IN THE SUPREME COURT OF THE STATE OF OREGON

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

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 Curry County
Honorable JESSE C. MARGOLIS, Judge

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

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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. The United States Supreme Court recognizes the same exception to the warrant requirement of the Fourth Amendment to the United States 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 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, neither Article I, section 9, nor the Fourth Amendment, prohibits 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, and the Fourth Amendment, do

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 the state or federal constitutions.

FACTUAL AND PROCEDURAL BACKGROUND

At approximately 10:30 p.m., Detective McCourt of the Brookings Police Department and Deputy Lorentz of the Curry County Sheriff's Office arrived at the scene of a one-vehicle crash and a reported fight between a man and a woman. (Tr 24-25, 39; Ex 1).[1] A woman, Wilson-McCullough, was at the scene, and she told Deputy Lorentz that she lived at the nearby residence with defendant and that defendant had driven the truck into the ditch and had been drinking that day. (Tr 26-28). Wilson-McCullough accompanied the deputy to the residence to look for defendant. (Tr 29). Wilson-McCullough opened the door, and the deputy looked through the door. (Tr 29, 45). Because of the small size of the residence—a small trailer—Deputy Lorentz could see the full

[1] Unless otherwise noted, all transcript citations are to the transcript of the March 2, 2012, pretrial hearing.

trailer from the doorway. (Tr 46). He did not see defendant. (Tr 29). At one point, officers heard some rustling in the bushes, and it sounded like someone was running through the bushes, but when they went to check, they were not able to find anyone. (Tr 29).

Deputy Lorentz returned to the crash site, where State Trooper Spini had arrived. (Tr 29). Detective McCourt had concluded that the crashed truck was owned by a third party, (Tr 30). The detective left the scene to go to residence. (*Id.*). Deputy Lorentz and Trooper Spini remained at the crash scene until about 11:30 p.m. and 11:50 p.m., respectively. (Tr 40, 56). Detective McCourt spoke with who confirmed that he owned the truck and that he had seen defendant driving it about 45 minutes earlier. (Tr 30, 40). He said that defendant was driving it unsafely and that defendant appeared to be intoxicated. (Tr 31-32).

Trooper Spini returned to the residence at 12:56 a.m. (Tr 56). As he was pulling up, he observed Wilson-McCullough standing on the porch, and defendant was standing next to her near the door. (Tr 56). Within seconds, defendant stepped inside the residence and closed the door. (Tr 56). At one point, he stuck his head out the door, and then closed the door again. (Tr 56). Trooper Spini made numerous attempts to get defendant to come out of the trailer, but defendant did not respond. (Tr 33, 57). Trooper Spini radioed for assistance, and at 1:12 a.m., Deputy Lorentz returned to the scene. (Tr 41, 57).

Three Brookings police officers also arrived to maintain a perimeter around defendant's residence. (Tr 42).

Trooper Spini and Deputy Lorentz decided that they needed to act quickly. (Tr 34). The deputy entered the trailer through a window, and he then opened the door for Trooper Spini. (Tr 35). Defendant was in the bathroom, and after some conversation, he agreed to come out. (*Id.*). When he came out, defendant had bloodshot, watery eyes, slurred speech, and the officers noticed an overwhelming odor of alcohol. (Tr 36). Trooper Spini arrested defendant at 1:33 a.m., and he transported him to jail. (Tr 36, 43, 60, 74-75) At the jail, defendant made incriminating statements, and he submitted to a Breathalyzer test at 2:23 a.m., which revealed his blood-alcohol content to be 0.14 percent. (Tr 61).

The deputy later testified that the last time he obtained a telephonic warrant in Curry County, it took approximately 45 minutes, but that had gone quickly because he had already been at his office when he started preparing that warrant application. (Tr 37). Trooper Spini estimated that it would have taken 90 minutes to prepare a warrant application and obtain a warrant for a blood-draw. (Tr 58-59).

Defendant moved to suppress all of the evidence obtained after the warrantless entry into his home. *State v. Ritz*, 270 Or App 88, 91, 347 P3d 1052, *rev allowed*, 357 Or 550 (2015). The trial court denied the motion to

suppress, relying on "[e]xigent circumstances and hot pursuit" as providing "a valid basis for entry into the trailer without a warrant." *Id.* at 92.

The Court of Appeals upheld the denial of the defendant's motion to suppress, but in doing so it distinguished this court's decision in *State v. Machuca*, 347 Or 644, 227 P3d 729 (2010):

> In this case, the state argues that *Machuca* establishes that police were justified in immediately entering [the] defendant's home without a warrant in order to prevent loss of blood-alcohol evidence. But *Machuca* does not reach that far. In *State v. Sullivan*, 265 Or App 62, 78, 333 P3d 1201 (2014), * * * we noted that *Machuca* dealt with 'the context of limited testing that is specifically designed to detect impairment, performed on a defendant who has already been validly seized as a prelude to that testing.' We declined to extend *Machuca* to a 'fundamentally different type of government intrusion, a home entry.' * * * Citing the 'substantial burden that the state faces when it attempts to justify a warrantless home entry,' we reasoned that the near 'per se' rule established in *Machuca* was inapplicable.

Ritz, 270 Or App at 93-94 (citations omitted). Based on that understanding of *Machuca*, the court's analysis turned to "an examination of whether a warrant could reasonably have been obtained without sacrificing evidence of the crime of DUII." *Id.* The court explained that, for exigent circumstances to justify a warrantless entry into a home, "the state has the burden of proving exigency by showing that critical evidence *would have been lost* if police had waited to obtain a search warrant." *Id.* at 97 (emphasis added).

Applying that rule to the facts of this case, the court held that the state had met that high burden. Because the record reflected that it would have taken

45-90 minutes for the police to prepare a warrant application, *id.* at 97, and because there was evidence "that the 'average' alcohol dissipation rate is .015 BAC per hour," *id.* at 100 (quoting testimony), the court concluded that "it would take approximately five hours and twenty minutes for a person's BAC to drop from 0.08 to 0.00." *Id.* Based on the time that had already passed from the time defendant crashed his vehicle, and because it could reasonably take another 90 minutes to obtain a warrant, there was "a substantial possibility that [the] defendant's BAC would have dropped from 0.08 (the threshold level for liability) to zero by the time it could be measured." *Id.* at 101. Therefore, the court concluded that the warrantless entry into the defendant's home to search "was reasonable under these specific circumstances." *Id.* The court reached the same result under the Fourth Amendment, concluding that "the analysis under the federal constitution is indistinguishable from that under the Oregon constitution." *Id.* This court allowed the state's petitions for review in both this case and in *State v. Rice*, 270 Or App 50, 52, 346 P3d 631, *rev allowed*, 357 Or 550 (2015),which was decided the same day and which applied the same exigency analysis to reverse a trial court's denial of a motion to suppress.

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, or the Fourth Amendment.

Here, law enforcement officers had probable cause to believe that: (1) defendant had been driving under the influence of intoxicant earlier in the evening; (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 officers' 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 constitutional rights against unreasonable search and seizure.

ARGUMENT

A warrantless entry into a home does not violate Article I, section 9, or the Fourth Amendment, 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 to 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 happened in this case—during closing argument, in an effort to explain his intoxication, defendant noted that there were "containers of alcohol" in the home, but there were "no containers at the vehicle." (Tr 378).

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 prove "that critical evidence would have been lost if police had waited to obtain a search warrant." *Ritz*, 270 Or App at 97. Although the Court of Appeals concluded that—even under that rule—exigent circumstances existed in this case, the rule itself imposes a hurdle that is inconsistent with this court's exigency caselaw and is not faithful to the purposes of the exigent circumstances exception to the warrant requirement.

That Court of Appeals' rule 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 officers sought to obtain was observations of defendant. They wanted to observe defendant's demeanor and behavior for signs of intoxication, and they wanted to observe defendant perform FSTs. Depending on the results of those observations, they also likely would have sought to obtain a sample of defendant's breath, blood, or urine for chemical analysis. 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. 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 this case—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, 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). *See Ritz*, 270 Or App at 97-101 (relying on *McNeely* for "guidance"). 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 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).

Although the Court of Appeals correctly affirmed the denial of the motion to suppress in this case, it did so based upon an incorrect exigency analysis. 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 they entered defendant's home, the officers had probable cause to believe that defendant was driving under the influence of some form of intoxicants earlier that evening. The officers had no way of knowing what substances were impairing defendant; therefore, they 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 the officers were attempting to obtain, therefore, was the same as that deemed reasonable in *Mazzola*.[2]

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

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[2] Even assuming that the officers were 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*.

of securing defendant was so that they could observe defendant and possibly have him perform FSTs. Those observations would take 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 "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, did the officers enter defendant's home with minimal force and place defendant under arrest without significant 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 45-90 minutes to procure a warrant and that at least three hours had already passed since defendant drove. 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. Further delay, even for 45-90 minutes, to get a warrant in these circumstances would be significant; therefore, by any measure, the officers were justified in entering defendant's home.

D. The home entry did not violate the Fourth Amendment.

As noted above, in this case, the Court of Appeals also concluded that the officers' warrantless entry into defendant's home did not violate the Fourth Amendment.[3] *Ritz*, 270 Or App at 101. The court relied on its interpretation of

[3] The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no

Footnote continued…

McNeely, and concluded "that, for purposes of this case, the analysis under the federal constitution is indistinguishable from that under the Oregon constitution." *Id.* For many of the same reasons discussed above with respect to Article I, section 9, the officers' warrantless entry into defendant's home did not violate the Fourth Amendment.

Unless law enforcement creates an exigency by unlawful conduct, a "warrantless entry to prevent the destruction of evidence is reasonable, and thus allowed" under the Fourth Amendment. *King*, 131 S Ct at 1858; *see also Ker v. California*, 374 US 23, 42, 83 S Ct 1623, 10 L Ed 2d 726 (1963) (approving a search incident to arrest where there was a "likelihood that the marijuana would be distributed or hidden before a warrant could be obtained"). In *McNeely*, the Supreme Court held that alcohol dissipation did not create a *per se* exigency such that it would excuse the need for a warrant in all cases in which a blood draw was administered for the purpose of providing evidence of a DUII defendant's blood-alcohol content. However, as noted above, the rule from *McNeely* was narrow and does not control the outcome of this case.

(…continued)
Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

In *McNeely*, the suspect was in custody and already under observation, and "the arresting officer did not identify any other factors [besides the dissipation of alcohol] that would suggest he faced an emergency or unusual delay in securing a warrant." 133 S Ct at 1567. The officer elected to forgo a warrant "only because he believed it was not legally necessary to obtain [one]." *Id*. On review, the State of Missouri advanced a lone justification under the Fourth Amendment for the blood draw—a categorical, bright-line, *per se* exigency rule for warrantless blood draws based on the dissipation of alcohol. *Id*. at 1568.

The United States Supreme Court rejected that rule in favor of a rule excusing the need to obtain a warrant when the warrant process could "significantly increase" the delay and, thus, compromise the state's ability to obtain reliable blood-alcohol evidence. *Id*. at 1561, 1568. The Court explained that there will undoubtedly be cases in which "anticipated delays in obtaining a warrant will justify a blood test without judicial authorization, for in every case the law must be concerned that evidence is being destroyed." *Id*. at 1568. The Court recognized that "because an individual's alcohol level gradually declines soon after [s]he stops drinking, a significant delay in testing will negatively affect the probative value of the results." *Id*. at 1561. "While experts can work backwards from the BAC at the time the sample was taken to determine the BAC at the time of the alleged offense, longer intervals may raise questions

about the accuracy of the calculation." *Id*. at 1563. "For that reason, exigent circumstances justifying a warrantless blood sample may arise in the regular course of law enforcement due to delays from the warrant application process." *Id*.

The Court further recognized police officer's ability to rely on their experience in determining whether the steps it would take to get a warrant would result in a significant delay:

> But because '[t]he police are presumably familiar with the mechanics and time involved in the warrant process in their particular jurisdiction,' *post*, at 1573 (opinion of ROBERTS, C.J.), we expect that officers can make reasonable judgments about whether the warrant process would produce unacceptable delay under the circumstances. *Reviewing courts in turn should assess those judgments 'from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.'*

McNeely, 133 S Ct at1564 n 7 (emphasis added; quoting dissenting opinion; quoting *Ryburn v. Huff*, 565 US ___, 132 S Ct 987, 992, 181 L Ed 2d 966 (2012) (per curiam)). *McNeely* thus equated the possibility of a "significant delay" as sufficient to establish exigency and it directed reviewing courts to give great deference to the judgments of officers on the scene as to how long getting a warrant would take. Under *McNeely*, it is sufficient if the officer reasonably could have concluded that the warrant process could have resulted in significant delay. *Accord Schmerber*, 384 US at 769-71 (exigent circumstances

existed because two hours had already elapsed and any further delay would have risked loss of evidence).

Although the Court of Appeals attempted to apply the *McNeely* standard in this case, its announced rule—that the state would have to prove that it would have lost *all* the evidence—is a misapplication of *McNeely*. In *McNeely*, the Court adopted a rule that excuses the failure to obtain a warrant if the warrant process could have "significantly increased" the delay in chemical testing. As explained above, this court has already interpreted that rule to be consistent with the Article I, section 9, rule that exigent circumstances will "ordinarily" be present when officers are faced with dissipating impairment evidence.

Although this court should affirm the denial of the Fourth Amendment suppression motion in this case, it should do so employing a correct analysis of the exigent circumstances exception to the warrant requirement. Under Supreme Court precedent, the warrantless home entry in this case was lawful under the Fourth Amendment for the same reasons in was lawful under Article I, section 9. Because of the natural dissipation of impairment evidence, and because of the likelihood of tampering with that evidence, a 45-90 minute delay in obtaining and executing a warrant would be a significant delay. Consequently, the officers' warrantless entry into defendant's home to secure that evidence was not an unreasonable search or seizure under the Fourth Amendment.

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." In either event, exigent circumstances permitted entry into defendant's house without a warrant. This court should affirm the judgment of the Court of Appeals—albeit for different reasons—and it should affirm the ruling and judgment of the circuit court.

Respectfully submitted,

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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 Ernest Lannet and Anne Fujita Munsey, attorneys 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 8,445 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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