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 No. 11CR1068 CA A152111 SC S063292

REPLY BRIEF OF PETITIONER ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Curry County
Honorable JESSE C. MARGOLIS, Judge

Opinion Filed: March 25, 2015
Authored by Garrett, Judge.
Before: Ortega, Presiding Judge, and DeVore, Judge, and Garrett, Judge.

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STATEMENT OF THE CASE

At the heart of this case—and of the companion case, *State v. Rice* (S063291)[1]—is the scope of the exigent circumstances exception to the warrant requirements of Article I, section 9, of the Oregon Constitution, and of the Fourth Amendment to the United States Constitution. Specifically, the issue in this case is how those exceptions apply to a warrantless home entry for the purposes of securing evidence that is necessarily being destroyed—here, evidence of impairment, including blood-alcohol content (BAC) evidence, possible drug-impairment evidence, and other observational evidence of impairment.

The state files this brief to reply to five of defendant's arguments: (1) that this court's decision in *State v. Girard*, 276 Or 511, 555 P2d 445 (1976), does not permit a warrantless home entry to prevent evidence destruction; (2) that the application of the exigent circumstances exception turns on the need for the evidence, the likelihood of obtaining the evidence, and the severity of the offense being investigated; (3) that the exigent circumstances rule from *State v. Machuca*, 347 Or 644, 227 P3d 729 (2010), and *State v. Milligan*, 304 Or 659,

[1] This case and *Rice* have been consolidated for oral argument, to be held on January 12, 2016.

748 P2d 130 (1988), is limited to blood draws on persons already in custody; (4) advances in technology that make it easier to obtain warrants work to limit the exigent circumstances exception; and (5) that the Fourth Amendment prohibits warrantless home entries to obtain impairment evidence. For the reasons explained below, none of defendant's arguments withstand scrutiny. Instead, this court should conclude that the state's proposed rule—allowing a warrantless home entry for the limited purpose of securing dissipating impairment evidence—respects the constitutional significance of a government entry into the home while remaining true to the foundation of the exigency exception.

A. *Girard* allows a warrantless home entry to secure evidence.

Defendant argues that *Girard* allowed police to make a warrantless entry to arrest a suspect for burglary only to prevent the suspect from fleeing—not to prevent evidence from being destroyed. (Resp BOM 8 n 2). Although this court stated that, because the particular evidence at issue in that case was "not easily disposable," a warrantless entry might not have been justified on that basis alone, it also reaffirmed that the concealing of evidence is generally an exigent circumstance that would justify a warrantless home entry. *Girard*, 275 Or at 514-15. The rule from *Girard* is that a warrantless entry is justified to prevent a suspect from fleeing or to prevent destruction of evidence, unless the evidence is not easily disposable. Of course, the evidence here—impairment

evidence—is easily disposable. In other words, if a warrantless entry to prevent loss of evidence was ever authorized by the exigent circumstances exception, it would necessarily be authorized in a case where officers needed to secure evidence of impairment. Defendant's effort to distinguish *Girard*, therefore, is unavailing.

B. Defendant's proposed rule assumes facts not generally known to officers confronted with a DUII suspect who has barricaded himself in a home.

Defendant proposes a new rule of law that would limit the exigent circumstances exception for purposes of warrantless home entries to an assessment of several factors: "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." (Resp BOM 1). That new rule, however, is not grounded in this court's—or the United States Supreme Court's—exigency caselaw, which generally addresses only whether an exigency exists. Moreover, as explained below, the defendant's proposed factors assume that officers in the field are aware of a whole host of facts that would rarely be available to them; in other words, his proposed rule would require second-guessing an officer's split-second exigency determination with the benefit of later-revealed facts.

The state's proposed rule of law, on the other hand, is firmly rooted in established exigency principles and is consistent with long-settled precedent.

Recognizing the constitutional significance that a warrantless home entry entails, the state's proposed rule allows law enforcement to enter a home to seize a DUII suspect for the sole purpose of securing dissipating impairment evidence only: (1) if the officer has probable cause to believe that evidence of intoxication will still be detectable; and (2) if the suspect is in the home and is knowingly preventing the officer from securing that evidence by refusing to leave. The state's narrow rule remains true to the philosophical basis for the exigency exception while respecting the constitutional significance of a government intrusion into a home.

1. Defendant's suggestion that the state's limited need for BAC evidence undermines the exigency is incorrect.

In arguing that the need for the evidence is a factor in the exigency analysis, defendant maintains that, "[b]ecause 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." (Resp BOM 25). This argument is flawed for three reasons.

First, defendant incorrectly assumes that BAC evidence is the only evidence sought. In addition to BAC evidence, officers investigating a suspected DUII are seeking to secure other relevant evidence. Specifically, officers are gathering observational evidence of a DUII suspect's appearance and behavior as close to the time of driving as possible. As defendant notes,

BAC is but one way of proving DUII. (Resp BOM 15-16). The state also can prove DUII by establishing that defendant was impaired to a noticeable and perceptible degree at or near the time of driving. ORS 813.010(1)(b), (c).

Second, the potential availability of retrograde extrapolation does not replace the need to gather impairment evidence—including BAC evidence—as close in time as possible to the time when defendant drove. Although retrograde extrapolation evidence is relevant and reliable evidence that can be used to estimate a suspect's BAC at an earlier time, the reliability of that evidence diminishes as time passes. Retrograde extrapolation evidence is strongest when law enforcement knows when the suspect started and stopped drinking and when and how much the suspect has had to eat. As time passes, retrograde extrapolation becomes less reliable, and after alcohol is no longer detectable in the breath or blood, retrograde extrapolation is no longer available. Moreover, if a suspect is able to credibly claim that he consumed additional intoxicants after driving, retrograde extrapolation to establish BAC at the time of driving is nearly impossible. Consequently, unless officers know what a defendant's BAC is while standing at the front door, they cannot know whether that evidence will dissipate entirely in the time it takes to get a warrant.

Third, because retrograde extrapolation evidence works only to measure BAC, it provides no assistance when the source of a suspect's intoxication is unknown. Although other drugs also dissipate in the bloodstream over time,

unlike alcohol, not all other drugs dissipate at a predictable rate that would allow an assessment of impairment at some earlier point in time. Defendant's reliance on this factor as part of his proposed rule of law would require law enforcement officers to know which substances were impairing the defendant when they had to determine whether to make a warrantless entry into the house. Although in this case, officers learned—after the fact—that defendant was impaired by alcohol, there was no way for them to know that at the time they had to decide whether or not to seize defendant. *See State v. Snow*, 337 Or 219, 225, 94 P3d 872 (2004) ("The proper focus is on the reasonableness of the officers' actions at the time they took them in response to the exigency[.]").

2. Beyond needing probable cause to believe that evidence will be located in the place to be searched, the "likelihood of obtaining the desired" evidence is not a factor in the exigency analysis.

Defendant next argues that, because "the likelihood of obtaining the desired evidence is much less certain" than his constitutional privacy interest, this court should conclude that no exigency exists. (Resp BOM 23). He argues that, because someone who has barricaded himself inside a home is unlikely to voluntarily submit to a breath or blood test, it is unlikely that police will be able to obtain BAC evidence by entering the suspect's home. (Resp BOM 24). His argument is flawed in two respects.

First, defendant's argument again assumes that the only evidence of impairment that officers are seeking during a DUII investigation is BAC

evidence. As previously noted, BAC is just one method of proving intoxication, and observational evidence is also important. Moreover, even if a defendant refuses to submit to a breath or blood test, that refusal can be used as evidence in a criminal proceeding. *See* ORS 813.310 (evidence of refusal to submit to chemical test admissible in DUII trial). So, rather than being *unlikely* to produce evidence, a warrantless entry to detain a DUII suspect is almost certain to produce evidence (observational evidence and either BAC evidence or refusal evidence).

Second, defendant's argument that a person who retreats into his home is unlikely to cooperate with a breath or blood test is proven empirically false in both this case and in *Rice*. In both of these cases, after the police entered the defendants' homes and arrested them, they submitted to breath tests.

3. The severity of the underlying offense is not a dispositive factor in determining whether an exigency exists.

Defendant also argues that the severity of the underlying offense is a factor in determining whether an exigency exists. (Resp BOM 16-17). He does not, however, identify any source in Oregon law for the proposition that the *existence* of an exigency depends on the officer's subjective belief about what offenses the suspect may have committed. Although the seriousness of the offense that officers are investigating may be relevant in determining the

reasonableness of the officers' subsequent actions, it is not relevant to determining whether an exigency exists.

To be sure, in *Welsh v. Wisconsin*, 466 US 740, 104 S Ct 2091, 80 L Ed 2d 732 (1984), the United States Supreme Court concluded that the state could not rely on exigency as a basis for a warrantless home entry for the sole purpose of making an arrest for a non-jailable traffic offense. The Court so held because the "State of Wisconsin has chosen to classify the first offense for driving while intoxicated as a noncriminal, civil forfeiture offense for which no imprisonment is possible." *Id.* at 754. Therefore, the state's interest in making a warrantless home entry to preserve BAC evidence was so low that no exigency existed. *Id.*

Of course, in Oregon, DUII is a criminal offense—and potentially a felony. *See* ORS 813.010(5) (describing circumstances that would convert DUII from a Class A misdemeanor to a felony). And, in the 30 years that have passed since *Welsh*, no one now "can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." *Missouri v. McNeely*, 569 US ___, 133 S Ct 1552, 1565, 185 L Ed 2d 696 (2013) (internal quotation omitted). So, the state's interest here is much greater than was the state's interest in *Welsh*. Moreover, at the time an officer has to make the decision to enter or wait for a warrant, he or she may have no way of knowing whether a DUII suspect has prior offenses that would convert the current

offense into a felony or if there are other associated offenses not yet known by the officers.

So, the "significance of the offense" factor is important only in situations where the on-scene law enforcement officers know that the only offense they are investigating is a noncriminal (or at least non-jailable) offense. Other states interpreting *Welsh* have reached similar conclusions. *See People v. Thompson*, 135 P3d 3, 8-9 (Cal 2006) (distinguishing *Welsh* on the ground that "in California, driving under the influence is not an 'extremely minor' offense"); *State v. Keenan*, 325 P3d 1192, 1200 (Kan App 2014), *rev granted* (April 29, 2015) (distinguishing *Welsh* on the ground that even misdemeanor DUI in Kansas is a jailable offense). *See also Illinois v. McArthur*, 531 US 326, 336-37, 121 S Ct 946, 148 L Ed 2d 838 (2001) (distinguishing *Welsh*; allowing law enforcement to prevent people from entering a home for two hours while they obtained a warrant to search for drug possession evidence to prevent destruction of the evidence before a warrant could be obtained).

Additionally, it is worth reiterating that even if the significance of the offense is a factor in the exigency analysis under the Fourth Amendment, this court has never identified it as a factor under Article I, section 9. Rather, this court's exigency analysis simply focuses on whether "immediate action is necessary to prevent the disappearance, dissipation, or other loss of evidence." *State v. Mazzola*, 356 Or 804, 811, 345 P3d 424 (2015). This court has applied

the same exigency analysis whether the crime being investigated was a misdemeanor DUII (*Mazzola*), a felony burglary (*Girard*), or unspecified traffic offenses (*Snow*).

4. The extent to which evidence will be lost while a warrant is obtained is the most significant factor in determining whether the exigent circumstances exception applies.

The final factor in defendant's proposed exigency analysis—the potential for evidence loss while a warrant is obtained—is the only factor that finds support in this court's caselaw. In fact, loss of evidence is one of the exigencies that this court specifically has recognized will dispense with the warrant requirement of Article I, section 9. *See Snow*, 337 Or at 223 (quoting *State v. Stevens*, 311 Or 119, 126, 806 P2d 92 (1991)) ("An exigent circumstance is a situation that requires police to act quickly to prevent danger to life or serious damage to property, or to forestall a suspect's escape or the destruction of evidence.").

Defendant downplays that factor here, though, arguing again that BAC evidence would not be lost because the state could rely on retrograde extrapolation and the evidence it already had which provided probable cause to arrest. (Resp BOM 26). As explained above, the utility of retrograde extrapolation is limited and is not a substitute for BAC and observational evidence as close in time as possible to the time the suspect drove. And, it provides no aid to the state in proving impairment by substances other than

alcohol. Moreover, although the state already had some evidence of impairment at the time officers entered defendant's home, nothing about the exigent circumstances exception compelled the state to sacrifice obtaining other evidence. *See Snow*, 337 Or at 224-25 (holding that "[t]he fact that other limited information about [the] defendant was available does not mean that the officers had no right to seek more specific information that would help them apprehend [the] defendant").

In summary, defendant's four-factor proposal for determining whether the exigent circumstances exception authorizes a warrantless search or seizure lacks support in this court's caselaw and is not necessary. Under well-settled exigency principles, law enforcement officers may conduct a warrantless search or seizure to prevent loss of evidence (among other exigencies that would permit a search or seizure) during the time it would take to obtain a warrant. As explained below, because impairment evidence is necessarily always dissipating, any delay caused by obtaining a warrant will necessarily lead to the loss of evidence.

C. *Machuca* and *Milligan* apply broadly to dissipating impairment evidence.

Defendant argues that *Machuca* and *Milligan* apply only when a defendant already has been lawfully seized and only when the search performed was a warrantless blood draw. (Resp BOM 18-19). This court should not read

those cases so narrowly. The question in *Machuca* was whether "the undisputed evanescent nature of alcohol in the blood," 347 Or at 656, necessarily established that blood-alcohol evidence was being destroyed for the purposes of the exigent circumstances analysis. Both *Milligan* and *Machuca* held that the answer to that question was "yes." Although both of those cases arose in the context of a search of the defendant's blood, the legal question that those cases address—whether the natural dissipation of alcohol in a suspect's blood is an "exigency" that would justify a warrantless search—is the same question before this court here. Defendant's proposed rule of law—and his interpretation of *Machuca*—would limit *Machuca* beyond recognition. This court should not follow that path.

To be sure, this court and the United States Supreme Court have afforded special constitutional protections to homes. Respecting those special protections, the state's proposed rule allows exigent-circumstances home entries for *only* the limited purpose of securing an individual who the police have probable cause to believe committed DUII (or other impairment-related crime), and *only* when they have probable cause to believe that the individual is still in the home and that evidence of intoxication will still be detectable, and *only* when the individual is preventing the officer from obtaining the impairment evidence by refusing to leave the home voluntarily. *Machuca* and *Milligan* establish that an exigency exists, and the state's proposed rule allows it to

preserve dissipating evidence while safeguarding a suspect's rights against unconstitutional searches or seizures.

D. Despite advances in communications technology, obtaining a warrant to enter a home still takes time; if evidence would be destroyed during that time, the exigent circumstances exception applies.

Defendant's final argument is that, "advances in technology" have shortened the time it takes to get a warrant so that, now, warrants "should be able to be obtained in less than an hour." (Resp BOM 28). "Indeed," defendant notes, the failure of the state to adopt "standard-form warrant applications for drunk-driving investigations" "arguably could be considered a means of creating a perceived exigency" by the state. (Resp BOM 28). As explained below, even with technological advancements, obtaining a warrant can still be time consuming. Moreover, the exigent circumstances exception continues to permit warrantless searches and seizures if waiting for a warrant would result in the loss of evidence.

Although it is true that communications technology has dramatically improved since the adoption of Article I, section 9, and even in the years following some of this court's seminal exigency cases, that does not mean that warrants can be obtained instantaneously (or even generally as fast as the hour suggested by defendant). In order to obtain a warrant, an officer typically must prepare a supporting affidavit that details all of the evidence to establish probable cause. *See* ORS 133.545 (detailing warrant application process). The

officer has to locate a judge who is willing to hear the warrant application. Moreover, the officer has to find a judge who is willing to issue a warrant electronically (although telephonic and electronic warrants are allowed by statute, there is nothing requiring judges to issue electronic warrants). Additional time is often needed to have a district attorney review the warrant before it is submitted. Occasionally, a judge will ask a law enforcement officer to make changes to the warrant application, so additional time is needed for those changes to be made. Finally, an officer needs to obtain a hard copy of the warrant.[2] *See* ORS 133.575(3) (requiring officer to "give a copy of the warrant" to the person in control of the premises being searched). All the while, the officer needs to secure the scene to prevent the suspect from escape and to attempt to observe whether the suspect is permanently altering the evidence by ingesting additional intoxicants.

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[2] In the case of a warrant for a blood draw—which would usually occur at a police station or a medical facility where printers would likely be located—such a requirement might not add significant time to the process. But, in a situation like this case, finding a printer while the officer is at the suspect's house could add significant time to the process.

Moreover, here, the evidence in the record was that a warrant would have taken between 45 minutes and 90 minutes to obtain. So, obtaining a warrant is not the simple process defendant's proposed rule envisions.[3]

Regardless, even if it were a simple process, *Machuca* explains that impairment evidence is constantly being destroyed. Therefore, any delay necessitated by obtaining a warrant is a delay that causes significant evidence to be lost. This court has never held that Article I, section 9, requires the state to sacrifice evidence to obtain a warrant. Where police have probable cause to believe that evidence is being destroyed, they are entitled to make warrantless home entries to prevent that destruction. *Girard*, 276 Or at 515-16. And, when it comes to impairment evidence, such evidence is always dissipating. *Machuca*, 347 Or at 657.

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[3] In *McNeely*, the Supreme Court explained that,

> "we by no means claim that telecommunications innovations have, will, or should eliminate all delay from the warrant-application process. Warrants inevitably take some time for police officers or prosecutors to complete and for magistrate judges to review. Telephonic and electronic warrants may still require officers to follow time-consuming formalities designed to create an adequate record, such as preparing a duplicate warrant before calling the magistrate judge. * * * And improvements in communications technology do not guarantee that a magistrate judge will be available when an officer needs a warrant after making a late-night arrest."

Id. at 1562 (citation omitted).

Only if the process of obtaining a warrant could be completed before a search or seizure is conducted would the exigent circumstances exception not apply. That is what this court meant in *Machuca*, when it left open the possibility that in rare cases a warrant may still be required to perform a blood-draw. That is, there might be a situation where police physically could not obtain a blood draw for several hours (due to the availability of qualified personnel to draw the blood, for instance) where a warrant would be required because obtaining the warrant would not delay the search or seizure.

Here, however, every minute that police would have spent applying for and obtaining a warrant would have equated to a minute of delay in obtaining crucial BAC or observational impairment evidence. Law enforcement officers had probable cause that defendant had driven while impaired earlier in the evening, then hidden in the foliage for several hours. They also knew that he had locked himself in his house and he would not come out voluntarily when asked to do so. Under those circumstances, any time taken to obtain a warrant would have resulted in the loss of evidence. That is precisely the situation that the exigent circumstances exception seeks to avoid.

E. Defendant's Fourth Amendment analysis is flawed.

Although the state generally relies on its opening brief to address any separate Fourth Amendment arguments, two arguments made by defendant warrant responses. First, defendant suggests that *McNeely* undermined the rule

from *Schmerber v. California*, 384 US 757, 86 S Ct 1826, 16 L Ed 2d 908 (1966). (Resp BOM 34-35). That is incorrect. Although the Court in *McNeely* distinguished *Schmerber*, it adhered to the basic holding from *Schmerber* that exigency must be evaluated in light of the totality of the circumstances. *McNeely*, 133 S Ct at 1558. Second, defendant argues that Oregon's implied consent statutes allow law enforcement officers to only "request consent," and that a warrantless home entry "merely for the purpose of *requesting* consent is unreasonable under the Fourth Amendment." (Resp BOM 38; emphasis in original). Defendant's presumption is incorrect. Oregon's implied consent statutes allow officers to obtain breath or blood analysis through "any lawful means." ORS 813.100(5). That would include searches or seizures conducted pursuant to a warrant or exigent circumstances.

CONCLUSION

For all of the reasons explained here, and in the state's opening brief, this court should affirm the trial court's denial of defendant's motion to suppress—albeit based on a different exigent circumstances analysis than that employed by the Court of Appeals.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on December 22, 2015, I directed the original Reply Brief of Petitioner on Review, State of Oregon, to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Anne Fujita Munsey, 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 3,989 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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