IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. AMANDA L. NEWCOMB, Defendant-Appellant, Respondent on Review.	Multnomah County Circuit Court Case No. 110443303 CA A149495 SC S062387

RESPONDENT'S BRIEF ON THE MERITS

Review of the Decision of the Court of Appeals
on Appeal from the Judgment
of the Circuit Court for Multnomah County
Honorable Eric J. Bergstrom, Judge

Opinion Filed: April 16, 2014
Author of Opinion: Sercombe, Judge
Concurring Judges: Ortega, Presiding Judge, and Hadlock, Judge

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BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, AMANDA L. NEWCOMB

STATEMENT OF THE CASE

This case concerns the scope of a person's protected privacy interest in personal property. At issue is whether the state conducted a search by extracting a blood sample from defendant's dog and testing the sample to determine whether defendant had committed animal neglect. Under Article I, section 9, of the Oregon Constitution and the Fourth Amendment to the United States Constitution, a search occurs when the state intrudes into personal property. It makes no difference that the property at issue here was a dog. Because the blood test was an intrusion into defendant's personal property, it was a search.

Questions Presented and Proposed Rules of Law

First Question Presented

Does the lawful seizure of a person's dog eliminate the person's constitutionally protected interest in the dog?

First Proposed Rule of Law

No. Contrary to the state's novel claim, the lawful seizure of a person's dog does not eliminate the person's constitutionally protected interest in it.

Second Question Presented

Assuming that the lawful seizure of a person's dog does not eliminate the person's constitutionally protected interest in it, and no exception to the warrant requirement applies, may the state extract blood from the dog and test the blood without first obtaining a warrant?

Second Proposed Rule of Law

No. A state-directed intrusion into seized personal property is a search, even if the intrusion is a veterinary test. As such, it is constitutional only if it is supported by a search warrant or an exception to the warrant requirement.

Summary of Argument

Under Oregon law, "dogs are * * * personal property." ORS 609.020. When the state intrudes into personal property, the intrusion constitutes a search under Article I, section 9, of the Oregon Constitution. The same is true under the Fourth Amendment to the United States Constitution. Under both constitutions, an intrusion is a search even when the property has been lawfully seized, and even when there is probable cause to believe that the property contains evidence.

Here, at the behest of the police, a veterinarian took a blood sample from defendant's dog and subjected the sample to laboratory testing. The blood test[1] served two purposes: to determine the appropriate course of veterinary treatment, and to investigate whether defendant had committed animal neglect. Despite the lawful seizure of the dog, the blood test was a search, because it involved an intrusion into defendant's personal property. To be sure, there are social and legal norms that protect animals from abuse and neglect. In some cases, those norms undoubtedly make it reasonable to search or seize an animal without a warrant. But they do not extinguish a person's protected privacy interests. Because it was a warrantless search, the blood test was constitutional only if it was supported by an exception to the warrant requirement.

On review, the state makes an alternative argument that even if the blood test was a search, it was reasonable. This court should not address that argument, much less reverse the decision of the Court of Appeals on that basis, because the state did not adequately develop the argument below. In any case, the argument lacks merit, because the state failed to establish the application of any warrant exception, existing or novel.

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[1] For simplicity, defendant uses "the blood test" to refer jointly to the test's two components: (1) the extraction of a blood sample from the dog and (2) laboratory testing of the blood sample. As explained in greater detail below, the blood test was a search, because it involved an intrusion into defendant's personal property.

In sum, because the blood test was a search conducted without a warrant and the state failed to establish the application of a warrant exception, the blood test was unconstitutional. The Court of Appeals correctly determined that the trial court erred by denying defendant's motion to suppress.

Argument

Article I, section 9, of the Oregon Constitution[2] prohibits unreasonable searches. Under Article I, section 9, "warrantless * * * searches * * * are *per se* unreasonable unless falling within one of the few 'specifically established and well-delineated exceptions' to the warrant requirement." *State v. Davis*, 295 Or 227, 237, 666 P2d 802 (1983) (quoting *Katz v. United States*, 389 US 347, 357, 88 S Ct 507, 19 L Ed 2d 576 (1967)). The same is true under the Fourth Amendment to the United States Constitution.[3] *Katz*, 389 US at 357. Accordingly, to conduct a constitutional search, the police must have a search warrant or a justification under an exception to the warrant requirement. *State v. Heckathorne*, 347 Or 474, 482, 223 P3d 1034 (2009).

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[2] Article I, section 9, provides in relevant part that "[n]o law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search * * *."

[3] The Fourth Amendment provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches * * * shall not be violated."

Here, a veterinarian took a blood sample from defendant's dog and tested the sample to determine the cause of the dog's emaciated condition. The blood test had two purposes: to determine the appropriate course of veterinary treatment, and to investigate the possibility that defendant had committed animal neglect by failing to provide the dog with sufficient food.

Defendant moved to suppress the blood test results. The trial court concluded that the blood test was not a search, and denied defendant's motion to suppress on that basis. Tr 54. The Court of Appeals reversed, concluding that the blood test was a warrantless search that was not supported by an exception to the warrant requirement. *State v. Newcomb*, 262 Or App 256, 269, 324 P3d 557 (2014).

On review, the state makes two alternative arguments. First, the state argues that the blood test was not a search, because under the social and legal norms protecting animals from abuse and neglect, the owner of a lawfully seized animal has no protected privacy interest in the animal's physical condition. The state's novel "no-search" argument lacks merit.

Second, the state argues that even if the blood test was a search, the search was reasonable, even though it was not supported by a warrant or a warrant exception. This court should not consider that equally novel "reasonable-search" argument, because the state did not adequately develop it below. In any case, like the no-search argument, the state's reasonable-search

argument lacks merit. Finally, the *amici curiae* make several additional arguments, each of which lacks merit.

I. The blood test was a search.

A. The blood test was a search under the Oregon Constitution.

1. Under Article I, section 9, of the Oregon Constitution, a search occurs when the state intrudes into a person's effects.

Under Article I, section 9, a "search" is an intrusion by the state into the protected privacy interest of an individual. *State v. Rhodes*, 315 Or 191, 196, 843 P2d 927 (1992). This court has explained that, in contrast to the Fourth Amendment to the United States Constitution (which defendant will discuss below), "the privacy protected by Article I, section 9, is not the privacy that one reasonably *expects* but the privacy to which one has a *right*." *State v. Campbell*, 306 Or 157, 164, 759 P2d 1040 (1988) (emphasis in original). The scope of that right to privacy is determined, in large part, by the "social and legal norms of behavior" that provide a person with some measure of freedom from public scrutiny in society at large. *State v. Howard/Dawson*, 342 Or 635, 642, 157 P3d 1189 (2007) (citing *Campbell*, 306 or at 170).

As pertinent here, Article I, section 9, protects a privacy interest in the information concealed within personal property. *Rhodes*, 315 Or at 196-97; *see State v. Dixson/Digby*, 307 Or 195, 207, 766 P2d 1015 (1988) (noting that the use of the word "effects" in Article I, section 9, refers to personal property). By

prohibiting intrusions into personal property, social and legal norms of behavior protect the privacy of the information concealed within it. *See State v. Smith*, 327 Or 366, 373, 963 P2d 642 (1998) (noting that the privacy interests that are protected by Article I, section 9, "commonly are circumscribed by the space in which they exist and, more particularly, by the barriers to public entry (physical and sensory) that define that private space"). Accordingly, when the state intrudes into personal property, the intrusion constitutes a search under Article I, section 9. *See, e.g.*, *Rhodes*, 315 Or at 197 (holding that the police searched the defendant's truck by opening the door, exposing its contents, and looking inside).

2. The blood test was a search under Article I, section 9, because it was an intrusion into defendant's personal property.

"The extraction of a blood sample [from a person] by the police is * * * a search." *State v. Milligan*, 304 Or 659, 664, 748 P2d 130 (1988). The same is true of the extraction of a blood sample from a person's dog, because "dogs are

* * * personal property." ORS 609.020.[4] *See also* ORS 167.310(2) (describing domestic animals as "owned or possessed by a person"); ORS 167.310(9) (describing the minimum care that must be provided by an animal's "owner"); ORS 167.312 (providing for damages payable to an animal's "owner" for interference with research animals). Because dogs have the legal status of personal property, an intrusion by the state into a person's dog is a search under Article I, section 9.

Here, at the behest of the police, a veterinarian took a blood sample from defendant's dog and tested the sample to determine whether the dog's emaciated condition was due to some illness or to defendant's criminal neglect. Together with other tests, the blood test showed that the dog "was a healthy dog and with a basic plan of good quality food, he rapidly began to gain weight. So there basically was nothing wrong with him." Tr 19-20, Tr 25-26; *See Supplementary Memorandum in Support of Motion to Suppress* 5, ER 1-9

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[4] At common law, that was not always the case. *See, e.g.*, *Citizens' Rapid-Transit Co. v. Dew*, 100 Tenn 317, 45 SW 790 (1898) ("It is true that at common law a dog was not considered as property * * *"). For example, there was no common law crime of larceny for taking and carrying away a dog. *See Mullaly v. New York*, 86 NY 365, 366 (1881). Their common law status reflected the view that dogs "were base in their nature and kept merely for whims and pleasures" and thus possessed no intrinsic value. *Dew*, 45 SW at 791; *see Mullaly*, 86 NY at 366-67. *See also McCallister v. Sappingfield*, 72 Or 422, 425, 144 P 432 (1914) (explaining that ORS 609.020 enacted the "present-day common law[,]" which was "the natural evolution of the status of the dog as known at common law which considered the animal to be property, yet of an inferior sort").

(describing the laboratory tests conducted by the veterinarian).[5] In other words, the blood test revealed that the dog was not suffering from an illness that would explain its emaciated condition, and that the condition was therefore more likely to have been caused by defendant's failure to provide adequate food. Because the blood test revealed that information by intruding into defendant's personal property, it was a search under Article I, section 9.

3. The blood test was a search under Article I, section 9, even if the dog was lawfully seized under the plain view exception.

To be sure, the police had seized the dog shortly before the veterinarian took the blood sample, and the Court of Appeals held that the seizure was justified by the "plain view exception" to the warrant requirement. Tr 19; *Newcomb*, 262 Or App at 264. But even if the plain view exception justified the seizure, defendant retained a protected privacy interest in the dog's physical condition.

This court has explained that "[w]hen the police lawfully seize a container, they can thoroughly examine the container's *exterior* without violating any privacy interest of the owner or the person from whom the container was seized. For example, the police can observe, feel, smell, shake

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[5] *See Newcomb*, 262 Or App at 259 n 1 (explaining that the prosecutor relied on the description of the tests that was provided in defendant's memorandum, instead of presenting evidence about them at the suppression hearing).

and weigh it." *State v. Owens*, 302 Or 196, 206, 729 P2d 524 (1986) (emphasis added). However, the lawful seizure of personal property does not diminish a person's protected privacy interest in information that remains concealed within the property after the seizure. *See State v. Munro*, 339 Or 545, 550, 553, 124 P3d 1221 (2005) (accepting the state's concession that viewing a lawfully seized videotape was a "search," but concluding that the search was authorized by a warrant); *Heckathorne*, 347 Or at 483-85 (reaffirming the principle that opening a lawfully seized container that does not reveal or announce its contents is a search that must be justified by a warrant or an exception to the warrant requirement). Here, the extraction of the blood sample was an intrusion into defendant's personal property, not just an examination of its exterior.

More specifically, the lawful seizure of property under the plain view exception does not implicitly authorize a search of the property, or eliminate a person's constitutionally protected interest in its concealed contents. *See United States v. Williams*, 41 F3d 192, 197 (4th Cir 1994) ("[A]lthough the plain view doctrine may support the warrantless seizure of a container believed to contain contraband, any subsequent search of its concealed contents must either be accompanied by a search warrant or justified by one of the exceptions to the warrant requirement"); *United States v. Miller*, 769 F2d 554, 557 (9th Cir 1985) (observing that even when the Fourth Amendment's plain view exception permits seizure of personal property, it does not permit a warrantless search of

the seized property for evidence that remains concealed). Here, the plain view exception may have authorized the seizure, but it did not eliminate defendant's protected privacy interest in the physical condition of her dog.

Nor does the existence of probable cause to seize personal property under the plain view exception imply that the property "announces its contents," such that a person can have no protected privacy interest in the property. *See Texas v. Brown*, 460 US 730, 750, 103 S Ct 1535, 1548, 75 L Ed 2d 502 (1983) (Stevens, J., concurring) (explaining that the plain view exception may support the warrantless seizure of a closed container but not the warrantless search of its contents that were not visible to the police); *Heckathorne*, 347 Or at 484 (discussing *State v. Herbert*, 302 Or 237, 729 P2d 547 (1986); noting that opening the lawfully seized container in that case was a search, even though the police had probable cause to believe that it contained contraband); *State v. Fugate*, 210 Or App 8, 14, 150 P3d 409 (2006) (explaining the difference between containers that "announce their contents" and those that only provide probable cause to conduct a search); *State v. Stock*, 209 Or App 7, 12 n 1, 146 P3d 393 (2006) (same). Here, even if it was immediately apparent that the dog was evidence that defendant had committed a crime, the information about the dog's physical condition that the blood test revealed was *not* apparent. Accordingly, although the plain view exception may have justified the seizure,

defendant retained a protected privacy interest in the physical condition of her dog.

In sum, even if the police had probable cause to believe that the dog's body contained evidence of crime, and the plain view exception authorized the seizure, defendant retained a protected privacy interest in the information about its physical condition that remained concealed within it. Because the blood test involved an intrusion into defendant's personal property, the blood test was a search under Article I, section 9, despite the preceding seizure.

B. The blood test was a search under the United States Constitution.

1. Under the Fourth Amendment, a search occurs when the state intrudes into a person's effects.

There are two kinds of intrusions that constitute a search under the Fourth Amendment. First, a search occurs under the Fourth Amendment when the state violates a subjective expectation of privacy that society recognizes as reasonable. *Kyllo v. United States*, 533 US 27, 33, 121 S Ct 2038, 150 L Ed 2d 94 (2001) (citing *Katz*, 389 US at 361 (Harlan, J., concurring)). Second, under the more traditional approach, a search occurs under the Fourth Amendment when the state physically intrudes into persons, houses, papers, or effects. *Florida v. Jardines*, 133 S Ct 1409, 1414, 185 L Ed 2d 495 (2013); *see also United States v. Jones*, 132 S Ct 945, 947, 181 L Ed 2d 911 (2012) (holding that

installing a tracking device on the undercarriage of the defendant's car was a search, because it was a physical intrusion upon the defendant's effects).

2. The blood test was a search under the United States Constitution, because it was an intrusion into defendant's effects.

Defendant relies primarily on the property-rights prong of the federal test that the Court re-emphasized in *Jardines* and *Jones*. Because dogs are personal property under ORS 609.020, they are subject to the protections of the Fourth Amendment. *See Altman v. City of High Point, N.C.*, 330 F3d 194, 203 (4th Cir 2003) (holding that privately owned dogs were "effects" subject to the protections of the Fourth Amendment); *see also Brown v. Muhlenberg Township*, 269 F3d 205, 209-10 (3d Cir 2001) (same); *Fuller v. Vines*, 36 F3d 65, 68 (9th Cir 1994) (same), *overruled on other grounds by Robinson v. Solano Cnty.*, 278 F3d 1007 (9th Cir 2002); *Lesher v. Reed*, 12 F3d 148, 150-51 (8th Cir 1994) (dogs are property subject to Fourth Amendment seizure requirements). Here, as previously described, at the direction of a police officer, a veterinarian extracted a blood sample from defendant's dog and tested the sample to determine whether the dog's emaciated condition was due to some illness or to defendant's criminal neglect. The blood test revealed that the dog did not have an illness that would explain its condition. Because the state obtained that information by intruding into defendant's effects, the blood test was a search under the Fourth Amendment.

3. The blood test was a search under the Fourth Amendment, even if the dog was lawfully seized under the plain view exception.

Like Article I, section 9, the Fourth Amendment protects personal property even after it has been lawfully seized. *See United States v. Jacobsen*, 466 US 109, 114-115, 104 S Ct 1652, 80 L Ed 2d 85 (1984) (noting that even when the government may seize a package to prevent its loss or destruction, it must still obtain a warrant before examining its contents). As pertinent here, even when the plain view exception to the warrant requirement justifies the seizure of personal property, an intrusion into the property must be separately supported by a warrant or an exception to the warrant requirement. *Brown*, 460 US at 750 (Stevens, J., concurring); *Miller*, 769 F2d at 557; *Williams*, 41 F3d at 197. Consequently, the blood test was a search under the Fourth Amendment, even if the plain view exception justified the preceding seizure.

C. The state's animal rights-based argument lacks merit, because animal-protection norms do not imply that the owner of a seized animal lacks a constitutionally protected interest in it.

The state disregards those familiar considerations, and instead advances a novel, animal rights-based argument in support of its claim that the blood test was not a search under Article I, section 9. Specifically, the state argues that (1) animals have a right to be free from abuse and neglect under social and legal norms that do not apply to other kinds of property, and therefore (2) once the

police seized defendant's dog, defendant lacked a constitutionally protected interest in its physical condition. Pet Br 12-13.

That argument lacks merit. In particular, it relies on an unstated assumption that a person can have no protected privacy interest in information revealed by an intrusion that is sanctioned by "social and legal norms of behavior," such as those protecting animals from abuse and neglect. That assumption is demonstrably false. Although social and legal norms commonly justify the state's intrusions into private property, they do not always do so by eliminating a person's protected interest in the property. On the contrary, this court's warrant-exception cases show that when social and legal norms concerning something *other* than privacy justify an intrusion, they do so by overriding a person's protected privacy interest, not by demonstrating its absence.

For example, the statute governing the treatment of lost personal property can justify an intrusion into such property, to satisfy the societal concern for protecting the owner's possessory interest in the property. *See State v. Pidcock*, 306 Or 335, 340, 759 P2d 1092 (1988) (explaining that the need to identify the owner of lost property may justify a warrantless search). Similarly, a police department's inventory policy might justify an intrusion into personal property to satisfy certain social and legal norms. *See State v. Atkinson*, 298 Or 1, 7, 688 P2d 832 (1984) (explaining that a warrantless search of personal property

conducted pursuant to an inventory policy may be justified by the need to protect the property, to prevent the assertion of false claims, and to mitigate any danger the property might present). And in a particularly pertinent example, the legal norms protecting animals from abuse and neglect might justify the seizure of an animal, or even an intrusion into its body, to protect it from unlawful harm. *See State v. Fessenden*, 355 Or 759, 772-73, 333 P3d 278 (2014) (holding that the warrantless seizure of an abused or neglected animal may be justified by "exigent circumstances"). As those cases demonstrate, social and legal norms may justify an intrusion into personal property, but they do so without extinguishing a person's protected privacy interest. Instead, the protected privacy interest is simply outweighed by other societal concerns.

To be sure, this court has explained that the privacy that Article I, section 9, protects is determined largely by "'social and legal norms of behavior.'" *Howard/Dawson*, 342 Or at 642 (quoting *Campbell*, 306 Or at 170). In *Campbell*, this court noted that behavioral norms such as trespass laws and conventions against eavesdropping can help to identify the scope of a person's protected privacy interests under Article I, section 9. Specifically, this court explained that the absence of a behavioral norm prohibiting a particular form of scrutiny in society at large could demonstrate the corresponding absence of a protected interest against that form of state scrutiny under Article I, section 9. *Campbell*, 306 Or at 170. In that way, the behavioral norms that provide

privacy can help to identify the scope of a person's protected privacy interest under Article I, section 9.

But not all "social and legal norms of behavior" perform that function. This court's cases demonstrate that norms concerning matters other than privacy and property have no bearing on the scope of a person's protected privacy interests under Article I, section 9. Rather, when this court looks to "social and legal norms of behavior" to determine whether a particular intrusion was a search, it considers only whether privacy or property norms would have prohibited the kind of intrusion at issue. *See Campbell*, 306 Or at 170 (citing only privacy and property norms as examples of norms that illuminate the scope of the privacy interests protected by Article I, section 9); *Howard/Dawson*, 342 Or at 642 (holding that police inspection of garbage collected by a sanitation company was not a search, because the inspection was not prohibited by privacy or property norms); *Dixson/Digby*, 307 Or at 211-12 (holding that officers' entry onto private land outside the residential curtilage was not a search, because, in the absence of barriers to entry, it was not prohibited by privacy or property norms); *see also Smith*, 327 Or at 372-73 (explaining that, because protected privacy interests are rarely "self-announcing," they are typically recognizable only by their association with a physical location that is protected from public scrutiny or entry by a property norm). Thus, as far as this court's cases show, the only "social and legal norms of behavior" that serve to

illuminate the scope of a person's protected privacy interests under Article I, section 9, are norms concerning privacy or property. Other kinds if norms, like the animal-protection norms invoked by the state, might make an intrusion constitutional in a given case, but they would do so by overriding a person's protected privacy interests, not by eliminating them.

The state makes a similar animal-rights based argument under the Fourth Amendment, in which the social and legal norms protecting animals imply that a person has no reasonable expectation of privacy in a seized animal's physical condition. Pet Br 15-16. As with its argument under Article I, section 9, the state fails to explain the nature of that implication. But in any case, the state addresses only the reasonable-expectation-of-privacy prong of the Fourth Amendment test, and makes no mention of the property-rights prong on which defendant relies. *See Jones*, 132 S Ct at 949-51; *Jardines*, 133 S Ct at 1414. Regardless of whether defendant had a reasonable expectation of privacy in the physical condition of her dog, the blood test was a search under the Fourth Amendment because, as previously explained, the test was a physical intrusion into defendant's effects. *Id.*

In sum, although the social and legal norms protecting animals from abuse and neglect might justify a state-directed intrusion into a person's dog in order to reveal information about its physical condition under certain circumstances, that justification would not reflect the absence of a

constitutionally protected interest. would Defendant retained a protected interest in the physical condition of her dog, regardless of the social and legal norms protecting it from abuse and neglect. Accordingly, the blood test was a search under Article I, section 9, and under the Fourth Amendment.

II. The state did not establish that the blood test was a reasonable search.

In addition to its novel argument that the warrantless blood test was not a search, the state presents an alternative, equally novel argument that the warrantless blood test was a reasonable search. In particular, the state argues that because (1) the blood test served an important veterinary purpose, and (2) ORS 167.345[6] authorizes the provision of veterinary care to impounded animals, it follows that (3) the blood test was reasonable, despite the absence of

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[6] ORS 167.345 provides, in pertinent part:

> "(2) If there is probable cause to believe that any animal is being subjected to treatment in violation of ORS 167.315 to 167.333, 167.340, 167.355, 167.365 or 167.428, a peace officer, after obtaining a search warrant or in any other manner authorized by law, may enter the premises where the animal is located to provide the animal with food, water and emergency medical treatment and may impound the animal. * * *.
>
> "* * * * *
>
> "(4)(a) A court may order an animal impounded under subsection (2) of this section to be held at any animal care facility in the state. A facility receiving the animal shall provide adequate food and water and may provide veterinary care."

a warrant. Pet Br 17-19. This court should not consider that argument, because the state failed to develop it below. In any case, it lacks merit.

A. This court should not reverse the Court of Appeals' decision on the basis of the state's reasonable-search argument, because the state did not adequately develop that argument below.

1. This court will not consider an argument from the petitioner on review that the petitioner failed to make in the Court of Appeals.

This court "will not address arguments that were not raised in the Court of Appeals." *State v. Burgess*, 352 Or 499, 508, 287 P3d 1093 (2012). *See State v. Castrejon*, 317 Or 202, 209 n 9, 856 P2d 616 (1993) (failure to raise an issue in the Court of Appeals generally precludes review by this court). In particular, the "petitioner in this court * * * cannot shift or change his position and argue or raise an issue that was not before the Court of Appeals." *Tarwater v. Cupp*, 304 Or 639, 644 n 5, 748 P2d 125 (1988).

2. The state did not adequately develop its reasonable-search argument in the Court of Appeals.

Here, the state did not adequately develop its reasonable-search argument in the Court of Appeals. In the trial court, the prosecutor asserted that "it is not unreasonable to provide medical care to a neglected dog[,]" and cited ORS 167.345, which authorizes a facility receiving an impounded animal to provide veterinary care. Tr 46. But the state did not raise a reasonable-search argument in its brief in the Court of Appeals. *See* Res Br 6-10 (arguing only that defendant lacked a protected privacy interest in her dog).

Instead, the state waited until oral argument in the Court of Appeals to mention the possibility that the blood test was a reasonable search. In particular, as the court noted, "[a]t oral argument on appeal, the state asserted that whatever privacy right defendant had in the dog, the search was reasonable under the circumstances." *Newcomb*, 262 Or App at 271 n 13. The Court of Appeals expressly declined to consider the application of a novel warrant exception for veterinary testing of a seized animal, because, despite counsel's assertion at the podium, the state had not adequately developed that argument on appeal. *Id.* This court should not disturb that conclusion. Because the state did not properly raise its reasonable-search argument in the Court of Appeals, this court should not consider it on review.

B. In any case, the state's reasonable-search argument lacks merit.

1. If the state's point is that the warrantless search was reasonable even though it was not justified by a warrant exception, that claim lacks merit.

A warrantless search is constitutional only if it is supported by an exception to the warrant requirement. *Davis*, 295 Or at 237; *Katz*, 389 US at 357. Here, when read literally, the state's brief advances no argument for the application of an exception to the warrant requirement, existing or novel. Instead, the state asserts that the blood test was reasonable *despite* the absence of a warrant exception, because it served an important veterinary purpose, and because ORS 167.345 authorizes the provision of veterinary care to an

impounded animal. Pet Br 17-19; *see* Pet Br 4 (proposing, as a rule of law, that "a law enforcement officer need not obtain a warrant or establish that an exception to the warrant requirement applies before authorizing or directing a veterinarian to perform diagnostic tests, even if the results of testing may be used as evidence in a criminal prosecution of the owner").

The state's claim that a warrantless search can be reasonable when no warrant exception applies is unprecedented. As this court has emphasized, "[a]ny intrusion of state power upon a constitutionally protected interest, be it for civil or criminal investigative purposes, must comply with constitutional standards." *State v. Bridewell*, 306 Or 231, 239, 759 P2d 1054 (1988). Under that principle, even if the state intrudes upon personal property purely for "civil" purposes, the intrusion must be authorized by a warrant or an exception to the warrant requirement. Thus, even if it were appropriate for this court to consider the state's claim that the police need neither a warrant nor a warrant exception before subjecting a seized animal to veterinary testing, that claim provides no basis for reversing the decision of the Court of Appeals.

2. If the state's point is that this court should recognize a novel warrant exception for the provision of veterinary care to an impounded animal, that claim lacks merit.

Read charitably, the state's point may be that this court should recognize a novel warrant exception for the provision of veterinary care to a lawfully impounded animal. That contention would also lack merit.

Although the state points out that ORS 167.345 authorizes the provision of veterinary care to impounded animals, defendant notes, as an initial matter, that ORS 167.345 did *not* authorize the provision of veterinary care to defendant's dog in this case. ORS 167.345(4)(a) authorizes an animal care facility to provide veterinary care to an animal impounded under ORS 167.345(2) only if a court has ordered the animal to be held at the facility. Even assuming that defendant's dog was "impounded" under subsection (2), no court had ordered an animal care facility to hold it. Consequently, ORS 167.345(4)(a) did not authorize the veterinarian to provide veterinary care to it.

But even if it had, that authorization would not suffice to establish the application of a warrant exception, because the fact that a law authorizes an intrusion does not make the intrusion a reasonable search. *See Bridewell*, 306 Or at 239 (observing that state action pursuant to statutory authority does not ensure compliance with Article I, section 9). For example, even when a duly enacted policy authorizes an administrative search, the search is reasonable only if (among other requirements) the policy eliminates the discretion of those responsible for conducting it. *Atkinson*, 298 Or at 10. Here, ORS 167.345(4)(a) provides that "[a] facility receiving the animal * * * *may* provide veterinary care." (Emphasis added). Thus, far from eliminating discretion, ORS 167.345(4)(a) expressly provides it. In particular, it provides no limit to a

facility's discretion to provide elective veterinary care that may reveal otherwise concealed evidence of a crime.

Of course, the state has never claimed that the administrative search exception applies. Defendant cites it only because the exception's requirements demonstrate that a social or legal norm (such as a duly enacted administrative search policy) can authorize a warrantless search that is nonetheless unreasonable.[7] *See also Pidcock*, 306 Or at 342 (observing that a search of personal property would have been unlawful even though the lost-property statute authorized it, if it had been conducted for an investigative purpose); *Bridewell*, 306 Or at 239 (statutory "community caretaking" authority would not make a search constitutional). Statutory authority alone is never sufficient to make a warrantless search reasonable. Thus, if the state's point is that the search was reasonable solely by virtue of being authorized by ORS 167.345(4)(a), that argument lacks merit.

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[7] Defendant notes, however, that the legislature could address the policy concern presented by this case by bringing ORS 167.345(4)(a) into compliance with the requirements of the administrative search exception. For example, the legislature could require any facility receiving an impounded animal to provide "[v]eterinary care deemed necessary by a reasonably prudent person to relieve distress from injury, neglect or disease." ORS 167.310(9)(d) (describing the veterinary care included in the definition of "minimum care"). Evidence of crime discovered through the provision of such care might be admissible, just as evidence discovered in an inventory search conducted pursuant to a policy that complies with the requirements of the administrative search exception.

In sum, because the blood test was a search that was not supported by a warrant or an exception to the warrant requirement, it was unconstitutional, and the results are subject to suppression.

III. This court should not reverse the Court of Appeals' decision on the basis of the *amici curiae*'s arguments, because each argument lacks merit or was not developed below.

The *amici curiae* make several additional arguments. Each lacks merit or was not developed below.

A. Even if ORS 167.345 authorized the blood test, the blood test was a search that had to satisfy Article I, section 9.

The *amici* argue that the blood test was not a search under Article I, section 9, because it was authorized by ORS 167.345(4)(a). *Brief of Amicus Curiae*, 10-11. As explained in Section I above, that argument lacks merit. The law may authorize the police to search personal property without eliminating a person's protected privacy interest in the property's contents. *See, e.g.*, *Pidcock*, 306 Or at 341-42 (intrusion pursuant to lost property statute was a search). Here, even if ORS 167.345(4)(a) authorized the blood test, that authority would not establish that defendant lacked a protected privacy interest in the physical condition of her dog.

B. This court should not consider the *amici curiae*'s argument that the seizure extinguished defendant's protected privacy interest, because the state abandoned that argument in the Court of Appeals; in any case, it lacks merit.

The *amici* reprise the prosecutor's argument from the suppression hearing that the blood test was akin to a "confirmatory test" of the contents of a lawfully seized transparent container. *Brief of Amicus Curiae*, 12-14; *see Owens*, 302 Or at 206-07 (affirming the warrantless testing of a substance contained in a lawfully seized transparent container to confirm the substance's identity); Tr 45 (prosecutor argues that the dog was akin to a transparent container because "[i]t doesn't contain anything else other than more dog").

This court should not consider that argument, because the state abandoned it in the Court of Appeals. *See* Res Br 6-10 (arguing only that defendant's protected privacy interest was "trumped" by animal-protection norms); *Tarwater* 304 Or at 644 n 5 ("[P]etitioner in this court * * * cannot shift or change his position and argue or raise an issue that was not before the Court of Appeals").

In any case, the argument lacks merit. In *Owens*, this court approved the confirmatory test because it did not involve an intrusion into a protected privacy interest. In particular, extracting the substance from the transparent container was not a search, because the container's transparency meant that it was not the kind of personal property that could provide protection from public scrutiny of

its contents. 302 Or at 206. *See Smith*, 327 Or at 373 (explaining that the privacy interests protected by Article I, section 9, are commonly determined by the barriers to public scrutiny provided by property). And once the container was breached, testing the substance to confirm its identity involved no greater intrusion than was already inherent in the seizure. *Owens* 302 Or at 206. The test in *Owens* was constitutional not only because the container had been lawfully seized and the police had probable cause to believe that it contained drugs, but also because its transparency meant that opening it to extract the substance revealed no information that was not already apparent. *See also Heckathorne*, 347 Or at 484 (discussing *Herbert*; noting that opening the lawfully seized container in that case was a search, even though the police had probable cause to believe that it contained contraband); *Fugate*, 210 Or App at 14 (explaining that a container can provide probable cause without "announcing its contents"); *Stock*, 209 Or App at 12 n 1 (same).

The same cannot be said of the extraction of blood from the dog's body in this case. Unlike a transparent container or a container that otherwise reveals its contents, defendant's dog continued to protect the information within it from public scrutiny, even after it was seized, by forming a "barrier[] to public entry (physical and sensory) that define[d a] private space[.]" *Smith*, 327 Or at 373. In particular, even if the officer had probable cause to believe that the dog was evidence that defendant had committed animal neglect, it was *not* apparent that

the dog had no illness that would provide an alternative explanation of its emaciated condition. Accordingly, unlike the extraction of identifiable drugs from a transparent container, the blood test intruded upon a privacy interest protected by Article I, section 9.

This case is also distinct from *State v. Munro,* 339 Or 545, 124 P3d 1221 (2005) and *State v. Luman,* 347 Or 487, 223 P3d 1041 (2009). The *amici* cite those cases for the proposition that when the police have probable cause to believe that lawfully seized property contains evidence of a crime, the police do not conduct a search by intruding into the property to confirm that belief. *Brief of Amicus Curiae* 14-17. *Munro* and *Luman* do not support that contention. To be sure, in each of those cases, this court approved an examination of the contents of a lawfully-seized videotape. But the videotape in *Munro* was searched pursuant to the authority of a warrant that had authorized its seizure.[8]

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[8] Defendant acknowledges that this court gave a different account of its reasoning in *Munro* when it decided *Luman*. 347 Or at 500-02. With respect, that account is unpersuasive. In *Munro,* this court stated explicitly that the search of the videotape was lawful because the warrant authorized the police to examine its contents:

> "When the police subsequently accessed the pornographic images stored on the videotape, they were searching in a location authorized by the warrant."

footnote continued…

339 Or at 553. And the defendant's privacy interest in the videotape in *Luman* had been extinguished by a preceding private search that revealed the same information. 347 Or at 495 (explaining that the defendant's privacy interest had been "destroyed, at least to the extent of the scope of the private search"). Neither case held that a person lacks a protected privacy interest in lawfully seized personal property whenever the police have probable cause to believe that it is or contains evidence of crime.

On the contrary, this court's cases demonstrate that a person retains a privacy interest in seized property. Were it otherwise, this court would have had no occasion to explain that extracting the substance in *Owens* was not a search, because of the container's transparency, or that extracting the container's contents in *Heckathorne* was not a search, because its contents had already been revealed by unchallenged conduct. *Owens*, 302 Or at 206; *Heckathorne*, 347 Or at 485. Unlike the property in those cases, defendant's dog continued to provide a functioning barrier to scrutiny of its physical condition, even after it was seized. Consequently, the intrusion was a search under Article I, section 9.

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339 Or at 553. *See also Luman*, 347 Or at 504-06 (De Muniz, C.J., dissenting) (explaining the court's reasoning in *Munro*). Contrary to the account in *Luman*, *Munro* did not hold that the authority for the examination was inherent in the lawful possession of the tape. Nor did the lawful seizure alone extinguish the defendant's privacy interest in *Luman* itself. Rather, as noted below, it was the preceding private search that did so. 347 Or at 495, 502.

C. This court should not consider the *amici curiae*'s inevitable-discovery argument, because the state did not make that argument in the trial court or in the Court of Appeals; in any case, it lacks merit.

Next, the *amici* argue that the contested evidence was admissible because it would inevitably have been discovered. *Brief of Amicus Curiae* 18-19; *see State v. Johnson*, 340 Or 319, 327, 131 P3d 173 (2006) (holding that evidence discovered in an unconstitutional search is not subject to suppression if it inevitably would have been discovered by lawful investigative procedures). This court should not consider that argument, because the state failed to make it in the Court of Appeals. *Tarwater*, 304 Or 644 n 5. Moreover, inevitable discovery does not provide an alternative basis for affirmance of the trial court's decision, because it was not raised in that court, and the record might have been significantly different if it had been. *See Outdoor Media Dimensions Inc. v. State*, 331 Or 634, 659-60, 20 P3d 180 (2001) (reviewing court may affirm on an alternative basis only if the factual record would not have been different if the prevailing party had raised that basis below).

In any case, the prosecution has an affirmative obligation to prove the factual predicates to inevitable discovery. *State v. Hall*, 339 Or 7, 25, 115 P3d 908 (2005). Here, it has not done so. Because the state has never asserted or sought to prove that the evidence would inevitably have been discovered, and because defendant had no chance in the trial court to respond to and disprove

that claim, the *amici*'s inevitably-discovery argument provides no basis for reversing the decision of the Court of Appeals.

D. The *amici curiae*'s argument that defendant had no reasonable expectation of privacy lacks merit, because defendant relies on the property-rights prong of the Fourth Amendment test.

Finally, the *amici* argue that the blood test was not a search under the Fourth Amendment, because defendant lacked a reasonable expectation of privacy in the physical condition of her dog. *Brief of Amicus Curiae* 19-22; *see Kyllo*, 533 US at 33 (explaining that the Fourth Amendment applies to intrusions upon a person's reasonable expectation of privacy). Even if that claim were true for the reasons the *amici* cite, it would have no bearing on this case. As explained above, defendant had a protected interest in her dog because it was one of her effects, regardless of whether she had a reasonable expectation that its physical condition would remain private after the seizure. Accordingly, the *amici*'s Fourth Amendment argument lacks merit.

CONCLUSION

This Court should affirm the decision of the Court of Appeals, reverse the judgment of the trial court, and remand the case to the trial court for further proceedings.

Respectfully submitted,

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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 7,555 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 January 22, 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 Anna Joyce, #013112, Solicitor General, and Jamie K. Contreras, #022780, Assistant Attorney-in-Charge, Criminal & Collateral Remedies Appeals, attorneys for Petitioner on Review, and Lora Dunn, attorney for *amici curiae.*

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