1984).

First, a politically accountable body must identify legitimate, *civil* interests; the purpose of the scheme *can not be to investigate crime or uncover crime evidence*. *Atkinson*, 298 Or at 8. For example, in *State v. Anderson*, 304 Or 139, 743 P2d 715 (1987), Oregon State Police and the Clackamas County Sheriff's office conducted a roadblock to check vehicle registrations and driver sobriety. Defendant moved to suppress evidence of his intoxication obtained at the roadblock. This court observed that "an administrative search, that is, one for a purpose other than the enforcement of laws by means of criminal sanctions, could be authorized by lawmakers and conducted pursuant to administrative regulations." *Id.* at 141. However, the roadblock at issue was not administrative because "criminal sanctions unquestionably were the intended consequences of the roadblock." *Id.*; *see also, State v. Boyanovsky*, 304 Or 131, 743 P2d 711 (1987) (same); *Nelson v. Lane County*, 304 Or 97, 743 P2d 692 (1987) (roadblock checkpoint for non-criminal purposes must be authorized by politically accountable body). If a purpose of the "administrative scheme" is to investigate crime, the scheme is not "administrative" by definition and fails Article I, section 9, from inception.

Second, the politically accountable body must enact (or delegate authority to create) administrative procedures that eliminate discretion on the part of the state actor executing the scheme and narrowly tailor any intrusion into constitutionally protected interests so as to achieve the legitimate goals of the scheme without unnecessary infringement on the constitutional interests. *Atkinson*, 298 Or at 10; *State v. Boone*, 327 Or 307, 959 P2d 76 (1998) (city ordinance authorizing vehicle impoundment impliedly granted authority to police agency to adopt inventory policy).

Finally, the state actor executing the administrative scheme must strictly adhere to those procedures. *State v. Atkinson*, 298 Or at 8-11.

As with any administrative scheme, the state actor does not have license to conduct arbitrary and random intrusions into constitutional interests. When the purpose of a traffic stop is to enforce the non-criminal provisions of the vehicle code, Article I, section 9, limits the state actor to questioning about circumstances that gave rise to the traffic stop, unless the officer develops reasonable suspicion of criminal activity to justify an expansion of the traffic stop into a criminal investigation.

D. ORS 810.410 Grants Statutory Authority to Investigate Non-Criminal Traffic Violations

The legislature enacted ORS 810.410 in 1983 in the wake of *Brown. v Mulnomah County District Court*. The statute reflected the legislative attempt to enact procedures governing the enforcement of a civil, administrative vehicle code

without running afoul of the holding of *Brown*. In other words, it was a legislative attempt to codify non-criminal procedures to enforce a non-criminal administrative code, thereby avoiding the criminal prosecutorial model and all the attendant constitutional protections afforded a criminal defendant in the criminal model.

“From that [legislative] history [of *former* ORS 810.410 (1983)], we glean that the legislature sought to keep traffic infractions decriminalized and to reduce the attendant enforcement methods as much as necessary to accomplish that goal. The legislature intended to satisfy the concerns expressed in *Brown v. Multnomah County Dist. Ct.*, *supra*, and thus to permit only minimal intrusions on Oregon drivers stopped for traffic infractions.”

State v. Porter, 312 Or 112, 817 P2d 1306 (1991).

Consistent with that legislative intent, this court interpreted pre-1997 versions of ORS 810.410 to reflect the principle that the legislature intended police-motorist encounters to be short-lived, narrowly-focused interactions. *See, e.g., State v. Toevs*, 327 Or 525, 964 P2d 1007 (1998) (police violated *former* ORS 810.410 (1993) by extending the traffic stop to ask about drugs), *State v. Dominguez-Martinez*, 321 Or 206, 895 P2d 306 (1995) (officer lacked authority under *former* ORS 810.410 (1989) to extend traffic stop after traffic investigation completed), *State v. Farley*, 308 Or 91, 775 P2d 835 (1989) (officer lacked authority under *former* ORS 810.410 (1985) to continue traffic stop after the probable cause for the stop had evaporated).

1. *The 1997 Amendments to ORS 810.410*

The 1997 amendments to ORS 810.410(3), *see* Or Laws 1997, ch 866 §§ 4 and 5, contain the purported statutory basis for the officer's questions and consent requests in this case. The italicized text below reflects those 1997 amendments to ORS 810.410:

(3) A police officer:

(a) Shall not arrest a person for a traffic violation.

(b) May stop and detain a person for a traffic violation for the purposes of investigation reasonably related to the traffic violation, identification and issuance of citation.

(c) May make an inquiry into circumstances arising during the course of a detention and investigation under paragraph (b) of this subsection that give rise to a reasonable suspicion of criminal activity.

(d) May make an inquiry to ensure the safety of the officer, the person stopped or other persons present, including an inquiry regarding the presence of weapons.

(e) May request consent to search in relation to the circumstances referred to in paragraph (c) of this subsection or to search for items of evidence otherwise subject to search or seizure under ORS 133.535.

(f) May use the degree of force reasonably necessary to make the stop and ensure the safety of the peace officer, the person stopped or other persons present.

(g) May make an arrest of a person as authorized by ORS 133.310 (2) if the person is stopped and detained pursuant to the authority of this section.

2. *The Text and Context of subsections 3(d) and 3(e) did not authorize the officer's request for consent to search in this case*

Section (3)(d) ostensibly applies to this case. It authorizes a stopping officer to “make an inquiry to ensure the safety of the officer * * * including an inquiry regarding the presence of weapons.” The subsection clearly authorizes questions about weapons and matters relevant to officer safety concerns.

The officer in this case asked whether defendant had any weapons on him or in the car, and defendant said ‘no.’ *Kirkeby*, 220 Or App at 180. That effectively ended the officer’s statutory authority to inquire about weapons, because the text of ORS 810.410 does not authorize a pat down or authorize a request for consent to conduct a pat down of a stopped motorist.

The officer’s testimony in this case was unambiguous. Defendant was well known to the officer, had been non-violent and cooperative with the officer on all prior occasions, and was cooperative and “businesslike” on this occasion, as well. After defendant denied having any weapons, the officer requested, and defendant consented, to a frisk. After the frisk the officer was “confident” that defendant did not possess any weapons. *Kirkeby*, 220 Or App at 180. The officer nonetheless asked for consent to search the items that he felt during the frisk—only because he was curious about them and wanted to investigate further, not because he thought they were weapons. *Id.* In search and seizure parlance, the officer was on a classic, suspicion-less “fishing expedition”, hoping to discover something incriminating.

Further, even if ORS 810.410(3)(d) authorizes an officer to request consent to conduct a frisk during a traffic stop without reason to believe that the motorist is armed and dangerous, by no means does it authorize an officer to ask about items that he knows are not weapons or ask for consent to search those items. The officer in this case acted outside the statutory authority of section 3(d) when he asked for consent to conduct a pat down, asked about items that did not feel like weapons, and asked to search the items out of pure curiosity.

The officer's request to frisk defendant and search the items that he knew were not weapons exceeded the statutory authority given officers to conduct routine, non-criminal traffic stops. From that point forward if not earlier, the officer used the leverage of a civil, administrative traffic stop to expand the seizure into a criminal investigation. That is precisely the kind of arbitrary exercise of executive power—acting without a judicial warrant or statutory or administrative oversight authority—that Article I, section 9, is designed to prevent. *State v. Weist*, 302 Or at 376 (* * * the function of [Article I, section 9] is to subordinate the power of the executive officers over the people and their houses, papers, and effects to legal controls *beyond the reach of the executive itself*. One measure of control is found in a carefully limited judicial warrant; another is found in legislative enactments defining and limiting official authority.”(Emphasis added)).

Further, the officer's request for consent to frisk and subsequent questions were not motivated by officer-safety concerns and, therefore, were outside the officer-safety exception to Article I, section 9. *See State v. Bates*, 304 Or 519,

524, 747 P2d 991 (1987) (“* * * Article I, section 9, of the Oregon Constitution, does not forbid an officer to take reasonable steps to protect himself or others if, during the course of a lawful encounter with a citizen, the officer develops reasonable suspicion, based upon specific and articulable facts, that the citizen might pose an immediate threat of serious physical injury to the officer or others then present.”)

Alternatively, the state may argue that section 3(e) of ORS 810.410 authorized the officer’s consent requests, even if the requests were unrelated to concerns about weapons and officer safety. That subsection states that an officer,

“(e) May request consent to search in relation to the circumstances referred to in paragraph (c) of this subsection or to search for items of evidence otherwise subject to search or seizure under ORS 133.535.”

That subsection has two parts, separated by the word “or.” The first part references subsection “c”—relating to those instances when the officer has “reasonable suspicion of criminal activity.” The officer had no reasonable suspicion of criminal activity in this case. Consequently, the first clause of subsection 3(e) is not at issue in this case.

The latter clause in subsection “e” (“or to search for items of evidence otherwise subject to search or seizure under ORS 133.535”) could be read as open-ended authority to request consent to search with or without reasonable suspicion of criminal activity. But to read the second clause of subsection “e” so broadly would run afoul of the first prong of the *Atkinson* rule, namely that an

administrative scheme must be for civil, non criminal purposes. *State v. Anderson*, 304 Or 139; *State v. Boyanovsky*, 304 Or 131.

The interpretation of ORS 810.410(3)(e) that would satisfy constitutional concerns is that it authorizes a request for consent to search for evidence of offenses other than the original traffic violation only when the officer lawfully learns of information during the course of the traffic stop that gives rise to reasonable suspicion or probable cause to believe that the motorist possesses crime evidence or evidence of another offense. If that construction is applied, this court need not reach the legislative history of the statute discussed in the next section to resolve this case.

3. *Legislative history discloses an impermissible motive for the 1997 amendments: The intent to use an administrative enforcement scheme to conduct criminal investigations*

The Oregon District Attorney's Association (ODAA) proposed the 1997 amendments to ORS 810.410 in response to Supreme Court and Court of Appeals opinions ordering the suppression of evidence obtained in violation of the existing version of ORS 810.410. The ODAA representatives most notably complained of *State v. Dominguez-Martinez*, 321 Or 206, 895 P2d 306 (1995), *State v. Senn*, 145 Or App 538, 930 P2d 874 (1996), and *State v. Peterson*, 143 Or App 545, 923 P2d 1340 (1996).

The ODAA proposed two related bills, House Bill 2432, which was intended to amend the traffic infraction statute at issue in this case (ORS 810.410),

and House Bill 2433, which was intended to amend the criminal stop statute (ORS 131.615). Ultimately, the two bills amending both statutes merged into HB 2433.

As originally proposed, the amendment to ORS 810.410 was solely intended to address officer-safety concerns. The original purpose of the amendment was merely to allow an officer to *ask* (“inquire”) about weapons during the course of a traffic stop and only when the officer had a “degree of concern” about the motorist. Tape Recording, House Committee on Judiciary, Subcommittee on Criminal Law, HB 2433, Feb 13, 1997, Tape 25 A, at 52, 130, 210 (statement of Marion County Deputy District Attorney Stephen Dingle). According to Mr. Dingle, there was no intention to turn the traffic stop into a “broad inquiry.” *Id* at 237. The purpose was to allow the stopping officer to ask about weapons. *Id* at 210, 371. In response to a question from Representative Prozanski, Mr. Dingle acknowledged that if the motorist said he did not have a weapon, the officer would have to accept the answer. *Id* at 107. *See also*, Tape Recording, House Committee on Judiciary, Subcommittee on Criminal Law, HB 2233, February 13, 1997, Tape 24 B at 152 (statement of Portland Police Lieutenant Michael Bell: if the motorist says he does not have a weapon, “that’s the end of it.”); Tape Recording, House Committee on Judiciary, Subcommittee on Criminal Law, Feb 13, 1997, Tape 24 B at 247 (statement of Russ Spencer, representing Oregon Sheriff’s Association: the bill does not contemplate or condone a “fishing expedition”).

However, HB 2432 was later amended to include what would become section “3(e)” of ORS 810.410. *See*, Or Laws 1997, ch 866, § 5(e). The ODAA testimony disclosed a separate purpose to the amendments in addition to officer safety—crime detection. On April 28, 1997, the ODAA submitted two-page testimony that outlined the “three main goals for HB 2432 and 2433,” namely, (1) officer safety during traffic stops, (2) officer safety frisks during criminal investigatory stops, and (3) crime prevention. Testimony, House Committee on Judiciary, Subcommittee on Criminal Law, April 28, 1997, Ex G (statement of ODAA, submitted by Marion County District Attorney Dale Penn). ER 1-2. The ODAA ambitiously informed the legislature that HB 2432 would “specifically overrule” such cases as *State v. Dominguez-Martinez*, 321 Or 206, and *State v. Bates*, 304 Or 519 (1991). *Id* at 1. ER 1.

On May 27, 1997, Marion County District Attorney Dale Penn provided testimony to the Judiciary Subcommittee on Criminal Law. His written testimony reads in part as follows:

“The consent provisions are an important part of this legislation for two reasons. First, they add greatly to the officer safety provisions of this bill. The consent provisions give an officer the authority not only to ask if there are weapons present, but the right to ask if the stopped person will voluntarily consent to a search of his or her person or car for weapons or other dangerous objects. *Second, the right to ask for consent to search furthers the other goal of this bill—crime prevention. If an officer suspects (but does not yet have reasonable suspicion or probable cause) that stolen property, drugs, weapons, or other unlawful items are in a car that has been lawfully stopped or on the person of a lawfully stopped individual, this provision of the bill would authorize an officer, during the course of the lawful stop, to ask for a voluntary consent to search.*”

Testimony, House Committee on Judiciary, Subcommittee on Criminal Law, May 27, 1997, Ex E (statement of Marion County District Attorney Dale Penn) (emphasis added). ER 3-10 at 7-8.

The ODAA's proposed amendments were intended to allow police to gather crime evidence as well as further officer safety. The ODAA wanted statutory authority to gather physical and testimonial evidence during criminal investigatory stops and non-criminal traffic stops for use in subsequent criminal prosecutions. That is precisely what Article I, section 9, prohibits in an administrative law context. *State v. Anderson*, 304 Or 139; *State v. Boyanovsky*, 304 Or 131; *Nelson v. Lane County*, 304 Or 97.

To the extent that the 1997 amendments to ORS 810.410 purport to authorize expanding a traffic stop into a criminal investigatory stop absent reasonable suspicion or probable cause, the amendments contravene Article I, section 9, and any evidence obtained pursuant to those statutory provisions is to be suppressed in a criminal prosecution. *State v. Anderson*, 304 Or 139; *State v. Boyanovsky*, 304 Or 131.

Traffic stops occur hundreds if not thousands of times a day in Oregon, affecting diverse demographic groups with varying degrees of knowledge about their rights. Police stop high school and college students, blue collar workers, professionals, and immigrants for various non-criminal vehicle code violations. As a matter of constitutional law, those stops should have the appearance and the

procedures that accompany a civil, administrative scheme. *Brown v. Multnomah County District Court*. A motorist who is seized under color of law is legally obligated to interact with the stopping officer as to matters related to the traffic stop and is not free to leave until the officer permits it. A stopped motorist is similarly reasonably inclined to believe he must interact with the officer even as to matters unrelated to the stop. At a minimum, a stopped motorist will reasonably believe that compliance with the officer's questions and requests will improve the motorist's chances of avoiding a traffic citation.

An officer who expands an administrative traffic stop (from which the motorist may not leave without the officer's permission) into a criminal investigation without independent reasonable suspicion of criminal activity is acting unilaterally, arbitrarily, and outside extra-executive oversight. Article I, section 9, prohibits precisely that kind of arbitrary, unsupervised and overreaching state action during official intervention into constitutionally protected interests.

4. *State v. Amaya does not address the issues in this case*

The Attorney General relies heavily on *State v. Amaya*, 336 Or 616, 89 P3d 1163 (2004), but that case does not speak to the controlling issues in this case. *See*, State's Brief on the Merits at 12.

Ms. Amaya was the passenger in a van that was legally stopped for a traffic violation. After the driver consented to a search, the officer asked the driver and

Ms. Amaya to leave the van, and he advised Ms. Amaya to leave her purse in the van. Defendant exited the van, but she took her purse and placed it at her feet, which prompted the officer to ask about the purse and ultimately seize and search it. Defendant argued that the officer had seized her without reasonable suspicion by questioning her about the purse prior to searching it. This court declined to reach that issue and ruled, instead, that even if the officer had seized defendant, the seizure was reasonable for officer-safety reasons:

“We conclude, however, that it is unnecessary in this case to decide if defendant was ‘seized’ by [officer] Reynolds questioning. Even assuming that Reynolds’s questions to defendant temporarily restrained her liberty and thus constituted a ‘seizure’ of defendant, those questions were permissible under Article I, section 9, because they were based on Reynolds’s reasonable suspicion that defendant posed an immediate threat of serious physical injury to him.”

State v. Amaya, 336 Or at 631 (citing *State v. Bates*, 304 Or 509, and *State v. Ehly*, 317 Or 66, 854 P2d 421 (1993)).

With respect to ORS 810.410(3)(d), this court stated, “To the extent that defendant argues that *every* question by an officer that is unrelated to the reason for a valid traffic stop violates Article I, section 9, unless the question is based on reasonable suspicion, we reject defendant’s argument.” *Id.* at 626. This court explained that it rejected the argument because it “is tantamount to asserting that ORS 810.410(3)(d) is unconstitutional on its face because it allows safety-related questions without requiring reasonable suspicion that there is an immediate threat to the officer’s safety.” *Id.*

As the preceding sections of this brief demonstrate, defendant does not make the same argument here. Rather, defendant assumes for the sake of argument that, pursuant to *Amaya*, ORS 810.410(3)(d) is facially constitutional to the extent that it permits an officer making a traffic stop to inquire about the presence of weapons. But, defendant maintains that the face of the statute (1) does not authorize the officer to follow up on the inquiry and ask for consent to frisk the motorist when there is no indication that the motorist poses a threat, and (2) does not authorize an officer to seek consent to search items in the motorist's possession that he feels during a frisk when the officer knows the items are not weapons and has no concern for his safety. Further, should ORS 810.410 allow those more intrusive inquiries and requests, the statute does not validly advance a civil, administrative goal, but, rather, represents a constitutionally impermissible legislative intent to use the enforcement arm of an administrative scheme as a means of uncovering crime evidence. *State v. Anderson*, 304 Or 139; *State v. Boyanovsky*, 304 Or 131.

II. Fourth Amendment Analysis

A. The State has Failed to Demonstrate or Argue that the Evidence was Obtained in Compliance with the Fourth Amendment

As a preliminary matter, this court should affirm the Court of Appeals and the trial court on the procedural basis that the state, as appellant in the Court of Appeals and petitioner in this court, has failed to address all the independent

grounds supporting the trial court's order of suppression. *See, e.g., Jensen v. Medley*, 336 Or 222, 239-40, 82 P3d 149 (2003) (although trial court's jury instruction concerning one theory of liability was erroneous, this court affirmed the verdict because there was another basis for it that the defendant did not challenge on appeal). Specifically, the state has failed to address the Fourth Amendment issue in this court or in the Court of Appeals.

Defendant moved in the trial court to suppress the evidence because the officer violated Article I, section 9, *and* the Fourth Amendment to the United States Constitution. *See, e.g., Motion to Suppress*, at 1; Memorandum in support at 5-6, 10. The state bears the burdens of proof and persuasion when it obtains evidence without a warrant. ORS 133.693(4); *State v. Tucker*, 330 Or 85, 997 P2d 182 (2000). At the motion to suppress hearing, defendant orally argued that the Fourth Amendment provided an independent basis to exclude the evidence. *See, Tr* at 53 (“However, [ORS 810.410] is not the end of the story because the Oregon and Federal Constitution still have to be complied with.”) The trial court clearly understood that its ruling was constitutionally based. *See, Tr* at 62 (“But let me just put [findings of fact] on the record and how I made my decision which facts are significant constitutionally because this is a constitutional issue.”) And the trial court stated that it was adopting the defendant's arguments in support of the motion to suppress. *See, Tr* at 65 (“I'm adopting your argument the argument in your brief and that you made today * * * *”).

Defendant acknowledges that he did not make this argument in the Court of Appeals, but defendant's failure to make a procedural argument for affirmance in the Court of Appeals is not a waiver of the argument on review and it does not excuse the state's failure in the Court of Appeals and in this court to demonstrate that the police conduct did not violate the Fourth Amendment. Rather, this court can affirm the Court of Appeals on any basis not argued in the Court of Appeals or considered by the Court of Appeals. *See, e.g., State v. Bea*, 323 Or 199, 208, 915 P2d 979 (1996) (rejecting state concession that a traffic violation occurred and affirming the Court of Appeals on grounds not argued or addressed in the Court of Appeals).

Despite the fact that the federal constitution was raised and argued in the trial court and forms an independent basis to support the trial court's ruling excluding the evidence, the state has not directly advanced an argument explaining how the warrantless discovery of the evidence in this case came within an exception to the warrant requirement of the Fourth Amendment. In fact, the state has failed to cite the Fourth Amendment in this court or the Court of Appeals. To obtain relief on appeal and obtain an order reversing the trial court, the state had to demonstrate that it procured the evidence through an exception to the warrant requirement of both constitutions. *State v. Kennedy*, 295 Or 260, 666 P2d 1316 (1983) (articulating the "first things first" state law analysis). Unless the state demonstrated that the Fourth Amendment was not violated, it should not be heard to complain that the trial court erred.

B. The Fourth Amendment Requires Suppression

Should the court conclude that the state as appellant adequately argued (or need not argue) that it obtained the evidence in compliance with the Fourth Amendment, defendant will turn to the federal issue and demonstrate that the police violated the Fourth Amendment.⁹

1. Temporal Extension Prohibited

The United States Supreme Court holds that drivers and passengers are seized for Fourth Amendment purposes during a traffic stop:

“Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a ‘seizure’ of ‘persons’ within the meaning of this provision.” *Whren v. United States*, 517 US 806, 116 S Ct 1769, 135 L Ed2d 89 (1996), *citing Delaware v. Prouse*, 440 US 648, 653, 99 S Ct 1391, 59 L Ed2d 660 (1979) (random stops of motorists to check vehicle documentation violates the Fourth Amendment), *United States v. Martinez-Fuerte*, 428 US 543, 556, 96 S Ct 3074, 49 L Ed 2d 1116 (1976) (border checkpoint stops permissible), *United States v. Brignoni-Ponce*, 422 US 873, 878, 95 S Ct 2574, 45 L Ed2d 607 (1975) (“roving patrol” stops impermissible).

⁹ The Fourth Amendment reads:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

The seizure is considered reasonable under classic Fourth Amendment analysis, which balances the public interest against the individual's right to personal security from arbitrary government interference. *Terry v. Ohio*, 392 US 1, 19, 88 S Ct 1868, 20 L Ed2d 889 (1968). Even after the initial stop of the car and the passenger, police may also order the driver and passengers from the car under a broad, categorical application of the officer-safety doctrine. *Maryland v. Wilson*, 519 US 408, 117 S Ct 882, 137 L Ed2d 41 (1997) (extending the rule of *Pennsylvania v. Mimms* to passengers). *See, Pennsylvania v. Mimms* 434 US 106, 98 S Ct 330, 54 L Ed2d 331 (1977) (*per curiam*) (as a matter of course, a police officer may order a lawfully stopped driver out of the car during a traffic stop).

However, any additional intrusion must be independently justified by the particular facts surrounding the encounter. *Knowles v. Iowa*, 525 US 113, 117, 119 S Ct 484, 142 L Ed2d 492 (1998) (noting that a traffic stop is more like a *Terry* encounter than an arrest and any additional intrusions into the driver's or passenger's search and seizure rights must be independently justified).

The United States Supreme Court and the circuits unanimously agree that an unauthorized temporal extension of an otherwise valid traffic stop violates the Fourth Amendment. *See, United States v. Caballes*, 543 US 405, 407, 160 L Ed 2d 842 (2005) ("A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission."); *U.S. v. Mendez*, 476 F 3d 1077 (9th Cir 2007) (same); *United States v. Santiago*, 310 F3d 336 (5th Cir 2002)

(same); *See generally*, Wayne R. LaFare, 4 *Search and Seizure: A Treatise on the Fourth Amendment*, § 9.3(e), 395-97 (4th ed 2004) (citing cases).

In the present case, the officer did little to investigate the traffic violation and issue a citation. Instead, the officer was clearly more interested in conducting a classic fishing expedition to search defendant's person and his car for potential crime evidence.

The officer had everything he needed to issue a traffic citation *before* asking whether defendant had weapons on him or in the car, before asking for consent to frisk defendant, and before asking for consent to search the items that he felt in defendant's pocket. The extra-curricular activities certainly extended the traffic stop beyond the traffic needs of the stop, in violation of the Fourth Amendment.

2. *Subject Matter Limitation*

The United States Supreme Court has not directly decided whether questioning unrelated to a traffic stop is constitutionally permissible. *See Illinois v. Caballes*, 543 US 405, 421 n 3 (Ginsburg, J., dissenting) (“The question whether a police officer inquiring about drugs without reasonable suspicion unconstitutionally broadens a traffic investigation is not before the Court.”)

The federal circuits are split as to whether the Fourth Amendment imposes a subject-matter limitation on a traffic stop. *Compare, e.g., United States v. Shabazz*, 993 F2d 431, 436 (5th Cir 1993) *with United States v. Holt*, 264 F3d 1215

(10th Cir 2001). The circuits that acknowledge a subject-matter limitation on traffic stops reason that an officer may inquire *only* about matters related to the traffic stop, unless the officer has reasonable suspicion to believe that the motorist is engaged in criminal activity.

For example, the Tenth Circuit adheres to the subject-matter limitation rule but recognizes an exception for *loaded* firearms. During a lawful traffic stop, an officer may ask if the motorist has a *loaded* firearm in the vehicle. *United States v. Holt*, 264 F3d 1215 (10th Cir 2001). However, if the motorist declines to answer, the officer may take no legal action based on the refusal to answer:

“If the motorist declines to answer the question, however, the officer could not, in the absence of particularized suspicion, take any legal action (other than reasonable actions for personal safety) based on the refusal. Because it is within a motorist’s right to refuse to answer, ordinarily, no inference of guilt can be drawn from the refusal and any further detention must be supported by reasonable suspicion or probable cause.” *United States v. Holt*, 264 F3d at 1224, *citing*, *Berkemer v. McCarty*, 468 US at 439-40, *Terry v. Ohio*, 392 US at 34 (White, J., concurring).

Though it has not directly advanced a Fourth Amendment argument in this case (other than noting a national split on the issue, State’s BOM at 17, n 5), the state has argued elsewhere that the Fourth Amendment imposes a temporal limit on a traffic stop but not a subject-matter limitation. *See, e.g.*, State’s Respondent’s brief at 12 in *State v. Stone*, 223 Or App 724, 196 P3d 95, *petition rev filed* 12/9/08 (2008). The state typically cites *Muehler v. Mena*, 544 US 93, 161 L Ed 2d 299 (2005), for that proposition. But *Mena* does not stand for that proposition.

In *Mena* the petitioner filed a 42 USC §1983 claim for damages, asserting that police violated her Fourth Amendment rights by questioning her about her immigration status while she was seized pursuant to the execution of a criminal search warrant. The Court held that the claim was not cognizable under §1983.

Mena does not control the Fourth Amendment analysis because a §1983 claim is cognizable only when petitioner alleges facts that constitute a violation of *clearly established* statutory or constitutional rights: “We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 US 800, 818, 102 S Ct 2727 (1982). The government officials in *Mena* could assert a qualified judicial immunity defense to the claim because no *clear* constitutional right was violated for the purposes of claiming damages under a § 1983 claim.

But saying that no clear rule exists for purposes of obtaining monetary damages under a § 1983 claim does not mean that the issue has been decided against criminal defendants for Fourth Amendment criminal law purposes. In fact, the question whether the Fourth Amendment imposes a subject-matter limitation on stops is presently a hotly contested issue among the federal circuit courts and state courts.

For example, the question currently before the United States Supreme Court in *Arizona v. Johnson*, 217 Ariz 58, 170 P3d 667 (2007), *cert granted*, 128 S

Ct 2961 (No. 07-1122) (2008), is whether an officer may frisk a passenger during a traffic stop when the officer has reason to believe the passenger is armed and dangerous but lacks reasonable suspicion to believe that the passenger is engaged in criminal activity.

And in *Kansas v. Smith*, 184 P3d 890, 902, *cert den*, ___S Ct ___, 2008 WL 3924513 (No. 08-245) (2008), the Kansas Supreme Court held that an officer violates the Fourth Amendment by asking a passenger for consent to search when the consent request is unrelated to the reason for the traffic stop and unsupported by reasonable suspicion:

“Consequently, we hold that the Court of Appeals erred in ruling that *Mena* allows law enforcement officers to expand the scope of a traffic stop to include a search not related to the purpose of the stop, even if a detainee has given permission for the search. Rather, we continue to adhere to our longstanding rule that consensual searches during the period of a detention for a traffic stop are invalid under the Fourth Amendment to the United States Constitution and § 15 of the Kansas Constitution Bill of Rights.”

The subject-matter limitation on traffic stops is consistent with *Terry v. Ohio*, 392 US 1, 19, 20 L Ed2d 889 (1968), and *Florida v. Royer*, 460 US 491, 103 S Ct 1319 (1983). Under federal law, the reasonableness of a seizure is determined by balancing the legitimate public interest in the government conduct against the individual’s right to personal security from arbitrary government interference. *Terry*, 392 US at 19. The Court has stated that individual circumstances must justify both the initial *intrusion* and the *scope* of the intrusion into constitutionally-protected interests: “The scope of the search must be ‘strictly

“... tied to and justified by’ the circumstances which rendered its initiation permissible.” *Terry*, 392 US at 19 (citing *Warden v. Hayden*, 387 US 294, 310, 87 S Ct 1642 (1967) (Justice Fortas, concurring)); *see also*, *Royer*, 460 US at 500 (“It is the state’s burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in *scope and duration* to satisfy the conditions of an investigative seizure.” (Emphasis added)) Questioning a seized person about matters unrelated to the basis for the seizure is facially unreasonable and represents an arbitrary exercise of authority prohibited by the Fourth Amendment. This is especially true when the questioning alters the essential nature of the seizure from an investigation of a non-crime into a criminal investigation that exposes the individual to the loss of liberty.

The Fourth Amendment reasonableness calculus balances the legitimate government interest justifying an intrusion against the individual’s right to be free from arbitrary and unwarranted intrusions. In this case, the legitimate government interest justifying defendant’s seizure was the enforcement of a simple, civil administrative scheme, and the seizure was justified only to the extent that it served that legitimate government interest. When the officer in this case expanded the investigatory scope of the seizure into matters that were unrelated to the justification for the seizure and unsupported by independent reasonable suspicion, the officer unjustifiably imposed on defendant’s right to be free from arbitrary government interference with his liberty.

Conclusion

For the foregoing reasons, defendant respectfully requests that this court affirm the Court of Appeals and trial court decisions in this case.

Respectfully submitted,

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