IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. BELL MURPHY ANDERSEN, Defendant-Appellant, Respondent on Review.	Washington County Circuit Court Case No. C111600CR CA A150872 SC S063169

RESPONDENT'S BRIEF ON THE MERITS

Review of the Decision of the Court of Appeals
on Appeal from a Judgment of the Circuit Court for Washington County
Honorable Kirsten E. Thompson, Judge

Opinion Filed: March 18, 2015
Author of Opinion: Armstrong, J.
Concurring Judges: Haselton, C.J.; Duncan, J.; Nakamoto, J.;
Egan, J.; Flynn, J.; Wollheim, S.J.
Author of Dissent: DeVore, J.
Dissenting Judges: Ortega, J.; Sercombe, J.; Hadlock, J.; Tookey, J.; Garrett, J.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions and **Statutes**

Other Authorities

RESPONDENT'S BRIEF ON THE MERITS

Nature of the Proceeding

This case involves discretionary review of a Court of Appeals decision that reversed a circuit court judgment for erroneously denying a motion to suppress evidence. *See State v. Andersen*, 269 Or App 705, 346 P3d 1224, *rev allowed*, 357 Or 595 (2015). The issue on review is whether the warrantless search of defendant's Jeep was within Oregon's "bright line" automobile exception to Article I, section 9's warrant requirement, and, if it was, whether this court should abandon the exception.

Questions Presented and Proposed Rules of Law

First Question Presented

Was the search of defendant's Jeep authorized by the automobile exception to the warrant requirement of Article I, section 9?

First Proposed Rule of Law

The automobile exception to Article I, section 9, as drawn in *State v. Brown*, 301 Or 268, 721 P2d 1357 (l986), and as most recently interpreted in *State v. Kurokowa-Lasciak*, 351 Or 179, 263 P3d 336 (2011), is a narrow rule of "*per se*" or legally imputed exigency that depends on a single fact: the automobile's actual mobility at the time that police stop or encounter it in connection with the investigation of a crime. Because defendant's Jeep was not mobile when police stopped or first encountered it in connection with a crime,

but was instead parked, the legally imputed exigency from Oregon's "bright line" automobile exception did not authorize the warrantless search in this case.

Second Question Presented

Alternatively, should this court abandon its automobile exception to the warrant requirement of Article I, section 9?

Second Proposed Rule of Law

This court should abandon its automobile exception to the warrant requirement of Article I, section 9, based on the combination of reasons that (1) the exception was controversial at the time of its recognition and it remains so; (2) the exception was intended as a temporary accommodation pending technological advancements that have been realized; (3) contrary to the promise of *Brown*, the rule of *per se* exigency for automobiles is not easy to apply; and (4) a basis for the exception was not sufficiently independently analyzed under the Oregon Constitution.

Summary of Argument

Because defendant's Jeep was parked both when stopped by police and when encountered by police in connection with the investigation of a crime, the automobile exception to the warrant requirement of Article I, section 9, did not excuse the failure to obtain a warrant before searching the Jeep. That is because the automobile exception to Article I, section 9's warrant requirement, as drawn by this court in *Brown*, and as clarified in *Kurokawa-Lasciak*, is a narrow,

"bright line" rule of *per se* exigency that does not depend on an exigency presented by the facts of a particular case, but that instead depends on a single fact: the automobile's actual mobility at the time that it is stopped by police or encountered by police in connection with the investigation of a crime. In determining mobility, it does not matter that the Jeep's engine was running or that defendant was in the driver seat because the narrow rule of *Brown* does not extend to cars that are simply capable of mobility when stopped by police.

If this court disagrees that the automobile exception may not be invoked in this case, then defendant submits that this court should abandon the automobile exception in favor of returning to this court's pre-*Brown* practice of reviewing warrantless automobile searches for whether they fall within the exigent circumstances, search incident to arrest, or consent exceptions to the warrant requirement. *Brown* should be revisited for four reasons: the Oregon automobile exception was controversial at the time of its recognition and it remains so; the exception was intended as a temporary accommodation pending technological advancements that have in fact been realized; contrary to the promise of *Brown*, a rule of *per se* exigency for automobiles is not easy to apply; and, finally, a basis for the exception under Article I, section 9, was not adequately analyzed independent of the basis for the exception under the Fourth Amendment.

Summary of Facts and Procedural History

The Court of Appeals summarized the facts of this case as follows:

> "A Beaverton police officer, McNair, arranged a drug transaction between an informant and a suspect in drug activity for whom an arrest warrant had been issued. agreed to meet the informant to facilitate the purchase of half an ounce of methamphetamine. served in the deal as a drug broker, telling the informant that defendant would supply the drugs. told the informant to look for a silver Jeep or a red sedan in a WinCo parking lot.
>
> "Henderson, a plainclothes officer, circled the WinCo parking lot in an unmarked car, awaiting the transaction. When he returned to the front area of the parking lot, he saw a silver Jeep that had not been there a minute before. The Jeep had stopped some distance away from other vehicles and was positioned askew, across several parking spaces. Henderson watched speak to the occupants and then lean through the open passenger window. Henderson advised other officers of what he believed to be a drug transaction. The officers approached and arrested on the outstanding warrant. Defendant sat in the driver's seat of the Jeep with the engine running while the police arrested Defendant asked if she could leave, and McNair said that she could not because she was a subject of a police investigation. Defendant told McNair that she did not want to get out of the Jeep. McNair was concerned, however, about a sheathed dagger on the rear passenger floorboard at the feet of a passenger and ordered everyone in the Jeep to step out of it.
>
> "Although she initially refused, defendant ultimately agreed to allow a drug dog to sniff the exterior of the Jeep. The dog sniffed the outside of the Jeep and twice alerted officers to the presence of drugs. Based on the dog's responses, the officers decided to search the interior of the Jeep. Inside the Jeep, the dog alerted to defendant's purse, in which the police found half an

> ounce of methamphetamine and a lipstick case containing additional drugs. The state subsequently charged defendant with both unlawful possession and unlawful delivery of methamphetamine."

Andersen, 269 Or App at 707-08.

Defendant does not dispute the accuracy of the Court of Appeals' factual summary, except for the assertions that "Henderson advised other officers of what he believed to be a drug transaction" and that "a lipstick case containing additional drugs" was found in defendant's purse.[1] However, because this case turns on its facts, defendant offers a more complete factual summary below.[2]

On July 25, 2011, Beaverton police officer Patrick McNair observed the interactions between an informant and Brian in arranging an attempted purchase of a half-ounce of methamphetamine from an associate of 1/18/2012 Tr 22-26. was a known "player" in the local "drug scene" for whom an arrest warrant for a probation violation had been

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[1] As detailed in defendant's supplemental factual summary, Henderson informed other officers only that he had identified and that was walking away from the Jeep. And, as also detailed in the supplemental facts, the lipstick case containing additional drugs was found outside of defendant's purse, near the sheathed dagger on the floorboard.

[2] *See State v. Douglas*, 260 Or 60, 62, 488 P2d 1366 (l971) (explaining that "[b]ecause decisions in cases involving alleged illegal searches and seizures depend largely upon the particular facts of each case," the court reviews the facts "in more than usual detail"). *See also State v. Warner*, 284 Or 147, 149, 585 P2d 681 (l978) (noting that the "determination of the legality of searches and seizures depends largely upon the facts of each case").

issued. *Id*. at 25. At about 8:00 p.m., reported that he believed he had a methamphetamine source: "his girl in Hillsboro with the silver Jeep." *Id*. at 27, 58. The parties planned to meet "around the WinCo area." *Id*. at 26.

After an exchange of several text messages, reported to the informant that he and the seller were on their way in a red four-door car. *Id*. at 28. intended to meet the buyer at a Plaid Pantry across the street from WinCo. *Id*. at 83. McNair advised officers patrolling the WinCo area to watch for a silver Jeep or a red four-door car. *Id*. at 28.

Beaverton police officer Matthew Henderson was one of the officers on undercover patrol in the WinCo area. *Id*. at 87. At about 11:00 p.m., Henderson checked WinCo's side parking lot, and when he returned to the front parking lot a minute later, he saw a silver Jeep on the far side of the front lot that had not been present before. *Id*. at 69, 89. WinCo shared the parking lot with other businesses that were closed at that time, and traffic in the lot was light. *Id*. at 88. Instead of pulling into a single parking space, the Jeep parked across several spaces. *Id*. at 90.

Henderson noted that the Jeep was occupied, but he could not discern if there was a female occupant. *Id*. Henderson saw walk away from the Jeep, in the company of a male, toward a Plaid Pantry. *Id*. at 91-92. and the male abruptly turned before reaching the Plaid Pantry, though, and approached the Jeep. *Id*. at 92-93. The male got into the Jeep's front passenger

seat, and, from outside the Jeep, talked to the male through the open front window. *Id*. at 93. then leaned into the Jeep with his upper torso and appeared to reach across the front seat before returning to his conversational stance outside the Jeep. *Id*. at 93-94.

Henderson informed McNair that he had identified in the parking lot and that he had observed walking away from the Jeep. *Id*. at 93. Henderson believed that was in the area to "deal meth." *Id*. at 94. Before driving to the WinCo parking lot, McNair requested that a canine unit be dispatched to the scene. *Id*. at 30. Once at the WinCo parking lot, McNair saw the silver Jeep and noted that a female was in the driver seat. *Id*. at 31. In addition to the male in the front passenger seat, there was a male and a female in the back seat. *Id*. at 31-32. McNair also observed a sheathed dagger near the feet of the rear male passenger. *Id*. at 35. McNair believed that he had probable cause to believe that there were drugs or evidence of a drug deal in the Jeep. *Id*. at 32.

Police arrested on the outstanding warrant. *Id*. at 36. At the time of arrest, at least two other officers (Brown and Henderson) were present, in addition to McNair. Tr 35-36, 98. McNair contacted defendant, the female in the driver seat, who asked if she could leave. *Id*. at 35. The Jeep's engine was running. *Id*. at 68. McNair responded that she could not leave because she was the subject of a police investigation. *Id*. at 36.

Defendant said McNair had no reason to detain her. *Id*. at 37. At about this time, yet another police officer (Groshong) arrived. *Id*. at 37.

McNair explained that a narcotics-detecting dog was on its way, and he asked defendant to speak with him away from the Jeep. *Id*. at 37. Defendant said that she did not want to leave the Jeep. *Id*. McNair said a drug dog was going to sniff the car, and defendant said she refused permission for any search. *Id*. McNair repeated that he wanted a dog to sniff the car, and defendant told him to go ahead with the sniff. *Id*. at 38. McNair got everyone out of the Jeep and patted them down. *Id*. at 38-39. At that point, McNair did not know which person was the potential drug supplier for drug deal. *Id*. at 37, 51, 56-57.

The police dog sniffed the Jeep's exterior and alerted to both of the Jeep's front door areas. *Id*. at 42, 80. The dog then sniffed the Jeep's interior and alerted to a purse on the front floorboard and to the area of the floor where the purse had rested. *Id*. at 42-43. McNair searched the purse and discovered $634 in cash and what was later proved to be 13.9 grams of methamphetamine. *Id*. at 43, 175. On the passenger side floor, a few inches from the dagger, McNair found a lipstick case, within which were three small bags of what was later proved to be half-gram quantities of methamphetamine. *Id*. at 43-44.

While McNair and the dog searched the Jeep's interior, defendant yelled that police had no permission to search and was on her phone, apparently with

her mother. *Id*. at 45, 145. McNair arrested defendant, after which defendant's mother arrived at the scene. *Id*. at 46. Defendant yelled to her mother to take her purse and said, "Don't let them take my car." *Id*. at 46. McNair believed that it would have taken several hours to obtain a warrant to search the Jeep. *Id*. at 70-71, 74.

In the circuit court, the state argued that, based on the foregoing facts, the warrantless search of the Jeep was justified by both the exigent circumstances exception and the automobile exception to Article I, section 9's warrant requirement. *Id*. at 187-92. The state argued in support of both exceptions that police had probable cause to search the Jeep for evidence of a "drug deal" as soon as they saw and the Jeep in the WinCo parking lot. *Id*. at 187-88, 190. The state argued alternatively that if there was not probable cause initially, then police developed it after the drug dog alerted to the exterior of the Jeep. *Id*. at 190-92.

Defendant responded that the facts of a silver Jeep with a female driver in the WinCo parking lot failed to establish probable cause to search the Jeep, and that the search failed to qualify for the automobile exception because the Jeep was not mobile. *Id*. at 198-99, 201-02. The court found that there was probable cause for the search of the Jeep both when the Jeep was parked at WinCo and after the dog sniff. *Id*. at 206-07. The court further found that both the exigent

circumstances exception and the automobile exception excused the failure to obtain a warrant. *Id*.

In the Court of Appeals, defendant abandoned her argument that police lacked probable cause to search, but still argued that neither the exigent circumstances exception nor the automobile exception applied to the facts of her case. Appellant's Brief at 10-20. In response, the state conceded that the search was not justified by the exigent circumstances exception and argued only that the automobile exception applied because the Jeep was "constructively" mobile. Respondent's Brief at 2-10. Because defendant's brief did not question whether there was probable cause for the search, the state did not identify at which point in the encounter that probable cause existed.

Argument

Defendant's argument proceeds in two parts. Section I describes the automobile exception to the warrant requirement of Article I, section 9, as articulated in *State v. Brown*, 301 Or 268, 721 P2d 1357 (l986), and argues that the search in this case did not fall within the exception. Section II asserts that should this court find *Brown*'s automobile exception applicable, this court should abandon the exception.

I. The search of defendant's Jeep was not within the scope of the automobile exception as drawn by this court in *State v. Brown* because the Jeep was not mobile when stopped or first encountered by police.

A. The *Brown* rule and its rationale.

Article I, section 9, of the Oregon Constitution guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure."[3] Consistent with that provision, searches or seizures conducted without a warrant are "*per se* unreasonable unless they fall within one of the few specifically established and carefully delineated exceptions to the warrant requirement." *State v. Bridewell*, 306 Or 231, 235, 759 P2d 1054 (l988). One of those few exceptions is the exigent circumstances exception, which allows police to search without a warrant when they have probable cause and are confronted with an exigency that requires police to act swiftly to prevent danger to life, serious damage to property, a suspect's escape, or destruction of evidence. *State v. Snow*, 337 Or 219, 223, 94 P3d 872 (2004).

In *State v. Brown*, this court crafted an "automobile" exception to Article I, section 9's warrant requirement as a "*per se* exigency rule." Under the

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[3] Article I, section 9, provides:

> "No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."

exception, if police have probable cause to believe that a car contains "contraband or crime evidence" and the car is "mobile when stopped by police," police may search without a warrant. *Brown*, 301 Or at 276. In explaining the nature of the "exigency" required to satisfy Article I, section 9, the court emphasized that "the key to the automobile exception is that the automobile need be mobile at the time it is lawfully stopped." *Id*. That is, "[m]obility of the vehicle at the time of the stop, by itself, creates the exigency."[4] *Id*.

In adopting a narrow rule of *per se* exigency, the court was clear that it does not matter whether a passenger might take custody of a car, whether the police have adequate personnel to support an arrest, whether a tow truck is available, whether a magistrate could have issued a warrant, or whether a threatening crowd is present. *Id*. at 278. Instead, all that a trial judge must find is: "(1) the car was mobile at the time it was stopped by the police; and (2) the police had probable cause to believe that the car contained contraband or crime evidence." *Id*.

After describing the new exception, the court explained that adoption of a "*per se* exigency rule" would provide "the clearest guidelines for police in

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[4] Significantly, the dissent in *Brown* describes the majority's rule as an exception to Article I, section 9, that applies "only when officers have lawfully stopped the vehicle while in motion." *Brown*, 301 Or at 291 (Linde, J., dissenting).

conducting automobile searches," and that "[e]xigencies should not be determined on a case-by-case basis." *Id*. Instead, "[p]olice need clear guidelines by which they can gauge and regulate their conduct rather than trying to follow a complex set of rules dependent upon particular facts regarding the time, location and manner of highway stops." *Id*. To provide that clarity, the court "reject[ed] the language that anything in addition to the mobility of an automobile at the time it is lawfully stopped is required to create exigency under the automobile exception as defined in this case." *Id*. at 277. Thus, assuming police have probable cause to search a car, the single controlling factor in whether the automobile exception may be invoked is whether the car was mobile at the time police stopped it. *Id*. at 278.

The court noted that though its decision was an interpretation of the Oregon Constitution, it had been persuaded by United States Supreme Court decisions interpreting the federal constitution, including *Carroll v. United States*, 267 US 132, 45 S Ct 280, 69 L Ed 543 (l925), and its progeny. *Id*. at 274. In *Carroll*, federal prohibition agents and a state police officer stopped a car in transit and then searched it without a warrant based on probable cause to believe that the car was being used to ferry alcohol in violation of the National Prohibition Act. *Carroll*, 267 US at 134-35. Confronted with a claim that the search violated the Fourth Amendment, the Court noted that the Fourth Amendment had long been construed as viewing differently a search of a

stationary structure and a search of "a movable vessel" that "readily could be put out of reach of a search warrant." *Id*. at 151. The Court held that, because of an automobile's mobility, warrantless searches of automobiles when there is probable cause to believe the automobile is carrying "contraband or illegal merchandise" does not violate the Fourth Amendment. *Carroll*, 267 US at 153-54.

The *Brown* court also noted approvingly the observation from *Chambers v. Maroney*, 399 US 42, 52, 90 S Ct 1975, 26 L Ed 2d 419 (l970), that "[f]or constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant." *See Brown*, 301 Or at 276 ("We agree with the proposition that if police have probable cause to believe that a person's automobile, which is mobile when stopped by police, contains contraband or crime evidence, the privacy rights of our citizens are subjected to no greater governmental intrusion if the police are authorized to conduct an immediate on-the-scene search of the vehicle than to seize the vehicle and hold it until a warrant is obtained.").

As announced in *Brown*, then, the automobile exception to the warrant requirement of Article I, section 9, is a narrow rule of *per se* exigency for mobile automobiles. And, based on the court's adoption of the *Chambers* observation that searching a car with probable cause with or without a warrant

is not significantly different, the *Brown* rule is a rule of expedience as much as a rule of exigence.

The *Brown* court applied its new warrant exception to the case before it, and to a companion case, *State v. Bennett*, 301 Or 299, 721 P2d 1375 (l986). In *Brown*, police had information that the defendant had assaulted his girlfriend and stolen her purse, and that the defendant always carried a handgun in a purse on his person or in the trunk of his car. *Brown*, 301 Or at 270. Police then stopped the defendant, while the defendant was driving his car, to arrest him for assault and theft. *Id*. The officers searched the car's passenger compartment, glove box, and locked trunk. *Id*. In the trunk was a black purse, within which was a handgun. *Id*. Though the defendant was handcuffed throughout the encounter, and was both handcuffed and in a patrol car when police searched his trunk, the court found that the search came within its *per se* exigency rule for automobile searches. *Id*. at 270, 273, 278-79.

In *Bennett*, police had probable cause to believe that the defendant was transporting marijuana in his car. 301 Or at 301. Police stopped the defendant while he was driving his car, arrested him, placed both the defendant and his passenger in patrol cars, and then searched the car. *Id*. at 301-03. The search was of the car's interior, locked trunk, and closed footlockers that were found within the locked trunk. *Id*. at 303. This court described the search as "a textbook application of Article I, section 9, of the Oregon Constitution as

interpreted in *State v. Brown*" and "a classic valid warrantless search and seizure of a mobile automobile as set forth in *Brown.*" *Id*. *See also State v. Kosta*, 304 Or 549, 554-55, 748 P2d 72 (l987) (*Brown* rule authorized a warrantless search of the trunk of car that police stopped based on probable cause to believe there was a package of cocaine in the trunk).

The court declined opportunities to apply *Brown*'s *per se* exigency rule to cars that were not mobile—that is, not actually moving—when stopped by the police in *State v. Kock*, 302 Or 29, 725 P2d 1285 (l986) and *State v. Kurokawa-Lasciak*, 351 Or 179, 263 P3d 336 (2011). In *Kock*, because the defendant was suspected of stealing merchandise from his store employer, police conducted surveillance on his car while it was parked outside of his place of employment. 302 Or at 31. At one point, police saw the defendant leave the store with a box and place a package from the box in his car. *Id*. After the defendant returned to the store, police searched the car, seized the package, and discovered that the package contained diapers. *Id*. The defendant was then arrested for theft. *Id*.

This court allowed review to consider whether the *Brown* rule should be extended to cars that have not just been stopped by police but are, instead, only *capable* of mobility. *Id*. at 32. It decided that the bright line rule of *Brown* would remain "just where [the court] left it in that case: Searches of automobiles that have just been lawfully stopped by police may be searched without a warrant and without a demonstration of exigent circumstances when

police have probable cause to believe that the automobile contains contraband or crime evidence." *Id*. at 33.

In rejecting an extension of the automobile exception to automobiles that are only capable of mobility, this court emphasized that police need clear guidelines for their actions and that citizens need a clear explanation of their constitutional rights. *Id*. For those two reasons, the court concluded that "*Brown* sets the outer limit for warrantless automobile searches without other exigent circumstances." *Id*. It also agreed with Chief Justice Peterson's observation in his concurrence in *Bennett* that "there are advantages in having a clear, workable and consistent automobile exception, rather than one dependent upon a case-by-case showing of exigency." *Id*. at 33-34.

The court adhered to *Kock* in *Kurokawa-Lasciak*. There the defendant was suspected of laundering money at a casino. 351 Or at 181. The casino prohibited the defendant from engaging in further cash transactions for 24 hours, and it posted a photograph of the defendant in its cashiers' cages. *Id*. When the defendant attempted a cash transaction with a casino cashier, he saw his photograph, reached through the cage, and grabbed the photo. *Id*. at 182. The defendant then drove away from the casino in a van, but he returned about 15 minutes later, parked the van, and walked toward the casino. *Id*.

Police stopped the defendant roughly 30 feet from the van to investigate him for money laundering. *Id*. They arrested him for disorderly conduct and

theft of the casino photograph, then took him to jail. *Id*. at 183. Police continued their investigation by interviewing the defendant's girlfriend who told police that the defendant had marijuana in the van, and who ultimately allowed police to search the van. *Id*. at 184.

This court rejected the state's argument that because the defendant's van was operable, the search of the van came within *Brown*'s automobile exception.[5] The court adhered to the "bright line" that it had drawn in *Brown* and *Kock* and held that the automobile exception "does not permit a warrantless search of a defendant's vehicle when the vehicle is parked, immobile, and unoccupied at the time that the police encounter it in connection with a crime." *Id*. at 181. In so holding, the court again acknowledged *Brown*'s intent to provide police with clear guidelines and noted *Brown*'s stated preference for warrants. *Id*. at 188. It also noted that both *Brown* and *Kock* "expressly rejected operability as the basis for the automobile exception to the Oregon Constitution." *Id*. at 193. Significantly, the court stated:

> "We acknowledge the logic of the state's position—that it is just as likely that a person in control of an operable car will drive off with evidence or contraband as will a person in control of a car that was mobile at the time of the initial encounter and

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[5] Because the court rejected application of the automobile exception based on the car's immobility, it did not determine at which point in the encounter that police developed probable cause to search the van or whether the timing of the probable cause determination bore on the automobile exception's applicability.

> remains mobile thereafter. But we are also cognizant that, when the court recognized the automobile exception in 1986, it was careful to recognize a limited exception to the constitutional requirement that a neutral magistrate, and not officers in the field, determine the existence of probable cause to search. The court drew the 'bright line' that it did to benefit both the police and the citizens of this state. *If we were to alter that line, we would be overruling those cases*."

Id. at 193 (emphasis added).

In between the "classic" automobile exception cases of *Brown* and *Bennett*, and the parked-car cases of *Kock* and *Kurokawa*, is *State v. Meharry*, 342 Or 173, 149 P3d 1155 (2006). In *Meharry*, a fire chief saw the defendant drive her van erratically and nearly cause a collision. 342 Or at 175. He followed the defendant and reported his observations to police. *Id*. The officer who responded to the report saw the fire chief following the defendant, and, after the defendant pulled into a convenience store parking lot, parked behind the defendant's van and followed her into the store. *Id*. The defendant was dazed and stuporous and admitted having taken a number of prescription medications. *Id*. at 176. After the defendant failed field sobriety tests, the officer arrested her for driving under the influence of intoxicants, searched her person incident to arrest, found a syringe in a pocket, then searched the inside of the van and found evidence that was the basis of a motion to suppress. *Id*.

This court found that the search fell within the narrow rule of *Brown* because, when police first encountered the defendant's van in connection with a

crime, the defendant was driving her van and appeared to be driving under the influence of intoxicants. *Id*. at 179. The van was thus mobile within the meaning of *Brown*. *Id*. at 180. *See also Kurokawa-Lasciak*, 351 Or at 192-93 (noting that *Meharry* decision turned on the fact that the defendant's van was mobile when police encountered it in connection with a suspected crime and not simply operable).

From the foregoing review of this court's cases applying the rule crafted in *Brown*, it is clear that the Oregon automobile exception to the warrant requirement is, as described in *Brown*, a narrow rule of *per se* exigency that does not depend on an exigency presented by the facts of a particular case, but that depends instead on a single fact: the automobile's actual mobility at the time that it is stopped by police or encountered by police in connection with the investigation of a crime. And, under *Brown*, an automobile's actual mobility is determined not by its capacity for motion or risk of motion but instead by the fact that police have observed it in transit.

B. *Brown*'s application to this case.

In this case, police were monitoring an attempted drug sale between and a police informant. said he intended to obtain the drugs from "his girl in Hillsboro with the silver Jeep." His plan was to meet the informant at a Plaid Pantry in the area of a WinCo store. He told the informant that he would be arriving in a red four-door car. At least one undercover officer

then patrolled the WinCo parking lot, looking for a silver Jeep or a red four-door sedan. At about 11:00 p.m., the officer checked WinCo's side parking lot, then returned to the front lot about a minute later and saw a silver Jeep parked across several parking spots in the far corner of the WinCo parking lot that had not been there previously.

The undercover officer saw and another male walking away from the Jeep, but then abruptly turn back toward the Jeep. The male got into the Jeep's front passenger seat, and conversed with him through the passenger door's open window. The officer reported his observations to Officer McNair.

McNair called for a drug-detecting dog then responded to the WinCo parking lot. He saw a female in the driver seat of the Jeep, a male in the front passenger seat, a male and a female in the rear seats, and standing outside the Jeep. Police arrested on the outstanding warrant and got all of the Jeep's occupants out of the vehicle. The drug-detecting dog sniffed the Jeep's exterior, "alerted" to the doors, then sniffed the Jeep's interior and alerted to the driver floorboard and to defendant's purse that had been resting on the floorboard. McNair then searched the Jeep's interior, including defendant's purse, and found methamphetamine in the purse and in a lipstick case that was under the front passenger seat.

The automobile exception as articulated in *Brown* and most recently interpreted and applied in *Kurokawa-Lasciak* did not excuse the officers' failure to obtain a warrant to search the Jeep and its contents because the Jeep was not mobile when police first stopped it or first encountered it in connection with a crime.[6] Instead, police first encountered and then stopped the Jeep in connection with a suspected drug crime when the Jeep was parked.

The condition of the Jeep upon initial encounter can be characterized only as "parked" for several reasons. First, that is the word used by the undercover officer when he described his initial observation of the Jeep: "It was parked on the east side of the parking lot * * *. And the vehicle was parked within a few hundred –maybe 100 feet of Cedar Hills Boulevard." Tr 89. "It was parked crossing over the lines[.]" Tr 90. Second, the observations of the officer were consistent with the Jeep's status as parked. That is, the officer saw and another male briefly walk away from the Jeep and then abruptly return to the Jeep, where the unknown male got into the front passenger seat after which conversed with the Jeep's occupants through the open passenger side window, and leaned deeply into the Jeep and across the front

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[6] Defendant questions whether police had probable cause to search the Jeep at the time that it was initially encountered in connection with a crime (that is, before the dog sniff of the Jeep's exterior), but, because probable cause was not challenged in the Court of Appeals, defendant does not press that argument further.

passenger area. Third, the Jeep was not in a lane of travel, but was off the road and in the parking area of a parking lot. And finally, at no time did any officer see the Jeep in any physical motion.

Defendant acknowledges that because the engine was running and defendant was in the driver seat, the Jeep was capable of mobility. But the narrow *per se* rule of *Brown* does not extend to cars that are simply capable of mobility, *i.e.* "operable," when encountered or stopped by police. *Brown* and this court's cases interpreting *Brown* have made clear that the ticket to a warrantless automobile search is the automobile's actual "mobility" at the time of the stop and that actual mobility turns on whether a car is in transit. Because defendant's Jeep was not mobile within the meaning of *Brown*, the automobile exception to the warrant requirement of Article I, section 9, did not excuse the failure to obtain a warrant in this case.

II. This court should abandon the automobile exception in favor of returning to pre-*Brown* practice.

If this court determines that the automobile exception authorized the warrantless search in this case, then defendant submits that this court should abandon the automobile exception in favor of returning to this court's pre-*Brown* practice of reviewing warrantless automobile searches for whether they fall within the exigent circumstances, search incident to arrest, or consent exceptions.

Defendant acknowledges that she is requesting reconsideration of *Brown* for the first time in this court. However, because the trial court and the Court of Appeals are bound to follow decisions of this court and have no ability to overrule this court's decisions, an assertion that a prior decision of this court should be revisited may be made in this court. *See Stranahan v. Fred Meyer*, 331 Or 38, 47 n 6, 11 P3d 228 (2000) (noting that because lower courts must follow decisions of the Oregon Supreme Court, a contention that a Supreme Court decision was wrongly decided may be raised for the first time in this court).

Defendant also acknowledges that the principle of *stare decisis* "dictates that this court should assume that its fully considered prior cases are correctly decided." *Farmers Insurance v. Mowry*, 350 Or 686, 692, 261 P3d 1 (2011). But, this court has stated that it will revisit prior decisions based on a variety of considerations. *Id*. The list of considerations is not exhaustive because "[t]he circumstances in which *stare decisis* applies are simply too varied." *Id.* at 693 n 3. *See also Couey v. Atkins*, 357 Or 460, 485, 355 P3d 866 (2015) (observing that "[p]recisely what constitutes an 'error' sufficient to warrant reconsideration of a constitutional precedent cannot be reduced to a neat formula"). Among the grounds that this court has recognized for revisiting a prior decision is a showing that the prior case was wrongly decided based on (1) an inadequate legal analysis or (2) because the legal or factual context for the prior decision

has changed in a way that seriously undermines the reasoning or the result of the earlier decision. *Mowry*, 350 Or at 698.

The decision in *Brown* should be revisited for four reasons: the Oregon automobile exception was controversial at the time of its recognition and remains so; the exception was intended as a temporary accommodation pending technological advancements that have in fact been realized; contrary to the promise of *Brown*, a rule of *per se* exigency for automobiles has not been easy to apply; and, finally, a basis for the exception under Article I, section 9, was not adequately analyzed independent of the basis for the exception under the Fourth Amendment.

A. The Oregon automobile exception was controversial at the time of its recognition and remains so.

Justices Linde and Lent vigorously dissented from the four-vote majority in *Brown*.[7] Justice Linde disagreed with the premise that "in every case, the search of the trunk of a mobile vehicle, once it has been stopped, is 'exigent *per se*' regardless of individual circumstances." *Brown*, 301 Or at 280 (Linde, J., dissenting). Relatedly, in Justice Linde's view, "The fatal flaw in the majority's position is its statement that 'exigencies should not be determined on a case-by-case basis.'" *Id*. at 292. That statement is flawed because "[e]xigencies are emergencies, circumstances that require urgent action; of course they arise case

[7] Justice Roberts retired after *Brown* was argued and her replacement did not participate in the decision. 301 Or 268 n 4.

by case." *Id*. And, "the proposition that it always, or generally, is impossible to obtain a warrant to search a vehicle after it has been stopped in transit is simply contrary to fact, especially in cases where the occupants have been placed in custody outside the vehicle." *Id*.

Justice Linde also rejected as faulty the majority's assumption that conducting an immediate on-the-scene search of a stopped vehicle is no greater intrusion than holding the vehicle until a warrant is obtained. *Id*. at 294. In other words, assuming that a warrant *would* issue, holding someone while obtaining a warrant would be a greater intrusion than just conducting the warrantless search. The majority's contrary assumption is faulty because it is the person whose constitutional rights are at stake that should have the choice whether to consent to an immediate search or to await a warrant, especially when bags or other closed containers are involved. *Id*. at 294-95 ("The person, not the officer, is the one to decide whether to insist on the right to have the supposed probable cause tested by a magistrate and to accept the inconvenience of the necessary seizure. There is simply no basis for this court or any court to make such a categorical choice for all owners of automobile trunks or closed containers found in automobiles as a class.").

Justice Linde also believed strongly that before a court reaches the constitutionality of the practice, "[a] rule authorizing warrantless police searches of automobiles on probable cause alone, without actual circumstances

of necessity, should be enacted by politically accountable elected policymakers rather than by [the] court." *Id*. at 280. Finally, Justice Linde was concerned that the decision was not sufficiently grounded in an independent interpretation of the Oregon Constitution and that the *per se* rule would likely lead to confusion, not clarity, in the area of vehicle searches. *Id*. at 284-88, 290-91.

Chief Justice Peterson in *Bennett* confessed that the rule announced in *Brown* bothered him, but he joined the opinion to make a majority and put the issue to rest. *See Bennett*, 301 Or at 308, (Peterson, C.J., concurring) ("I confess that the result in this case troubles me. * * * I aim at putting the question to rest, to the end that everyone will know and understand what is the rule. I therefore join in the opinion of the majority."). *See also Brown*, 301 Or at 281 (Linde, J., dissenting) (noting position of Chief Justice).

Justice Lent in *Kosta* observed that whenever the court believes that it may have erred in its constitutional interpretation, it should rectify the error because the only other way to change the court's erroneous interpretation is through the cumbersome process of constitutional amendment. 304 Or at 556 (Lent, J., concurring). He then noted the court's majority decision in *Brown*, over his and Justice Linde's dissent, and lamented, "I hope someday that error [the majority decision in *Brown*] will be rectified by this court." *Id*.

In *Meharry*, decided ten years after *Brown* and *Bennett*, Justice Durham joined in the majority's decision but expressed reservations about the *Brown* rule. Justice Durham wrote:

> "The proposition that Article I, section 9, of the Oregon Constitution allows the police to search every stopped vehicle in Oregon without a warrant based on a flexible criterion like 'mobility' remains controversial. The *Brown* majority adopted that proposition to lend certainty to the decisionmaking process of law enforcement officers. That is, of course, a worthwhile goal. But, in my view, the *Brown* court's decision oversold the notion that it would lead to certainty. Whether a vehicle is 'mobile,' or *sufficiently* mobile under the particular facts to permit a warrantless search, can change with every stop.
>
> "The decision in *Brown* also understated the constitutional policy requiring a judicial examination of the particular facts to determine whether a particular search is reasonable. The one-size-fits-all rule of *Brown* for searching a citizen's property is difficult to harmonize with the state constitutional prohibition on searches that are not reasonable under all the particular circumstances."

Meharry, 342 Or at 181-82 (emphasis in original).

The Oregon automobile exception recognized in *Brown* was thus controversial among the members of this court at the time of its recognition, and, at least as recently as this court's decision in *Meharry*, has continued to draw publicly stated questions from the court about its rationale and its application. For that reason this court should revisit the exception.

B. The automobile exception recognized in *Brown* was intended to be a temporary accommodation pending technological advancements that have been realized.

Perhaps to mitigate the fact that the automobile exception it adopted was controversial, the majority in *Brown* expressed its belief that the exception would be short-lived:

> "In this modern day of electronics and computers, we foresee a time in the near future when the warrant requirement of the state and federal constitutions can be fulfilled virtually without exception. * * * Thus, the desired goal of having a neutral magistrate could be achieved within minutes without the present invasion of the rights of a citizen created by the delay under our current cumbersome procedure and yet would fully protect the rights of the citizen from warrantless searches."

Brown, 301 Or at 276 n 6.

The dissent noted, more than once, that it believed the majority's decision was intended to be a "temporary accommodation that remains open for future consideration." *Id*. at 280, 293, 298 (Linde, J., dissenting). And in *Bennett*, Justice Jones, addressing the dissent of Justice Lent, commented that he "envision[ed] a day when modern electronic techniques will provide the best of both worlds—warrants and immediate searches and seizures[.]" 301 Or at 310 (Jones, J., concurring). That modern world arrived some time ago.

Significantly, the Oregon legislature has authorized the use of telephonic search warrants since 1973,[8] and in 1999 authorized the use of search warrants by facsimile transmission or similar electronic transmission.[9] Both telephonic and electronic search warrants eliminate the requirement of a personal appearance *by anybody*, thereby accelerating the warrant process significantly over the traditional in-person process. *See* Comment, *Telephonic Search Warrants Under the Oregon Constitution: A Call for the Limitation of Exigent Circumstances*, 24 Willamette L Rev 967, 979-81 (l988) (describing the process for obtaining a telephonic warrant). While search warrants today perhaps may not yet be obtained instantaneously, they may be obtained in less than an hour. *See, United States v. Morgan*, 744 F2d 1215, 1222 (6th Cir 1985) (noting that a telephonic warrant takes at least a half hour); *United States v. Baker*, 520 F Supp 1080, 1084 (S.D. Iowa 1981) (noting that telephonic search warrants are obtainable in 20 to 30 minutes).

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[8] *See* Or Laws 1973, ch 836, §83, codified at ORS 133.545(6), and providing that instead of a written affidavit particularly setting forth the facts and circumstances tending to show that the objects of a search are in the places to be searched, "the judge may take an oral statement under oath" in support of an application for a search warrant.

[9] *See* Or Laws 1999, ch 56, §1, codified at ORS 133.545(7), and providing that in addition to the procedure set out in ORS 133.545(6), "the proposed warrant and the affidavit may be sent to the court by facsimile transmission or any similar electronic transmission that delivers a complete printable image of the signed affidavit and proposed warrant."

Notably, in *Missouri v. McNeely*, __ US __, 133 S Ct 1552, 1561-62, 185 L Ed 2d 696 (2013), the Court rejected the government's proposed rule of *per se* exigency in cases of nonconsensual blood testing on suspicion of drunk-driving in part because of innovations in telecommunications that have allowed for more expeditious processing of warrant applications. In the Court's view, "adopting the State's *per se* approach would improperly ignore the current and future technological developments in warrant procedures, and might well diminish the incentive for jurisdictions 'to pursue progressive approaches to warrant acquisition that preserve the protections afforded by the warrant while meeting the legitimate interests of law enforcement.'" *Id*. at 1563 (quoting *State v. Rodriguez*, 570 Utah Adv Rep 55, 156 P3d 771, 779 (2007)).

In short, the automobile exception recognized in *Brown* was intended to be short-lived, pending technological advancements that expedite the process for obtaining a warrant. Because those advancements have been realized, *Brown*'s automobile exception should be reconsidered.

C. Contrary to the promise of *Brown*, the rule of *per se* exigency for automobiles has not proved easy to apply.

As noted above, *Brown*'s rule of *per se* exigency was intended to provide police with "the clearest guidelines" for conducting warrantless automobile searches. The rule, though, has proved difficult to apply in at least four areas.

First, despite *Brown*'s relative clarity, the Court of Appeals has applied the automobile exception not only to cars that are actually mobile when stopped by police, but also to cars that are constructively "mobile" based on their mere capacity for motion. *See, e.g.*, *State v. Mosley*, 178 Or App 474, 481, 38 P3d 278 (2001), *rev den*, 334 Or 121 (2001) (automobile exception applied to car that was parked and unoccupied when encountered by police because the defendant and his passenger were just outside the car and attempting to enter the car at the time of the encounter); *State v. Burr*, 136 Or App 140, 149, 901 P2d 873, *rev den*, 322 Or 360 (l995) (finding automobile exception applied to search of car parked on the shoulder of a road and unoccupied, because any of the four defendants standing outside of the car "need only have taken a few steps to have placed themselves in the vehicle in order to leave"); *State v. Cromwell*, 109 Or App 654, 659, 820 P2d 888 (l991) (finding that automobile exception allowed warrantless search of car parked in the middle of the road and occupied, because the defendant "could have driven away at any moment").

Second, in addition to applying *Brown* to cars that are constructively mobile when stopped, the Court of Appeals has declined to apply *Brown* to cars that are immobile when searched even though they were in fact mobile when stopped. In *State v. Kruchek*, 156 Or App 617, 969 P2d 386 (l998), *aff'd by an equally divided court*, 331 Or 664 (2001), for example, police stopped a van that they had been watching for drug activity after they also saw the van

commit a traffic violation. Because the driver lacked proof of insurance, police impounded the van and inventoried its contents. *Id*. at 619-20. In the course of the inventory, police discovered and searched a plastic cooler and found a large amount of marijuana. *Id*. at 620. The court rejected the state's theory that the search was within the automobile exception because, "once [the officer] impounded the van, any exigency created by the van's mobility was extinguished. [The officer] was in control of the vehicle and could have kept it at the location of the stop until a warrant was issued." *Id*. *Accord, State v. Resler*, 163 Or App 328, 987 P2d 1269 (l999).

But, in *State v. Ruiz*, 219 Or App 148, 154-55, 182 P3d 246, *rev den*, 344 Or 671 (2008), the rationale of *Kruchek* notwithstanding, the court found that the automobile exception did *not* apply because, though police were in possession of the searched car and intended to impound it, a tow truck had not yet been called. *Accord, State v. Getzelman*, 178 Or App 591, 601, 39 P3d 195, *rev den*, 334 Or 289 (2002). Under *Brown*, though, whether the circumstances actually present a factual exigency at the time of a warrantless search does not matter. It is instead only the mobility of vehicle at the time of the stop that matters. *See Brown*, 301 Or at 276 (making clear that for automobile exception to apply "[m]obility of the vehicle at the time of the stop, by itself, creates the exigency").

Third, the Court of Appeals has found that the automobile exception applies even when there is not a temporal coincidence of an automobile's mobility and probable cause to search the automobile. In *State v. Smalley*, 233 Or App 263, 225 P3d 844, *rev den*, 348 Or 415 (2010), for example, police stopped a pickup truck for investigation of a traffic violation, obtained the driver's consent to search the pickup, discovered a backpack from which the odor of marijuana emanated, and searched the backpack, which the passenger admitted was his. Though there was not probable cause to search the pickup while the pickup was mobile, that was not an issue and the search was upheld as within the automobile exception. *Id*. at 268. *See also State v. Forrister*, 179 Or App 516, 40 P3d 571 (2002) (though probable cause to search car was developed only after car was stopped for investigation of a burned out license plate light, search upheld as within automobile exception).

Brown, *Bennett*, *Kock*, and *Kurokawa-Lasciak*, though, all appear to contemplate application of the automobile exception when police have probable cause to search a mobile vehicle, *i.e.*, when there is a temporal coincidence of mobility and probable cause. At the least, none of this court's cases squarely endorse the automobile exception's application to cars that are stopped only based on probable cause to believe that a driver has committed a traffic violation and without probable cause to believe that evidence of the violation is in the car.

Finally, early Court of Appeals cases applying *Brown* appear to have read *Brown*'s requirement that a vehicle must be mobile when stopped by police narrowly. In *State v. Vaughn*, 92 Or App 73, 757 P2d 441, *rev den*, 306 Or 661 (l988), for example, police had probable cause to search the defendant's car for marijuana. They followed the defendant as he drove toward the location of the intended marijuana purchaser, but the defendant pulled off of the freeway and stopped at a residence eight miles short of his destination. 92 Or App at 74. Police then approached the residence, ordered all of the occupants, including the defendant, to the ground, and searched the defendant's car. *Id*. The court declined to find that the automobile exception applied because, although the defendant's car was "mobile when the police first saw it, it was not when they first confronted defendant." *Id*.

Similarly, in *State v. Warner*, 117 Or App 420, 844 P2d 272 (l992), the Court of Appeals concluded that the automobile exception did not apply to a search of a pickup that police had probable cause to search when they saw the defendant drive past them because, by the time that police turned around and caught up with the defendant, the defendant had already pulled to the side of the road on his own. The court noted that "[a] car is 'mobile' if it is lawfully stopped while moving" and that on the facts before it, "[d]efendant's car was

not stopped while moving." *Id*. at 423.[10] *See also State v. Walker*, 113 Or App 199, 830 P2d 633, *rev den*, 314 Or 574 (l992) (facts failed to support automobile exception because the defendant had already parked and left his car when police caught up to him).

However, later Court of Appeals cases read this second temporal component of *Brown*'s mobility requirement more broadly. That is, the court has evaluated mobility not simply at the time of an automobile's stop by police, but instead at the time that police encounter it in connection with a crime. For example, in *State v. Finlay*, 257 Or App 581, 307 P3d 518, *rev den*, 354 Or 389 (2013), police had probable cause to search a particular truck. Police observed the truck enter a parking lot, park, exit the truck, and enter a restaurant. *Id*. at 583-84. Police then searched the truck roughly 40 minutes later, and the court upheld the search as within the automobile exception because, when the officer saw the defendant drive into the parking lot, she "encountered" the defendant's truck in connection with a crime, thereby satisfying *Brown*'s mobility requirement. *Id*. at 591. *See also State v. Pirtle*, 255 Or App 195, 296 P3d 625 (2013).

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[10] The court also refused to find that the pickup was constructively mobile because it was disabled and would not start. *Warner*, 117 Or App at 424.

Tying mobility to the point at which police first encounter an automobile in connection with the investigation of a crime appears to have derived from *Kock*. *See Kock*, 302 Or at 33 (holding that "any search of an automobile that was parked, immobile and unoccupied at the time the police first encountered it in connection with the investigation of a crime" must be supported by a warrant or an actual exigency). At least, that is the first time the phrase was used in an appellate opinion. But the phrase is only dictum, because it was not necessary to the court's decision that *Brown* would not be extended to permit warrantless searches of cars that are parked, mobile, and unoccupied when police develop probable cause to search. *See Engweiler v. Persson*, 354 Or 549, 558, 316 P3d 264 (2013) (defining dictum as a statement "not necessary to the court's decision"). That is, whether police focused their attention on the car in *Kock* when it was in motion or when they encountered it in connection with a crime was not at issue; instead, the question was whether the rule of *per se* exigency would be extended to parked and unoccupied cars for which probable cause to search exists. Because the phrase is dictum, it is not clear whether the *Brown* rule applies to automobiles that are mobile merely when first encountered in connection with a criminal investigation.

In summary, in at least four areas of *Brown*'s application, the *per se* rule of *Brown* has not been as easy to apply as the *Brown* majority had expected. Because the *Brown* rule's ease of application was a basis for the rule, and

because that basis for the rule has not been realized, this court should abandon *Brown*'s automobile exception.

D. A basis for the automobile exception to Article I, section 9, was not adequately analyzed independent of the basis for the exception under the Fourth Amendment.

The court in *Brown* announced that it was "deciding this case independent of federal law" and noted that it cited United States Supreme Court decisions "only because we believe they are persuasive, not because they are precedent for this court in interpreting the Oregon Constitution." 301 Or at 274. Despite that announcement, the court did not conduct an independent state constitutional analysis. Instead, it appears to have adopted the result in *Carroll*, with little regard for *Carroll*'s rationale and without applying the rationale in *Brown*'s context.

At issue in *Carroll* was whether a provision of the National Prohibition Act that authorized warrantless searches of automobiles suspected of transporting alcohol in violation of the Act conflicted with the Fourth Amendment's warrant requirement. In concluding that the provision did not violate the Fourth Amendment, the Court relied on the fact that the same Congress that had referred the Fourth Amendment to the states for ratification had also statutorily authorized warrantless customs searches, which demonstrated a legislatively recognized difference between searches of

premises and searches of conveyances. *Carroll*, 267 US at 151-53. Noted the Court,

> "We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the government, as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."

Id. at 153.

The *Brown* court, though, did not find a similar legislative recognition in Oregon of warrantless searches of conveyances. Had it done so, that would have provided insight into whether the rule of *per se* exigency in *Brown* was "unreasonable" within the meaning of Article I, section 9.[11]

And, in pre-*Brown* cases applying *Carroll*, the court consistently interpreted *Carroll* as authorizing warrantless searches when exigent

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[11] Defendant acknowledges that the usual method for interpreting original provisions of the Oregon Constitution is to ascertain and give effect to the framers of the provision at issue by examining the wording of the provision, the case law surrounding it, and the historical circumstances that led to its adoption. *See Priest v. Pearce*, 314 Or 411, 415-16, 840 P2d 65 (l992). However, this court has not applied that methodology when interpreting Article I, section 9. *C.f.*, *State v. Howard*, 342 Or 635, 157 P3d 1189 (2007) (relying on case law); *State v. Meredith*, 337 Or 299, 96 P3d 342 (2004) (relying on case law); *State v. Dixson/Digby*, 307 Or 195, 766 P2d 1015 (l988) (relying on case law and rejecting state's textual argument); *State v. Caraher*, 293 Or 741, 653 P2d 942 (l982) (relying on case law).

circumstances are present, not simply when a mobile vehicle is involved. *See e.g., State v. Downes,* 285 Or 369, 372, 591 P2d 1352 (l979); *State v. Fondren,* 285 Or 361, 365, 591 P2d 1374, *cert den*, 444 US 834 (l979); *State v. Greene*, 285 Or 337, 591 P2d 1362 (l979); *State v. Groda*, 285 Or 321, 326-27, 591 P2d 1354 (l979). The court in *Brown* did not discuss its prior interpretations of *Carroll*, it did not explain why an independent analysis of Article I, section 9, allowed for a rule of *per se* exigency in cases of mobile vehicles, and it failed to even acknowledge that in *Carroll* exigent circumstances were in fact present.

Significantly, in both *Fondren* and *Greene* this court rejected arguments by the state that warrantless seizures of cars that were seized from a parking lot (*Fondren*) and a driveway (*Greene*) were permitted because police did not "invade an enclave of the defendant's privacy" to seize the cars. *Fondren*, 285 Or at 363. Instead, Oregon courts appear to have a history of distinguishing searches of premises from searches of vehicles on grounds of exigency, not on grounds of privacy.

The *Brown* court also failed to undertake any discussion of the *right* of privacy under Article I, section 9. In *State v. Campbell*, 306 Or 157, 759 P2d 1040 (l988), this court distinguished a right of privacy under Article I, section 9, from the "reasonable expectation of privacy" standard of the Fourth Amendment. It rejected the federal standard and announced that "the privacy protected by Article I, section 9, is not the privacy that one reasonable *expects*

but the privacy to which one has a *right*." 306 Or at 164 (emphasis in original). A construction of Article I, section 9, independent of the Fourth Amendment and in the context of a new exception to Article I, section 9, should have at least examined the scope of the right at issue and the impact of the new rule on that right.

In short, because a basis for the automobile exception to Article I, section 9, was not adequately analyzed independent of the basis for the exception under the Fourth Amendment, this court should revisit the automobile exception that was articulated in *Brown*.

E. Consistent with the Oregon Constitution, the impracticability of obtaining a search warrant should be the only justification for a warrantless search of an automobile on an exigent circumstances theory.

A rule of "*per se* exigency" that is divorced from the particular facts of a case is not consistent with Article I, section 9's requirement that all searches be reasonable. Whether the failure to obtain a warrant may be excused should not turn on whether a vehicle is parked or moving when first encountered by police, but instead on whether the circumstances make it impracticable to obtain a warrant. Factors relevant to that analysis may include, among others: the time of day; the location of the stop; the ratio of officers to suspects; the presence of associates of the suspects; whether it is safe to leave the car unguarded; and whether another person is asserting a possessory interest in the car.

In short, an automobile exception that is premised on an actual exigency is far more faithful to the notion that warrantless searches are presumptively unreasonable than is the "*per se* exigency" rule of *Brown*. Determining exigency based on particular facts was the pre-*Brown* rule, *see, e.g., Greene*, 285 Or at 345, and an exception to the warrant requirement of Article I, section 9, beyond those few specifically established and carefully delineated exceptions is not consistent with the scope of the Article I, section 9, privacy right. For that reason, this court should abandon the automobile exception articulated in *Brown* in favor of returning to the pre-*Brown* practice of approving warrantless searches in cases of exigent circumstances, consent, and searches incident to arrest.

CONCLUSION

Based on the foregoing argument, defendant requests that this court affirm the decision of the Court of Appeals.

Respectfully submitted,

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

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 10,664 words.

Type size

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

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Respondent's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on December 1, 2015.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Respondent's Brief on the Merits will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Paul L. Smith, #001870, Deputy Solicitor General, and Susan G. Howe, #882286, Senior Assistant Attorney General, attorneys for Petitioner on Review.

Respectfully submitted,

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