IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. RANDALL RAY RITZ, Defendant-Appellant Respondent on Review.	Curry County Circuit Court Case No. 11CR1068 CA A152111 SC S063292

RESPONDENT'S BRIEF ON THE MERITS

Review of the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court
for Curry County
Honorable Jesse C. Margolis, Judge

Opinion Filed: March 25, 2015
Author of Opinion: GARRETT, J.
Before Ortega, Presiding Judge, and DeVore, Judge, and Garrett, Judge.

ERNEST G. LANNET #013248
Chief Defender
Criminal Appellate Section
ANNE FUJITA MUNSEY #994080
Senior Deputy Public Defender
Office of Public Defense Services
1175 Court Street NE
Salem, OR 97301
anne.munsey@opds.state.or.us
Phone: (503) 378-3349
Attorneys for Petitioner on Review

ELLEN F. ROSENBLUM #753239
Attorney General
PAUL L. SMITH #001870
Deputy Solicitor General
400 Justice Building
1162 Court Street NE
Salem, OR 97301
paul.l.smith@doj.state.or.us
Phone: (503) 378-4402
Attorneys for Respondent on Review

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STATEMENT OF THE CASE

Defendant accepts the Attorney General's Statement of Facts with the addition and clarification of pertinent facts set out in the argument that follows.

Question Presented and Proposed Rules of Law

May police enter a home without a warrant to potentially secure evidence of a misdemeanor crime, when that evidence is dissipating at a steady rate but will not be destroyed immediately?

First Proposed Rule of Law.

Under Article I, section 9, whether police are justified in making a warrantless entry into a home to try to secure evidence of an offense involves an assessment of several factors, including: the need for the evidence, the likelihood of obtaining it, the severity of the underlying offense, and the extent to which the evidence will be lost while a warrant is obtained. When someone's home may contain slowly dissipating evidence of a nonviolent misdemeanor offense that does not present a lingering safety hazard, police must obtain a search warrant to (forcibly) cross the threshold.

Second Proposed Rule of Law.

The Fourth Amendment does not allow police to enter a home without a warrant to obtain dissipating blood alcohol evidence unless it involves a serious

felony, the warrantless entry will yield the desired evidence, and the delay to obtain a warrant would significantly undermine the efficacy of the search.

Summary of Argument

The Article I, section 9, exigent circumstances exception to the warrant requirement is a doctrine of practical necessity. This court has applied the doctrine in a variety of circumstances. Whether exigent circumstances exist depends on the reason for the search, the level of intrusion, and the likelihood that the search will yield the desired result. Because the home is the most protected area under Article I, section 9, this court has only allowed police to forcibly cross the threshold without a warrant in an attempt to prevent death, serious harm, or the escape of a felon. It has allowed lesser intrusions for less compelling reasons, such as a trespass to prevent an ongoing crime and a limited search of already an already seized person to obtain dissipating evidence.

This case presents the issue of a warrantless entry into a home to obtain dissipating evidence of the offense of driving under the influence of intoxicants (DUII). The state relies heavily on this court's decisions in *Machuca* (involving the warrantless blood draw of an arrestee) and *Mazzola* (involving the warrantless administration of field sobriety tests (FSTs) to a lawfully seized person). Neither of those cases supports the state's position. *Machuca* is

limited to blood draws to determine an arrestee's blood alcohol content (BAC). It does not extend to the very different circumstance of a warrantless entry into a person's home. And *Mazzola* is a perfect example of how this court looked to the need for the evidence (great in that case) and the level of intrusion (very minimal) in determining that the warrantless search was justified.

The dissipating nature of DUII evidence does not create an exigency that justifies a warrantless home entry for several reasons. First and foremost, the location of the search—a person's home—demands the greatest protection, because so much private information is contained there. A home entry exposes much more information than a blood draw or an FST. Second, the likelihood of obtaining the desired evidence is much less certain. Only if a person consents to a blood or breath test will police obtain the desired BAC evidence—an unlikely result when the person is refusing to come out of his home. Third, the evidence will not disappear if police take the time to obtain a warrant. BAC evidence dissipates at a steady and predictable rate, allowing the state to calculate a person's BAC based on results from a later test. Fourth, the need for the evidence is not as dire, because the state has two methods to prove intoxication—BAC and impairment. Especially given that the police must have probable cause that the suspect committed DUII prior to entry, the state likely already has similar evidence, such as observable signs of intoxication and impairment, from other sources. And the state cannot justify an entry based on

the mere possibility that the suspect will tamper with the evidence; it must have a reason to believe that such tampering is occurring. Finally, advances in technology making it easier and more efficient to obtain a warrant, which militates against allowing warrantless searches both in general, and with respect to lesser offenses in particular.

The analysis under the Fourth Amendment is similar. In *McNeely*, the Supreme Court held that the Fourth Amendment demands a warrant before a blood sample may be drawn when police officers can reasonably obtain a one without significantly undermining the efficacy of the search. In *Welch*, the Court held that the gravity of the underlying offense is an important factor in determining whether an exigency exists, and it suggested that a warrantless home entry would never be justified to obtain evidence of a minor offense. Those cases strongly suggest that police must obtain a warrant to enter a home to obtain dissipating BAC evidence to prosecute the offense of DUII.

Argument

I. Whether exigent circumstances exist is determined after a review of the totality of the circumstances, including legal considerations such as the necessity of the search, the location to be searched, and the evidence to be gained by the search.

Article I, section 9, of the Oregon Constitution protects against "unreasonable" searches and seizures.[1] Warrantless entries and searches of premises are *per se* unreasonable, unless police act within one of the few "specifically established and well-delineated exceptions" to the warrant requirement. *State v. Fessenden/Dicke*, 355 Or 759, 764, 333 P3d 278 (2014). The burden is on the state to show that circumstances existing at the time of entry satisfy one of those exceptions. ORS 133.693(4); *State v. Davis*, 295 Or 227, 237, 666 P2d 802 (1983).

A. The exigent circumstances exception is a doctrine of "practical necessity."

One warrant exception is when the police have probable cause to believe that a crime has been committed and the police face exigent circumstances that require immediate action. *State v. Stevens*, 311 Or 119, 126, 806 P2d 92

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[1] Article I, section 9, of the Oregon Constitution 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 probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."

(1991). As this court has frequently quoted, "An exigent circumstance is a situation that requires the police to act swiftly to prevent danger to life or serious danger to property, or to forestall a suspect's escape or the destruction of evidence." *Id*. In other words, "exigent circumstances" require the existence of an "emergency." *State v. Bridewell*, 306 Or 231, 236, 759 P2d 1054 (1988).

Notably, the exigent circumstances doctrine does not lend itself to bright-line rules. It is a doctrine of "practical necessity." *State v. Peller*, 287 Or 255, 262, 598 P2d 684 (1979) (quoting *State v. Greene*, 285 Or 337, 591 P32d 1362 (1979)). As this court explained, "In certain cases, the societal interest in a warrantless search or seizure is simply believed to outweigh the interest in requiring prior judicial approval of such government action." *Peller*, 287 Or at 262.

Thus, this court has held that exigent circumstances allowed entry into a hotel room (*Miller*) and a residence (*Stevens*) to locate a potential murder victim in the hope that the person was still alive. *Stevens*, 311 Or 128-32; *State v. Miller*, 300 Or 203, 229, 709 P2d 225 (1985). *Stevens* involved two searches, one for the kidnapped girls and a second for the third girl who was not with the first two. Regarding both searches, this court emphasized that the scope of the search was limited to the exigency that justified it. *Stevens*, 311 Or at 130, 132. Conversely, in *Davis*, this court held that any emergency "dissipated" when the

potential victim walked out of the door of the motel room unharmed. *State v. Davis*, 295 Or 227, 240, 666 P2d 802 (1983).

In *Fessenden/Dicke*, this court concluded that an officer was justified in entering onto private property to seize a neglected horse to prevent it from falling, which would put it at risk of serious imminent injury or death. *State v. Fessenden/Dicke*, 355 Or 759, 772-73, 333 P3d 278 (2014). The court explained:

> "Our cases recognize that one of an investigating officer's most pressing responsibilities is to apprehend the perpetrator of a crime *in progress*. An officer who has probable cause to believe that a perpetrator is in the process of causing unlawful harm has a responsibility to apprehend the perpetrator to prevent the perpetrator from causing further imminent harm to a victim."

Id. (emphasis added). Because the officer had probable cause to believe that the crime of animal neglect was "in progress" and that "warrantless action was necessary to prevent an ongoing criminal act from causing further serious imminent harm to the victim of the crime," the exigent circumstances exception justified the officer's actions. *Id*. at 773.

In *Snow*, this court held that police in "hot pursuit" of the driver of an eluding vehicle were justified in searching the defendant's car for identification in an attempt to locate him and prevent his escape. *State v. Snow*, 337 Or 219, 224, 94 P3d 872 (2004). In *Girard*, this court held that police could enter a house to arrest a burglary suspect to prevent his escape when they heard

someone say, "Hurry, they are coming." *State v. Girard*, 276 Or 511, 515, 555 P2d 445 (1976).[2] However, in *Peller*, decided three years later, this court concluded that exigent circumstances did not justify entry into the defendant's home to prevent his escape when police had no indication that he would attempt to "make a break." *Peller*, 287 Or at 264. It explained that "the mere possibility" that the defendant could "make a break" if he were so inclined does not give "rise to exigent circumstances." *Id.*

Finally, this court has allowed warrantless searches to prevent the destruction of evidence in limited circumstances. It allowed the warrantless seizure and subsequent search of an automobile that was involved in an armed theft at a residence, because someone could remove the evidence or drive the car away at any time. *Greene*, 285 Or at 591. It allowed a warrantless blood draw of an arrestee to determine the defendant's BAC after a fatal car accident

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[2] *Girard* did not hold that police were justified in entering the defendant's home to prevent the destruction of evidence. This court stated,

> "It is true that defendant's admonition, 'Hurry, they are coming' may not have given the officers reason to enter to prevent evidence from being concealed or destroyed because the burglary evidence was not easily disposable. However, the officers still could have understood the statement to mean, 'Let's get out of here; the officers are coming,' in which case entry would be justified to effect an arrest to avoid escape."

Girard, 276 Or at 515.

in *Milligan*, and a single-car accident involving physical injury in *Machuca*, based on the dissipating nature of BAC evidence. *State v. Machuca*, 347 Or 644, 657, 227 P3d 729 (2010); *State v. Milligan*, 304 Or 659, 666, 748 P2d 130 (1988). And it allowed the warrantless administration of roadside FSTs when the officer had probable cause to believe the seized person was driving under the influence of alcohol (*Nagel*) or controlled substances (*Mazzola*), again based on the dissipating nature of the evidence. *State v. Mazzola*, 356 Or 804, 819-20, 345 P3d 424 (2015); *State v. Nagel*, 320 Or 24, 33, 880 P2d 451 (1994).

One final aspect of this court's exigent circumstances jurisprudence is worth noting—the timeliness of the officers' actions. In *Fondren*, this court held that exigent circumstances did not exist when an officer waited four hours after establishing probable cause to seize a parked automobile, the maximum time for obtaining a warrant was four hours, and the officer was not concerned that someone else would gain access to the car in the intervening time. *State v. Fondren*, 285 Or 361, 366-67, 591 P2d 1374, *cert den*, 444 US 834 (1979), *overruled on other grounds by State v. Brown*, 301 Or 268, 721 P2d 1357 (1986). It explained, "The officer cannot create exigent circumstances by his own inaction." *Id*. at 367. Similarly, in *Matsen*/*Wilson*, the police gathered information regarding a drug house for two weeks, but desired to catch the defendant in the act of delivery, so did not seek a warrant, instead making a

warrantless entry shortly after the defendant arrived. *State v. Matsen/Wilson*, 287 Or 581, 587, 601 P2d 784 (1979). This court stated, "The police cannot weave together a web of information, then claim exigent circumstances when the suspect arrives and can conveniently be snared. The warrant process is more than an inconvenient formality." *Id*. Finally, in *Bridewell*, this court held that a police delay of 12 hours from the time that the defendant was reported missing to the officers' entry onto his premises "significantly dissipated any possible exigency." *State v. Bridewell*, 306 Or 231, 236, 759 P2d 1054 (1988).

Notably, in *Mazzola*, this court's most recent exigent circumstance opinion, the court emphasized the necessity to balance multiple factors: the need for the evidence, the level of intrusion, and the timeliness of the officer's action:

> "As pertinent here, *Milligan*, *Heintz*, and *Machuca* teach us that, where a warrantless search for evidence of the crime of DUII is supported by probable cause to arrest the defendant, *the issue of exigency should be assessed in light of the reasonableness of the search in time, scope, and intensity*. Here, limited testing designed to detect evidence of current impairment was performed on a person who already had been validly stopped and also was subject to arrest for DUII. The tests at issue were limited in scope and intensity; they did not intrude into defendant's body; rather, they assessed her coordination, balance, and motor skills. Those tests constituted probative evidence of an element—current impairment—of the crime of defendant's arrest, they were administered soon after defendant had been observed driving, and they immediately preceded her arrest. With respect to exigency, there also was evidence that 'over time the body filters drugs and they dissipate in one's body,' that various drugs can dissipate at different rates, and that the effects of drugs wear off over time.

> Again, the challenged FSTs assess a motorist's impairment at the time of driving, not at a later time. In light of the limited scope and intensity of those tests, and their proximity in time to defendant's arrest, the described evidence established a sufficient exigency to justify the warrantless administration of the FSTs in this case."

Mazzola, 356 Or at 819-20 (citation omitted; emphasis added).

The foregoing cases show that whether exigent circumstances exist depends on the particular circumstances of each case. As one jurist explained, "Exigencies are emergencies, circumstances that require urgent action; of course they arise case by case." *State v. Brown*, 301 Or 268, 292, 721 P2d 1357 (1986) (Linde, J., dissenting). Thus, although the exigent circumstances doctrine has been employed in a wide variety of contexts, determining whether a particular warrantless search is justified depends on the need for the evidence, the degree of the privacy invasion, and the timing of the officer's actions.

B. Entering a home is a much greater invasion of privacy than other kinds of searches.

Oregon courts have repeatedly held that a person's home demands the strictest privacy protection. "[A] person's home, and the right to privacy in that home, is 'the quintessential domain protected by the constitutional guarantee against warrantless searches.'" *State v. Cocke*, 334 Or 1, 6, 45 P3d 109 (2002) (quoting *State v. Louis*, 296 Or 57, 60, 672 P2d 708 (1983)). As the Oregon Supreme Court explained:

> "The very purpose of our constitutional provision was to protect a person's home from governmental intrusions. This right against intrusion should be stringently protected by the courts. As such, any exceptions to the warrant requirement should be narrowly and carefully drawn. * * * Absent articulable facts that evidence a compelling and urgent need for the entry, the Oregon Constitution demands a warrant be issued."

State v. Davis, 295 Or 227, 243, 666 P2d 802 (1983) (citations omitted).

And more recently, in holding that a potential crime victim was seized when police ordered her out of her home and required her to remain on the porch for questioning, this court stated that "[t]he principal deciding factor" was the setting involved—the privacy of her home. *State v. Fair*, 353 Or 588, 600, 302 P3d 417 (2013). It explained:

> "An ultimate objective of the constitutional protections, both state and federal, against unreasonable searches and seizures is 'to protect the individual in the sanctity of his [or her] home[.]' *The degree to which law enforcement conduct intrudes on a citizen's protected interest in privacy and liberty is significantly affected by where the conduct occurs*, such as in the home, in an automobile, or on a public street. A government intrusion into the home is at the extreme end of the spectrum: 'Nothing is as personal or private. Nothing is more inviolate.' "

Id. (citations omitted) (emphasis added).

Thus, this court has held that police with probable cause to believe a person has committed a crime may not enter a home to arrest that person without a warrant, unless exigent circumstances exist. *State v. Olson*, 287 Or 157, 165, 598 P2d 670 (1979). It explained, "Such probable cause justifies only the issuance of a warrant." *Id*. Conversely, if police have an arrest warrant,

they may enter a residence to execute it, so long as they have probable cause to believe that the person is on the premises. *State v. Jordan*, 288 Or 391, 402, 605 P2d 646 (1980). In that case, a neutral magistrate has determined that the arrest is appropriate, and the police are merely executing that order, with the additional limitation that they must have probable cause of the person's presence to enter a private residence to do so.

Notably, even under the exigent circumstances doctrine, this court has never approved of a warrantless entry into a home except in the hope of preventing danger to life or to prevent the escape of a felony suspect. *Stevens*, 311 Or 128-32; *Miller*, 300 Or at 229; *Girard*, 276 Or at 515. Even the latter context involves what future danger the public may face if the felon is left to roam free and wishes to maintain that freedom. *See Jordan*, 288 Or at 400-01 (explaining that the "inherent mobility to escape often presents unforeseeable dangers that necessitate swift police action"). Whereas, the destruction of evidence involves the punishment of past wrongs—a less compelling interest. Thus, a police entry to seize evidence of a completed low-level offense lacks the urgent public safety interest that prompts a police entry to either render emergency aid to someone in distress or seize a felon who is actively fleeing police custody. The only other warrant exception that provides for warrantless home entries is the emergency aid exception—again a situation in which police

hope to alleviate a situation involving serious physical injury or harm. *State v. Baker*, 350 Or 641, 649, 260 P3d 476 (2011).

C. The dissipation of evidence is not as exigent a circumstance as the destruction of evidence.

The dissipation of evidence is not as dire as the destruction of evidence. Dissipation happens gradually—it does not present a "now or never" situation akin to the proverbial flushing toilet. In the case of evidence of alcohol intoxication, it occurs at a steady and predictable rate. And importantly, it cannot be controlled by either the intoxicated person or the officers seeking the evidence. *Missouri v. McNeely*, __ US __, 133 S Ct 1552, 1561, 185 L Ed 2d 696 (2013). That greatly reduces the necessity, and hence the exigency, of acting *immediately* to secure the evidence, rather than obtaining a search warrant.

Furthermore, because evidence of alcohol intoxication dissipates at a steady and predictable rate, retrograde extrapolation may be applied to a current BAC level to determine a prior BAC level. *State v. Eumana-Moranchel*, 352 Or 1, 10, 277 P3d 549 (2012) (holding relevant and admissible "an expert's testimony explaining retrograde extrapolation, which uses a person's BAC at the time of the test to establish, based on a scientific formula, that the person's BAC was above the legal limit at a certain earlier time"). The availability of retrograde extrapolation evidence diminishes the exigency of obtaining a

defendant's BAC without securing a warrant to do so. Although alcohol dissipates at a steady rate, so that "minutes count," *Machuca*, 347 Or 657, those minutes become much less critical when a retrograde extrapolation formula is used. Under those circumstances, the state only needs evidence of the defendant's BAC while some alcohol remains in the system—it need not be the moment closest to driving (assuming the other retrograde extrapolation factors are available).

Another factor to consider is the need for the evidence. In the case of DUII, the state has alternative methods of proof. ORS 813.010(1).[3] The state may prove the element of intoxication by proving that the defendant's BAC is above .08, or that he is impaired to a noticeable or perceptible degree. UCrJI No. 2701 ("'Under the influence of intoxicating liquor' means that [defendant's name]'s physical or mental faculties were adversely affected by the use of

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[3] ORS 813.010(1) provides:

> "(1) A person commits the offense of driving while under the influence of intoxicants if the person drives a vehicle while the person:
>
> "(a) Has 0.08 percent or more by weight of alcohol in the blood of the person as shown by chemical analysis of the breath or blood of the person made under ORS 813.100, 813.140 or 813.150;
>
> "(b) Is under the influence of intoxicating liquor, a controlled substance or an inhalant; or
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> "(c) Is under the influence of any combination of intoxicating liquor, an inhalant and a controlled substance."

intoxicating liquor to a noticeable or perceptible degree."); *State v. King*, 316 Or 437, 446, 852 P2d 190 (1993), *overruled in part on other grounds by Farmers Ins. Co. v. Mowry*, 350 Or 686, 697, 261 P3d 1 (2011) (holding that ORS 813.010(1)(a), (b), and (c) describe single offense, and jury need not agree on which test results (BAC, FSTs, or combination) established that the driver was under the influence). So even if the state is not able to obtain BAC evidence, it may still prosecute the suspect and obtain a conviction based on impairment evidence.

Finally, the seriousness of the offense and the government's interest in prosecuting a suspected offender must be taken into consideration. The government's interest in prosecuting a person for a serious or violent felony is much greater than for a nonviolent offense designated as a misdemeanor or a violation by the legislature. The five-year statutory maximum for the lowest classification of felonies, Class C, is five times greater than the statutory maximum for the highest classification of misdemeanors, Class A. *Compare* ORS 161.603(3) with ORS 161.615(1). Thus, the need to enter a home to secure DNA evidence of a rape or murder is much greater than the need to enter to seize a half-eaten candy bar to use in a shop-lifting prosecution.

Because the exigent circumstances exception is a doctrine of "practical necessity," courts must consider the type of offense, the type of evidence that is hoped to be gained by the search, and whether the same or similar evidence can

be obtained by other means when determining whether exigent circumstances justifying a warrantless search exist.

II. Before entering a home without a warrant to obtain evidence of intoxication, the state must show a strong need for the evidence under the particular circumstances of the case and that a warrant could not be obtained without significantly undermining the efficacy of the search.

The state seeks to extend *Machuca*'s and *Mazzola*'s reliance on the dissipating nature of BAC evidence and other observable evidence of impairment to the very different context of a warrantless entry into a home. Petitioner's BOM at 14-20. However, the analysis in those cases does not translate beyond testing someone who is already lawfully seized. For a warrantless entry into a home, the need to obtain dissipating DUII evidence is not an exigent circumstance justifying the state's violation of a person's privacy rights.

A. *Machuca*'s narrow near *per se* exigency for blood draws, which are guaranteed to produce evidence of BAC, does not extend to other situations.

In *State v. Machuca*, 347 Or 644, 227 P3d 729 (2010), this court considered "*the role that exigent circumstances play in blood draws* conducted under scenarios like the one at issue here." *Id*. at 651 (emphasis added). That scenario arose when police arrested the defendant for DUII at the hospital following a single-car accident and conducted a blood draw without a warrant. This court traced the history of its own previous decisions on the subject of

DUII blood draws and concluded that its exigent circumstances analysis in *State v. Moylett*, 313 Or 540, 836 P2d 1329 (1992), "which required the state to prove 'that it could not have obtained a search warrant without sacrificing the evidence,'" unnecessarily and inappropriately "shifted [the] focus away from the blood alcohol exigency itself and onto the speed with which a warrant presumably could have issued in a particular case." *Machuca*, 347 Or at 656. After disavowing that analysis, it explained:

> "*Milligan*[4] was not, and is not now, to the contrary. We agree with the observation in *Milligan* that a '[w]arrantless seizure and search under such circumstances therefore is constitutionally justified, unless a warrant can be obtained without sacrificing the evidence.' 304 Or at 665–66. *Milligan*, however, illustrates that when probable cause to arrest for a crime involving the blood alcohol content of the suspect is combined with the undisputed evanescent nature of alcohol in the blood, those facts are a sufficient basis to conclude that a warrant could not have been obtained without sacrificing that evidence.
>
> "It may be true, phenomenologically, that, among such cases, there will be instances in which a warrant could have been both obtained and executed in a timely fashion. The mere possibility, however, that such situations may occur from time to time does not justify ignoring the inescapable fact that, in every such case, evidence is disappearing and minutes count. 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**. We do so, however, understanding that particular facts may show, in the rare case, that a warrant could have been obtained and executed *significantly* faster than the actual process otherwise used under the

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4 *State v. Milligan*, 304 Or 659, 748 P2d 130 (1988).

> circumstances. We anticipate that **only in those rare cases will a warrantless blood draw be unconstitutional**."

Machuca, 347 Or at 656-57 (italics in original; bold added). Thus, by its terms, the near *per se* exigency announced in *Machuca* only applies to warrantless blood draws.

That comports with the court's analysis of the exigency involved. The court relied heavily on *Milligan*, which started with the premise that the defendant's lawfully seized body (the place to be searched), contained dissipating evidence:

> "In concluding that the search of the defendant's body and the seizure of his blood did not violate Article I, section 9, this court began with the observation that, at the time that the defendant was seized, the police had probable cause to believe that the blood alcohol evidence in his body was rapidly dissipating:
>
> > 'When he was seized, the officers had probable cause to believe that defendant was a vessel containing evidence of a crime he had committed—evidence that was dissipating with every breath he took. *See State v. Heintz*, *supra*, 286 Or at 248, 249 [594 P2d 385].'
>
> *Milligan*, 304 Or at 665, 748 P2d 130."

Machuca, 347 Or at 653. The *Machuca* court then addressed "exactly the type of exigency that had necessitated a warrantless blood draw from the defendant in [the *Milligan*] case," quoting from *Milligan*:

> "'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. Testimony at the hearing on defendant's motion to

> dismiss established that alcohol dissipation rates vary from person to person. To determine the dissipation rate of any particular individual, it is necessary to take more than one blood sample. A nurse at the hospital testified that the "usual practice" was to draw the blood samples one hour apart. Thus, the first blood sample must be drawn early enough so that a measurable amount of alcohol will still be present in the suspect's blood an hour later. *This evidence established that exigent circumstances existed justifying the warrantless extraction of at least the initial blood sample,* so long as the extraction was made promptly after the suspect was taken to a place where it could be made. He was taken to such a place in this case. No warrant was required for the initial testing of defendant's blood.'
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> *Milligan*, 304 Or at 666, 748 P2d 130 (emphasis added)."

Machuca, 347 Or at 654.

Several factors are important in that analysis. First, the object to be searched in blood draw cases is the defendant's body—a vessel that the police both possess and have probable cause to believe contains dissipating evidence. The government has already substantially impaired the liberty of that body—through the arrest.

Second, the *Machuca* court emphasized the following sentence of the *Milligan* opinion: "*This evidence established that exigent circumstances existed justifying the warrantless extraction of at least the initial blood sample*, so long as the extraction was made promptly after the suspect was taken to a place where it could be made." *Machuca*, 347 Or at 654. That shows that the exigency was limited in two ways. First, it justified the initial seizure of blood to obtain a baseline BAC before an unknown amount of alcohol had dissipated,

but it did not necessarily justify a later blood draw that would not occur for a specified period of time. Thus, the mere fact of the dissipation of alcohol does not create the exigency—it is the unknown amount of dissipation that matters. In addition, the exigency justification required the extraction to be made "promptly after the suspect was taken to a place where it could be made." Thus, to prove the exigency, the state must show that it did indeed pursue the evidence expeditiously.

Third, the *Machuca* court did not abandon the notion that if "a warrant can be obtained without sacrificing the evidence," then the police do not face a true exigency. *Machuca*, 347 Or 656 ("We agree with the observation in *Milligan* that a '[w]arrantless seizure and search under such circumstances therefore is constitutionally justified, unless a warrant can be obtained without sacrificing the evidence.'"). It simply shifted the presumption in DUII blood draw cases by acknowledging that when the issue is the seizure of blood from a person to which the police already have lawful access, it is an undisputed fact that the alcohol in that blood is dissipating at a regular rate.

Machuca was decided before the United States Supreme Court's decision in *Missouri v. McNeely*, 133 S Ct 1552. *McNeely* held that "In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn *without significantly undermining the efficacy of the search*, the Fourth Amendment mandates that they do so." *Id*. at

1561 (emphasis added). This court claims that its holding in *Machuca* is consistent with *McNeely*, because it leaves open the possibility that a warrant may be required in "rare" circumstances. *State v. Moore*, 354 Or 493, 497, 318 P3d 1133 (2013), *adh'd to as modified on recons*, 354 Or 835, 322 P3d 486 (2014) ("In our view, the Court's rejection of a *per se* exigency rule is not inconsistent with our statement in *Machuca II* that, while exigent circumstances are 'ordinarily' present in a case involving alcohol, that may not be true, depending on the facts of a particular case."); *see also Mazzola*, 356 Or at 816 n 11 (reiterating *Moore* claim and distinguishing *McNeely* on the ground that it was limited to blood draws and did not apply to roadside FSTs). Whether or not the *Machuca* rule comports with the Fourth Amendment and the state's burden to prove the reasonableness of a warrantless search, this court should not extend it to entry into a home to collect DUII evidence.

Mazzola is even less helpful to the state. As explained above in section I.A., the *Mazzola* court held that "the issue of exigency should be assessed in light of the reasonableness of the search in time, scope, and intensity." *Mazzola*, 356 Or at 820. It then concluded that the limited intrusion of roadside FSTs on a person who had already been seized was justified because of the dissipating nature of intoxication evidence and the importance in a controlled substance DUII case of obtaining that evidence as close as possible to the time of driving. *Id*. at 819-20. That analysis *supports* defendant's argument that

exigent circumstances do not justify the warrantless intrusion into a home to obtain DUII evidence.

B. The state's interest in possibly securing bodily evidence of DUII does not obviate the need for a warrant to enter a home.

The primary concern here is the warrantless invasion of a home. As explained above, the home is the most protected area under Article I, section 9. Compared with blood, urine, and breath tests and FST searches for DUII evidence, which only yield the evidence for which the police have probable cause, the search of a home exposes a wealth of private information that is unrelated to the crime being investigated. Thus, the privacy invasion is much greater. *Fair*, 353 Or at 600 ("A government intrusion into the home is at the extreme end of the spectrum: 'Nothing is as personal or private. Nothing is more inviolate.'"). Under those circumstances, the government's need for the invasion must be particularly strong. *Mazzola*, 356 Or at 820 ("the issue of exigency should be assessed in light of the reasonableness of the search in time, scope, and intensity").

Second, the likelihood of obtaining the desired evidence is much less certain. Given the implied consent statutory scheme, the entry into a person's home does not inevitably lead to BAC evidence. Even if police have probable cause to believe that a person has committed the crime of DUII and that the person can be located within the residence, the police do not have probable

cause to believe that the sought-after evidence (the BAC) will likely be found in the place to be searched (the home). The legislature prohibits police from physically compelling an uncooperative person to submit to a blood draw or a breath test. ORS 813.100(2).[5] Thus, whether the police are able to obtain the BAC evidence is entirely dependent on the will of the suspect—one who, like in this case, has retreated into his home rather than interact with the police. In other words, because of the implied consent statutory scheme, police entry into a house merely puts the officers in the position of requesting consent from an uncooperative suspect. A warrantless entry into the home for the purpose of *requesting* consent is not a recognized exception to Article I, section 9.

Third, the nature of the exigency changes when the issue is the entry into a home to obtain BAC evidence. Unlike the blood draw situation, in which the drawing of the blood necessary forestalls the destruction of evidence, mere entry into a home does not forestall the destruction of BAC evidence—many more steps are needed for that to occur. Unless police have a phlebotomist or a breathalyzer machine with them, they cannot obtain the evidence right away.

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[5] ORS 813.100(2) provides:

> "No chemical test of the person's breath or blood shall be given, under subsection (1) of this section, to a person under arrest for driving a motor vehicle while under the influence of intoxicants in violation of ORS 813.010 or of a municipal ordinance, if the person refuses the request of a police officer to submit to the chemical test after the person has been informed of consequences and rights as described under ORS 813.130."

They must take the person to a location where the blood draw or breath test can occur, and they must perform the test as soon as possible. Many things can occur in an individual situation to delay the obtaining of that evidence, some of which are in the control of the police, including remaining on the premises to collect other evidence or choosing not to pursue a blood draw or breath test. *See Matsen/Wilson*, 287 Or 581, 587 (holding that officer's investigative choices are relevant to determining whether exigent circumstances existed). In order for an exigency to obtain in an alcohol dissipation situation, the state must show that it pursued the evidence expeditiously. *Milligan*, 304 Or at 666 (stating that exigent circumstances exist for a warrantless blood draw, "so long as the extraction was made promptly after the suspect was taken to a place where it could be made"). Thus, the exigency relies on more than the indisputable evidence of alcohol dissipation; it also hinges on swift action by the police to obtain and preserve the dissipating evidence.

Fourth, the need for the evidence affects the analysis and weighs against finding an exigency in most DUII situations. Because BAC evidence dissipates at a steady rate and because of the availability of retrograde extrapolation evidence in Oregon, a person's BAC at a given time can be calculated based on his BAC at a later time. *Eumana-Moranchel*, 352 Or at 10. That lessens the need for an *immediate* entry to obtain BAC evidence; the evidence will still be available after some delay. And as explained above, because police have

alternative ways to prove intoxication, BAC evidence is less necessary than other kinds of evidence, such as certain kinds of physical evidence in a murder case, possession of controlled substances in a drug case, and possession of stolen goods in a property crime case.

And even if police are seeking only observable signs of intoxication, both the need for the evidence and the exigency must be considered. As with BAC evidence, observable signs of intoxication, such as bloodshot, watery eyes, slurred speech, the odor of alcohol, and poor coordination cannot be destroyed immediately. Like BAC evidence, they dissipate slowly over time. Furthermore, police may already have that or similar evidence prior to entry into a home. The exigent circumstances exception to the warrant requirement requires probable cause that the person has committed a crime. In the case of DUII evidence, that probable cause is often based on some of the same evidence that the police hope to attain by a warrantless entry. Police may have already observed signs of intoxication before the person retreats into his home, or they may have received reports of that evidence from third parties who can testify to more timely observations. When that is the case, there is no need for an immediate entry that would excuse the warrant requirement.

The state on review relies heavily on the possibility that the suspect could contaminate the evidence by drinking after he drove and thus confuse the issue of intoxication. Petitioner's BOM at 2, 9, 20-21, 24-27, 34 (citing the

possibility of intentional tampering as an exigent circumstance in DUII cases). However, the mere possibility of contamination cannot provide a basis for exigency. *Peller*, 287 Or at 264 (explaining that "the mere possibility" that the defendant could make a break if he were so inclined does not give rise to exigent circumstances). Absent specific signs supporting that exigency, such as seeing the suspect open a beer through a window or hear him request one from another occupant in the house, the possibility of contamination is conjecture.

It is also worth noting that a warrantless entry to obtain DUII evidence will not prevent future or ongoing harm. Once a person is in his home, he has ceased to drive, and the police can prevent him from doing so again (a remote possibility if he knows that police are looking for him). His most likely course of action is to "sleep it off," which does not put the public or the police at risk of harm. Furthermore, immediate apprehension of a DUII suspect likely will not prevent him from committing future DUIIs, in the way that apprehending a dangerous felon will likely prevent future harm because the person is incarcerated. Most people who are arrested for DUII are cited and released. And even after they are convicted, they are not likely to receive a lengthy jail sentence that would keep them off the road. *See* ORS 813.010(4), (5) (DUII is Class A misdemeanor or Class C felony); ORS 161.615 (maximum sentence for Class A misdemeanor is one year); OAR 213-017-0006 and Appendix (felony DUII classified at crime seriousness level six, with presumptive sentence

ranging from probation to 30 months in prison). Thus, the state's only interest in seizing a DUII suspect in his home is the possibility of obtaining evidence for prosecution of a misdemeanor crime.[6]

A final consideration is the advances in technology that have shortened the amount of time that it takes to get a warrant. *McNeely*, 133 S Ct at 1561-63; *Fessenden/Dicke*, 355 Or at 771. In Oregon, the availability of telephonic warrants means that a warrant in a drunk driving case, in which the probable cause evidence is usually straightforward, should be able to be obtained in less than an hour. ORS 133.545(7)-(8); *see also State v. Rice*, 270 Or App 50, 55, 346 P3d 631, *rev allowed*, 357 Or 550 (2015) (quoting trial court finding, "It can take a matter of mere minutes to get a judge on the line for a telephonic warrant if things go right."). The Supreme Court noted that some jurisdictions have standard-form warrant applications for drunk-driving investigations, which is something that Oregon law enforcement could adopt. *McNeely*, 133 S Ct 1562. Indeed, the failure to adopt such a standard arguably could be considered a means of creating a perceived exigency.

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[6] Police could have information that the suspect has two prior DUII convictions within the past 10 years, which would make the crime a Class C felony. However, that would only slightly increase the state's interest in apprehending the person.

The forgoing considerations show that a warrantless entry into a home to collect evidence of DUII will rarely be justified under the exigent circumstances doctrine, despite the dissipating nature of BAC and intoxication evidence.

III. Under the totality of the circumstances, the state did not prove that exigent circumstances excused the need to obtain a warrant to enter defendant's home in this case.

The officers in this case entered defendant's trailer between 1:12 and 1:33 a.m., three hours after first becoming aware that defendant may have been driving while intoxicated.

Police received a dispatch report at approximately 10:15 p.m. that a man and a woman were fighting in a residential driveway near a vehicle that had crashed into a ditch. *State v. Ritz*, 270 Or App 88, 89, 347 P3d 1052, *rev allowed*, 357 Or 550 (2015). They confirmed that report at 10:30 p.m., when they saw the truck in a ditch and spoke to the woman, who indicated that she lived at the residence with defendant, who had been drinking that day. *Id*. At that point, the police had probable cause to believe that defendant had committed the crime of DUII.

The woman allowed police to check the residence, but defendant was not inside. One of the officers heard what sounded like someone running through nearby bushes, but upon investigation, he did not find anyone. Police learned that the truck belonged to a third party, so one of the officers went to the truck

owner's residence. There, the police obtained additional evidence that defendant had committed DUII: he said that he had seen defendant driving the truck shortly before the crash, that defendant was driving unsafely and had damaged property, and that "defendant was 'slumped over' in the truck and appeared to be intoxicated." *Id*.

At least three officers were involved in the investigation at that point. The officer who had spoken to the truck's owner left the crash scene at 11:30 p.m. *Id*. at 90. At 11:50 p.m., the last officer left the crash scene. That officer returned at 12:56 a.m., and as he pulled up, he saw defendant standing outside the trailer near the door. "Seconds later," defendant went inside and closed the door, briefly stuck his head out, then closed it again. *Id*. At 1:05 a.m., the officer recalled another investigating officer, who returned to the scene at 1:12 a.m. Several Brookings police units also arrived to provide assistance, and the law enforcement officers formed a perimeter around the trailer to cover all exit points. *Id*. The police then entered defendant's trailer and arrested defendant at 1:33 a.m.

They observed an "overwhelming odor" of alcohol and noted that defendant had bloodshot, watery eyes, and slurred speech. Defendant was transported to the Curry County Jail, where he made incriminating statements and took a breath test at 2:23 a.m., which showed that he had a BAC level of 0.14 percent. *Id*. at 90-91.

One of the officers testified that he decided not to apply for a warrant because he was concerned about the loss of evidence due to the dissipation of alcohol in defendant's bloodstream. Another officer testified that they wanted to minimize the time that the Brookings officers were at the scene because those officers were out of their jurisdiction and needed to return to their normal duties. *Id*. at 90.

One officer testified that the last telephonic warrant that he had obtained took 45 minutes. Another officer estimated that it would take 90 minutes to prepare a warrant application at the scene, and a little longer to obtain warrant. *Id*. at 90.

Those circumstances do not present an exigency that could justify entering defendant's residence without a warrant. Most importantly, the officers waited almost three hours from the time they had probable cause that defendant had committed DUIII to the time that they made the warrantless entry. *See Matsen*/*Wilson*, 287 Or at 587 (holding that police may not delay seeking a warrant until exigent circumstances arise). If the officers had been serious about apprehending defendant, they could have obtained an arrest warrant, which would have allowed them to enter defendant's residence if they obtained probable cause to believe that he was inside. *Jordan,* 288 Or at 402. That the officer returned to defendant's residence to see whether defendant had returned shows that the officers believed it likely to occur.

Second, the officers already had ample evidence that defendant had committed DUII. Two witnesses had provided statements that they had observed defendant driving while intoxicated by alcohol, and the scene corroborated their account.

Third, the officers knew that over three hours had elapsed since defendant had been driving. Consequently, even if defendant consented to some form of BAC test, it would not yield evidence of defendant's BAC at the time of driving without the use of retrograde extrapolation. A delay of 45 to 90 minutes (less, if one of the officers had been actively obtaining a search or arrest warrant) would not significantly affect that calculation.

Those circumstances do not present an "emergency" situation making it necessary for police to enter defendant's home without a warrant.[7]

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[7] The trial court found that the warrantless entry was justified by exigent circumstances due to the dissipation of alcohol in defendant's blood stream, hot pursuit when the officer saw defendant outside his trailer, and officer safety because the Brookings officers were not attending to their regular duties of patrolling the city of Brookings. The state has abandoned the latter two arguments in this court.

IV. The warrantless entry into defendant's residence was not justified by the probable cause and exigent circumstances exception to the warrant requirement of the Fourth Amendment to the United States Constitution.

A. The Fourth Amendment does not allow police to enter a home without a warrant to obtain dissipating BAC evidence unless it involves a serious felony and the delay to obtain a warrant would significantly undermine the efficacy of the search.

The Fourth Amendment protects against "unreasonable" searches and seizures.[8] A warrantless search is *per se* unreasonable unless it falls within one of the established exceptions to the warrant requirement. *Katz v. United States*, 389 US 347, 357, 88 S Ct 507, 19 L Ed 2d 576 (1967). However, those exceptions are few in number, and "police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests." *Welsh v. Wisconsin*, 466 US 740, 749-50, 104 S Ct 2091, 80 L Ed 2d 732 (1984).

It is "axiomatic" that "'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" *Id*. at 748 (quoting *United States v. United States District Court*, 407 US 297, 313, 92 S Ct 2125,

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[8] The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]"

The Fourth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 US 643, 655, 81 S Ct 1684, 6 L Ed 2d 1081 (1961).

2134, 32 L Ed 2d 752 (1972)); *see also Payton v. New York*, 445 US 573, 585-86, 100 S Ct 1371, 63 L Ed 2d 639 (1980) (same).

Probable cause and exigent circumstances can justify the warrantless entry into a home under certain circumstances. *Welsh*, 466 US at 741; *Payton*, 445 US at 590 ("[a]bsent exigent circumstances," the "firm line at the entrance to the house * * * may not reasonably be crossed without a warrant"). Exigent circumstances include hot pursuit of a fleeing felon, imminent destruction of evidence, the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling. *Minnesota v. Olson*, 495 US 91, 100, 110 S Ct 1684, 109 L Ed 2d 85 (1990). However, police may not create their own exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment. *Kentucky v. King*, 563 US 452, 461-62, 131 S Ct 1849, 1857-58, 179 L Ed 2d 865 (2011). Whether exigent circumstances justify a warrantless entry is determined by looking at the totality of the circumstances. *McNeely*, 133 S Ct at 1559.

In some situations, the destruction of evidence based on blood alcohol dissipation can justify a warrantless blood draw of a previously arrested person. *McNeely*, 133 S Ct 1552; *Schmerber v. California*, 384 US 757, 770-771, 86 S Ct 1826, 16 L Ed 2d 908 (1966). In *Schmerber*, the Supreme Court considered the totality of the circumstances in finding the warrantless blood draw reasonable:

> "The officer in the present case, however, might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.' We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, *there was no time to seek out a magistrate and secure a warrant*. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest.
>
> "Similarly, we are satisfied that the test chosen to measure petitioner's blood-alcohol level was a reasonable one. *Extraction of blood samples for testing is a highly effective means of determining the degree to which a person is under the influence of alcohol*. Such tests are a commonplace in these days of periodic physical examination and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain."

Id. (citations and footnote omitted, emphasis added); *see McNeely*, 133 S Ct at 1560 (observing that *Schmerber* based its holding on specific facts of case).

Thus, in *McNeely*, the Court rejected a *per se* exigency rule for blood testing in DUII cases. *McNeely*, 133 S Ct at 1560-61, 1568. It noted that the steady and predictable dissipation of BAC evidence, which is out of the suspect's control, does not present the same kind of exigency as the immediate destruction of other types of evidence. *Id*. at 1561. It cited the likely delay in obtaining the evidence caused by the need to transport the suspect to a medical facility and suggested that a warrant could be obtained during that time. And it cited the advances in technology that make getting a warrant much quicker and

more efficient. *Id*. at 1561-62. Those are all reasons that the need to obtain a blood draw in the DUII context is not exigent.

The exigent circumstances exception does not apply where there is time to secure a warrant. *See Michigan v. Tyler*, 436 US 499, 509, 98 S Ct 1942, 56 L Ed 2d 486 (1978) ("Our decisions have recognized that a warrantless entry by criminal law enforcement officials may be legal when there is compelling need for official action and no time to secure a warrant."); *Vale v. Louisiana*, 399 US 30, 35, 90 S Ct 1969, 26 L Ed 2d 409 (1970) (finding warrantless home entry unreasonable where practical to obtain warrant). Thus, *McNeely* held that "In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *Id*. at 1561. It is the state's burden to prove that a warrant could not be obtained in within a reasonable time. *Welsh*, 466 US at 750.

Another significant consideration when deciding whether exigent circumstances exist is the gravity of the offense. In *Welsh*, another alcohol dissipation case, the Supreme Court explained:

> "Our hesitation in finding exigent circumstances, especially when warrantless arrests in the home are at issue, is particularly appropriate when the underlying offense for which there is probable cause to arrest is relatively minor. Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all

> warrantless home entries. When the government's interest is only to arrest for a minor offense, that presumption of unreasonableness is difficult to rebut, and the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate."

Welsh, 466 US at 750 (citations and footnote omitted). The court then held "that an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made." *Id*. at 753. It stated that "application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense, such as the kind at issue in this case [a non-jailable violation], has been committed." *Id*. Thus, the court concluded that the warrantless home arrest in that case merely "because evidence of the petitioner's blood-alcohol level might have dissipated while the police obtained a warrant" constituted "unreasonable police behavior." *Id*. at 754.

B. Under the totality of the circumstances, the warrantless entry into defendant's residence to obtain evidence of a misdemeanor DUII was not reasonable.

Applying the forgoing principles to this case shows that the warrantless entry into defendant's residence was unreasonable under the Fourth Amendment. Because this case involved a warrantless home entry, the state's burden to prove the need for the entry was high.

At trial, the state attempted to justify the entry based on the natural dissipation of alcohol in the blood stream. However, as explained above in subsection II.B., the likelihood of obtaining the desired evidence was uncertain. *Compare Schmerber*, 384 US at 770-771 (explaining that warrantless search of the defendant's blood was reasonable because it was "a highly effective means" of determining his level of intoxication). Because the Oregon implied consent statutory scheme does not permit police to forcibly obtain a person's blood or breath to test for BAC in a DUII case, the only thing gained from the warrantless entry is the opportunity to request consent. The fact that the Oregon Legislature has chosen to limit the state's ability to obtain BAC evidence to physically consensual situations in DUII cases shows that the state's need for the evidence is not compelling. *See Welsh*, 466 US at 754 (explaining that the State of Wisconsin's decision to classify the first offense for DUII as a noncriminal, civil forfeiture offense for which no imprisonment is possible "is the best indication of the State's interest in precipitating an arrest"). The warrantless entry of a person's home merely for the purpose of *requesting* consent is unreasonable under the Fourth Amendment.

Furthermore, to prove an exigency, the state was required to prove that it could not have obtained a warrant without significantly undermining the efficacy of the search. At the time that police entered defendant's residence, over three hours had elapsed since the accident. Officers testified that it would

have taken 45 to 90 minutes to obtain a warrant. Because the officers did not know when defendant last drank or how much he drank, they could not prove that the additional time to get a warrant would have prevented a retrograde extrapolation analysis from being effective. Notably, the officers had evidence that defendant showed extreme signs of intoxication (being "slumped over" while driving and driving into a ditch), indicating that his BAC was high at that time. Thus, it was not reasonable to conclude that a 45- to 90-minute delay would be dispositive regarding whether the police could obtain any BAC evidence, especially when they did not even know whether defendant would consent to a test.

Finally, the gravity of the offense does not justify the warrantless entry into defendant's apartment. In Oregon, DUII is a Class A misdemeanor, punishable by a year in jail. ORS 813.010(4); ORS 161.615(1). Only if a person has been convicted previously of two DUIIs in the past 10 years does the offense become a felony. ORS 813.011(1). Many federal courts have held that "an exigency related to a misdemeanor will seldom, if ever, justify a warrantless entry into the home." *LaLonde v. County of Riverside*, 204 F3d 947, 956 (9th Cir 2000); *see also Hopkins v. Bonvicino*, 573 F3d 752, 769 (2009), *cert den*, 130 S Ct 2342 (2010) (stating that misdemeanor DUII does not fall within the exigent circumstances exception justifying a warrantless entry into a person's home); *United States. v. Struckman*, 603 F3d 731 (9th Cir

2010) ("while the commission of a misdemeanor offense is not to be taken lightly, it militates against a finding of exigent circumstances where the offense, like the criminal trespass at issue here, is not inherently dangerous"); *United States v. Johnson*, 256 F3d 895, 909 n 6 (9th Cir 2001) ("in situations where the underlying offense is only a misdemeanor, law enforcement must yield to the Fourth Amendment in all but the 'rarest' cases"). Even in the context of hot pursuit, a greater exigency than the loss of evidence, "federal and state courts nationwide are sharply divided on the question whether an officer with probable cause to arrest a suspect for a misdemeanor may enter a home without a warrant while in hot pursuit of that suspect." *Stanton v. Sims*, __ US __, 134 S Ct 3, 187 L Ed 2d 341 (2013).

Considering the strong protection the Constitution affords against warrantless entries into a person's home, the lesser seriousness of the crime of DUII, the limited need the state has for BAC evidence, and the ready availability of an electronic warrant, the officer's warrantless entry into defendant's residence was unreasonable and violated his rights under the Fourth Amendment.

CONCLUSION

For the foregoing reasons, defendant respectfully prays that this court reverse the decision of the Court of Appeals, reverse the decision of the trial court, and remand to the trial court for further proceedings.

Respectfully submitted,

ERNEST G. LANNET
CHIEF DEFENDER
CRIMINAL APPELLATE SECTION
OFFICE OF PUBLIC DEFENSE SERVICES

ESigned

ANNE FUJITA MUNSEY OSB #994080
SENIOR DEPUTY PUBLIC DEFENDER
Anne.Munsey@opds.state.or.us

Attorneys for Defendant-Appellant
Randall Ray Ritz

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

Brief length

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 10, 204 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Respondent's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on December 8, 2015.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Respondent's Brief on the Merits will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Paul L. Smith, #001870, Deputy Solicitor General, attorney for Petitioner on Review.

Respectfully submitted,

ERNEST G. LANNET
CHIEF DEFENDER
CRIMINAL APPELLATE SECTION
OFFICE OF PUBLIC DEFENSE SERVICES

ESigned

_____

ANNE FUJITA MUNSEY OSB #994080
SENIOR DEPUTY PUBLIC DEFENDER
Anne.Munsey@opds.state.or.us

Attorneys for Respondent on Review
Randall Ray Ritz