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IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review vs. JAMES HARVEY RICE, Defendant-Appellant, Respondent on Appeal	)	Lincoln County Circuit Court No. 104651 Court of Appeals No. A151640 Supreme Court No. SC S063291

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 Lincoln County,
the Honorable Thomas O. Branford, Judge

Opinion filed: March 25, 2015
Author of Opinion: Egan, Judge
Joined by: Armstrong, Presiding Judge, and Nakamoto, Judge

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RESPONDENT'S BRIEF ON THE MERITS

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

Did the Court of Appeals correctly rule that the state failed to meet its burden of showing that exigent circumstances were sufficient to authorize police to forcibly invade defendant's home[1] to arrest him, and to search for evidence of the crime of driving under the influence of intoxicants (DUII)?

- **Proposed Rule of Law:** The evanescence of blood alcohol evidence does not automatically establish exigent circumstances sufficient to authorize the warrantless entry of a suspect's home to arrest him, and to search for evidence of alcohol intoxication.
- **Proposed Rule of Law:** Evanescent blood alcohol evidence is sufficient to authorize a warrantless entry of a suspect's home only if the facts known to police at the time of the entry establish that a warrant could not have been obtained in a timely manner, and that the search and seizure actually could be done.

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[1] Defendant later explains the manner in which armed and belligerent police entered his home. Although the circumstances likely were not the same as, say, a home invasion by a robbery gang, they would have been quite frightening—particularly in this day and age. *See, e.g.*, William B. Brown & Scott Tighe, *The Militarization of Policing: Bypassing the Posse Comitatus Act*, Justice Policy Journal, Fall 2015 (forthcoming); Radley Balko, *Rise of the Warrior Cop: The Militarization of America's Police Forces* (2013). For these reasons, undersigned counsel has no qualms about calling the officers' entry a "forcible invasion."

- **Proposed Rule of Law:** Where the facts known to police at the time they entered a suspect's home show (i) as likely as not that they would have been able to obtain a warrant in a timely manner, but they made no effort to obtain one; and (ii) learned they would be prevented from conducting a search; and where the police threatened to forcibly invade the suspect's home if he did not admit them and followed through on that threat, the evanescence of blood alcohol evidence is not sufficient to authorize the warrantless entry of the suspect's home.

NATURE OF THE PROCEEDING

A. Generally.

Defendant was charged by a four-count information. App Br at ER-1 to -2. He moved pretrial to suppress evidence that law enforcement seized consequent to a warrantless and forcible invasion of his home. The trial court denied his motion, and his case went to trial. His jury acquitted him of Count 2, reckless driving, convicted him of Count 4, interfering with a peace officer, and "hung" on both Count 1, DUII, and Count 3, third-degree escape.

After deciding to retry defendant, the state substantively amended the information's DUII charge. Defendant again moved to suppress, and also challenged the substantive amendment. The amendment was withdrawn, but trial court again denied defendant's motion to suppress. App Br at ER-3.

Defendant was tried to a new jury. This time his jury acquitted him of Count 3, third-degree escape, but convicted him of Count 1, DUII.

Defendant appealed. *State v. Rice*, 270 Or App 50, 346 P3d 631, *rev allowed*, 357 Or 550 (2015). The Court of Appeals held that the trial court erred in denying his motion to suppress, and reversed his DUII conviction. But that court affirmed defendant's conviction for interfering with a peace officer.

Defendant petitioned for this court's review of the Court of Appeals decision affirming his interfering with a peace officer conviction. Meanwhile, the state petitioned for review of the Court of Appeals decision reversing defendant's DUII conviction. This court denied defendant's petition but allowed the state's.

B. The Fourth Amendment.

Just as he did in the Court of Appeals, defendant grounds his arguments on both the Fourth Amendment and on Article I, section 9 of the Oregon Constitution. In the Court of Appeals, the state claimed that "that defendant's argument under the Fourth Amendment is unpreserved[.]" *Rice*, 270 Or App at 54. Because the Court of Appeals decided the issue on state constitutional grounds, it decided not to address the state's lack-of-preservation claim. *Id*.

Certainly the Court of Appeals decision is consistent with principles of judicial economy. But for the reasons defendant explained in the Court of

Appeals, and for those he explains immediately below, if that court had addressed the state's claim, it should have rejected it.

In his Motion to Suppress, defendant cited both the Fourth and Fourteenth Amendments, as well as Article I, section 9. *See* Defendant's Motion to Suppress at 2. Unlike other search and seizure principles—*e.g.*, the rationale for the Fourth Amendment's exclusionary rule (deterrence of unlawful police conduct), as opposed the rationale for Article I, section 9's exclusionary rule (restoration of privacy and property rights)—exigent circumstances principles are essentially identical under the state and federal constitutions. *See State v. Davis*, 295 Or 227, 241 n 18, 666 P2d 802 (1983) ("[i]nasmuch as certain federal cases under the Fourth Amendment are instructive, we shall refer to federal cases in outlining our view of exigencies which apply equally under our own constitution"). Consequently, defendant's legal arguments at the motion hearing applied to both constitutional provisions. Separating his arguments under state and federal categories would have been pointless, so the reason for doing so did not exist. *Cowgill v. Boock*, 189 Or 282, 302, 218 P2d 445 (1950) ("[w]hen the reason for [a] rule ceases" to exist, "the rule itself ceases"). *See also State v. Stevens*, 311 Or 119, 141, 806 P2d 92 (1991) the law does not require a futile act to preserve an issue.).

Also consider that the state raised *State v. Machuca*, 347 Or 644, 227 P3d 729 (2009) at the motion hearing. *See* 4/25/11 Tr 65. Defendant requested

permission to provide additional briefing addressing *Machuca*, and the court granted his request. *See* 4/25/11 Tr 65-66. Defendant filed a Motion for Reconsideration in which he addressed *Machuca*, including by citing to and analyzing Fourth Amendment case law. *See* App Br at ER-11. The court denied reconsideration. *See Id*. The case went to trial, the jury "hung" on the DUII count, and the court declared a mistrial. The state then issued a new information, substantively amending the DUII count. App Br at ER-3. Facing a new charge, defendant filed a motion opposing the information's amendment, and, again, relying on the Fourth Amendment, moved to suppress. *See* Case Register, item no. 72. The amendment to Count 1 was removed, but the court again denied defendant's motion to suppress.

All the way through the litigation, defendant cited the Fourth Amendment and made arguments applying it. This gave the trial court ample opportunity to address a Fourth Amendment-based claim. The claim is preserved. *See, e.g.*, *State v. Sundberg*, 349 Or 608, 613-15, 247 P3d 1213 (2011) (relying *inter alia* on *State v. Haugen*, 349 Or 174, 243 P3d 31 (2010) and *State v. Hitz*, 307 Or 183, 766 P2d 373 (1988) to hold that claim involving jury selection preserved where defendant voiced objections during *voir dire* and followed them with motion for new trial).

FACTS MATERIAL TO DETERMINATION OF REVIEW

Defendant accepts the state's summary of the material facts, but, as needed, provides additional facts in the Argument section of his brief.

SUMMARY OF ARGUMENTS

Except in the rarest of circumstances, the federal and state constitutions prohibit police from forcibly entering a person's home without a warrant to seize the person for a completed and non-violent misdemeanor, and to search for and seize evidence.

Here, late in the morning on a Sunday, police forcibly invaded defendant's home without a warrant to investigate the completed and non-violent misdemeanor of DUII. The sole reason for the entry was to arrest defendant for that crime, and to search for evidence of alcohol intoxication that police were concerned would dissipate over time. But before making their warrantless entry, police officers made no effort to contact a magistrate to obtain a warrant. Moreover, defendant, who evinced no interest in leaving his home, effectively told the officers that he would exercise his legal right to block them from conducting a search. Police then announced they would forcibly invade defendant's home if he did not submit to their entry. When defendant did not submit, the officers followed through on their threat by forcibly invading defendant's home, arresting him, and eventually obtaining evidence of alcohol intoxication. Under these circumstances, the Court of Appeals correctly

ruled (a) there was an insufficient basis to justify the entry, (b) the entry was illegal, and (c) evidence seized pursuant to it should have been suppressed. Furthermore, the court correctly reversed defendant's DUII conviction.

ARGUMENTS

The following principles are foundational to the issue of whether the Court of Appeals correctly ruled that exigent circumstances were not sufficient to authorize police officers to forcibly invade defendant's home without a warrant:

> "[W]hat is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."

The Federalist No. 51 at 337 (A Hamilton or J Madison) (Modern Library 1937).

The "auxiliary precautions" the framers chose to "oblige [government] to control itself" are the separation of governmental powers into legislative, executive, and judicial departments. The framers chose those precautions in recognition that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed [*sic*], or elective, may justly be pronounced the very

definition of tyranny." The Federalist No. 47 at 313 (J Madison) (Modern Library 1937).

Instead of the strict sort of separation that political philosophers such as Montesquieu formulated, the framers chose a separation combined with "checks and balances"—one in which "[a]mbition [would] be made to counteract ambition," The Federalist No. 51 at 337—by allotting each department a share of the other departments' powers. The framers chose this form in recognition that unless the three "departments be so far connected **and blended** as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained." The Federalist No. 48 at 321(J Madison) (Modern Library 1937) (emphasis added).

Thus, Publius said,[2]

> "[T]he convention which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive, and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the

[2] Writing under the *nom de plume* "Publius," Alexander Hamilton, James Madison, and John Jay issued The Federalist Papers to try to persuade reluctant states to ratify the United States Constitution to replace the Articles of Confederation. Ratification was completed in 1787. Library of Congress, *Primary Documents in American History: The Federalist Papers*, *http://www.loc.gov/rr/program/bib/ourdocs/federalist.html* (accessed 12/7/2015).

> same time. **But no barrier was provided between these several powers**."

The Federalist No. 48 at 324 (emphasis in original).

This separation of powers, coupled with checks and balances, serve as "the great security against a gradual concentration of the several powers in the same department," by "giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others." The Federalist No. 51 at 337.[3]

Government's general law enforcement authority resides in the executive department. *See Coolidge v. New Hampshire*, 403 US 443, 482, 91 S Ct 2022, 29 L Ed 2d 564 (1971). The law enforcement power includes the authority to investigate crime by various methods, including by making arrests, and searching for and seizing evidence of crime. This is an awesome power, for it

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[3] Seventy years after ratification of the United States Constitution, territorial delegates approved the Oregon Constitution. Although they did not have to, *e.g.*, *Dreyer v. Illinois*, 187 US 71, 84, 23 S Ct 28, 47 L Ed 79 (1902), the delegates chose to mirror the federal constitution's system of separation of powers with checks and balances (albeit with some interesting but non-essential differences, *e.g.*, by diminishing the chief executive by assigning certain executive powers to an "Administrative Department" comprised of a secretary of state and a state treasurer, Or Const, Art VI, but enhancing executive powers by authorizing the chief executive to fill judicial department vacancies without the auxiliary precaution of legislative department confirmation, Or Const, Article V, § 16). Because the delegates those to mirror the federal system in all essential ways, what Hamilton, Madison, and Jay said about the federal system applies equally to the state system.

encompasses even the authority to take human life. *Tennessee v. Garner*, 471 US 1, 7, 105 S Ct 1694, 85 L Ed 2d 1 (1985) ("there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment"). When this awesome power is the focus, surely the need for auxiliary precautions, to protect against executive department abuses, reaches its zenith.

In 1787, the United States Constitution explicitly imposed no auxiliary precautions on the executive department's exercise of this awesome power. Those precautions were created four years later, after the several states' ratified the congressionally proposed Bill of Rights. Among other things, that bill protected the right of citizens to be free from "unreasonable searches and seizures[.]" US Const, Amend IV.

The Fourth Amendment initially protected citizens only from federal government action. The United States Supreme Court decisions in *Wolf v. Colorado*, 338 US 25, 69 S Ct 1359, 93 L Ed 1782 (1949) and *Mapp v. Ohio*, 367 US 643, 81 S Ct 1684, 6 L Ed 2d 1081 (1961) incorporated into the Fourteenth Amendment's Due Process Clause, thereby making applicable to actions of state governments and their subdivisions, the Fourth Amendment right and the exclusionary remedy for violations of that right.

With certain exceptions—none of which applies here—the Oregon Constitution mirrors the Fourth Amendment right.[4] Both provisions provide auxiliary precautions by subjecting the validity of executive department assertions of this law enforcement power to judicial department review. In a sort of *ex parte* proceeding, executive department officials may obtain advance judicial department review by showing a magistrate that "probable cause, supported by Oath or affirmation," US Const, Amend IV, supports issuance of a warrant. *See also* Or Const, Art I, § 9 ("no warrant shall issue but upon probable cause, supported by oath, or affirmation"). The validity of such a combined executive-judicial departmental exercise of power then is presumed. *United States v. Place*, 462 US 696, 701, 103 S Ct 2637, 77 L Ed 2d 110 (1983); *State v. Johnson*, 335 Or 511, 520-21, 73 P3d 282 (2003). This presumption may be rebutted only if in a contested, judicial department proceeding, the subject of the warranted action establishes that the magistrate wrongly concluded that the officers provided probable cause to support of the warrant.

Although the Fourth Amendment and Article I, section 9 prefer that law enforcement conduct searches and seizures pursuant to warrants, it does not

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[4] Article I, section 9 protects against "against unreasonable search, or seizure[.]" Unless otherwise noted, anything defendant says about the Fourth Amendment also applies to Article I, section 9.

demand they be conducted that way. Again, the constitutional provisions demand that searches and seizures be "reasonable." A warrant**less** search and seizure is "*per se* unreasonable[.]" *Davis*, 295 Or at 237. It is reasonable only if validly done pursuant to a recognized exception to the warrant requirement. *Illinois v. McArthur*, 531 US 326, 330, 121 S Ct 946, 148 L Ed 2d 838 (2001); *State v. Bridewell*, 306 Or 231, 235, 759 P2d 1054 (1988).

But because the constitutions prefer warrant**ed** searches, they disfavor warrant**less** searches. Owing to that disfavor, the constitutions reverse the burden by requiring the government to establish valid applications of recognized exceptions to the warrant requirement. *Arkansas v. Sanders*, 442 US 753, 759-60, 99 S Ct 2586, 61 L Ed 2d 235 (1979); *State v. Baker*, 350 Or 641, 647, 260 P3d 476 (2011).

As seen, the auxiliary precaution of judicial department review of this form of law enforcement action will be employed proactively, if executive department officials seek a magistrate's warrant. The precaution will be employed a second time if the subject of the warranted action exercises his right of judicial department review. There, the subject will bear the burden of showing that the magistrate should not have issued the warrant.

Conversely, if law enforcement officers conduct a warrantless action, the auxiliary precaution will be employed reactively if the subject of the action exercises his right to judicial department review. The government will bear the

burden of showing that the officers validly acted under a warrant exception.

A. Exigent Circumstances Principles Generally.

Exigent circumstances is a recognized exception to the warrant requirement. It applies, for example, when law enforcement "need[s] to provide emergency assistance to an occupant of a home, [to] engage in 'hot pursuit' of a fleeing suspect, * * * [to] enter a burning building to put out a fire and investigate its cause, * * * [or] to prevent the imminent destruction of evidence." *Missouri v. McNeely*, 569 US ___, 133 S Ct 1552, 1558-59, 185 L Ed 2d 696 (2013) (citations omitted). *See also Stevens*, 311 Or at 126 ("[a]n exigent circumstance is a situation that requires the police to act swiftly to prevent danger to life or serious damage to property, or to forestall a suspect's escape or the destruction of evidence").

Here, the state argues that the destruction-of-evidence variant of the exigent circumstances exception applied, to seize evidence that defendant was "under the influence of intoxicating liquor" in violation of the DUII statute. App Br at ER-3 (Count 1 of Amended Information). This argument is based on principles announced in cases such as *Schmerber v. California*, 384 US 757, 770, 86 S Ct 1826, 16 L Ed 2d 908 (1966) (upholding warrantless blood test of DUII suspect, because 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") and

Machuca, 347 Or at 655 ("in the context of an alcohol-related crime, there commonly will be an exigency because, as we already have noted, a suspect is a vessel containing evidence of a crime he had committed—evidence that is dissipating with every breath he takes") (internal quotations omitted)).

But the warrantless law enforcement action in defendant's case is fundamentally different from those in *Schmerber* and *Machuca*. Those cases involved seizures of evidence through blood draws. Although law enforcement invading a human "body in search of evidence of guilt," *McNeely*, 133 S Ct at 1558, is no small thing, there is a much larger thing—indeed, the largest of all things. It is based on "the English common-law maxim, 'A man's home is his castle.'" *Minnesota v. Carter*, 525 US 83, 94, 119 S Ct 469, 142 L Ed 2d 373 (1998) (Scalia, J., concurring). From that maxim stems "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Kyllo v. United States*, 533 US 27, 31, 121 S Ct 203, 150 L Ed 2d 94 (2001) (internal quotations omitted). *See also United States v. United States District Court*, 407 US 297, 313, 92 S Ct 2125, 32 L Ed 2d 752 (1972) (the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed"); *State v. Tourtillott*, 289 Or 845, 865, 619 P2d 423 (1980) ("[n]othing is as personal or private" and "[n]othing is more

inviolate" than "one's home").[5] For these reasons, the constitutional demand that law enforcement exercise this power reasonably applies most emphatically to searches of persons' homes. *See also Chambers v. Maroney*, 399 US 42, 52, 9 S Ct 1975, 26 L Ed 2d 419 (1970) (exigent circumstances sufficient for a warrantless search of a suspect's car might well be insufficient for a warrantless search of his home, for "there is a constitutional difference between houses and cars").

Remarkably, the state claims that "in situations where the suspect is **in a home** and cannot be monitored, * * * [he] could be tampering with * * * evidence by consuming additional drugs or alcohol. Given those circumstances,

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[5] *Riley v. California*, 573 US ___, 134 S Ct 2473, 2491, 189 L Ed 2d 430 (2014) states: "[A] cell phone search would typically expose to the government far more than the most exhaustive search of a house[.]" This passage could, but should **not**, be read as implying that modernly, the physical entry of cell phones is the chief evil against which the constitutions are directed. For one thing, not everyone who has a cell phone keeps gobs of personal information in it. For example, many people use "burner phones," which contain little if any personal information. *See* Urban Dictionary, *available at* www.urbandictionary.com/define.php?term=Burner%20phone (accessed Nov. 5, 2015).

More significantly, not everyone owns a cell phone, but everyone has a home. It may be a veritable palace, affordable only to plutocrats. Or it may be a designated area an impoverished man stakes out for himself under a bridge. But no matter how grand or how modest, it is his "castle." This confirms that even in this digital age, the "physical entry of the home [remains] the chief evil against which the wording of the [search and seizure clauses] is directed[.]" *District Court*, 407 US at 313. *See also Tourtillott*, 289 Or at 865.

the constitution does not require an officer to secure a warrant. Instead, the exigency is manifest." State's Br on Merits at 24 (emphasis added).

That claim is remarkable, because it is based on the **exact opposite** of Fourth Amendment and Article I, section 9 principles. Indeed, if the state's claim were the law, then instead of becoming "free from unreasonable governmental intrusion" by "retreat[ing] into his own home," *Kyllo*, 533 US at 31, a person's entry into his "castle" would instantly authorize governmental intrusion. The remarkable claim simply is repugnant to the common law tradition, *Carter*, 525 US at 94, and to the constitutional principle from cases such as *District Court* and *Tourtillott*. The court should reject the claim.[6]

In any event, Fourth Amendment case law initially held that a "belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant." *Agnello*

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[6] Possibly the state bases its remarkable claim on its belief that defendant "fled inside" his home to "avoid[]" or "evad[e] arrest" or "other contact with the police." State's Br on Merits at 1, 8, 14, 19 . If so, then the state bases its claim on a **mistaken** belief. The record shows that although off-duty sheriffs called police when they saw defendant driving toward his home, defendant did not know that, nor did he know that police were coming to his home. *See Rice*, 270 Or App at 51-52. (Fourteen to twenty minutes later, police arrived at defendant's home after they had called in his "station wagon's license plate number" to obtain his address. *Id*. at 51.) Because nothing in the record supports the state's belief that defendant entered his home to flee from police, that belief cannot support the state's remarkable claim that a person entering his "castle" instantly authorizes governmental intrusion. *See Mattiza v. Foster*, 311 Or 1, 8, 803 P2d 723 (1990) (claims lacking factual foundations fail).

v. United States, 269 US 20, 33, 46 S Ct 4, 70 L Ed 145 (1925). Later, that strict view gave way to situations involving "exceptional circumstances," where "evidence or contraband was threatened with removal or destruction." *Johnson v. United States*, 333 US 10, 15, 68 S Ct 367, 92 L Ed 436 (1948). Whether that type of situation exists depends on whether "the circumstances, viewed objectively, justify the action." *Brigham City v. Stuart*, 547 US 398, 404, 126 S Ct 1943, 164 L Ed 2d 650 (2006). *See also Baker*, 350 Or at 649 ("an emergency aid exception to the Article I, section 9 warrant requirement is justified when police officers have an objectively reasonable belief, based on articulable facts, that a warrantless entry is necessary to" address the emergency).[7] Moreover, the "warrantless entry * * * must, of course, be supported by a **genuine** exigency." *Stuart*, 547 US at 406 (emphasis added).

These and other limitations recognize that "searches and seizures inside a home without a warrant are presumptively unreasonable." *Id*. at 403. The limitations are critical to ensuring that the exception does not "swallow[] up the general rule that a warrant is needed to search premises." 3 Wayne R. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment*, § 6.5(b) at 518 (5th ed 2012) (hereafter LaFave). The state may overcome the presumption of

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[7] An emergency aid claim is a type of exigent circumstances claim. *See Stevens*, 311 Or at 126 ("[a]n exigent circumstance is a situation that requires the police to act swiftly to prevent danger to life").

unreasonableness only by establishing that there was a "question of * * * **imminent** destruction, removal, or concealment of the property to be seized." *United States v. Jeffers*, 342 US 48, 52, 72 S Ct 93, 96 L Ed 59 (1951) (emphasis added). *See also Vale v. Louisiana*, 399 US 30, 35, 90 S Ct 1969, 26 L Ed 2d 409 (1970) (exigency exists only if law enforcement knows items subject to seizure "were **in the process** of destruction" (emphasis added)).

Also within the exigent circumstances calculus is the matter of "balancing." It compares the suspect's privacy expectations or interests with the seriousness of the crime he is suspected of committing. *See, e.g.*, *State v. Mazzola*, 356 Or 804, 820, 850 P3d 356 (2015). For example, Article I, section 9 "typically requires a degree of justification for a seizure of a person that correlates with the extent to which police conduct intrudes on that citizen's liberty." *State v. Fair*, 353 Or 588, 603, 302 P3d 417 (2013). But as explained, a suspect's privacy expectations or interests are at their zenith when police would enter his "castle."

Consider *Welsh v. Wisconsin*, 466 US 740, 104 S Ct 2091, 80 L Ed 2d 732 (1984). It involved a warrantless entry of the suspect's home to arrest for a version of DUII that carried no incarcerative penalty, and to search incident to arrest. The search incident to arrest exception necessarily involved the exigent circumstances exception. *Mazzola*, 356 Or at 821 ("[a]n arrest * * * creates a

type of **exigency** justifying a warrantless search"; internal quotations omitted; emphasis added)). As LaFave explains:

> "[T]he cases often raise the issue whether the police, already inside the premises for some other legitimate reason such as an arrest, may on an emergency basis conduct a search beyond that permitted [as incident to arrest], sometimes the issue is whether the exigencies are such that warrantless entry and search are justified."

LaFave, § 6.5 at 511.

A key requirement of the search incident to arrest exception, so of the variant of the exigent circumstances exception at issue here, is that "a grave offense [must be] involved, particularly one that is a crime of violence," as opposed to "one of the 'complacent' crimes, like gambling." *Dorman v. United States*, 435 F2d 385, 392 (DC Cir 1970) (citing *inter alia Warden v. Hayden*, 387 US 294, 87 S Ct 1642, 18 L Ed 2d 782 (1967)). For example, given the nature of the offense at issue in *Welsh*, which carried **no** criminal penalty of incarceration, the Court held that despite the evanescence of blood-alcohol evidence, police were required to obtain a warrant before they entered the defendant's home to arrest him. 466 US at 753 ("application of the exigent circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense, such as the kind at issue in this case, has been committed"). The Court rejected the state's argument that alcohol dissipation sufficed to justify the entry: "[A] warrantless home arrest cannot be upheld simply because evidence of the

petitioner's blood-alcohol level might have dissipated while the police obtained a warrant." *Id*. at 754.

There is a split of authority over exactly what *Welsh* proscribes. Some jurisdictions hold that *Welsh* prohibits warrantless home entries only if the suspected offense carries **no** criminal penalty of incarceration. *See* LaFave, § 6.1(f) at 419 and n 229. Other jurisdictions hold that *Welsh* allows warrantless home entries for felonies, but not for misdemeanors. *See Hopkins v. Bonvicino*, 573 F3d 752, 768 (9th Cir 2009). *But see Stanton v. Sims*, ___ US ___, 134 S Ct 3, 187 L Ed 2d 341 (2013) (*per curiam*) (applying "hot pursuit" exception). Still other jurisdictions hold that *Welsh* allows warrantless home entries for misdemeanors **if** they are crimes of violence. *State v. Curl*, 125 Idaho 224, 227, 869 P2d 224 (1993) (relying *inter alia* on *Welsh* to hold that "when the only concern is destruction of evidence, the offense must be sufficiently grave, i.e., a violent offense, be it misdemeanor or felony," for police to enter a home without a warrant).

Regardless of which line of authority is correct, there always is a "heavy burden on the [state] to show that there was a need that could not brook the delay incident to obtaining a warrant[.]" LaFave, § 6.1(f) at 410. That the state's interest is limited to seizing evidence of a completed and non-violent misdemeanor decreases the state's ability to meet its burden of showing that its interest outweighs "the right of a man to retreat into his own home and there be

free from unreasonable governmental intrusion." *Kyllo*, 533 US at 31 (internal quotations omitted). Otherwise, even the most trivial of offenses carrying an incarcerative penalty could authorize police to enter a home without a warrant.[8]

Also decreasing the state's ability to meet its burden is law enforcement acting forcefully, rather than peaceably. This is because forcible, non-peaceful conduct impairs the state's ability to show "reasonableness of police attitude and conduct." *Dorman*, 435 F2d at 393. For example, if police were to "announc[e] that they would break down the door if the occupants did not open the door voluntarily," police will have acted unreasonably. *Kentucky v. King*, 563 US 452, 471, 131 S Ct 1849, 179 L Ed 2d 865 (2011).

Finally, consider that during a judicial department exercise of the auxiliary precaution of determining the sufficiency of an executive department application for a search warrant, the magistrate takes into account only those facts contained in "the four corners of the affidavit." *State v. Russell*, 293 Or

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[8] Suppose a police officer has probable cause a shoplifter who stole a 50¢ candy bar is in his home. The officer's probable cause is for the completed and non-violent crime of third-degree theft. ORS 164.043(1)(b). But that crime is a Class C misdemeanor, ORS 164.043(2), which carries an incarcerative penalty of up to 30 days. ORS 161.615(3). Taken to its extreme, a rule universally allowing police to enter homes to avoid the destruction of evidence of an offense carrying an incarcerative penalty would allow the officer to break into the home to arrest the shoplifter and to seize the candy bar before he eats it.

469, 474, 650 P2d 79 (1982). Nothing else—and certainly nothing that comes along later—is considered.

Likewise, only facts available to law enforcement at the time of the warrantless action—so nothing that comes along later—are considered in determining whether extant exigent circumstances were "sufficient to justify conducting a [search and seizure] without a warrant." *McNeely*, 133 S Ct at 1568. As the Third Circuit explained, "[B]ased on the surrounding circumstances of the information **at hand**," a warrantless search is justified only when law enforcement officers "reasonably conclude that the evidence will be destroyed or removed before they can secure a search warrant[.]" *United States v. Rubin*, 474 F2d 262, 268 (3d Cir 1973) (emphasis added). *See also* LaFave, § 6.5(b) at 533 ("hindsight * * * does not enter into the equation when judging the lawfulness of a warrantless police entry").

For example, when explaining its rejection of the state's exigent circumstances claim, the *McNeely* Court said: "[T]he arresting officer did not identify any other factors that would suggest he **faced** an emergency or unusual delay in securing a warrant." 133 S Ct at 1567 (emphasis added). Thus, the Court spoke in terms of what the officer "faced"—*i.e.*, the facts he had "at hand"—when he acted without a warrant.

State v. Miskell, 351 Or 680, 277 P3d 522 (2012) is similar. It involved a law enforcement officer's reliance on a claim of exigent circumstances under

ORS 133.726(7)(b) to intercept communications without a court order.[9] *Miskell*, 351 Or at 682. The court "conclude[d] that the circumstances **at the time that [the officer] decided to go forward** with the monitoring operations were not * * * 'of such exigency that it would be unreasonable to obtain a court order.'" *Id*. at 699 (emphasis added). *See also Baker*, 350 Or at 647 ("[t]he state has the burden of proving that circumstances **existing at the time** were sufficient to satisfy any exception to the warrant requirement" (emphasis added)). Thus, the "circumstances" the officer had when he "decided to go forward" with his investigation—*i.e.*, the facts he then had "at hand"—were all that counted.

Imagine the emasculation of auxiliary precautions if the exigent circumstances calculus included facts that came into consideration **after** the officer "decided to go forward" with the warrantless action. An officer lacking exigent circumstances "sufficient to justify conducting a [search and seizure] without a warrant," *McNeely*, 133 S Ct at 1568, could willfully enter a suspect's home in hopes that once inside, he might find evidence establishing sufficient exigent circumstances **after the fact**.

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[9] *Miskell* held that ORS 133.726(7)(b) "refers to 'exigent circumstances' in the specialized legal sense—as it has been used by this court in discussing exceptions to the search warrant requirement under Article I, section 9, and by the federal courts in discussing exceptions to the warrant requirement under the Fourth Amendment." *Miskell*, 351 Or at 696.

Admitting that evidence could "swallow[] up the general rule that a warrant is needed to search premises." LaFave, § 6.5(b) at 518. It would repudiate the principle that

> "[t]he proper focus is on the reasonableness of the officers' actions at the time they took them in response to the exigency, not on the results of those actions. *See State v. Miller*, 300 Or 203, 229, 709 P2d 225 (1985) (focusing on reasonableness of officer's belief when he entered room, rather than results of entry)."

State v. Snow, 337 Or 219, 225, 94 P3d 872 (2004). Moreover, admitting that evidence would repudiate the principle prohibiting warrantless searches and seizures based on law enforcement-created exigencies. *See, e.g.*, *King*, 563 US at 473 (Ginsburg, J., dissenting) ("[t]he urgency must exist * * * when the police come on the scene, not subsequent to their arrival, prompted by their own conduct").

In sum, the exigent circumstances calculus includes only those facts that law enforcement considered at the time of their warrantless entry. Facts that come along later play no role.

B. Application of Exigent Circumstances Principles.

The Court of Appeals based its decision in defendant's case on *State v. Sullivan*, 265 Or App 62, 333 P3d 1201 (2014). *See Rice*, 270 Or App at 55. Like defendant's case, *Sullivan* involved a situation where a police officer forcibly invaded a suspect's home without a warrant, to arrest for DUII and to seize evanescent blood alcohol evidence. 265 Or App at 63. On the defendant's

appeal of the trial court's denial of his motion to suppress, the Court of Appeals rejected the state's claim that exigent circumstances based on that evanescence always was sufficient to validate the warrantless entry. *Id*. at 93-94. The state did not petition.

In defendant's case,

> "The trial court found that the '[a]vailability of a judge to review a search warrant on a Sunday at 11 a.m. is speculative; it is far easier to contact a judge at 2 a.m. because they are routinely home at that time. It can take a matter of mere minutes to get a judge on the line for a telephonic warrant if things go right.' Yet, to justify a warrantless entry into a residence under the doctrine of exigent circumstances, the state has the burden to prove that the time it would have taken to obtain a warrant would have sacrificed the evidence. Based on the trial court's findings, the state did not meet that burden."

Rice, 270 Or App at 55-56 (citations omitted).

Although the trial court found that "'[i]t can take a matter of mere minutes to get a judge on the line for a telephonic warrant if things go right,'" *id*. at 55, the court concluded, "'It doesn't matter how quickly Sites might have been able to get a telephonic warrant; **he did not have to waste the time doing that**. That's the whole point behind the doctrine of exigent circumstances.'" *Id*. (emphasis added).

But the exigency was based on the dissipation of blood-alcohol evidence, and "the natural dissipation of alcohol in the bloodstream does not constitute an exigency **in every case** sufficient to justify conducting a blood test without a warrant." *McNeely*, 133 S Ct at 1568 (emphasis added). *See also State v.*

Moore, 354 Or 493, 497 n 5, 318 P3d 1133 (2013), *adh'd to as modified on recons*, 354 Or 835, 322 P3d 486 (2014) ("the Court's rejection [in *McNeely*] 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"). Thus, *McNeely* and *Moore* establish that the exigency does not automatically authorize police to extract someone's blood without a warrant. That being the case, then contrary to what the trial court ruled, the exigency is even less likely to authorize police to forcibly invade someone's **home** without a warrant. *Accord Chambers*, 399 US at 52 (exigent circumstances sufficient for a warrantless search of a suspect's car might well be insufficient for a warrantless search his home).

For example, suppose a magistrate doing a police "ride along" was with Sites when he arrived at defendant's home. Sites could have provided his "ride along" the information at hand to get a warrant instantly. In that sort of situation, the exigency would have been "[**in**]sufficient to justify" forcibly invading defendant's home "without a warrant." *McNeely*, 133 S Ct at 1568.

Of course Sites did not have such a "ride along." But then again, in effect, maybe he did. After all, the trial court found that "'[i]t can take a matter of mere minutes to get a judge on the line for a telephonic warrant if things go right[.]'" *Rice*, 270 Or App at 55.

Which leads to the question of whether things would have gone right. The answer is: Who knows? Perhaps if Sites had tried, but failed, to track down a magistrate, the record might establish that things did **not** "go right" and that the exigency **was** "sufficient to justify" forcibly invading defendant's home "without a warrant." *McNeely*, 133 S Ct at 1568.

But Sites did not even "attempt[] to obtain a telephonic warrant to enter the home[.]" *Rice*, 270 Or App at 53. He did not, because he and the other officers "believed that [just because] they had probable cause and exigent circumstances," they were good to go. *Id*. Thus, Sites effectively based his forcible invasion decision on the belief that exigent circumstances automatically sufficed as a complete substitute for the constitutional warrant requirement.

His belief was wrong. The record shows that Sites essentially faced the "ride-along" situation. That is because for all anyone knows, "things [would have gone] right" if he had tried to contact a magistrate, and in "a matter of mere minutes" he could have gotten "a judge on the line for a telephonic warrant[.]'" *Rice*, 270 Or App at 55. Thus, the exigency was "[**in**]sufficient to justify" forcibly invading defendant's home "without a warrant." *McNeely*, 133 S Ct at 1568.

Admittedly, Sites said, "[T]he last time he had forced entry into a residence, it had involved detectives and had taken several hours to obtain a warrant." *Rice*, 270 Or App at 53. But that is all that Sites said at the hearing on

defendant's motion to suppress, held about five months after he forcibly invaded defendant's home. Sites did not say that at the time **he decided** to forcibly invade defendant's home, he was thinking in terms of that "last time" experience. 4/25/11 Tr 45-46. For that matter, he did not even say when that "last time" was. *Id*. For all anyone knows, the "last time" was during the interim, between the time that Sites invaded defendant's home, and when the court heard defendant's motion to suppress.

Thus, Sites's "last time" experience is not part of "the surrounding circumstances of the information **at hand**" when he concluded "a warrantless search [was] justified." *Rubin*, 474 F2d at 268 (emphasis added). It is not something he considered when he "decided to go forward with the" warrantless, forcible invasion of defendant's home. *Miskell*, 351 Or at 699. His "last time" experience is mere "hindsight" which may "not enter into the equation when judging the lawfulness of [the] warrantless police entry." LaFave, § 6.5(b) at 533. *Accord Snow*, 337 Or at 225.

This leaves only the trial court's finding "that the '[a]vailability of a judge to review a search warrant on a Sunday at 11 a.m. is speculative; it is far easier to contact a judge at 2 a.m. because they are routinely home at that time." *Rice*, 270 Or App at 55.

Sites too mentioned "it may have been difficult to reach a judge to issue a warrant." *Id*. at 53. But that is something he said "in retrospect" at the motion hearing, which may not be part of the exigent circumstances calculus. *Id*.

The trial court's reliance on this "Mayberry problem"[10] involves something that came along later, so included hindsight in the calculus. But again, "hindsight * * * [may] not enter into the equation when judging the lawfulness of [the] warrantless police entry." LaFave, § 6.5(b) at 533.

Moreover, with respect to the trial court's finding that "the '[a]vailability of a judge to review a search warrant on a Sunday at 11 a.m. is speculative," *Rice*, 270 Or App at 55, the record establishes that it is **equally** speculative to claim that Lincoln County was "Mayberry"—*i.e.*, that a magistrate no more was available for Sites than was a mechanic for the "man in a hurry." **At best** for the state, the facts militating for and against the claim that a warrant could not have been timely obtained are "in equipoise." Because, at best for the state, the facts

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[10] This reference is to the third-season episode of "The Andy Griffith Show," called "Man in a Hurry" (information *available at* http://www.imdb.com/title/tt0512509/fullcredits?ref_=tt_ov_st_sm (accessed Nov. 14, 2015)). It involved a man who, on a Sunday, was on his way to a business meeting in Raleigh when his car broke down on the outskirts of Mayberry. Despite his efforts, the man couldn't find a mechanic to repair his car, leaving him fearful he would miss his meeting.

But the thing is, the man in a hurry **did try** to find a mechanic. In defendant's case, no one tried, so no one knows, if a magistrate could have been found in Lincoln County late in the morning on a Sunday.

are in equipoise, the state did not meet its heavy burden of proving that the exigent circumstances exception was "sufficient to justify" forcibly invading defendant's home "without a warrant." *McNeely*, 133 S Ct at 1568. *See State v. Arellano*, 149 Or App 86, 90, 941 P2d 1089 (1997), *rev dismissed*, 327 Or 555 (1998) (where facts militating for and against admission of defendant's proffered evidence were "in equipoise," defendant failed to meet his burden of proving admissibility of his evidence).

There is one other matter involving impermissible hindsight. It involves the state's reliance on the fact that "**[a]t trial**, defendant testified that, immediately after reaching home, he drank nearly two coffee mugs full of vodka because he was out of his pain medication." *Rice*, 270 Or App at 54 (emphasis added).

During the motion hearing, Sites explained he kept an eye on defendant (4/25/2011 Tr 30-33), but voiced nothing about a concern that defendant was willfully destroying evidence by drinking in his home (nor was he charged with evidence tampering). Consequently, the possibility of defendant doing such a thing was not part of "the circumstances at the time that [Sites] decided to go forward" with the warrantless entry. *Miskell*, 351 Or at 699.

Besides, defendant "testified that" he began drinking "**immediately** after reaching home" so before Sites arrived, and that he did so as a form of self-medication (to control pain). *Rice*, 270 Or App at 54 (emphasis added). Nothing

suggests he purposefully drank to destroy evidence, as is required to establish exigent circumstances for a warrantless entry. *See Johnson v. United States*, 333 US at 14-15 (where "evidence or contraband was threatened with removal or destruction," "a magistrate's warrant for search may be dispensed with"). *See also State v. Lovig*, 675 NW2d 557, 567 (Iowa 2004) (where "there was no evidence that police suspected Lovig was engaged in any purposeful activity within the apartment that would destroy the integrity of any future chemical tests," the court found that "the circumstances * * * did not support a warrantless entry into the apartment"); ORS 162.295(1) ("[a] person commits the crime of tampering with physical evidence if, with intent that it be * * * unavailable in an official proceeding which * * * to the knowledge of such person is about to be instituted, the person * * * alters * * * physical evidence").

Finally, there is Sites's claimed concern that "defendant would attempt to leave[.]" *Rice*, 270 Or App at 52. But here again, Sites described nothing to support an objective basis for such a concern. Defendant only refused "to step outside" when Sites asked him to and, after cussing at Sites, defendant "closed the interior door" on him. *Id*. When Sites persisted, defendant told Sites he was "'getting annoying,'" cussed at him again, told Sites he had "'better get more cops here,'" and again closed the interior door on Sites. *Id*. Sites "continued to peer into defendant's home where he saw defendant sit down at his dining room

table. Sites continued to order defendant to open the door, telling him that, if he didn't open the door, 'I'd be forcing entry into his residence.' Defendant closed his blinds." *Id*.

In *State v. Peller*, 287 Or 255, 264, 598 P2d 684 (1979), this court said, "We do not agree * * * that the mere possibility that defendant could make a break if he were so inclined gives rise to exigent circumstances **when there is no indication that he is, in fact, so inclined**." (Emphasis added.) If that were the rule, the court explained,

> "a warrantless entry would be justified any time the police announced their presence and the defendant refused to come out of his home. The practical effect of this would be to **all but eliminate** the requirement that there be exigent circumstances in order to justify a warrantless entry to arrest."

287 Or at 264 (emphasis added).

Applying *Peller* to this case, the record objectively shows there was "no indication that" defendant was "inclined" to leave his home. *Id*. There was only his "refus[al] to come out" when Sites commanded him to do so. *Id*. Treating these facts as authorizing the home invasion "would * * * all but eliminate the requirement that there be exigent circumstances in order to justify a warrantless entry to arrest." *Id*. The court should reject an exigent circumstances claim based on Sites' stated concern "that defendant would attempt to leave[.]" *Rice*, 270 Or App at 52.

The information provided above should be ample reason to affirm the Court of Appeals. But there are at least three other reasons police acted unreasonably, and why this court should affirm.

First, because Sites was investigating the crime of DUII, all he could do was **request** that defendant submit to a search, *e.g.*, to field sobriety tests. ORS 813.135. Defendant could refuse to take such tests (albeit with consequences, *e.g.*, ORS 813.136).

Article I, section 9 does not recognize, as an exception to the warrant requirement, entering someone's home merely for the purpose of **requesting** consent to search. Therefore, exigent circumstances "sufficient to justify conducting a [search and seizure] without a warrant," *McNeely*, 133 S Ct at 1568, should exist only when officers certainly **will** be able to conduct the search. Such circumstances should not exist when officers learn they will **not** be able to conduct the search.

Here, "the circumstances at the time that [Sites] decided to go forward" with the warrantless entry, *Miskell*, 351 Or at 699, included "Sites ask[ing] defendant to step outside to perform field sobriety tests," and defendant telling Sites, "'I don't see why I would do that.'" *Rice*, 270 Or App at 52. These circumstances show that when Sites forcibly invaded defendant's home, he did

so **after** learning that defendant would not consent to a search. Therefore, Sites acted unreasonably, and in violation of defendant's rights.[11]

Second, to try to stop defendant from closing the interior door into his home, Sites "put his hand through an open window in the locked and closed storm door—placing his hand against the interior door—and told defendant not to close the door." *Rice*, 270 Or App at 52. When defendant closed his interior door anyway, Sites "immediately attempted to forcibly open the locked storm door, damaging the handle." *Id*. After calling for backup, "Sites continued to order defendant to open the door" and, reminiscent of the "big bad wolf," told defendant "that, if he didn't open the door, 'I'd be forcing entry into his residence.'" *Id*. After backup arrived, "Sites reached through the open window

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[11] That defendant later consented to FSTs and a breath test are hindsight considerations. They are irrelevant, because they were not among "the circumstances at the time that [Sites] decided to go forward" with the warrantless entry. *Miskell*, 351 Or at 699. Besides, there is a world of difference between what a person would do **after** his home has been forcibly invaded by belligerent, armed men, and what he would do **before** that invasion occurred.

Moreover, whether there actually was an urgency in administering a breath test truly is not known. There would be only if the delay were expected to be so long that retrograde extrapolation could **not** be done. *See State v. Eumana-Moranchel*, 352 Or 1, 277 P3d 549 (2012) (authorizing admission of breath test results based on retrograde extrapolation) Here, no record evidence shows the delay would have been too long to permit retrograde extrapolation. The record thus fails to show there was a risk of "imminent destruction * * * of the [evidence] to be seized." *Jeffers*, 342 US at 52.

of the storm door and unlatched it, then he **kicked in** defendant's interior door, breaking the door frame." *Id*. at 53 (emphasis added).

Given these circumstances, the state cannot show "reasonableness of police attitude and conduct." *Dorman*, 435 F2d at 393. Instead, and consistent with what the Court said in *King*, Sites's "announc[ement] that [he] would break down the door if [defendant] did not open the door voluntarily," and Sites's following through on that threat, establishes that police acted **un**reasonably, so in violation defendant's rights. *King*, 563 US at 471.

The final reason this court should affirm the Court of Appeals involves the balancing of state interests and defendant's privacy expectations and interests. *See, e.g.*, *Fair*, 353 Or at 603 (Article I, section 9 "typically requires a degree of justification for a seizure of a person that correlates with the extent to which police conduct intrudes on that citizen's liberty").

It was one thing for the *Mazzola* court to hold that the state interest in traffic safety outweighed the defendant's right to be free from warrantless searches in the form of field sobriety tests done in a public place. Those types of searches are "limited in scope and intensity; they did not intrude into defendant's body; rather, they assessed [a motorist's] coordination, balance, and motor skills." 356 Or at 820. It is quite another thing to hold that the same state interest outweighs "the English common-law maxim, 'A man's home is his castle.'" *Carter*, 525 US at 94, from which stems the greatest of all privacy

expectations and interests—"the right * * * to retreat into his own home and there be free from unreasonable governmental intrusion." *Kyllo*, 533 US at 31. *See also District Court*, 407 US at 313; *Tourtillott*, 289 Or at 865.

Defendant's privacy is on one pan of the scales. On the other pan is the state interest in public safety, accomplished through criminal law enforcement. Certainly the state has a public safety interest in reducing the frequency and hazards of intoxicated driving. But that interest should not be considered in isolation, and as some sort of monolith. It should be considered in the context of the crime at issue—here, a completed and non-violent misdemeanor. *See* OAR 213-003-0001(15) (defining DUII as a "person misdemeanor" only "as provided in OAR 213-004-0009); OAR 213-004-0009 (establishing misdemeanor DUII as a "person" crime only when the defendant was "convicted of a felony that has operation of a motor vehicle as an element, or of a felony that involved death, injury or property damage caused by the use of a motor vehicle").

Moreover, the state interest should be considered in the context of the enforcement mechanism at issue, including **the efficacy** of that mechanism.

"Overall, studies of DUII laws tend to be skeptical of a deterrent effect of get-tough legislation[.]" David W. Neubauer & Henry F. Fradella, *America's Courts & the Criminal Justice System* 96 (11th ed 2014) (citing Henry F. Fradella, *Minimum Mandatory Sentences: Arizona's Ineffective Tool for the*

Social Control of DUI, 11 Crim Justice Policy Rev 113 (2000)). As Homel (ironically) explained, "Deterrence occurs almost as an unintended by-product of a system devoted to the moral dramatization of cultural ideals, a deterrent effects that do occur are invariably **evanescent**." Ross Homel, *Policing & Punishing the Drinking Driver: A Study of General & Specific Deterrence* 270 (1988) (emphasis added; citing H.L. Ross, *Deterring the Drinking Driver: Legal Policy & Social Control* (1982)).

These criminological sources reflect that notwithstanding the state interest in interest in reducing the frequency and hazards of intoxicated driving, DUII laws grounded on the "crime control model,"[12] which the executive department would enforce against defendant, have an uncertain efficacy in furthering that state interest. That uncertainty necessarily should reduce the relative weight of the state interest—particularly when it is combined with the fact that the state sought to enforce only a completed and non-violent misdemeanor.

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[12] As opposed to the "due process model,"

> "advocates of [the crime control] model are concerned that criminals 'beat the system' and 'get off easy.' In their view, the cure is to eliminate legal loopholes by curtailing the exclusionary rule, abolishing the insanity defense, allowing for preventive detention of dangerous offenders, and increasing the certainty of punishment."

Neubauer & Fradella, *America's Courts* at 19.

That relatively "light" state interest is on one pan of the scales. On the other pan is something very certain: Defendant's "right * * * to retreat into his [**castle**] and there be free from unreasonable governmental intrusion." *Kyllo*, 533 US at 31. That right is very "heavy"; indeed, it is the heaviest of all privacy expectations and interests the Fourth Amendment and Article I, section 9 protect. *District Court*, 407 US at 313; *Tourtillott*, 289 Or at 865. Defendant's side of the scales should dominate, thus establishing that law enforcement's warrantless, forcible invasion of his home was unreasonable and in violation of defendant's Fourth Amendment and Article I, section 9 rights.

CONCLUSION

The Court of Appeals correctly ruled the state failed to meet its burden of showing that exigent circumstances were sufficient to authorize police to forcibly invade defendant's home, to arrest him, and to search for and seize evidence of the crime of DUII. This court should affirm the Court of Appeals reversal of the trial court's denial of defendant's motion to suppress and of his conviction for DUII.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on December 8, 2015, I filed this Respondent's Brief on the Merits with the Appellate Court Administrator, Appellate Court Records Section, by using the court's electronic filing system.

I further certify that on December 8, 2015, I served this Respondent's Brief on the Merits on Acting Solicitor General Paul L. Smith, attorney for petitioner on review State of Oregon, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word-count limitation of ORAP 5.05(2)(b)(ii), and that, as described in ORAP 5.05(2)(a), the count of this brief is 9,534 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(4)(f).

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