IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. JAMES HARVEY RICE, Defendant-Appellant, Respondent on Review.	Lincoln County Circuit Court No. 104651 CA A151640 SC S063291

BRIEF ON THE MERITS 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 Lincoln County
Honorable THOMAS O. BRANFORD, Judge

Opinion Filed: March 25, 2015
Authored: Egan, Judge.
Before: Armstrong, Presiding Judge, and Nakamoto, Judge, and Egan, Judge.

JESSE WM. BARTON #881556
Attorney at Law
P.O. Box 5545
Salem, OR 97304

Telephone: (503) 391-6283
Email: jwmb@jessbartonlaw.com

Attorney for Respondent on Review

ELLEN F. ROSENBLUM #753239
Attorney General
PAUL L. SMITH #001870
Deputy Solicitor General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email: paul.l.smith@doj.state.or.us

Attorneys for Petitioner on Review

TABLE OF CONTENTS

INTRODUCTION AND STATEMENT OF THE CASE 1

QUESTION PRESENTED AND PROPOSED RULE OF LAW 2

Question Presented 2

Proposed Rule of Law 2

FACTUAL AND PROCEDURAL BACKGROUND 3

SUMMARY OF ARGUMENT 7

ARGUMENT 8

A. A warrantless entry into a home does not violate Article I, section 9, if it is done to prevent imminent loss of evidence. 9

1. Generally, a warrantless search or seizure is not unreasonable if it falls within an exception to the warrant requirement, including when immediate action is necessary to prevent loss or destruction of evidence. 9

2. A warrantless entry into a home is not unreasonable if it is supported by probable cause and a reasonable belief that evidence inside is being concealed or destroyed. 11

B. In the context of a DUII investigation, when a suspect enters a home for the purpose of evading arrest and refuses to come out, law enforcement may enter the home without a warrant to prevent the imminent destruction of evidence. 14

1. Under *Machuca* and *Mazzola*, blood-alcohol content evidence, and other observable evidence of impairment, is always dissipating. 14

2. Therefore, if a DUII suspect enters a home for the purpose of avoiding arrest or other contact with the police, evidence necessarily is being lost through natural dissipation and possibly being destroyed through intentional tampering 19

3. The Court of Appeals' requirement that a warrantless entry is permitted only if the state proves that *all* evidence will be lost in the time it would take to get a warrant is not supported by this court's case law and

is not faithful to the purposes of the exigent circumstances exception. 21

C. In this case, exigent circumstances and probable cause justified the officer's entry into defendant's home both to arrest defendant for DUII and to secure evidence of defendant's impairment.....27

CONCLUSION..... 30

TABLE OF AUTHORITIES

Cases Cited

Kentucky v. King,
563 US 452, 131 S Ct 1849, 179 L Ed 2d 865 (2011) 13

Missouri v. McNeely,
569 US ___, 133 S Ct 1552, 185 L Ed 2d 696 (2013) 25, 26, 29, 30

Payton v. New York,
445 US 573, 100 S Ct 1371, 63 L Ed 2d 639 (1980) 11

Schmerber v. California,
384 US 757, 86 S Ct 1826, 16 L Ed 2d 908 (1966) 10, 29

State v. Bridewell,
306 Or 231, 759 P2d 1054 (1988).....9

State v. Brown,
301 Or 268, 721 P2d 1357 (1986).....9

State v. Dahl,
323 Or 199, 915 P2d 979 (1996).....11

State v. Fair,
353 Or 588, 302 P3d 417 (2013).....9, 11

State v. Girard,
276 Or 511, 555 P2d 445 (1976)..... 12, 28, 29

State v. Greene,
285 Or 337, 591 P2d 1362 (1979).....10

State v. Heintz,
286 Or 239, 594 P2d 385 (1979).....18

State v. Machuca,
347 Or 644, 227 P3d 729 (2010)..... 5, 14, 15, 18, 21, 22, 23, 26, 28, 29

State v. Machuca,
231 Or App 232, 218 P3d 145 (2009),
rev'd, 347 Or 644 (2010).....14

State v. Mazzola,
356 Or 804, 345 P3d 424 (2015).....9, 10, 14-18, 22, 23, 26-29

State v. Milligan,
304 Or 659, 748 P2d 130 (1988).....18

State v. Moore,
354 Or 493, 318 P3d 1133 (2013).....26

State v. Moylett,
313 Or 540, 836 P2d 1329 (1992)..... 14, 15, 21, 22

State v. Rice,
___ Or ___, ___ P3d ___ (September 11, 2015).....6

State v. Rice,
270 Or App 50, 346 P3d 631,
rev allowed, 357 Or 550 (2015) 4, 5, 6, 21, 25

State v. Ritz,
270 Or App 88, 347 P3d 1052,
rev allowed, 357 Or 550 (2015) 6, 21, 23, 24, 25

State v. Snow,
337 Or 219, 94 P3d 872 (2004).....10

State v. Stevens,
311 Or 119, 806 P2d 92 (1991).....10

State v. Sullivan,
265 Or App 62, 333 P3d 1201 (2014).....6, 25

State v. Tourtillott,
289 Or 845, 618 P2d 423 (1980).....9

United States v. United States District Court,
407 US 297, 92 S Ct 2125, 32 L Ed 2d 752 (1972).....11

Warden v. Hayden,
387 US 294, 87 S Ct 1642, 18 L Ed 2d 782 (1967).....12

Welsh v. Wisconsin,
466 US 740, 104 S Ct 2091, 80 L Ed 2d 732 (1984).....11

Winston v. Lee,
470 US 753, 105 S Ct 1611, 84 L Ed 2d 662 (1985).....29

Constitutional & Statutory Provisions

Or Const Art I, § 9 ..... 1, 2, 3, 6, 7, 8, 9, 12, 14, 15, 17, 18, 24, 25, 26, 27
ORS 801.272 17
ORS 813.010(1)(a) 16
ORS 813.010(1)(b) 16, 17
ORS 813.010(1)(c) 16
US Const Amend XIV 6, 9, 10, 11, 13, 24

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

INTRODUCTION AND STATEMENT OF THE CASE

This court has long recognized that exigent circumstances—coupled with probable cause—can provide an exception to the warrant requirement of Article I, section 9, of the Oregon Constitution. Under that exception, officers do not need to obtain a search warrant or an arrest warrant if they have probable cause of criminal activity and if there is a need for swift action to prevent danger to life or serious damage to property, or to prevent a suspect's escape or the destruction of evidence. This case presents a question of how the exigent circumstances exception applies when law enforcement officers need to make a warrantless home entry to seize a person who they have probable cause to believe very recently drove under the influence of intoxicants and who has fled inside his or her home and refuses to come out, thus, preventing police from investigating the crime.

Because this court has repeatedly recognized the undisputed evanescent nature of drug or alcohol impairment evidence, there is always a need to act swiftly to prevent the dissipation or other destruction of that evidence. That need does not diminish—and, indeed, may even increase—when a person suspected of driving under the influence of intoxicants (DUII) locks himself or herself inside a home. In that circumstance, Article I, section 9, does not

prohibit an officer from making a warrantless entry to seize the suspect, secure any observational evidence of the suspect's impairment, secure any physical evidence contained in the suspect's breath, blood, and urine, and prevent the suspect from further tampering with the evidence by consuming additional intoxicants. Such an entry falls within the exigent circumstances exception to the warrant requirement and, therefore, does not constitute an unreasonable search or seizure.

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question Presented

When law enforcement officers have probable cause to arrest a suspect for DUII and have probable cause to believe that the suspect may still be under the influence of intoxicants, may the officers enter the suspect's home without a warrant to search for and seize the suspect in order to secure dissipating evidence of intoxication?

Proposed Rule of Law

The purpose of the exigent circumstances exception to the warrant requirement is, in part, to protect against the imminent loss or destruction of evidence during the time it would take to acquire a warrant to seize that evidence. Consequently, Article I, section 9, does not prohibit a law enforcement officer from entering a home without a warrant to seize a DUII suspect and to secure dissipating impairment evidence, if the officer has

probable cause to believe that evidence of intoxication will still be detectable, and if the suspect is in the home and preventing the officer from obtaining impairment evidence by refusing to leave voluntarily. Such a warrantless entry is reasonable in time, scope, and intensity and, therefore, does not violate Article I, section 9.

FACTUAL AND PROCEDURAL BACKGROUND

Two off-duty deputy sheriffs observed defendant driving erratically on Highway 101 near Newport. (Tr 4).[1] After getting a closer look at defendant, they called the authorities to report him as a possible drunk driver. (Tr 5). They relayed descriptions of the vehicle and defendant, their location, and direction of travel. (Tr 13-14, 21-22, 24). Defendant ran a red light, and the deputies lost track of his vehicle. (Tr 5-11).

A short time later, one of the deputies—by then, traveling alone—encountered defendant in his vehicle again. (Tr 7). This time defendant was traveling with a woman in the passenger seat. (Tr 8). The deputy noticed defendant's vehicle weaving, and he again called to report the driver as a suspected drunk driver. (*Id.*). The dispatcher told the deputy that there was no one available to respond at that time, and the deputy eventually decided to stop

[1] Unless otherwise noted, all transcript citations are to the transcript of the April 25, 2011, motion to suppress hearing.

following defendant. (Tr 9). However, just as the deputy turned around, he saw a patrol car with "overhead lights * ** activated" driven by Deputy Sites headed in the direction defendant had been driving. (Tr 10). Deputy Sites was less than a minute behind defendant. (Tr 10, 15).

Deputy Sites, who learned the address of the registered owner of the vehicle, drove to that address. (Tr 23). He knocked on the door, looked into the window, and saw defendant and a woman in the house. (Tr 24). Defendant matched the description of the driver given by the off-duty deputies. (*Id.*). Defendant came to the door; he opened the interior door but left the exterior storm door locked. (*Id.*). The deputy "noticed that defendant's eyes were watery and glassy, he smelled of alcohol, his facial muscles were slack, he appeared lethargic, and, when he spoke, his speech was slurred." *State v. Rice*, 270 Or App 50, 52, 346 P3d 631, *rev allowed*, 357 Or 550 (2015); (Tr 25). Defendant admitted to recently driving. (Tr 26). When Deputy Sites asked defendant to step outside to perform field sobriety tests, defendant replied "I don't see why I would do that." (Tr 27). When the deputy told defendant that he was being detained on suspicion of DUII, and instructed him to open the door, defendant told the deputy to "[g]o fuck yourself," and closed the interior door. (*Id.*).

The deputy knocked on the door and yelled for defendant to open it. (Tr 27). When defendant again returned to the door, Deputy Sites instructed him

that he was under arrest and ordered defendant to open the exterior door. (*Id.*). Defendant again cursed at the deputy and told him that he had "better get more cops here," before again closing the interior door. (Tr 27-29).

Several minutes later, two additional officers arrived. (Tr 33). The officers believed that they had probable cause and exigent circumstances, permitting them to enter the residence without a warrant. Deputy Sites reached through the open window of the exterior door, unlatched it, and kicked in the interior door. (Tr 34-37). Once inside the officers located and arrested defendant. *Rice*, 270 Or App at 53. Deputy Sites testified that, in his experience, it would have taken "several hours" to obtain a warrant to forcibly enter defendant's home. (Tr 45-46).

Defendant moved to suppress all of the evidence obtained after the warrantless entry into his house. The trial court denied the motion to suppress, citing *State v. Machuca*, 347 Or 644, 227 P3d 729 (2010), and the exigent circumstances doctrine. *Rice*, 270 Or App at 53. At trial, defendant argued that, because he continued drinking and took pain medication once he got to his house, the state could not prove that he was impaired at the time he was driving. *See, e.g.*, 4-26-12 Tr 55 (opening statement), 188-90 (defendant's testimony). The jury ultimately convicted defendant of DUII, and defendant appealed.

The Court of Appeals reversed, holding that the warrantless entry violated defendant's Article I, section 9, right against unreasonable searches.[2] *Rice*, 270 Or App at 55-56. Relying on its decision in *State v. Sullivan*, 265 Or App 62, 333 P3d 1201 (2014), that court held that "to justify a warrantless entry into a residence under the doctrine of exigent circumstances, the state has the burden to prove that the time it would have taken to obtain a warrant would have sacrificed the evidence." *Rice*, 270 Or App at 55-56. The court also relied on *State v. Ritz*, 270 Or App 88, 347 P3d 1052, *rev allowed*, 357 Or 550 (2015) (decided the same day as *Rice*) for the proposition that "the state may prove that an exigency exists by showing that the circumstances at the time gave rise to a reasonable concern that, if police waited for a search warrant, the suspect's blood would lose all evidentiary value." *Rice*, 270 Or App at 56. This court then allowed the state's petitions for review in both this case and in *Ritz*.[3]

---

[2] Defendant also argued that the warrantless entry violated his rights under the Fourth Amendment to the United States Constitution. *Id.* at 54. Because it resolved the case on Oregon constitutional grounds, the Court of Appeals did not reach the Fourth Amendment claim—or the state's argument that the Fourth Amendment claim was unpreserved. *Id.*

[3] This court denied defendant's petition for review, raising a separate challenge to the sufficiency of the evidence for defendant's conviction for interfering with a peace officer. *See State v. Rice*, ___ Or ___, ___ P3d ___ (September 11, 2015) (denying defendant's petition for review).

SUMMARY OF ARGUMENT

The exigent circumstances exception to the warrant requirement permits warrantless searches and seizures when they are necessary to prevent the imminent destruction or dissipation of evidence. This court has recognized that blood-alcohol content evidence and observational evidence of a person's impairment is highly evanescent, and dissipates with every breath a subject takes. The natural dissipation of that type of evidence is an exigent circumstance that, coupled with probable cause, will permit reasonable searches and seizures for the purpose of securing the evidence.

Under that rationale, this court should further hold that, when a law enforcement officer has probable cause to believe that a DUII suspect is in a home and is still under the influence of intoxicants, and where the suspect refuses to voluntarily leave the home, the officer may enter the home without a warrant to seize the suspect and secure evidence of the suspect's impairment. A warrantless entry under such circumstances that is reasonable in time, scope, and intensity does not run afoul of Article I, section 9.

Here, law enforcement officers had probable cause to believe that: (1) defendant had been driving under the influence of intoxicant moments earlier; (2) he was still under the influence of intoxicants; and (3) he had locked himself in his house. When the deputy knocked on defendant's door and announced the reason he was there, defendant refused to come out voluntarily. Under those

circumstances, the deputy's decision to enter defendant's house without a warrant to seize defendant and to secure evidence of defendant's impairment was reasonable in time, scope, and intensity. Consequently, that action did not violate defendant's Article I, section 9, rights against unreasonable search and seizure.

ARGUMENT

A warrantless entry into a home does not violate Article I, section 9, if it is done to prevent imminent loss of evidence. In the context of a DUII investigation, when a suspect enters a home for the purpose of evading arrest and refuses to come out, law enforcement may enter the home without a warrant to detain the suspect and to prevent the imminent loss of impairment evidence through dissipation or tampering. The constitution does not require, as the Court of Appeals held, the state to prove that obtaining a warrant would require it to lose *all* evidence before it may make a warrantless home entry as part of a DUII investigation. In this case, exigent circumstances plus probable cause justified the deputy's entry into defendant's home to arrest defendant for DUII and to secure evidence of defendant's level of impairment.

A. A warrantless entry into a home does not violate Article I, section 9, if it is done to prevent imminent loss of evidence.

1. Generally, a warrantless search or seizure is not unreasonable if it falls within an exception to the warrant requirement, including when immediate action is necessary to prevent loss or destruction of evidence.

Article I, section 9, of the Oregon Constitution provides that, "[n]o 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[.]" Article I, section 9, imposes limits on searches and seizures "in order to prevent arbitrary and oppressive interference by [law] enforcement officials with the privacy and personal security of individuals." *State v. Fair*, 353 Or 588, 602, 302 P3d 417 (2013) (citing *State v. Tourtillott*, 289 Or 845, 853, 618 P2d 423 (1980)). The touchstone of any Article I, section 9, analysis is that of reasonableness. *Fair*, 353 Or at 602.

This court has interpreted Article I, section 9, to mean that, "a search conducted without a warrant is deemed unreasonable unless it 'fall[s] within one of the few specifically established and carefully delineated exceptions to the warrant requirement.'" *State v. Mazzola*, 356 Or 804, 810, 345 P3d 424 (2015) (quoting *State v. Bridewell*, 306 Or 231, 235, 759 P2d 1054 (1988)); *see also State v. Brown*, 301 Or 268, 273, 721 P2d 1357 (1986) (noting same rule regarding the Fourth Amendment of the United States Constitution). In general, the carefully delineated exceptions serve the legitimate need of law

enforcement officers to protect their own safety or the safety of others and to protect evidence from imminent loss.

One well-recognized exception to the warrant requirement is the exigent circumstances exception. *See State v. Stevens*, 311 Or 119, 126, 806 P2d 92 (1991). That exception "allows the police to conduct a search without a warrant if the search is both supported by probable cause and conducted under exigent circumstances." *Mazzola*, 356 Or at 810-11; *see also State v. Snow*, 337 Or 219, 223, 94 P3d 872 (2004). "Exigent circumstances include, among other things, situations in which immediate action is necessary to prevent the disappearance, dissipation, or other loss of evidence." *Mazzola*, 356 Or at 811; *see also State v. Greene*, 285 Or 337, 342, 591 P2d 1362 (1979) ("[A] warrant is not necessary if there is probable cause and if any evidence that might be present likely will have disappeared if the officers cannot seize and search before securing a warrant."); *Schmerber v. California*, 384 US 757, 770, 86 S Ct 1826, 16 L Ed 2d 908 (1966) (holding that a warrantless blood draw was reasonable under the Fourth Amendment where the officer "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"; internal quotation omitted).

2. A warrantless entry into a home is not unreasonable if it is supported by probable cause and a reasonable belief that evidence inside is being concealed or destroyed.

Traditionally, both the state and federal constitutional protections against unreasonable searches and seizures are most robust in protecting individuals in their homes. *See Fair*, 353 Or at 600 ("An ultimate objective of the [Oregon] constitutional protections * * * against unreasonable searches and seizures is to protect the individual in the sanctity of his or her home."; internal quotation omitted); *Welsh v. Wisconsin*, 466 US 740, 748, 104 S Ct 2091, 80 L Ed 2d 732 (1984) ("It is axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'"; quoting *United States v. United States District Court*, 407 US 297, 313, 92 S Ct 2125, 32 L Ed 2d 752 (1972)). Generally, law enforcement may not enter a home to conduct a warrantless search or to make a warrantless arrest. *See State v. Dahl*, 323 Or 199, 209, 915 P2d 979 (1996) ("A well-established, constitutional principle is that, where there is neither 'hot pursuit' nor any other pre-existing, exigent circumstances, police officers with probable cause to arrest a suspect may not make a warrantless and nonconsensual entry into a suspect's house in order to make a routine felony arrest of the suspect."); *see also Payton v. New York*, 445 US 573, 590, 100 S Ct 1371, 63 L Ed 2d 639 (1980) (stating same principle under Fourth Amendment). However, probable cause coupled with exigent circumstances still provides a basis for warrantless entry into a home.

See State v. Girard, 276 Or 511, 515-16, 555 P2d 445 (1976) (upholding warrantless entry to make felony arrest where police reasonably believed that suspect was concealing evidence or attempting to flee); *see also Warden v. Hayden*, 387 US 294, 298-300, 87 S Ct 1642, 18 L Ed 2d 782 (1967) (approving police entry of a house to pursue an armed robbery suspect who entered the house "less than five minutes before" the police reached it). In the context of a warrantless entry to make an arrest, exigent circumstances typically consist of preventing flight of a suspect or preventing loss or destruction of evidence.

In *Girard*, this court held that police did not violate Article I, section 9, when they entered a home to make a warrantless arrest after developing a reasonable belief that the defendant was either destroying evidence or attempting to flee. There, police went to the defendant's home to investigate his involvement in a residential burglary. *Girard*, 276 Or at 513. While waiting for backup to arrive, the police saw the defendant in the backyard carrying a box toward the back fence. After noticing the police, the defendant returned to the house with the box. *Id.*

The officers went around to the rear boundary of the backyard and spotted evidence related to the burglary. *Id.* One of the officers then knocked on the backdoor, and he heard a male voice say, "Hurry, they are coming." *Id.* The officer identified himself and demanded entry. *Id.* After receiving no

response, the officer forced his way into the house and found the defendant hiding under a bed. *Id.* A struggle followed, and the defendant temporarily escaped. *Id.* at 513-14. The officers then searched the house and seized several items of evidence implicating the defendant in the burglary. *Id.* at 514.

The Court of Appeals concluded that the officer had probable cause to arrest the defendant when they entered his home, but that no exigent circumstances justified the warrantless entry. *Id.* On review, this court disagreed. This court held that, when the officer heard the male voice say, "Hurry, they are coming," "it was reasonable for the officers to assume that the accused was hurrying to conceal evidence of the burglary or that he was about to escape." *Id.* at 514-15. And, because the officers lawfully entered the home to make the arrest, the evidence they discovered in the course of pursuing the defendant throughout the house was not suppressed. *Id.* at 516. *See also Kentucky v. King*, 563 US 452, 131 S Ct 1849, 1858, 179 L Ed 2d 865 (2011) ("Where * ** the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, *warrantless entry to prevent the destruction of evidence is reasonable* and thus allowed."; emphasis added).

B. In the context of a DUII investigation, when a suspect enters a home for the purpose of evading arrest and refuses to come out, law enforcement may enter the home without a warrant to prevent the imminent destruction of evidence.

1. Under *Machuca* and *Mazzola*, blood-alcohol content evidence, and other observable evidence of impairment, is always dissipating.

This court recently applied the exigent circumstances exception in the context of a search for evidence of DUII—blood-alcohol content evidence—in *Machuca*, concluding that a warrantless blood draw did not violate Article I, section 9. In *Machuca*, the defendant was arrested for DUII and reckless driving while he was being monitored in the emergency room following a single-car crash. 347 Or at 646. The arresting officer "asked [the] defendant if he would like to take a blood test." *Id.* at 647. The defendant agreed, and his blood was extracted. After being formally charged, the defendant moved to suppress the evidence from the blood draw. *Id.* The trial court denied that motion, but the Court of Appeals reversed. *Id.* at 649-50. On the question of exigent circumstances, the Court of Appeals relied on this court's opinion in *State v. Moylett*, 313 Or 540, 836 P2d 1329 (1992), and held that "[t]he state was not relieved of its duty to obtain a warrant * * * by the mere fact that alcohol dissipates in the bloodstream over time." *State v. Machuca*, 231 Or App 232, 247, 218 P3d 145 (2009), *rev'd*, 347 Or 644 (2010).

On review, this court held that the warrantless blood-draw did not violate Article I, section 9. After thoroughly examining its own cases on exigency, this court concluded that *Moylett*'s requirement that the state prove "'that it could not have obtained a search warrant without sacrificing the evidence,' unnecessarily deviated from this court's established case law," and it disavowed that part of *Moylett*. *Machuca*, 347 Or at 656 (quoting *Moylett*, 313 Or at 550-51). Instead, this court held 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." *Id.* Therefore, "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." *Id.* at 657. This court recognized that "in the rare case" where "a warrant could have been obtained and executed *significantly* faster" than under ordinary circumstances, the constitution might still require a warrant. *Id.* (emphasis in original). However, this court emphasized that "only in those rare cases will a warrant be unconstitutional." *Id.*

Five years later, this court applied and expanded on *Machuca* and held that the warrantless administration of roadside FSTs also was justified under the exigent circumstances exception. *Mazzola*, 356 Or at 819-20. In *Mazzola*, an

officer stopped the defendant for a traffic violation. *Id.* at 805-06. After a preliminary investigation, the officer "believed that he had probable cause to arrest [the] defendant for driving under the influence of a controlled substance, but he did not know which drugs she might have taken." *Id.* at 806. Additionally, the officer "knew the 'basic' facts that 'over time the body filters drugs and they dissipate in one's body,' that different drugs dissipate at different rates, and that the effects of drugs wear off over time." *Id.* Based on that information, the officer required the defendant to perform various FSTs. *Id.* at 807. The defendant moved to suppress the results of the tests, which tended to show that she was presently impaired. *Id.* at 807-08. The trial court denied the motion to suppress, concluding that the officer "had probable cause to arrest [the] defendant for driving under the influence of a controlled substance and that exigent circumstances existed." *Id.* at 808.

On review, this court affirmed, holding that exigent circumstances permitted the warrantless administration of FSTs. This court began with a discussion of the alternative ways in which DUII can be proved: "the state must prove (1) in the case of alcohol intoxication, that the driver had a proscribed BAC level, ORS 813.010(1)(a); or (2) alternatively in alcohol cases, and necessarily in controlled substance, inhalant, and combined intoxication cases, that the driver was impaired to a perceptible degree while driving, ORS 813.010(1)(b), (c)." *Mazzola,* 356 Or at 812-13. This court observed that,

"in an alcohol-based prosecution, blood alcohol content is probative of whether a defendant was impaired while driving." *Id.* at 813. By contrast, however, prosecutions under ORS 813.010(1)(b), cannot rely on chemical evidence and "evidence that the defendant was impaired while driving typically comes in other forms," *id.*, namely "observational evidence of a motorist's physical impairment," *id.* at 817.

This court then considered that the purpose of FSTs was to "test for, and provide evidence of, impaired driving." *Id.* at 818; *see also* ORS 801.272 (defining FSTs as a means for detecting impairment from alcohol, controlled substances, inhalants, or any combination thereof). Because the state cannot prove impairment under (1)(b) with a chemical test, "the most probative evidence generally will consist of observations made while—or close in time after—the defendant was driving." *Mazzola*, 356 Or at 818-19. "Thus, FST evidence—like any other observed evidence of impairment—that is gathered closest in time to the defendant's act of driving, will be most probative." *Id.* at 819.

Based on that need for the observational impairment evidence, coupled with the fact that such evidence is constantly dissipating, *id.* at 819, this court concluded that requiring the defendant to perform FSTs did not violate Article I, section 9:

> [*State v.*] *Milligan*, [304 Or 659, 748 P2d 130 (1988)], [*State v.*] *Heintz*, [286 Or 239, 594 P2d 385 (1979)], 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.

Mazzola, 356 Or at 819-20. The defendant had already been "validly stopped and also was subject to arrest for DUII." *Id.* at 820. Additionally, the FSTs "were limited in scope and intensity; they did not intrude into defendant's body," and "they were administered soon after [the] defendant had been observed driving, and they immediately preceded her arrest." *Id.* "In light of the limited scope and intensity of those tests, and their proximity in time to defendant's arrest," this court held, "the described evidence established a sufficient exigency to justify the warrantless administration of the FSTs in this case." *Id.*

Taken together then, *Machuca* and *Mazzola* apply carefully delineated exigency rules to searches for impairment evidence in a DUII investigation. They recognize that evidence of impairment—whatever the source—is evidence that is always, necessarily dissipating with each breath a suspect takes and with each passing moment. Consequently, if obtaining a warrant would add any time to the DUII investigation, undertaking that step will necessarily result in the loss or destruction of some amount of evidence. Therefore, Article I, section 9, does not require a warrant in those situations.

2. Therefore, if a DUII suspect enters a home for the purpose of avoiding arrest or other contact with the police, evidence necessarily is being lost through natural dissipation and possibly being destroyed through intentional tampering.

Accordingly, the general principle is that law enforcement can make a warrantless home entry to search for evidence or make an arrest if there is probable cause to arrest the suspect inside and to believe that evidence inside will be imminently compromised in some manner. And, in DUII investigations, this court has already explained that evidence of intoxication is always dissipating and that natural dissipation constitutes an exigency except in a rare case. It follows, therefore, that when law enforcement has probable cause that a suspect recently has been driving under the influence of intoxicants, and that suspect will not come out of a home for purposes of performing FSTs or submitting to a chemical analysis of his breath, blood, or urine, relevant, crucial evidence of impairment at or near the time of driving is inescapably being lost. Avoiding that loss of evidence is one of the primary purposes of the exigent circumstances exception to the warrant requirement, and a warrantless home entry to forestall that loss of evidence is not unreasonable.

Moreover, the risk of destruction of evidence in DUII investigations goes beyond simple certainty of dissipation. Another very real concern in these cases is the likelihood that a defendant will affirmatively tamper with his or her blood-alcohol content evidence by consuming additional intoxicants while in

the home—making it impossible to prove (or disprove) impairment at the time of driving. Or, at the least, when a DUII suspect is not under police control, he or she will be able to claim that such additional consumption did occur, thereby injecting reasonable doubt into the state's case. In fact, that is precisely what happened in this case—at trial, defendant argued that he was not impaired when he drove and that any impairment only occurred because he consumed alcohol in his home in the minutes before Deputy Sites entered and arrested him.

Evidence in a DUII case is not only in the outward physical manifestations and observations of impairment (*e.g.*, bloodshot watery eyes, slurred speech) but also the evidence contained in the suspect's body by way of breath, blood, or urine. Once a person enters a home, he or she has the ability to permanently alter that evidence and can do so within minutes. For example, the person can drink large amounts of alcohol within a relatively short amount of time and/or the person can take drugs that would contribute to impairment. The newly introduced substances would combine with the intoxicants already existing in the defendant's system, irreversibly altering the suspect's state of impairment from what it was at the time of driving. There is a time delay inherent in the process it takes to obtain a warrant, and no warrant can be obtained in the mere minutes it would take for a person to consume alcohol or drugs while in their house, therefore tampering with and damaging the evidence. That possibility of tampering, even independent of the natural

dissipation of impairment evidence, supports the state's proposition that a warrantless entry into a person's home is reasonable when an officer has probable cause to believe that the person is impaired and has recently driven a car.

Whether by natural dissipation or by affirmative tampering, the likelihood of evidence destruction is significant when a DUII suspect locks himself or herself in a house to prevent law enforcement from investigating the crime. The near certainty that critical evidence will be lost during the time it would take to obtain a warrant—even in the best of circumstances—constitutes an exigency that excuses law enforcement from obtaining a warrant before entering the home in such cases.

3. The Court of Appeals' requirement that a warrantless entry is permitted only if the state proves that *all* evidence will be lost in the time it would take to get a warrant is not supported by this court's case law and is not faithful to the purposes of the exigent circumstances exception.

The Court of Appeals, relying primarily on its own case law, held that exigent circumstances will excuse procuring a warrant only if the state can establish that waiting for a warrant "would have sacrificed the evidence" or that "the suspect's blood would lose all evidentiary value" in the time it took to get a warrant. *Rice*, 270 Or App at 56 (citing *Ritz*, 270 Or App at 99-100). That rule, however, relies on the part of *Moylett* that this court specifically disavowed in *Machuca*. As noted, in *Machuca* this court explained that the requirement from

Moylett that the state establish how long it would have taken to get a warrant and that the evidence would be "sacrificed" during that time was a deviation from this court's exigency jurisprudence.

After *Machuca* and *Mazzola*, the exigent circumstances analysis no longer focuses on how long it would have taken to get a warrant and, therefore, it does not require the state to prove that getting a warrant would require it to sacrifice all impairment evidence. The length of time required to get a warrant is relevant only if the time it would have taken to get a warrant is less than the time it would take to conduct the search at issue. *See Machuca*, 347 Or at 657 ("[P]articular 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 circumstances. We anticipate that only in those rare cases will a warrantless blood draw be unconstitutional.").

In this case, in particular, the Court of Appeals' reliance on the "time to get a warrant" factor from *Moylett* was misplaced. Here, the initial evidence that the deputy sought to obtain was observations of defendant. The deputy wanted to observe defendant's demeanor and behavior for signs of intoxication, and he wanted to observe defendant perform FSTs. As this court noted in *Mazzola*, such observational evidence—close in time to when the suspect is driving—is often the best evidence of whether the suspect was impaired, which is necessary evidence in any DUII prosecution. Because this observational

evidence, and any chemical-analysis evidence, is dissipating with every moment that passes, waiting to get a warrant necessarily would require sacrificing some evidence. This is particularly true here, where the suspect is not in custody and every minute spent getting a warrant is inevitably another minute that evidence is being lost. Instead of focusing on how long it would have taken to get a warrant, this court should start from the understanding that the "highly evanescent" nature of blood-alcohol evidence "is an exigent circumstance," *Machuca*, 347 Or at 657, that will permit a warrantless search so long as the search is "reasonable[] * * * in time, scope, and intensity," *Mazzola*, 356 Or at 820.

Additionally, the Court of Appeals' rule ignores the realities of evidence destruction in the DUII context. As this court has recognized, drug and alcohol impairment evidence is constantly dissipating. Moreover, the likelihood that a DUII suspect will tamper with the evidence by consuming additional intoxicants while in the home makes it all the more important for law enforcement to be able to "freeze the scene" for the purpose of establishing a suspect's level of impairment as close as possible to the time of driving. Suggesting—as the Court of Appeals did in *Ritz*—that the existence of exigent circumstances depends on whether the state could extrapolate the defendant's blood-alcohol content at the time of driving from a later obtained chemical analysis of the defendant's blood, breath, or urine places an unworkable burden

on law enforcement and goes well beyond the limitations imposed by Article I, section 9. *See Ritz*, 270 Or App at 97-98 (employing "retrograde extrapolation" techniques to explain why waiting to get a warrant "does not necessarily lead to the 'destruction' of BAC evidence").

As noted, when a law enforcement officer first encounters a DUII suspect, he or she does not know what substance—or combination of substances—is causing the impairment, when the suspect started consuming the substances, or when the suspect stopped consuming those substances. All the officer knows is that the suspect appeared to be driving while impaired and that the evidence of impairment is constantly dissipating—and, in situations where the suspect is in a home and cannot be monitored, that the suspect could be tampering with that evidence by consuming additional drugs or alcohol. Given those circumstances, the constitution does not require an officer to secure a warrant. Instead, the exigency is manifest.

By requiring the state to show that "the suspect's blood would lose all evidentiary value" in the time it took to get a warrant, it appears that the Court of Appeals was attempting to incorporate the United States Supreme Court's Fourth Amendment rule from *Missouri v. McNeely*, 569 US ___, 133 S Ct

1552, 185 L Ed 2d 696 (2013).[4] *Rice*, 270 Or App at 56 (citing *Ritz*, 270 Or App at 99-100). In *McNeely*, the Court held that the state was not required to obtain a warrant before performing a blood-draw on an in-custody DUII suspect if the warrant process could "significantly increase" the delay and, thus, compromise the state's ability to obtain reliable blood-alcohol evidence. *McNeely*, 133 S Ct at 1561, 1568. But the Court of Appeals' interpretation of, and reliance on, *McNeely* is wrong for two reasons.

First, *McNeely* is of limited utility when addressing a situation where the suspect is not in custody. By its terms, *McNeely* addressed exigent circumstances only for purposes of gathering blood-alcohol content evidence and only where the suspect was in custody, under observation, and unable to tamper with that evidence. It that situation, it is understandable why the Court was less concerned by minimal delays in the warrant-application process. Here, however, officers had no reasonable way of knowing what substances were impairing defendant, could not observe the outward signs of defendant's intoxication, and could not deter defendant from tampering with evidence of his

[4] The Court of Appeals did not explicitly adopt the *McNeely* test in this case, or in *Sullivan*—upon which this case relied. However, it did explicitly rely on *McNeely* as part of its Article I, section 9, analysis in *Ritz*. *Ritz*, 270 Or App at 97-98.

impairment (or be in a position to respond to any subsequent claims of tampering).

Second, even under *McNeely*, the Court of Appeals' test—that the state would have to prove that it would have lost *all* critical evidence—is too demanding. The *McNeely* Court recognized that a "significant delay" results in the loss of evidence by undermining the accuracy of the retrograde extrapolation. The analysis was focused on the *accuracy* of the calculation, not whether it would have been *impossible* to perform retrograde extrapolation at all.

Indeed, this court has interpreted *McNeely* narrowly and to be consistent with the Article I, section 9, rule that exigent circumstances "ordinarily" are present in this scenario. In *State v. Moore*, 354 Or 493, 318 P3d 1133 (2013), this court explained that "[i]n our view, the Court's rejection of a *per se* exigency rule is not inconsistent with our statement in *Machuca* [] 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." 354 Or at 497 n 5. *Accord id*. at 507-08 (Kistler, J., concurring) ("I * * * agree with the majority that the holding in [*McNeely*] * * * is quite narrow"); *see also Mazzola*, 356 Or at 816 n 11 (noting the limited scope of the *McNeely* holding, and specifically concluding that *McNeely* does not control the analysis with respect to exigency in the context of FSTs).

As explained below, under a correct application of the exigent circumstances exception, defendant's Article I, section 9, right to be free from unreasonable search and seizure was not violated in this case. Because the officers had probable cause to believe that defendant committed DUII and evidence was being destroyed, they were permitted to make a warrantless entry into defendant's home to seize defendant and secure the evidence of his impairment.

C. In this case, exigent circumstances and probable cause justified the officer's entry into defendant's home both to arrest defendant for DUII and to secure evidence of defendant's impairment.

This court should conclude that the warrantless entry into defendant's home in this case falls squarely within the exigent circumstances exception to the warrant requirement and, therefore, did not violate defendant's Article I, section 9, rights to be free from unreasonable search or seizure. Because of the natural dissipation of—and potential for tampering with—impairment evidence, *Mazzola* dictates that warrantless searches and seizures in the DUII investigation context do not violate the constitution if they are reasonable in time, scope, and intensity.

Here, the warrantless entry into defendant's home was reasonable in time, scope, and intensity. As in *Mazzola*, one of the purposes of the warrantless search was to allow law enforcement to observe defendant's behavior and his performance on FSTs. When he entered defendant's home,

Deputy Sites had probable cause to believe that defendant was driving under the influence of some form of intoxicants just moments earlier. The deputy had no way of knowing what substances were impairing defendant; therefore, he needed to be able to observe defendant and require defendant to perform FSTs and continue to observe the outward signs of impairment. The scope of the evidence that Deputy Sites was attempting to obtain, therefore, was the same as that deemed reasonable in *Mazzola*.[5]

Additionally, the duration of the search and seizure in this case was similarly limited. The officers' entry into defendant's home was very brief—only long enough to place him under arrest. And, one of the primary purposes of securing defendant was so that he could perform FSTs. Performing FSTs takes a relatively short amount of time and, if evidence of intoxication is not revealed, the search and seizure would end up being relatively brief.

Furthermore, the search and seizure in this case was not more invasive than the searches that this court upheld in *Machuca* and *Girard*. In *Machuca*, officers—employing the implied consent statutes—lawfully compelled the defendant to have his blood drawn. Although a blood draw is likely not as

---

[5] Even assuming that Deputy Stites was also seeking to obtain a breath or blood sample from defendant following the FSTs, that would not change the analysis. The scope of that search is no broader than what this court approved in *Machuca*.

"extensive [of an] imposition on an individual's privacy," *Winston v. Lee*, 470 US 753, 762, 105 S Ct 1611, 84 L Ed 2d 662 (1985), as is a search of an individual's house, it nonetheless marks a significant governmental intrusion on an individual's right to privacy. *See Schmerber*, 384 US at 770 (concluding that "no less could be required where intrusions into the human body are concerned" than would be required for "searches of dwellings").

Moreover, the home entry in this case was significantly less intrusive than was the home entry in *Girard*. There, the officers entered through a back door, searched the house for the defendant, engaged in a physical confrontation with the defendant, and then, after the defendant escaped, searched the house for physical evidence of a crime. Here, on the other hand, the officers repeatedly knocked on defendant's door, requested that defendant voluntarily come out of the house, and told him that he was under arrest for DUII. Only after defendant repeatedly refused to come out and became belligerent and threatening, did the officers enter defendant's home with minimal force and place defendant under arrest without altercation or incident. So compared to the searches and seizures at issue in *Mazzola*, *Machuca*, and *Girard*, the time, scope, and intensity of the officer's conduct here was comparable and reasonable.

Finally, even employing the "significant delay" analysis from *McNeely*, no warrant was required. The state produced evidence that it would have taken

an additional "several hours" to procure a warrant. That is precisely the type of significant "delay[] from the warrant application process" that *McNeely* recognized will excuse a failure to seek a warrant. 133 S Ct at 1563. A delay of several hours to get a warrant in these circumstances would be significant; therefore, by any measure, the officers were justified in entering defendant's home.

CONCLUSION

The entry, arrest, and search in this case were reasonable in time, scope, and intensity; therefore, no constitutional violation occurred. Additionally, any delay necessitated by procuring a warrant would have been a "significant delay." Therefore, exigent circumstances permitted entry into defendant's house without a warrant. This court should reverse the decision of the Court of Appeals, and it should affirm the ruling and judgment of the circuit court.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General

/s/ Paul L. Smith

PAUL L. SMITH #001870
Deputy Solicitor General
paul.l.smith@doj.state.or.us

Attorneys for Petitioner on Review
State of Oregon

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on September 25, 2015, I directed the original Brief on the Merits of Petitioner on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Jesse Wm. Barton, attorney for Respondent on Review, 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 7,113 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).

/s/ Paul L. Smith

PAUL L. SMITH #001870
Deputy Solicitor General
paul.l.smith@doj.state.or.us

Attorney for Petitioner on Review,
State of Oregon

PLS:aft/6812368