IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. DINA LOUISE MAZZOLA, Defendant-Appellant, Petitioner on Review.	Josephine County Circuit Court No. 101198M CA A148224 SC S062126

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

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Josephine County
Honorable PAT WOLKE, Judge

Opinion Filed: December 26, 2013
Author of Opinion: Duncan, J.
Before: Schuman, P.J., Duncan, J., and Wollheim, J.

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

STATEMENT OF THE CASE

Under this court's jurisprudence, due to the evanescent nature of blood-alcohol content, exigent circumstances exist to justify the warrantless administration of field sobriety tests (FSTs) when a police officer suspects a motorist is driving under the influence of alcohol. This case requires this court to determine whether the same exigent circumstances exist to justify the warrantless administration of FSTs when a police officer suspects a motorist is under the influence of one or more controlled substances. The dissipation of controlled substances from a person's body depends on too many unknown factors to be able to be reasonably ascertainable. Hence, the same exigent circumstances should apply to justify the warrantless administration of FSTs when a police officer suspects a motorist is under the influence of one or more controlled substances. Additionally, given Oregon's implied consent laws, a police officer is not required to obtain a motorist's roadside consent to perform FSTs, which should be justified only upon reasonable suspicion.

LEGAL QUESTION PRESENTED

Given that this court has ruled that field sobriety tests (FSTs) constitute a search under Article I, section 9 of the Oregon Constitution, does ordering the performance of roadside FSTs when an officer believes that a motorist may be

under the influence of one or more drugs fall within a well-recognized exception to the warrant requirement rule, so that the officer is not required to obtain a search warrant prior to administering them?

PROPOSED RULE OF LAW

The warrantless administration of FSTs during a driving under the influence of intoxicants (DUII) investigation does not violate Article I, section 9, regardless of the nature of suspected intoxicant, when an officer has either reasonable suspicion or probable cause to believe that a motorist is under the influence. This court has already recognized the evanescent nature of alcohol impairment may serve as exigent circumstances, when combined with probable cause to believe a motorist has committed the offense of DUII, to justify warrantless chemical testing of a person's blood-alcohol content. The same exigent circumstances should apply with respect to suspected drug impairment in a DUII investigation. Additionally, through Oregon's implied consent statutes, by operating a motor vehicle on the public roadways of Oregon, a motorist consents to field sobriety testing if a police officer reasonably suspects that the motorist has committed the offense of DUII. Lastly, given that FSTs are minimally intrusive, of short duration, and limited in purpose and are designed to serve Oregon's compelling interest in reducing drug- and alcohol-related traffic collisions and fatalities, they are not "unreasonable" searches if

the officer has reasonable suspicion to believe a motorist has committed the offense of DUII.

STATEMENT OF THE CASE

The state accepts defendant's statement of the case, except to the extent that the facts are clarified or supplemented in the argument below.

Summary of Argument

Defendant seeks reversal of her conditional guilty plea to DUII, on the basis that the trial court erred in denying her motion to suppress the results of FSTs administered without a search warrant. During a traffic stop, a police officer developed probable cause to believe that defendant was under the influence of one or more controlled substances. Defendant consented to performing the horizontal gaze nystagmus test, but the officer administered the rest of the FSTs without obtaining defendant's consent.

Defendant's appeal raises three interrelated legal issues. The first at issue is whether suspected drug-impairment can serve as exigent circumstances to justify the warrantless administration of FSTs. This court has already ruled that, except in rare cases, the evanescent nature of suspect's blood alcohol content is an exigent circumstance that will ordinarily permit a warrantless blood draw. The same exigent circumstances are present when an officer suspects a motorist to be under the influence of one or more controlled substances. Drugs are well-known to dissipate from a person's body, even if

the rate of dissipation is not known. Given the complexity of drug metabolism and the fact that drugs affect different people differently, there is no way to reasonably calculate how long a suspected DUII driver would continue to be under the influence of one or more controlled substances. Further, when multiple drugs are involved, the exact reaction with the body is far from predictable. There is also no presumptive level of impairment that can be measured by drugs in the blood which will constitute the crime of DUII. The best evidence of impairment, therefore, is gathered the closest in time to the motorist's actual driving. By requiring officers to weigh the length of time it would take to obtain a search warrant authorizing FSTs with the virtually impossible task of calculating the potential dissipation rate of a suspected drug or drugs involved, valuable evidence of the suspect's impairment at the time of driving will be forever lost.

Second, when a police officer has the required level of suspicion to believe that a motorist may have committed the offense of DUII, the officer is not required to obtain the motorist's roadside consent prior to administering FSTs, even if exigent circumstances were not present. Through Oregon's implied consent statutes, by operating a motor vehicle on the public roadways of Oregon, a motorist consents to submit to field sobriety testing if a police officer reasonably suspects that the motorist has committed the offense of DUII. Although a motorist may decline to perform FSTs, she does not have a

constitutional right to refuse to perform them, and the officer does not need to obtain additional consent.

Third, roadside FSTs are minimally intrusive, of short duration, and limited in purpose and are designed to serve Oregon's compelling interest in reducing alcohol-related and drug-related traffic collisions and fatalities. Consequently, under Article I, section 9, administering FSTs upon reasonable suspicion to believe that the motorist has committed the offense of DUII is not unreasonable.

ARGUMENT

Article I, section 9 of the Oregon Constitution provides that, "[n]o law shall violate the right of the people to be secure * * * against unreasonable search, or seizure; and no warrant shall issue but upon probable cause[.]" Article I, section 9 imposes limits on searches and seizures "in order to prevent arbitrary and oppressive interference by [law] enforcement officials with the privacy and personal security of individuals." *State v. Fair*, 353 Or 588, 602, 302 P3d 417 (2013) (citing *State v. Tourtillott*, 289 Or 845, 853, 618 P2d 423 (1980)).

This court has interpreted Article I, section 9 to mean that, other than "a few specifically established and well-delineated exceptions," searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable. *State v. Brown*, 301 Or 268, 273, 721 P2d

1357 (1986) (also noting same rule regarding the Fourth Amendment of the United States Constitution). Well-recognized exceptions include exigent circumstances, consent, and investigational inquiries. *See State v. Paulson*, 313 Or 346, 351, 833 P2d 1278 (1992) (consent); *State v. Stevens*, 311 Or 119, 126, 806 P2d 92 (1991) (exigent circumstances); and *State v. Cloman*, 254 Or 1, 6, 456 P2d 67 (1969) (investigational inquiry justified upon reasonable suspicion, not probable cause). The overarching touchstone to any Article I, section 9 analysis, however, is that of reasonableness. *Fair*, 353 Or at 602. In general, the carefully delineated warrant exceptions serve the legitimate need of law enforcement officers to protect their own well-being and to preserve evidence.

This court has ruled that FSTs constitute a search under Article I, section 9, because, by requiring a motorist to perform the tests, an officer would be able to detect aspects about the motorist's physical and psychological condition not typically detectable though simple observation. *State v. Nagel*, 320 Or 24, 30-31, 880 P2d 451 (1994). In *State v. Machuca*, 347 Or 644, 277 P3d 279 (2010) this court reaffirmed for purposes of Article I, section 9, the principle that the evanescent nature of a suspect's blood-alcohol content presents presumptive *per se* exigent circumstances to justify a warrantless blood draw, because the evidence is disappearing and minutes count. 347 Or at 657.

In this case, a police officer developed probable cause to believe that defendant was driving under the influence of one or more *controlled*

substances. The officer testified that he knew different drugs dissipate at different rates from a person's body. Both the trial court and the Oregon Court of Appeals ruled that exigent circumstances existed to justify defendant's warrantless performance of FSTs. Tr 62; 313 Or App at 383. Defendant argues that unless the state can introduce evidence of the rate of dissipation, drug impairment cannot serve as a presumptive *per se* exigency to justify the warrantless administration of FSTs. Pet Merits Br 11. As discussed below, the warrantless administration of FSTs can be justified under exigent circumstances, consent, or as part of the officer's investigational inquiry.

A. Defendant does not contest the arresting officer had probable cause to arrest her for DUII prior to administering the FSTs.

Before discussing the constitutionality of the FSTs, it is helpful to identify the legal issues on which it appears the parties agree. Defendant does not contest that she consumed controlled substances prior to driving. Prior to performing the FSTs, defendant admitted to Officer Lohrfink to taking both sleeping pills and Soma.[1] Tr 17-18. Defendant also does not contest the trial court's ruling that Officer Lohrfink formed probable cause to believe she was driving under the influence of one or more controlled substances prior to administering the FSTs. Tr 61.

[1] Soma (generic name: carisoprodol) is a commonly-used muscle relaxer and a Schedule IV controlled substance. *State v. McFarland*, 221 Or App 567, 571, 191 P3d 567 (2008); OAR 855-080-0024(2).

Conversely, the state does not contest the trial court's conclusion that Officer Lohrfink did not ask defendant's consent to perform the FSTs. Tr 57. After defendant performed the horizontal gaze nystagmus test, to which she consented, Officer Lohrfink stated, "We're going to do a few more tests, okay?" Tr 21. Defendant replied, "Okay," and performed the FSTs requested by Officer Lohrfink.[2] Tr 20-21, 47. The trial court ruled Officer Lohrfink did not request or obtain defendant's consent to perform the remainder of the FSTs. Tr 57.

[2] Other than the walk and turn test, Lohrfink did not identify the other FSTs he had defendant perform. Tr 20. Defendant's motion to suppress identifies the tests as the walk and turn test, the one leg stand test, and the finger to nose test. ER-5.

Similarly, Lohrfink also did not testify regarding defendant's performance of the FSTs. This court can reasonably infer, from the posture of defendant's case, that defendant exhibited signs of impairment when conducting the FSTs.

B. FSTs play an initial, critical role in a DUII investigation.[3]

Because FSTs play an important role in any DUII investigation, a detailed explanation of the reasons for and protocol of FSTs is necessary. For the most part, an officer administers FSTs as part of the initial DUII investigation at the scene of the traffic stop. National Highway Traffic Safety Administration (NHTSA), DOT HS-811-268, *Drug-Impaired Driving: Understanding the Problem & Ways to Reduce It: A Report to Congress* at 6 (2009) ("If the officer suspects that the driver is impaired, the officer will request that the driver exit the vehicle, and the officer will proceed to conduct pre-arrest screening tests" such as FSTs.). FSTs are used to detect impairment from alcohol, drugs, or a combination thereof.[4] They are psychophysical tests

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[3] Defendant makes an unpreserved argument that FSTs were not designed to – and therefore could not – accurately measure her level of impairment caused by controlled substances. Pet Merit Br 14-32. Other than making that broad factual assertion, however, defendant does not explain how that fact – if true – factors into an Article I, section 9 analysis. Defendant did not argue, for example, that the administration of FSTs was objectively unreasonable, exceeded the scope of an otherwise permissible search, or were not scientifically reliable. Had defendant raised those arguments to the trial court, the state would have had an opportunity to respond, including potentially making a different factual and legal record. *See, e.g.* M. Burns and T. Dioquino, *A Florida Validation Study of the Standardized Field Test (SFST) Battery, Introduction* (1998) ("As part of a DRE evaluation, the SFSTs provide important evidence of drug impairment[.]"). This court, therefore, should disregard defendant's argument that FSTs are not a reasonable measurement of a motorist's suspected drug impairment.

[4] ORS 801.272 defines "field sobriety test" as:

Footnote continued…

designed to simulate the divided attention characteristics of driving such as (1) information processing; (2) short term memory; (3) judgment and decision making; (4) balance; (5) steady, sure reactions; (6) clear vision; (7) small muscle control; and (8) coordination of limbs. NHTSA, HS-178-R5/13, *DWI Detection and Standardized Field Sobriety Testing Instructor Guide*, at 7-4, 7-14 (May, 2013 edition). A DUII suspect is to simultaneously perform two or more of the above-described tasks. *Id.* at 7-14. Mental tasks can include comprehension of verbal instructions, processing of information, and recall of memory, whereas physical tasks can include balance and coordination in various positions. *Id.* at 8-76. The idea that a person's FSTs performance is an indicator of the person's level of impairment is easily within the common knowledge and understanding of the average citizen. *State v. O'Key*, 321 Or 285, 297, 899 P2d 663 (1995) ("[F]ield sobriety tests, such as the walk-and-turn test, the one-leg-stand test, and the modifier finger-to-nose test, obtain their

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(…continued)

> [A] physical or mental test, approved by the Department of State Police by rule after consultation with the Department of Public Safety Standards and Training, that enables a police officer or trier of fact to screen for or detect probably impairment from intoxicating liquor, *a controlled substance*, an inhalant, or any combination of intoxicating liquor, an inhalant, and a controlled substance.
>
> (Emphasis added).

legitimacy from effects of intoxication based on propositions of common knowledge.").

FSTs were initially standardized and validated as an investigative tool for alcohol-impaired driving. NHTSA, DOT HS-808-839, *Validation of the Standardized Field Sobriety Test Battery at BACs Below 0.10 Percent*, at 1, 3 (August, 1998). In the 1970s, NHTSA and the Los Angeles Police Department designed a 12-step program that included field sobriety tests as an investigative tool for drug-impaired driving. *State v. Simpson*, 167 Or App 489, 493, 6 P3d 543, *rev den*, 331 Or 361 (2000). Multiple studies throughout the years have demonstrated the 12-step DRE protocol, which includes FSTs, to be "highly accurate" and a "valid method for detecting and classifying drug-impaired individuals." *State v. Daly*, 278 Neb 903, 912, 775 NW2d 47 (Neb 2009). Oregon and at least ten other states have recognized the scientific reliability of the 12-step DRE evaluation. *See State v. Sampson*, 167 Or App 489, 6 P3d 543, *rev den*, 331 Or 361 (2000); a*lso see State v. Daly*, 278 Neb at 912 n 7 (citing to judicial opinions in Nevada, Washington, Arkansas, Minnesota, Texas, New Mexico, Hawaii, and Florida which have found the nationally-standardized 12-step DRE protocol scientifically reliable).

C. Article I, section 9 does not require an officer to obtain a search warrant to administer field sobriety tests, regardless of nature of intoxicant.

1. Exigent circumstances exist to administer FSTs, regardless of the nature of intoxicant.

Under Article I, section 9, police actions are deemed reasonable and do not require a warrant if they are "conducted with probable cause and under exigent circumstances." *Nagel*, 320 Or at 31-32. "[A] situation that requires the police to act swiftly * * * to forestall * * * the destruction of evidence" qualifies as an "exigent circumstance." *Stevens*, 311 Or at 126; *see also State v. Greene*, 285 Or 337, 342, 591 P2d 1362 (1979) ("a warrant is not necessary if there is probable cause and if any evidence that might be present likely will have disappeared if the officers cannot seize and search before securing a warrant").

a. Under *Machuca* and *Nagel*, exigent circumstances already exist with respect to suspected alcohol impairment in a DUII investigation.

As defendant acknowledges, this court clearly and unequivocally reaffirmed for purposes of Article I, section 9, the principle that the evanescent nature of a suspect's blood alcohol content presents an exigent circumstance to justify a warrantless blood draw, because the "evidence [of intoxication] is disappearing and minutes count." *State v. Machuca*, 347 Or at 657. That circumstance, in combination with probable cause, justified the warrantless search and seizure of a suspect's blood alcohol content.

> We therefore declare that, for purposes of the Oregon Constitution, the evanescent nature of a suspect's blood alcohol content is an exigent circumstance that will ordinarily permit a warrantless blood draw of the kind taken here.

347 Or at 657. Only in very unusual circumstances would the state be precluded from relying on the exigency exception for the seizure of blood alcohol evidence. *Id.* The court explained that facts in such a "rare case" would have to show that the time it would take to obtain and execute a warrant would have been "*significantly*" faster than the time that it actually took to seize the evidence. *Id.* (emphasis in original).[5]

The evanescent nature of alcohol in the bloodstream also provides exigent circumstances to justify administering FSTs without a warrant. The defendant in *State v. Nagel* argued that requiring him to perform FSTs constituted an unreasonable search under Article I, section 9, in part because the

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[5] This court has recognized the exigent circumstances of a suspect's blood alcohol content long before *Machuca*. Exigent circumstances existed in *State v. Heintz*, 286 Or 239, 594 P2d 385 (1979) to justify the warrantless blood draw because the sought-after evidence – the suspect's blood alcohol content – was "highly evanescent." This court stated in *State v. Milligan*, 304 Or 659, 748 P3d 130 (1988), that, "in order to determine accurately the level of alcohol in a suspect's blood at the time of the alleged crime, the police must obtain an initial sample of the suspect's blood *with as little delay as possible"* because the evidence was "dissipating with every breath he took." 304 Or at 666 (emphasis added). Indeed, the state is not required to call an expert on the dissipation rate of alcohol in the bloodstream "because the fact that blood-alcohol dissipates over time is common knowledge." *State v. Parker*, 317 Or 225, 232 n 9, 855 P2d 636 (1993).

"search" was warrantless. 320 Or at 27. Like Officer Lohrfink in this case, the officer in *Nagel* "told [the] defendant that he wanted to administer" FSTs. 320 Or at 26. Also like this case, the court ruled the officer had probable cause to believe the defendant was driving under the influence of alcohol prior to administering the FSTs. *Id*. at 32.

After concluding that administering FSTs *did* constitute an Article I, section 9 search, this court nevertheless ruled that the defendant's results were admissible under the exigent circumstances exception to the warrant requirement rule. *Id.* at 33. This court noted that "[b]lood-alcohol content is a transitory condition, the evidence of which will dissipate in a relatively short time." *Id*. at 33. Evidence of alcohol intoxication, therefore, may dissipate during the time required to obtain a search warrant. *Id.* Consequently, under Article I, section 9, exigent circumstances justified the warrantless administration of FSTs. *Id.*[6]

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[6] Other states have ruled similarly under their respective constitutional provisions. *See State v. Dale*, 209 P3d 1038 (Alaska 2009) (Article I, section 14 of the Alaska Constitution); *Commonwealth v. Keller*, 823 A2d 1004 (Pa 2003) (Article I, section 8 of the Pennsylvania Constitution); *State v. Entrekin*, 98 Hawaii 221, 47 P3d 336 (Haw 2002) (Article I, section 7 of the Hawaii Constitution); *State v. Humphreys*, 70 SW3d 752 (Tenn 2001) (Article I, section 7 of the Tennessee Constitution); *State v. Lerette*, 858 SW2d 816 (Mo 1993) (Article I, section 15 of the Missouri Constitution); *State v. Bohling*, 173 Wis2d 529, 494 NW2d 399 (Wis 1993) (Article I, section 11 of the Wisconsin Constitution); *Aliff v. State*, 627 SW2d 166 (Tex 1982) (Article I,

Footnote continued…

b. For the same reasons, the same exigent circumstances should apply to suspected drug impairment in a DUII investigation.

Defendant does not contest any of the above-cited jurisprudence. In other words, he recognizes that the dissipating nature of alcohol in a person's bloodstream can serve as exigent circumstances under Article I, section 9 to justify the warrantless administration of FSTs and/or a warrantless blood draw of a DUII suspect. Defendant argues, however, that the same is not true with suspected drug impairment because, "unlike alcohol, the dissipation of controlled substances from the body is neither well-established nor common knowledge." Pet Merits Br 12.

Yet, it is precisely that reason – that it is impossible for a police officer to reliably extrapolate a person's impairment level from an unknown quantity and combination of drugs – that creates sufficient exigent circumstances with respect to drug impairment. Studies have been able to establish a direct measurement and correlation between the amount of alcohol in a person's system and the extent of that person's impairment. *United States v. Everett*, 972 F Supp 1313, 1317 (D Nev 1997). On average, a person eliminates alcohol at an average rate of .018 percent per hour. *State v. Eumana-Monanchel*, 352

(…continued)
section 9 of the Texas Constitution); *DeVaney v. State*, 259 Ind 483, 288 NE2d 732 (Ind 1972) (Article I, section 11 of the Indiana Constitution).

Or 1, 5, 277 P3d 549 (2012).[7] Using retrograde extrapolation, therefore, a person could extrapolate what a DUII suspect's blood-alcohol content was at the time of driving based upon the suspect's blood-alcohol content at some time *after* the time of driving. *Id.*

The same is not true for controlled substances. Some drugs have a quicker onset of effect than others, some have a longer duration, and the toxicological evidence of some remain in the system longer than others, sometimes even long after the impairing effects have subsided.[8] *United States*

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[7] In *Eumana-Monanchel*, this court noted that the fact that blood alcohol dissipates over time is common knowledge, even though the precise rate of dissipation is not necessarily commonly known. 352 Or at 10.

[8] Controlled substances are often identified as ultrashort-acting, short-acting, intermediate-acting, or long-acting. For example, an ultrashort-acting central nervous system depressant can take effect in a matter of seconds, and the effects last only a few minutes, whereas a short-acting CNS depressant can take up to 40 minutes to take effect and have its effects last for approximately five hours. An intermediate-acting CNS depressant generally takes effect in approximately 30 minutes but its effects typically last six to eight hours. Lastly, a long-acting CNS depressant generally takes approximately one hour after ingestion to take effect, and its effects typically last somewhere between eight to fourteen hours. NHTSA, HS-172-R5/13, *Drug Recognition Expert Course (DRE) 7-Day School Instructor Guide*, at 9-23 through 9-27 (2013 edition).

Of note, NHTSA classifies alcohol as a short-to-intermediate-acting central nervous system depressant. NHTSA, HS-172-R5/13, *Drug Recognition Expert Course (DRE) 7-Day School Instructor Guide*, at 9-23 through 9-23 (2013 edition). Soma, one of the drugs defendant admitted ingesting, is also considered a short-to-intermediate-acting central nervous system depressant. *Id.* at 9-29.

v. Everett, 972 F Supp 1317. *See also* NHTSA, DOT HS-811-268, *Drug-Impaired Driving: Understanding the Problem & Ways to Reduce It: A Report to Congress* at 3 (2009) ("Most psychoactive drugs are chemically complex molecules whose absorption, action, and elimination from the body are difficult to predict.").

A drug's dissipation rate is also affected by the person's body weight, kidney function, and individual metabolism, resulting in large individual variation in human response to drug consumption. *See Hansen v. Turnage*, 1988 WL 147881 at 2 (ND Cal 1988); NHTSA, DOT HS-811-249, *2007 National Roadside Survey of Alcohol and Drug Use by Drivers* at 10 (December, 2009) ("[B]ecause of the large individual variation in human response to drug consumption, attempts to define a 'norm' for the behavioral response to drugs is difficult."); NHTSA, HS-172-R01/11, *Drug Evaluation and Classification Training: "The Drug Recognition Expert School" Student Manual*, at IV-29 (January, 2011 edition) ("Apart from post-mortem studies of lethal levels, there haven't been routine opportunities to correlate drug concentrations with degrees of impairment."). Furthermore, a person's tolerance for a drug affects that person's impairment level; as tolerance develops, the user will experience diminishing psychoactive effects from the same dose of the drug. NHTSA, HS-172-R01/11, *Drug Evaluation and Classification Training Program: "The Drug Recognition Expert School"*

Student Manual, at I-24 (January, 2011 edition). Polydrug use, or drug use in conjunction with alcohol consumption,[9] is also common and will have varying impacts on a person's impairment level. *See* NHTSA, DOT HS-811-268, *Drug-Impaired Driving: Understanding the Problem & Ways to Reduce It: A Report to Congress* at 5 (2009) ("It is not uncommon for drivers to take two or three potentially impairing drugs at the same time."); NHTSA, HS-172-R01/11, *Drug Evaluation and Classification Training Program: "The Drug Recognition Expert School" Student Manual*, at III-6 (January, 2011 edition). Any particular combination of drugs may produce four general kinds of effects: a null effect, an overlapping effect, an additive effect, or an antagonistic effect. NHTSA, HS-178-R5/13, *DWI Detection and Standardized Field Sobriety Testing Instructor Guide*, at Intro-36 (May, 2013 edition).

Given the complexity of drug metabolism, testing a person's urine or blood for the presence of drugs –if any is still present in the body – typically reveals only that a person has ingested a particular drug or drugs at some point in the past. *See* NHTSA, HS-172-R01/11, *Drug Evaluation and Classification Training Program: "The Drug Recognition Expert School" Student Manual*, at III-4 (January, 2011 edition). A toxicology report will not inform when the

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[9] According to the NHTSA, it is actually more common to encounter polydrug users than single drug users. NHTSA, HS-178B-R2/06, *Drugs That Impair Driving Instructor's Lesson Plans*, at IV-20 (February, 2006 edition).

person used the drug, how much the person was affected by the drug or drugs, or when the person was affected by the drug. *See, e.g.*, NHTSA, HS-172-R01/11, *Drug Evaluation and Classification Training: "The Drug Recognition Expert School" Student Manual*, at III-4 (January, 2011 edition) ("Chemical tests of blood or urine usually disclose only whether or not a particular drug was recently used. The chemical test cannot be relied upon to determine whether the drug was psychoactive in the subject at that time.").

DUII is a time-specific crime, in that the state is required to prove that the defendant was under the influence of intoxicants *at the time of driving*. *See State v. Eumana-Moranchel*, 352 Or 1, 7, 277 P3d 549 (2012) ("The focus of [ORS 813.010] is on the act of driving, and doing so while impaired."). Toxicology reports do not reflect a motorist's impairment at the time of driving. Consequently, the best measure of a motorist's suspected drug impairment is through observation of the motorist's manual, cognitive, and perceptive skills as exhibited by the motorists's driving and performance on field sobriety tests. Unless officers are able to administer FSTs closest in time to the suspect's actual driving, evidence of impairment necessarily will be sacrificed. For that reason, the dissipating nature of drugs from a person's body presents at the very least the same exigent circumstances as that of alcohol and, given the nature and differences in drug dissipation, an even more compelling argument for exigency.

It is also unreasonable to expect officers, even those trained to detect and identify categories of drug impairment, to be pharmacological experts. *See State v. Klawitter*, 518 NW2d 577, 585 (Minn 1994) ("Drug recognition training is not designed to qualify police officers as scientists[.]"). Although it is common knowledge that drugs dissipate from a person's body over time, the metabolism is "very complex." *See State v. Strong*, 493 NW2d 834, 837 (Wisc 1992) ("It is common knowledge that the body functions to eliminate substances which are ingested."); NHTSA, HS-172-R01/11, *Drug Evaluation and Classification Training: "The Drug Recognition Expert School" Student Manual*, at IV-28 (January, 2011 edition) ("Drugs are metabolized in complex ways."). Officers are not trained to ascertain the nature of the drug a suspected DUII driver has ingested in order to determine how fast it will dissipate. *See State v. Baldwin*, 109 Wash App 516, 525, 37 P3d 1220 (Wash 2001), *rev den*, 147 Wash2d 1020 (Wash 2002) ("It would be ludicrous to expect an officer, even an officer with drug recognition training, to be able to diagnose in the field what precise drug has been ingested in a particular case.").

As a result, virtually every jurisdiction that has addressed the issue has ruled that suspected drug impairment creates the same exigent circumstances in the realm of DUII investigation as that of suspected alcohol impairment to justify a warrantless blood draw. *See, e.g., State v. Malinowski*, 330 Wis2d 836, ¶ 14, 794 NW2d 928 (Wis 2010) ("We agree with the majority of jurisdictions

that it is not necessary to distinguish between alcohol and drugs for the purposes of the exigent circumstances exception."); *State v. Steimel*, 155 NH 141, 148, 921 A2d 378 (NH 2007) ("We see no reason to reach a different conclusion with regard to controlled drugs."); *People v. Ritchie*, 130 Cal App3d 455, 459, 181 Cal Rptr 773 (Cal 1982) ("Making a distinction between the ingestion of alcohol and that of drugs is a needless refinement in distinction."). The United States Supreme Court also has recognized that the dissipation of drugs from a person's body creates exigency so that urine samples "must be obtained as soon as possible" in the context of the Federal Railroad Administration safety enforcement. *See Skinner v. Railway Labor Executives' Ass'n*, 489 US 602, 623, 109 S Ct 1402 (1989) ("Although metabolites of some drugs remain in the urine for longer periods of time * * * the delay necessary to procure a warrant nevertheless may result in the destruction of valuable evidence."). [10]

Consistent with the majority of states and the United States Supreme Court, the Oregon Court of Appeals also has ruled that suspected drug

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[10] *But see State v. Jones*, 111 Nev. 774, 895 P.2d 643, 644 (Nev 1995)(no exigent circumstances because cocaine can be detected in urine for two to five days). It is important to note, however, that *Jones* addressed only whether suspected drug impairment constituted sufficient exigent circumstances to justify a warrantless *blood draw*. The Supreme Court of Nevada did not address the warrantless administration of FSTs.

impairment of a motorist presents the same exigent circumstances to justify a warrantless blood draw or urine sample that suspected alcohol impairment does. *See State v. Fuller*, 252 Or App 245, 254, 287 P3d 1147 (2012) ("[I]t is immaterial that the officers did not identify specific, rapidly dissipating controlled substances that they expected to find in defendant's urine."); *State v. McMullen*, 250 Or App 208, 213, 279 P3d 367 (2012) ("Once police have probable cause to believe that evidence of a controlled substance will be in a suspect's urine * * * the exact identity of the substance is of no consequence in determining whether exigent circumstances exist."). The *McMullen* court noted that police officers, even DRE officers, should not be expected to be pharmacological experts:

> [W]e cannot reasonably expect police officers, even drug recognition experts, to be able to determine which controlled substance, alone or in combination , is causing a person to act in such a way as to indicate into intoxication.

Id. at 213.

The same exigent circumstances that justify a warrantless blood draw or urine sample in a DUII investigation should also justify the warrantless administration of FSTs. A blood draw or a urine sample is typically collected at the conclusion of a DUII investigation. Only in rare cases may an officer be able to obtain and execute a search warrant for a blood draw "*significantly* faster than the actual process otherwise used," *State v. Machuca*, 347 Or at 657

(emphasis in original). FSTs, however, are administered at the beginning of a DUII investigation. Time, therefore, is even more critical with respect to FSTs. The state is unaware of *any* circumstance in which an officer would be able to obtain and execute a search warrant to administer FSTs significantly faster than administering FSTs in the normal course of the DUII investigation. In fact, FSTs are often administered when only reasonable suspicion – not probable cause – exists.[11]

Despite the above-cited jurisprudence and inherent time constraints involved in administering FSTs, defendant asks this court to rule that which no court has done: that a motorist's suspected drug impairment does *not* constitute a *per se* exigency that would justify the warrantless administration of FSTs. Defendant's proposed rule of law would require all law enforcement officers, DRE and non-DRE alike, to reasonably ascertain that which scientists and doctors cannot: the specific dissipation rate of an ingested controlled substance, let alone the combination of controlled substances. Accordingly, all police officers who come into contact with a suspected drug-impaired motorist would have to "freeze" the roadside investigation to make the following calculations: (1) the nature and amount of the controlled substance or substances the motorist is suspected to have ingested; (2) the dissipation rate for said controlled

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[11] *See* footnotes 17 & 18, below.

substance, and how that may change when more than one controlled substance is present; (3) the availability of judges to review a request for a search warrant; and (4) the time required to obtain said search warrant. The chance that the officer would even have the type of accurate information needed to make a calculation as well as the expertise to do so is slim to non-existent.

Such a proposed rule of law is inherently impracticable, especially with respect to suspected drug-impaired motorists. Arguably, the best evidence obtained in an alcohol-impaired DUII investigation is the quantification of the suspect's blood-alcohol content. The officer (or jury) can use the test results to reasonably extrapolate back to determine the suspect's blood-alcohol content at the time of driving. Not so with suspected drug-impaired motorists. There is no measureable blood-drug content that will constitute the crime of DUII. The best evidence, therefore, is that which is gathered the closest in time to the suspect's actual driving. Unless officers are able to administer FSTs closest in time to the suspect's actual driving, evidence of the motorist's impairment at the time of driving will be forever lost.

2. By operating a motor vehicle on public roadways, a motorist has impliedly consented to take FSTs once an officer has reasonable suspicion to suspect he or she has committed the offense of DUII.

This court should also rule that Oregon's implied consent law works so that, by driving a motor vehicle on public streets, a suspected DUII driver has

already consented to perform FSTs when an officer has reasonable suspicion to suspect the motorist has committed the offense of DUII. Consequently, under those circumstances, an officer does not need to obtain a suspected DUII driver's roadside consent prior to administering FSTs.[12]

To address the problem of impaired driving in this state, the Oregon Legislature enacted the Motorist Implied Consent Law. *See* ORS 801.010(3) (identifying provisions included under that title). Under that law, a person who is arrested for DUII "shall be deemed to have given consent" to a chemical test of her breath to determine her blood alcohol content. ORS 813.100(1). The implied-consent law prohibits the officer from administering the breath test if the person refuses the request to take the test after she has been informed of those rights and consequences. ORS 813.100(2). In 1989, the Oregon Legislature enacted ORS 813.135, establishing implied consent for FSTs:

> Any person who operates a motor vehicle upon premises open to the public or the highways of the state *shall be deemed to have given consent to submit to field sobriety tests* upon the request of a police officer for the purpose of determining if the person is under the influence of intoxicants if the police officer reasonably suspects that the person has committed the offense of driving while under the influence of intoxicants in violation of ORS 813.010 or a municipal ordinance. Before the tests are

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[12] The trial court ruled on defendant's motion to suppress the results of her FSTs immediately after the close of evidence, so the state was not granted an opportunity to advance alternative theories of consent. Officer Lohrfink, however, testified that he did not pursue a search warrant to administer FSTs "because we go based on DMV implied consent." Tr 19.

> administered, the person requested to take the tests shall be informed of the consequences of refusing to take or failing to submit to the tests under ORS 813.136.

(emphasis added).

Consent is a well-recognized exception to the warrant requirement rule of Article I, section 9. *State v. Weaver*, 313 Or 212, 219, 874 P2d 1322 (1994) ("When there is consent to search, no warrant is necessary."). Furthermore a citizen may manifest implied consent to a search through his or her conduct. *See State v. Paulson* (*e.g.*, consenting to entry into residence by requesting emergency assistance). When a citizen drives a motor vehicle on public highways, he or she impliedly consents to submitting to FSTs and a breath test if an officer develops reasonable suspicion to believe he or she may be driving under the influence of intoxicants. *See State v. Spencer*, 305 Or 59, 70, 750 P2d 147 (1988) ("The basic concept embodied in the implied consent law is that one who drives a motor vehicle on the state's highways impliedly consents to a breath test. * * * Consent being implied by law, a driver may not legally refuse."); *State v. Newton*, 291 Or 788, 800, 636 P2d 393 (1981)("[The] defendant's consent had already been impliedly given in the sense that he accepted testing as a condition of his license to drive.").[13] As a consequence of

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[13] All fifty states have adopted similar implied consent laws that require motorists, as a condition of operating a motor vehicle within the state, to consent to BAC testing if the investigating officer has probable cause to suspect

Footnote continued…

defendant's election to drive on public highways, she manifested her consent to submit to FSTs. ORS 813.135. Accordingly, Officer Lohrfink was not required to seek additional consent from her at the scene of the traffic stop.

(…continued)

the motorist of driving under the influence of an intoxicant. *In the Matter of Suazo*, 117 NM 785, 787, 877 P2d 1088 (NM 1994). The vast majority of state courts have upheld the constitutionality of implied consent statutes. *See, e.g., People v. Harris*, 225 Cal App4th Supp 1, 8, 170 Cal Rptr3d 729 (Cal 2014) ("By choosing to use the highways, drivers voluntarily bring themselves under the regulation of the implied consent law."); *State v. Yong Shik Won*, 2014 WL 1270615 (Haw 2014) (at 20 – "As a matter of law, a person who exercises the privilege to drive and operates a vehicle on a public road is deemed to have given his or her consent to testing * * * as prescribed by the implied consent statute."); *State v. Humphreys*, 70 SW3d 752 (Tenn 2001) (Under Tennessee's implied consent statute, "[i]t is unnecessary for law enforcement officers to obtain the voluntary consent of an individual motorist before administering a breath test for alcohol concentration level."); *State v. Palmer*, 554 NW2d 859, 861 (Iowa 1996) ("The premise underlying implied consent is that a driver impliedly agrees to submit to a test in return for the privilege of using the public highways.) (internal citation omitted); *Commonwealth v. Riedel*, 539 Pa 172, 185, 651 A2d 135 (Pa 1994) ("[W]e hold that appellant does not have the right to refuse consent to blood testing under [Pennsylvania's] implied consent scheme."); *Seth v. State*, 592 A2d 436, 444 (Del 1991) ("The net effect of [Delaware's Implied Consent Statute] is an officer's ability to require a suspect to submit to testing, without that person's consent * * * so long as the officer has probable cause[.]"); *State v. Woolery*, 116 Idaho 368, 370, 775 P2d 1210, 1212 (Idaho 1989) ("Any person who drives or is in actual physical control of a motor vehicle in this state is deemed to have given his consent to an evidentiary test for concentration of alcohol, drugs or other intoxicating substances[.]"); *McKay v. Davis*, 99 NM 29, 30, 653 P2d 860 (NM 1982) (Under the Implied Consent Act, there is no constitutional right to refuse to take the [breath] test and the right granted by the legislature is merely the right not to be forcibly tested after manifesting refusal).

3. The warrantless administration of FSTs when an officer has reasonable suspicion to believe a motorist has committed the crime of driving under the influence constitutes a reasonable search for purposes of Article I, section 9.

Administering warrantless FSTs when reasonable suspicion exists to believe a motorist may be driving under the influence of intoxicants does not violate Article I, section 9 because, although a search, FSTs are a minimal intrusion in a citizen's privacy that serve a compelling public interest in the reduction of drug- and alcohol-related traffic collisions and fatalities.[14] Like the Fourth Amendment, the ultimate objective of Article I, section 9 is to protect citizens against "unreasonable" searches and seizures. *Fair*, 353 Or at 600. The touchstone of any Article I, section 9 analysis, therefore, is reasonableness. *Id.* at 602. A search, therefore, that does not fall within a well-delineated exception to the warrant requirement rule may nevertheless be "reasonable" under Article I, section 9. *See State v. Sanders*, 343 Or 35, 163 P3d 607 (2007) (statute mandating DNA profiling of all convicted felons did not violate Article I, section 9).

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[14] Whether Article I, section 9 requires an officer to have probable cause to believe that a driver has been driving under the influence before administering FSTs is still an open issue. In *Nagel*, this court intentionally abstained from ruling whether ORS 813.135 – which authorizes FSTs upon reasonable suspicion – violated Article I, section 9. 320 Or at 37. Here, of course, Officer Lohrfink had developed probable cause to believe defendant had committed the offense of DUII prior to administering the FSTs.

In *Sanders*, the criminal defendant challenged the constitutionality of ORS 137.076, which required him, as a person convicted of a felony, to provide a blood or buccal sample to the Department of Police, Department of Corrections, or other designated law enforcement agency. 343 Or at 37. ORS 137.076 requires criminal defendant convicted of (1) felony crimes; (2) third-degree sexual abuse or public indecency; or (3) murder or aggravated murder to provide a blood or buccal sample so that the state can maintain their DNA profile on file. No individualized reasonable suspicion or probable cause is required. The defendant argued that ORS 137.076 violated Article I, section 9 as an unreasonable search, because it did not fall within any well-delineated exceptions to the warrant requirement rule. 343 Or at 37.

This court nevertheless concluded that ORS 137.076 did not violate Article I, section 9, because it was narrowly tailored to serve a compelling public safety aim. *Id.* at 39-42. This court first noted in *Sanders* that convicted felons have lesser privacy rights in general than average citizens. 343 Or at 40 ("Those sentenced to prison forfeit many rights that accompany freedom.") (internal citation omitted). A person would be subject to ORS 137.076 only as a consequence of his or her convictions. 343 Or at 41. This court next considered the nature of the search – provision of a blood or buccal sample - itself. Although providing much more information about the offender, this court equated the blood or buccal sample to the traditional practice of

fingerprinting and photographing arrested suspects. *Id.* at 41-42. Additionally, the taking of a blood or buccal sample was minimally invasive. *Id.* at 42 n 5. Lastly, this court acknowledged that the state had a "substantially heighten[ed]" interest in identifying and monitoring persons convicted of the crimes enumerated in ORS 137.076. 343 Or at 43.

Although the mandatory DNA sample of ORS 131.076 cannot be equated to the warrantless administration of roadside FSTs, the same justifications that upheld ORS 137.076 justify the warrantless administration of FSTs. A motorist is subject to less freedom as a result of the choice to operate a motor vehicle. Operating a motor vehicle on public roadways is highly regulated: (1) a motorist must be licensed to drive; (2) a vehicle must be registered with the state; (3) the vehicle must satisfy safety regulations concerning its size, weight and equipment; and (4) a motorist must operate the vehicle lawfully. *See Oregon's Motor Vehicle Code passim*. A motorist, for instance, voluntarily submits his or her social security number, personal biometric data, provide proof of residency, and must be knowledgeable of motor vehicle laws and physically competent to operate a motor vehicle. *See* ORS 807.040 (license requirements generally), 807.062 (proof of residency), and 807.070 (examinations for each class or endorsement). The rules of operation regulate a motorist's responsibilities with respect to pedestrians, speed, disposal of human waste, highway work zones, school zones, funeral processions, and even the

stopping, standing and parking of the vehicle. *See* ORS Chapter 811 *passim.* A person who chooses to operate motor vehicles on public roadways voluntarily submits to all the regulations in exchange for use of the vehicle on pubic roadways.

Secondly, just as ORS 137.076 narrows the class of persons potentially subject to it by limiting the qualifying convictions, Oregon's implied consent statutes (ORS 813.100 and 813.135) do not require *all* motorists to submit to FSTs or chemical testing. ORS 813.100 and 813.135 require the police officer to have individualized reasonable grounds to believe that a motorist has committed the offense of DUII before administering FSTs and chemical testing.

The administration of FSTs is also minimally intrusive, of short duration,[15] and designed to address the suspicion of driving while intoxicated. It is no more intrusive than frisking a person for the presence of weapons. Most other states view FSTs, although constituting a search, to be minimally intrusive enough to be part of a *Terry v. Ohio*[16] investigative detention, requiring only

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[15] NHTSA's standardized FSTs take approximately five minutes to administer. *State v. Superior Court for Cochise County,* 149 Ariz 269, 272, 718 P2d 171 (Ariz 1986).

[16] *Terry v. Ohio*, 392 US 1, 88 S Ct 1868, 20 L Ed 2s 889 (1968).

reasonable suspicion that the motorist may have been driving under the influence of intoxicants.[17]

Lastly, FSTs play a significant role in regulating safe highways. Alcohol- and drug-impaired motorists present a grave danger to the public. Back in 1957, the United States Supreme Court stated, when upholding a warrantless blood draw of a DUII suspect, "The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard on the battlefield." *Breithaupt v. Abram*, 352 US 432, 439, 77 S Ct 408, 1 L Ed 2d 448 (1957). In 1983, it stated, "The carnage caused by drunk drivers is well documented and needs no detailed recitation here. This Court * * * has repeatedly lamented the tragedy." *South Dakota v. Neville*, 459

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[17] *See, e.g.*, *State v. Mecham*, 323 P3d 1088, 1094 (Wash 2014) (degree of intrusion of FSTs is "not excessive" and "an appropriate technique to measure the suspect's intoxication," justifiable by reasonable suspicion); *State v. Bernokeits*, 423 NJ Super 365, 374, 32 A3d 1152 (NJ 2011) ("In our view, administration of [FSTs] is more analogous to a *Terry* stop than to a formal arrest."); *State v. Whitney*, 889 NE2d 823, 829 (Ind 2008) (equating FSTs to a weapons frisk or license and registration check); *Commonwealth v. Blais*, 428 Mass 294, 297, 701 NE 2d 314 (Mass 1998) ("The *Terry* decision explicitly recognized that it is not only the officer's concern for his own safety, but that of others as well, that may form the basis for a reasonable search."); *State v. Wyatt*, 67 Haw 293, 305, 687 P2d 544 (Haw 1984) (FSTs "involve[] none of the probing into an individual's private life and thoughts that marks an interrogation or a search" and "only entail[] a display of transitory physical characteristics associated with inebriation."); *State v. Little*, 468 A2d 615, 617 (Me 1983) ("The performance of a couple of quick, simple coordination tests is not particularly onerous, offensive or restrictive.").

US 553, 558, 103 S Ct 916, 74 L Ed 2d 748 (1983). And, in 1990, it noted that "[n]o one can seriously dispute the magnitude of drunken driving problem or the States' interest in eradicating it." *Michigan Dept of State Police v. Sitz*, 496 US 444, 451, 110 S Ct 2481, 110 L Ed 2d 412 (1990).

Numerous courts have ruled the state's interest in combatting driving while intoxicated justifies the warrantless administration of FSTs upon *reasonable suspicion* that the motorist is impaired, including courts from Arizona, California, Connecticut, Georgia, Idaho, Maryland, Montana, Vermont, and Washington. [18]

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[18] *See, e.g.*, *State v. Mecham*, 323 P3d at 1093 ("[A] drunk driver presents a grave danger to the public."); *Blasi v. State*, 167 Md App 483, 893 A2d 1152 (Md 2006) (Maryland has a "compelling interest in controlling and preventing drunken driving."); *State v. Boyea*, 171 Vt 401, 409, 765 A2d 862 (Vt 2000) ("Indeed, a drunk driver is not at all unlike a 'bomb,' and a mobile one at that."); *Hulse v. Montana Motor Vehicle Division*, 289 Mont 1, 19, 961 P2d 75 (Mont 1998) ("Montana has a compelling interest to remove drunk drivers from our roadways."); *State v. Lamb*, 168 Vt 194, 199, 720 A2d 1101 (Vt 1998) ("A motor vehicle in the hands of a drunken driver is an instrument of death. It is deadly, it threatens the safety of the public, and that threat must be eliminated as quickly as possible.") (internal citation omitted); *State v. Lamme*, 19 Conn App 594, 599, 563 A2d 1372 (Conn 1989) ("The state has a vital interest in keeping intoxicated drivers off the roads and highways."); *State of Henderson*, 114 Idaho 293, 295, 756 P2d 1057 (Idaho 1988) ("Without question, the drunk driver is one of society's greatest concerns."); *State v. Golden*, 171 Ga App 27, 30, 318 SE2d 693 (Ga 1984) (Noting "the enormous danger to the public created by the presence of drunk drivers on the roadways[.]"); *Fuenning v. Superior Court for Maricopa County*, 139 Ariz 590, 595, 680 P2d 121 (Ariz 1983) (noting the compelling state interest in "reducing the terrible toll of life and limb on our highways."); *People v. Sudduth*, 65 Cal2d 543, 546, 55 Cal Rptr 393, 421 P2d 401 (Cal 1966) ("In a day when

Footnote continued…

The above-cited factors are similar to the factors this court cited to in *Sanders* to hold ORS 137.076 does not violate Article I, section 9, even when there was no individualized suspicion to justify the collection of DNA. For the same reasons, this court should conclude that although FSTs constitute a search under Article I, section 9, the warrantless administration of FSTs can be justified on reasonable suspicion to believe a motorist may have committed the offense of DUII.

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excessive loss of life and property is caused by inebriated drivers, an imperative need exists for a fair, efficient and accurate system of detection, enforcement, and, hence, prevention[.]"). *But see People v. Carlson*, 677 P2d 310, 317 (Colo 1984) ("Although some forms of governmental intrusion are so limited in scope as to be justified on a lesser quantum of evidence than probable cause, a roadside sobriety test does not fall into this category.") (internal citations omitted).

CONCLUSION

For the reasons explained above, this court should affirm the Court of Appeals' decision and affirm the judgment of the circuit court.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on September 4, 2014, I directed the original Brief on the Merits of Respondent on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Peter Gartlan and Kyle Krohn, attorneys for appellant, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 8,557 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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