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 No. C111600CR CA A150872 SC S063169

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

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for 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.; Garett, J.

Continued…

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STATEMENT OF THE CASE

The automobile exception to the warrant requirement allows police to search an automobile without a warrant because of the inherent exigencies presented by a vehicle's mobility. Although a vehicle must be "mobile" before the exception applies, that requirement does not mean that police must actually *see* a vehicle moving. Rather, a vehicle is "mobile" if an officer reasonably believes from objective observation that it was just moving and that a driver is physically present and capable of immediately moving the vehicle.

This court should reverse the decision of the Court of Appeals, which held that police may search under the automobile exception only if the vehicle is moving when they initially observe it. The arbitrary line drawn by the Court of Appeals is untethered from the purpose of the automobile exception and leads—as it did here—to absurd results. Nothing in this courts case law *requires* such an artificially limited concept of mobility, and this court should reject it. Instead, this court should clarify that, for the purpose of the automobile exception, courts should apply a mobility test that is consistent with the purposes of the exception and that comports with common sense. The state's proposed rule of law, which does not require an officer to personally observe a vehicle moving for it to be considered "mobile," better serves the

purposes behind the automobile exception and is more consistent with this court's general Article I, section 9 jurisprudence.

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question Presented

Does the automobile exception of Article I, section 9 require a law enforcement officer to observe a vehicle in actual motion in order for the vehicle to be considered "mobile?"

Proposed Rule of Law

No, not necessarily. Observation of motion is a sufficient basis from which to conclude that the vehicle is mobile, but it is not necessary. A stationary vehicle is also mobile for the purposes of Oregon's automobile exception if an officer reasonably believes from objective observation that it was just moving and that a driver is physically present and capable of immediately moving the vehicle.

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

The facts of this case are few and undisputed. Through the use of a confidential reliable informant (CRI), Beaverton Police Department officers arranged to purchase half an ounce of methamphetamine from a well-known drug dealer. Tr 24-26, 100. agreed to meet the CRI in the local Winco parking lot. Tr 27. advised the CRI that he and "his girl" would drive up in a silver Jeep or a red sedan. Tr 27.

At the time that the transaction was to take place, Officer Henderson patrolled the front area of the Winco parking lot but, at one point, drove to the side of the building to look for vehicle. Tr 88-89. When he returned to the front parking area approximately one minute later, he noticed a silver Jeep that previously was not there. Tr 89-90. The Jeep was parked perpendicular to the direction of the parking spaces, so that it was covering several spaces. Tr 90. Henderson observed several people inside the Jeep, and two men, including standing outside. Tr 90. Based on interactions of with the one or more occupants of the Jeep, Henderson believed that a drug transaction was occurring and he advised the other officers of his observations. Tr 93-94.

Uniformed officers arrived, immediately arrested and contacted defendant, who was sitting in the Jeep's driver's seat, with the keys in the ignition and the engine running. Tr 57, 68, 181. Defendant immediately began asking if she could leave, but another officer informed her that she was not free to go. Tr 36. One officer overheard defendant calling her mother and asking her mother to come and take the car. Tr 45. Defendant's mother arrived shortly thereafter, and defendant began yelling at her mother to take her purse and leave with the Jeep. Tr 73-74, 101, 145. This made the officers concerned that either defendant or her mother would drive the Jeep away. Tr 73.

The officers searched defendant's vehicle. Tr 42. They recovered 13.9 grams of methamphetamine, as well as $634 in cash, from defendant's purse, which had been left underneath the driver's seat. Tr 43.

Prior to trial, defendant moved to suppress evidence of the money and methamphetamine on the grounds that the officers conducted a warrantless search of her vehicle. ER-3. The trial court denied the motion, concluding that the search was justified under the automobile exception to Article I, section 9. Tr 206-07. Specifically, the court concluded that the officers had probable cause to believe drugs would be located in defendant's vehicle. Tr 206-07.

The Court of Appeals reversed, ruling that the warrantless search of defendant's automobile could not be justified under Oregon's automobile exception. *State v. Andersen*, 269 Or App 705, 719, 346 P3d 1224 (2015) (*en banc*). Specifically, it held that defendant's car was not "mobile" at the time that the officers encountered it because it was not moving when the police first observed it. *Id.* at 714-15. That court held that this court's automobile exception case law *compelled* the conclusion that in order to be considered "mobile" under Oregon's automobile exception, a vehicle must be observed to be *moving* when an officer first encounters it in connection with a crime. *Id.* at 709-14, 717.

Six judges dissented, reasoning that a vehicle, although temporarily stopped, should be recognized to be mobile when a driver is actively using the

vehicle. 269 Or App at 720, 733-34 (DeVore, J., dissenting). The dissent noted that this court's jurisprudence has never specifically excluded temporarily stopped vehicles from being "mobile" and that a vehicle's "mobility" should not depend upon whether an officer observed it to be moving, because vehicles commonly come to a stop while they are being used in the course of transportation. 269 Or App at 730, 732. It concluded that defendant's vehicle should be considered "mobile" because it was actively engaged in use:

> To be precise, if a vehicle is still operating, with a driver at the steering wheel and the engine running, and police have objective evidence that the vehicle has moved recently or will move imminently, then that vehicle "remains mobile."

269 Or App at 733-34. This court allowed the state's petition for review. 357 Or 595 (2015).

SUMMARY OF ARGUMENT

Mobility, for purposes of the Article I, section 9 automobile exception, should be determined from the totality of circumstances that an officer observes, including any reasonable inferences that can be drawn therefrom, and should be established when an officer reasonably believes that a vehicle was just moving and that a driver is physically present and capable of immediately moving the vehicle. Historical justification for the automobile exception pre-dates the warrant requirement rule, which presumes a warrantless search to be *per se* unreasonable unless fitting within a well-established exception. The

exception stems from the 1920's, when the rise of automobiles made it easier for criminals to transport stolen goods and avoid apprehension. Courts, including this one, historically justified an automobile exception to the warrant-requirement rule because of the exigency that a vehicle's *potential* mobility presents. A person's ability to flee from a police-citizen encounter in an automobile—and to take any evidence contained in the automobile—is not dependent upon whether an officer has just seen the automobile in motion. This court in *State v. Brown* relied upon the same justification when officially recognizing the automobile exception to Article I, section 9, and no reason exists to believe this court has held otherwise. Accordingly, this court should adopt the state's proposed rule of law that, a stationary vehicle is "mobile" for purposes of the automobile exception to Article I, section 9 when an officer has objective evidence to conclude that a driver is present and capable of immediately moving the vehicle.

ARGUMENT

Article I, section 9, of the Oregon Constitution provides, in relevant part: "No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure[.]" That constitutional mandate imposes limitations on searches and seizures "to prevent arbitrary and oppressive interference by [law] enforcement officials with the privacy and personal security of individuals." *State v. Tourtillott*, 289 Or 845,

853, 618 P2d 423 (1980) (discussing state and federal law principles); *see also State v. Watson*, 353 Or 768, 773, 305 P3d 94 (2013) (noting that the goal of Article I, section 9, is to protect citizens against "arbitrary and oppressive interference" by the police). Article I, section 9, like the Fourth Amendment, thus does not provide a literal protection against *every* invasion of privacy. *State v. Fair*, 353 Or 588, 602, 302 P3d 417 (2013) (noting that, although the wording of the two provisions is different, the guarantees are "substantively the same."). Rather, Article I, section 9's plain terms make reasonableness its touchstone. *State v. Guggenmos*, 350 Or 243, 257 n 6, 253 P3d 1042 (2011).

This court analyzes the constitutionality of a disputed search under the warrant requirement rule. Under that rule, a warrantless search is presumed to be *per se* unreasonable, unless the search falls 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 (1988). In 1986, this court held the automobile exception to be one of those historically-established exceptions. *State v. Brown*, 301 Or 268, 274, 721 P2d 1357 (1986). This court held in *Brown* that Article I, section 9 authorizes an officer to conduct a warrantless search of an automobile if "(1) [an] automobile is mobile at the time it is stopped by police or other governmental authority, and (2) * * * probable cause exists for the search of the vehicle." *State v. Brown*, 301 Or at 274.

At issue in this case is whether an officer must personally observe a vehicle to be moving, when first observed by the officer, in order for the vehicle to be considered "mobile" under Article I, section 9. To be sure, observing a vehicle is motion is an easy way to determine that a car is "mobile." Whether such an observation is *required*, however, is the issue in this case. To answer that question, it is important to understand the history of the automobile exception, and the first section of this brief addresses that history. From there, this brief then explains why the automobile exception does not require police to observe a vehicle in motion—rather, it requires only that an officer have an objectively reasonable basis to believe that the vehicle has recently been moving and is capable of moving in the immediate future.

I. The automobile exception of Article I, section 9, has never required that an officer *see* a vehicle in actual motion in order for the vehicle to be "mobile."

Prior to *Brown*, this court never predicated a warrantless search of a vehicle upon whether an officer first observed it to be motion. Instead, it authorized the search of an automobile as an extension of a search incident to arrest, justified by an automobile's inherent mobility. Similarly, in *Brown*, this court did not confine warrantless searches of automobiles to only those cases in which an officer observed the vehicle in question to be in motion. Lastly, although this court has re-visited the concept of "mobility" several times since

Brown, it has never held that an officer must observe a vehicle to be in motion for a warrantless search of the vehicle to be considered "reasonable."

A. Historically, this court authorized a warrantless search of an automobile based on the vehicle's inherent mobility.

This court did not "create" the automobile exception in *Brown*; rather, the court merely "codified" an already well-established tradition of holding the warrantless search of an automobile to be "reasonable," and, therefore, constitutional. This court historically justified the warrantless search of a vehicle upon its *potential* for future movement, rather than its past movement.

Precedence for Article I, section 9's automobile exception arose during the 1920s due to the confluence of two significant historical developments: (1) the new affordability and availability of automobiles; and (2) Prohibition legislation, in which the distribution, sale, and possession of alcohol was criminalized. *See* Frank Ernest Hill, *The Automobile: How It Came, Grew, and Has Changed Our Lives* (1967) (detailing the impact of the design, creation, and growth of the automobile on society); Frederick Lewis Allen, *The Big Change: American Transforms Itself, 1900-1950*, 121-30 (1952) (describing how the automobile transformed American communities and daily living habits and ideas throughout the half century); *State v. Greene*, 285 Or 337, 353, 591 P2d 1362 (1979) (Linde J., concurring). Suddenly, law enforcement was tasked with the interdiction of illegal liquor at a time in which bootleggers were able to

transport their product quickly and easily over long distances. As this court noted in 1926, "The automobile is a swift and powerful vehicle * * * [which] furnish[es] for a successful commission of crime a disguising means of silent approach and swift escape unknown in the history of the world before [its] advent." *State v. DeFord*, 120 Or 444, 455, 250 P 220 (1926) (citing *People v. Case*, 220 Mich 379, 190 NW 289 (Mich 1922). In an effort to combat the trafficking of illegal liquor, the United States Congress and state legislatures authorized law enforcement officers to conduct a warrantless search of an automobile if probable cause existed to believe the vehicle was being used to transport illegal liquor. Consequently, courts were required to consider whether the warrantless search of an automobile was "unreasonable." In none of the cases discussed below did the court hinge the reasonableness of the search on whether the officer had first observed the vehicle in motion.

1. Neither *Carroll v. United States* nor *State v. DeFord* required an officer to observe a vehicle in motion.

In 1925, the United States Supreme Court decided *Carroll v. United States*, 267 US 132, 45 S Ct 280, 69 L Ed 543 (1925), generally cited as the origin of the automobile exception.[1] The defendants in *Carroll* were convicted

[1] At the time the United States Supreme Court granted certiorari in *Carroll*, several state and federal circuit courts had already upheld a warrantless search of an automobile, when predicated on probable cause, to be "reasonable," and, therefore, constitutional. *See, e.g., King v. United States*, 1

Footnote continued…

of illegally transporting intoxicating liquor. Section 26, title 2 of the National Prohibition Act authorized an officer to conduct a warrantless search of an automobile if the officer developed probable cause to believe that the vehicle was being used to transport intoxicating liquor.[2] *Carroll*, 267 US at 143. The defendants argued that the legislation violated the Fourth Amendment[3] because it authorized a warrantless search of vehicles. *Id.* at 144. In rejecting that

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(…continued)
F2d 931 (9th Cir 1924); *Ash v. United States*, 299 F 277 (4th Cir 1924); *McAdams et al v. State*, 101 Okla 267, 219 P 145 (Okla 1923); and *People v. DeCesare*, 220 Mich 417, 190 NW 302 (Mich 1922).

[2] Specifically, Section 26, title 2 provided, in relevant part:

> "When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person *in the act of transporting* in violation of the law, intoxicating liquors in any wagon, buggy, automobile, water or air craft, or other vehicle, it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof."

Carroll, 267 US at 144.

[3] The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be search, and the person or things to be seized.

argument, the Court first noted that the legislative history of the National Prohibition Act established that the United States Congress saw a legal distinction between the search of a private dwelling, which still required the issuance of a search warrant, and that of an automobile, which did not. *Id.* at 145-47. The Court also noted that the Fourth Amendment did not denounce *all* searches and seizures, but only those considered to be "unreasonable." *Id.* at 147. In order to ascertain the reasonableness of a warrantless search of an automobile, the Court stated:

> The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.

Id. at 149. The Court then cited numerous pieces of federal legislation—enacted at or around the time of the adoption of the United States Constitution—that permitted an officer to conduct a warrantless search of a vehicle upon probable cause to believe that it was being used to transport contraband. *Id.* at 150-53. It concluded:

> 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 (emphasis added). Accordingly, the Fourth Amendment did not prevent the warrantless search of an automobile. *Id.* An officer, however, must first have probable cause to believe the vehicle is being used to transport illegal goods in order to justify the warrantless search. *Id*. at 156.

One year after *Carroll*, this court addressed the warrantless search of automobiles in *State v. DeFord*, 120 Or 444, 250 P 220 (1926) and held that such a search did not violate either the Fourth Amendment or Article I, section 9. The facts in *DeFord* were similar to those in *Carroll*: officers developed probable cause to believe that the defendant was transporting intoxicating liquor, stopped him while he was driving, and conducted a warrantless search of his vehicle, as authorized by section 2225—5, Or. L.. 120 Or at 449. The defendant contended that the warrantless search violated Article I, section 9. *Id.* at 448. Consistent with constitutional interpretation at the time, the *DeFord* court started with the presumption that Article I, section 9 prohibited "unreasonable searches and seizures only," noting that "[i]f searches and seizures without a warrant were considered unreasonable, the framers of the Constitution would have so declared."[4] *Id.* at 449. It also concluded that the

[4] This court in *DeFord* noted that "[t]he great weight of authority in this country" similarly held that the reasonableness of a search was not predicated upon whether it was supported by a warrant. *Id.* at 450.

1917 Oregon legislature drafted section 2225—5, Or. L. so as to *not* conflict with Article I, section 9. 120 Or at 460 ("This is a legislative construction of Article I, section 9, of the Constitution, and is entitled to great weight in the construction of that statute."). Finally, it determined *Carroll v. United States* to be dispositive, holding that "since the search and seizure is not unreasonable under the federal Constitution and laws enacted thereunder, it cannot be unreasonable under our state Constitution and the laws enacted thereunder." 120 Or 464.

Significantly, neither the United States Supreme Court in *Carroll* nor this court in *DeFord* hinged the reasonableness of the warrantless searches on the fact that the officers had observed the defendants' vehicles to be in motion when first encountered, most likely because the legislation involved did not require it. Rather, the searches were upheld as reasonable because the officers had probable cause to believe that the defendants were in the *act of transporting* illegal liquor. *Carroll*, 267 US at 144; *DeFord*, 120 Or at 460, 462. It is axiomatic that an act of transportation includes times in which the vehicle being used is in motion and times when it is not in motion.

2. Pre-*Brown* Oregon jurisprudence did not require an officer to observe a vehicle in motion.

Throughout the years between *DeFord* and *Brown*, this court continued to distinguish the constitutionality of warrantless searches of automobiles from

that of dwellings or non-vehicular personal effects. The distinction was predicated upon the fact that an automobile, by its very nature, was mobile, making it impracticable for officers to obtain a search warrant. *State v. Quinn*, 290 Or 383, 391, 623 P2d 630 (1981). This court did not explicitly recognize a *per se* "automobile exception," preferring to justify the warrantless search of an automobile under "exigent circumstances," "search incident to arrest," or a blend thereof. *See State v. Greene*, 285 Or at 345 (noting that there was a "distinct possibility" that someone might "try to remove [the] car or evidence before or after a warrant is obtained."); *State v. Krogness*, 238 Or 135, 142, 388 P2d 120 (1963) (justifying the warrantless search as incident to arrest but also necessary "because of the mobility of criminals and of their pursuers."); *State v. Hoover*, 219 Or 288, 297, 347 P2d 69 (1959) (upholding warrantless search of the defendant's vehicle as a search incident to arrest).

Additionally, officers were not required to obtain a search warrant to search an automobile after seizing it. The reasonableness of the search, in other words, was not contingent upon whether the officers *could* have obtained a search warrant. *See State v. Bennett*, 301 Or 299, 309, 721 P2d 1375 (1986) ("A citizen's rights of privacy are not protected by seizing him or his property and holding the person or property for hours pending the receipt of a warrant issued by a magistrate.") (Jones, J., concurring); *Greene*, 285 Or at 343 ("For 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.") (citing with approval to *Chambers v. Maroney*, 399 US 42, 52, 90 S Ct 1975, 26 L Ed 2d 419 (1970).

Justification for the search, moreover, was never predicated on whether the officer had personally observed the automobile in motion. In cases in which this court upheld the warrantless search of a car stopped while in motion, this court never conditioned the reasonableness of the search upon the fact that the officer saw the vehicle moving.[5] Similarly, this court also upheld the warrantless searches of parked or non-moving automobiles either as a search incident to arrest or under exigent circumstances. In *State v. Elk*, 249 Or 614, 439 P2d 1011 (1968), for example, this court upheld the warrantless search of a parked, unoccupied vehicle that police knew to be connected to a recent burglary, on the grounds that "it was highly likely that [the] defendant and his companions were in the immediate vicinity of the car" and capable of driving it away. *See* 249 Or at 621. The court also upheld the warrantless search of a parked, unoccupied automobile parked in a burglary suspect's driveway in *State v. Greene*, based upon the inherent mobility of the car and the fact that someone

[5] *See DeFord*; *State v. Christensen*, 151 Or 529, 51 P2d 835 (1935); *Hoover*; and *Krogness*.

may have tried to drive it away before the police could obtain a warrant. 285 Or at 345.

Elk and *Greene* demonstrate that, prior to *Brown*, this court did not require an officer to observe an automobile in question to be in motion in order to justify a warrantless search of the vehicle. The warrantless searches, in other words, were predicated upon the vehicles' potential for immediate departure rather than upon observed motion.

B. *State v. Brown's* concept of "mobility" did not require an officer to observe a vehicle in motion.

As noted, this court officially recognized the automobile exception to the warrant-requirement in 1986, in *State v. Brown*. Officers in *Brown* responded to a domestic disturbance call placed by the defendant's girlfriend. 301 Or at 270. The defendant's girlfriend informed that officers that the defendant, who was not present at the scene, "always carried" a handgun on his person or in the trunk of his car. *Id.* *A*pproximately twenty-four hours later, the police observed the defendant driving his automobile and stopped him to investigate both the domestic disturbance complaint *and* the firearm report. *Id*. When the defendant refused to provide consent to the search of his vehicle, the officers conducted a warrantless search of it and discovered a firearm in the trunk. *Id*.

This court upheld the warrantless search in *Brown*. In doing so, this court expressly recognized that an automobile exception existed to Article I,

section 9's warrant-requirement rule. *Id.* at 274. This court did not predicate the automobile exception upon whether an officer had observed the vehicle to be in motion when first encountered. Rather, this court adopted the same justification for Article I, section 9's automobile exception as the United States Supreme Court did in *Carroll* with respect to the Fourth Amendment: because it is mobile by its very nature, an automobile could be "quickly moved out of the locality or jurisdiction in which [a] warrant must be sought," making securing a search warrant impracticable. *Id.* at 274, 275. Specifically, this court stated:

> By adopting such a[n exception], we align ourselves with the traditional federal "automobile exception" to the Fourth Amendment requirement as set forth in the seminal case of *Carroll v. United States*, 267 US 132, 45 S Ct 280, 69 L Ed 543 (1925) *and its progeny*.[6]

Brown, 301 Or at 274 (emphasis added). The court, however, took pains to note that it was deciding the parameters of Oregon's automobile exception "independent of federal law." *Id.* at 274. The court stressed that "the key to the automobile exception is that the automobile need be mobile at the time it is lawfully stopped." 301 Or at 276. Other exigent circumstances were not needed – "mobility at the time of the stop, by itself, creates the exigency." *Id.*

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[6] By expressly adopting the reasoning of *Carroll v. United States* "and its progeny," the *Brown* court arguably also adopted the reasoning of *California v. Carney*, 471 US 386, 105 S Ct 2066, 85 L Ed 2d 406 (1985), in which the United States Supreme Court upheld the searched of a parked, but occupied, motor vehicle because of its "ready mobility."

It concluded that adopting a *per se* exigency rule for automobiles would provide "the clearest guidelines for police in conducting automobile searches." *Id.*

Even though this court declined to define its concept of "mobility," nothing in the opinion suggests that the court intended to carry something other than its ordinary meaning. In ordinary parlance, "mobile" describes an object that is "**1.** movable; not firm, stationary, or fixed; **2.** easily moved; very fluid[,]" and "**4.** in military usage, capable of being moved or transported quickly and with relative ease[.]" *Webster's New Twentieth Century Dictionary* 1153-54 (2nd edition 1983). Thus, nothing in *Brown* limits "mobility" for purposes of the automobile exception *only* to cars that an officer has actually seen move. Nor would such an artificially constrained notion be consistent with the purpose of the exception. A vehicle may be mobile, in other words, even though not presently in motion. Nor does a vehicle's mobility depend upon who witnesses it when it is motion. Accordingly, the concept of "mobility" under Oregon's automobile exception, as expressed in *Brown*, is not confined only to those automobiles initially observed in actual motion.[7]

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[7] That conclusion is further buttressed by the fact that the *Brown* court cited to three Supreme Court of California opinions to stress that "mobility of the vehicle at the time of the stop, by itself, creates the exigency." 301 Or at 276. Specifically, the court cited to *People v. Chavers*, 33 Cal 3d 462, 189 Cal Rptr 169, 658 P2d 96 (1983); *Wimberly v. Superior Court*, 16 Cal 3d 557, 128 Cal Rptr 641, 547 P2d 417 (1976); and, *People v. Cook*, 13 Cal 3d 663, 119 Cal Rptr 500, 532 P2d 148 (1975). *Brown*, 301 Or at 276. In each

Footnote continued…

Lastly, by citing to *People v. Chavers*, 33 Cal 3d 462, 189 Cal Rptr 169, 658 P2d 96 (1983), as persuasive authority, this court in *Brown* implicitly re-affirmed that officers are not required to obtain a search warrant after having seized the vehicle. *See Brown*, 301 Or at 275 (citing *Chavers*). In *Chavers*, the Supreme Court of California reiterated that, "[f]or constitutional purposes, *[there is] 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

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(…continued)
case, the court upheld a warrantless search of an automobile that had been moving when the police stopped it. *Chavers*, 658 P2d at 98; *Wimberly*, 547 P2d at 419-20; *Cook*, 532 P2d at 150;. In each case, however, the court cited to earlier precedence—namely, *People v. Dumas*, 9 Cal 3d 871, 109 Cal Rptr 304, 512 P2d 1208 (1973)—which upheld the warrantless search of a *parked* automobile under the automobile exception of Article I, section 13 of the California Constitution. *Chavers*, 658 P2d at 98; *Wimberly*, 547 P2d at 420-21; *Cook*, 532 P2d at 151 (each citing to *Dumas*). In *Dumas*, the police discovered the defendant's parked vehicle while executing a search warrant on the defendant's residence for stolen property. *Dumas*, 512 P2d at 1211. Although the search warrant did not authorize the search of the defendant's vehicle, the police searched it on the basis that the automobile might contain the items specified in the search warrant. The Supreme Court of California ruled that the exigent circumstances surrounding the discovery of the vehicle justified the search under California's automobile exception to the warrant requirement, noting:

> The [previously cited automobile exception] decisions upholding warrantless searches of automobiles *evidence no distinction* between the treatment of vehicles the police stop on the highway and vehicles they find parked at the curb.

512 P2d at 1217 (emphasis added). California's automobile exception, which the *Brown* court cited as persuasive, was not dependent upon whether an officer personally observed a vehicle in question moving.

carrying out an immediate search without a warrant." *Chavers*, 658 P2d at 100 (internal citations omitted) (emphasis added).

C. Since *State v. Brown*, this court has never held that an officer must observe a vehicle in motion for it to be "mobile."

In the years since it decided *Brown*, this court addressed the mobility requirement of the automobile three times. In those three cases, this court has never held that an officer must observe a vehicle in motion for it to be "mobile" under Article I, section 9. First, in *State v. Kock*, 302 Or 29, 725 P2d 1285 (1986), decided shortly after *Brown*, this court held that Article I, section 9 did not permit a warrantless search of a "parked, immobile, and unoccupied" vehicle. In *State v. Meharry*, 342 Or 173, 149 P3d 1155 (2006), this court held that the defendant's van was still mobile, even though the defendant had parked it and entered a nearby convenience store. Finally—and most recently—in in *State v. Kurokawa-Lasciak*, 351 Or 179, 263 P3d 336 (2011), this court reiterated that it was adhering to the automobile exception drawn in *Brown* and held that an unoccupied van parked in a casino parking lot when first encountered by the police was not "mobile" for purposes of the automobile exception. In none of these cases did this court hold, explicitly or implicitly, that an officer *must see* a vehicle in motion for it to be "mobile."

1. *State v. Kock* held that the automobile exception did not apply to "parked, immobile, and unoccupied" vehicles.

Shortly after *Brown*, this court distinguished Article I, section 9's automobile exception from the Fourth Amendment's automobile exception and held that it did not extend to "parked, immobile, and unoccupied" vehicles. In *Kock*, officers wanted to catch the defendant in the act of stealing from his employer, so they conducted a stake-out observation of the defendant's parked vehicle outside the store where the defendant worked. 302 Or at 31. Roughly two hours into the defendant's shift, officers observed the defendant bring merchandise from inside the store, place it in his vehicle, and then re-enter the store. *Id.*, at 31-32. During a warrantless search of the defendant's car, officers recovered stolen store merchandise. *Id.*, at 32. The defendant argued that the officers could not justify their search of his vehicle on the automobile exception. *Id*. Relying on *California v. Carney*, 471 US 386, 105 S Ct 2066, 85 L Ed 2d 406 (1985), the state argued that the defendant's vehicle was mobile, despite the fact that it was parked and unoccupied at the time of the search.[8] *See* State's Response to Petition for Review in *State v. Brown*, at 3-7.

[8] *California v. Carney* is part of the progeny of *Carroll v. United States* upon which the *Brown* court presumably predicated Article I, section 9's automobile exception. *See Brown*, 301 Or at 274; State's Response to Petition for Review in *State v. Brown*, at 3-7. In *Carney*, the United States Supreme Court justified the warrantless search of a parked (but occupied) mobile home

Footnote continued…

This court rejected the state's "readily mobile" argument and declined to adopt the United States Supreme Court's reasoning in *Carney*:

> We choose not to stretch the automobile exception as far as the Supreme Court of the United States has done in interpreting the Fourth Amendment, nor do we retreat from the position take in *State v. Brown*. * * * *Brown* sets the outer limit for warrantless automobile searches without other exigent circumstances.

302 Or 29, 33, 725 P2d 1285 (1986). More specifically, this court held that the automobile exception would not extend so far as to justify a warrantless search of a "parked, immobile, and unoccupied" vehicle, like the vehicle in that case was. *Id.* at 33. Accordingly, it suppressed the evidence discovered in the defendant's vehicle. *Id.* at 34.

Significantly, though, this court did *not* rule that an officer was required to observe a vehicle to be in motion in order for it to be considered "mobile" under Article I, section 9. The most that can be concluded from *Kock* is (1) this court no longer endorsed the warrantless search of parked, immobile, and unoccupied vehicles, as it had earlier in *Elk* and *Greene*; and (2) Oregon's automobile exception was narrower than that of the Fourth Amendment. Thus, nothing in *Kock* limits "mobility" for purposes of the automobile exception *only* to cars that an officer initially observes moving.

(…continued)
because (1) the motor home was "readily mobile" and (2) automobiles provide a reduced expectation of privacy. *Carney*, 471 US at 390-91.

2. *State v. Meharry* held that a vehicle remains mobile, even after it has stopped moving.

This court addressed the concept of "mobility" again in *State v. Meharry*, and held that a vehicle remains mobile, even after it has stopped. Even though a police officer had observed the defendant's car in motion on a city street, the defendant had parked and exited her vehicle before the officer was able to conduct a traffic stop. 342 Or at 175. The trial court ruled that the defendant's vehicle was not mobile because it was "parked, immobile and unoccupied" at the time the officer contacted defendant, and the Court of Appeals agreed. 201 Or App 609, 618, 120 P3d 520 (2005). This court reversed, ruling that the defendant's vehicle was "mobile" because an officer had initially observed it travelling on the street. 342 Or at 179. It noted that the Court of Appeals' reasoning "fails to give effect to the exigency that ordinarily justifies the warrantless search of a vehicle." *Id.* Given the purpose of Oregon's automobile exception, this court held that there was no difference, "for constitutional purposes," between "stopping an *otherwise mobile* car from resuming its journey" and "causing a moving car to come to a stop." *Id.* at 180 (emphasis added). This court did not otherwise change the concept of mobility first announced in *Brown.*

3. *Kurokawa-Lasciak* reaffirmed Oregon's automobile exception as announced in *Brown*.

Most recently, this court addressed the meaning of "mobility" in *State v. Kurokawa-Lasciak*. There, the officers stopped the defendant for suspicion of money laundering right after the defendant pulled into a casino parking lot in his van, parked it, and walked away. 351 Or at 182. None of the officers, however, observed the defendant arrive. *Id.* The officers arrested the defendant once he was approximately 30-feet from his van. *Id.* at 182. Based upon their contact with the defendant, the officers subsequently conducted a warrantless search of the van, under belief that the van contained both evidence of money laundering and drugs. *Id.*, at 184. *D*espite sharing several similarities with the facts in *Meharry*,[9] this court ruled that the vehicle in *Kurokawa-Lasciak* was *not* mobile – characterizing it instead as "parked, immobile, and unoccupied." *Id.*, at 181, 194. It rejected the state's argument that a vehicle was "mobile" if "no evidence exists that the car is inoperable" at the time of the encounter. *Id.* at 193.

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[9] In both *Meharry* and *Kurokawa-Lasciak*, officers had probable cause to suspect the defendant had committed a crime prior to contacting him or her. Also in both cases, the officer or officers contacted the defendant after the defendant parked his or her vehicle and walked away from it. Lastly, in both cases, the officers developed probable cause to believe evidence of the crime may be found in the defendant's vehicle *after* contacting the defendant.

Relevant to this case, this court has not altered or clarified the definition of mobility in its cases since *Brown* and *Kock*. Specifically, it has never held that an officer must personally observe a vehicle moving in order for Article I, section's automobile exception to apply. *Brown*, *Kock*, *Meharry*, and *Kurokawa-Lasciak* all have presented this court with the opportunity to rule that an officer *must see* a vehicle move in order for it to be considered mobile. It, however, has not so ruled. Had the court meant that to be the rule, it could have easily and explicitly stated so.

It is true that each time that this court has held a vehicle to be "mobile," an officer, in fact, did observe the defendant driving the vehicle. *See Brown*; *Meharry*. It is also true that each time that this court has held a vehicle was *not* "mobile," no officer had observed the vehicle to move. *See Kock*; *Kurokawa-Lasciak*. It does not necessarily follow, however, that an officer *must see* a vehicle actually move in order for it to be "mobile."[10] As this court has stated in another context, attempting to arrive at a rule of law by fact-matching cases

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[10] The Court of Appeals' holding that this court's jurisprudence requires such a conclusion perfectly illustrates the logical fallacy of "denying the antecedent" – "the incorrect assumption that if P implies Q, then not-P implies not-Q." *N.L.R.B. v. Noel Canning*, __ US __, 134 S Ct 2550, 2603, 189 L Ed 2d 538 (2014) (Scalia, J., dissenting); *Oregon Occupational Safety & Health Division v. CBI Services, Inc.*, 356 Or 577, 592 n 4, 341 P3d 701 (2014). "Denying the antecedent," in other words, confuses necessary conditions with sufficient conditions. It may be sufficient to see an automobile in motion to conclude that it is "mobile," but this court has never held that it is necessary.

"can be a misleading enterprise." *State v. Sierra*, 349 Or 506, 515 n5, 254 P3d 149 (2010). If anything, this court has gone out of its way to avoid making such a ruling, holding that there is no constitutional difference between "causing a moving car to come to a stop" and "stopping an *otherwise mobile* car from resuming its journey." *Meharry*, 342 Or at 180 (emphasis added).

II. The state's proposed rule of law is consistent with the purpose behind the automobile exception, as well as the historical and legal basis for the exception.

With that understanding of the development of the automobile exception, this court should hold that a vehicle is mobile if an officer reasonably believes from objective observation that it was just moving and that a driver is physically present and capable of immediately moving the vehicle. There is no requirement that an office actually observe the car in motion. That rule is not contrary to the text or context of Article I, section 9, and it is consistent with the historical underpinnings of the automobile exception.

As an initial matter, nothing in the wording of Article I, section 9 can be said to address the automobile exception to the warrant requirement rule directly, in part because (1) automobiles did not exist, or, at the very least were not widely used in 1857 as a means of transportation; and (2) Oregon counts did

not adopt a warrant requirement rule until many years later.[11] Historical circumstances surrounding its adoption provide no greater support. There is no direct evidence of the intention of the framers of the Oregon Constitution in adopting section 9. Although other provisions of the Bill of Rights engendered considerable discussion, neither the Journal of the Constitutional Convention nor the reports of newspapers of the day contain any discussion of section 9. Landau, *The Search for the Meaning of Oregon's Search and Seizure Clause*, 87 Or L Rev 819, 836-37 (2008). Thus, nothing in the history surrounded the adoption of Article I, section 9 compels an officer to first observe a vehicle to be in motion before conducting a warrantless search of it.

A. The state's proposed rule of law embodies the justification for recognizing an "automobile exception."

When faced with the rule that is at issue in a particular case, this court strives to ascertain the purpose behind the rule, in order to further refine the rule in a way that serves to achieve its purported goal. *See Meharry*, 342 Or at 179-80 (rejecting the Court of Appeal's reasoning because it "fails to give effect to the exigency that ordinarily justifies the warrantless search of a vehicle.").

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[11] Like the Supreme Court of the United States did regarding the Fourth Amendment, this court adopted the warrant requirement rule regarding Article I, section 9. *Coolidge v. New Hampshire*, 403 US 443, 91 S Ct 2022, 29 L Ed 2d 564 (1971); *State v. Snow*, 337 Or 219, 223, 94 P3d 872 (2004) (citing *State v. Bridewell*, 306 Or 231, 235, 759 P2d 1054 (1988)).

Thus, in order to define "mobile," this court should look to the reasons why the automobile exception was first recognized. *Id*.

As previously mentioned, the automobile "exception" was recognized well before the United States Supreme Court and this court adopted what is known as the "warrant-requirement." The *Carroll* court, whose reasoning both *DeFord* and *Brown* adopted, did not view the warrantless search of vehicles to be "unreasonable," because existing legislation at the time that the United States Constitution was adopted authorized such a search under certain circumstances. *Carroll*, 267 US at 149-53. Oregon's automobile exception is predicated upon the same exigency noted in *Carroll* and *DeFord*; namely, an automobile's immediate ability to leave the scene of a traffic stop. *See Brown*, 301 Or at 274 (aligning Oregon's automobile exception with "the seminal case of *Carroll*[.]").

An automobile creates exigent circumstances both by its recent mobility and, importantly, by its ability to *become* in motion. That unpredictability occurs when law enforcement officers encounter citizens who are in transit, due to the widened range of mobility afforded by vehicles.

Oregon's automobile exception, however, was not predicated solely upon an automobile's *past* mobility, which in itself fails to present exigent circumstances to justify a warrantless search. Rather, exigent circumstances are created because of an automobile's present ability to *become* mobile; namely,

an automobile's immediate ability to leave the scene of the police-citizen encounter. *Brown*, 301 Or at 275.

If the purpose of Oregon's automobile exception is to permit the warrantless search of an automobile that is capable of immediate flight, defendant's Jeep should be considered "mobile." Defendant's vehicle was clearly in use as a means of transportation, even though it was temporarily stopped when Officer Henderson first noticed it. The only reasonable inference to draw from the surrounding circumstances was that defendant had just pulled into the Winco parking lot and, regardless of being momentarily stationary, had the immediate ability, as well as the desire, to leave the lot. Under *Brown*, even though an automobile's "mobility" is determined at the time that it was stopped, it is the automobile's ability for immediate flight that creates the *per se* exigency. In other words, it is the automobile's *capability of moving* that serves as the exigency that justifies a warrantless search. The state's proposed rule of law directly serves the purpose of Oregon's automobile exception, because it recognizes a vehicle's capability of immediate flight as the justification for the warrantless search.

Furthermore, the state's proposed rule of law provides clear guidelines for the police. The proposed rule– that a stationary vehicle is "mobile" when an officer has objective evidence to conclude that it was just moving and a driver is present and capable of immediately moving the vehicle – clearly

distinguishes between a car that is "immediately moveable" from one that is only "operable." It recognizes that, when used in transit, automobiles are capable of immediate flight even when temporarily stationary. An officer could easily distinguish between an occupied vehicle that has recently been in motion and has its engine running and that is, therefore, immediately capable of driving away and a "parked, immobile, and unoccupied" car was *not* capable of immediate flight.

The state's proposed rule would also prevent the absurd results of the Court of Appeals' ruling. Under the Court of Appeals' ruling, had Officer Henderson *not* checked the side parking lot at Winco, he would have invariably seen defendant arrive, thereby justifying a warrantless search of defendant's vehicle. This court in *Meharry*, however, rejected the difference, for constitutional purposes, between stopping a moving car and "stopping an otherwise mobile car from resuming its journey." 342 Or at 180. Because Henderson did not *see* defendant arrive, the Court of Appeals' ruling requires the officers to obtain a search warrant to search defendant's vehicle.[12] That was despite the fact that a warrantless search could be conducted relatively quickly, whereas a search pursuant to a warrant would entail several hours of

[12] No additional exigent circumstances existed *other* that the fact that defendant was in the driver's seat with the engine running and capable of immediately leaving the parking lot.

defendant's and her vehicle's continued detention while Officer Henderson obtained the warrant. Yet this court has previously rejected the preference for requiring a search warrant under such circumstances. *Brown*, 301 Or at 276 (by citing *Chavers*); *Quinn*, 290 Or at 392-93; *Greene*, 285 Or at 343.

B. The state's proposed rule of law is also more consistent with Oregon constitutional case law as a whole.

Historically, courts and police officers are entitled to consider the totality of circumstances to determine the constitutionality of an officer's actions. *State v. Holmes*, 311 Or 400, 407, 813 P2d 28 (1991) ("Given the diversity of potential police-citizen encounters and that the facts and circumstances of each encounter may be so varied, the determination of whether a person has been seized * * * will require a fact-specific inquiry into the totality of the circumstances of the particular case."). An officer typically is not reduced to justifying his or her conduct based strictly upon what he or she can see. *See State v. Heckathorne*, 347 Or 474, 223 P3d 1034 (2009) (officers can rely upon various sensory clues when evaluating whether probable cause exists). Lastly, Article I, section 9 permits officers to make reasonable inferences about their observations. *See State v. Holdorf*, 355 Or 812, 333 P3d 982 (2014) (officers can rely upon facts that give rise to reasonable inferences, including those facts observed by another officer); *State v. Miglavs*, 337 Or 1, 90 P3d 607 (2004) ("[O]fficers reasonably may draw inferences about human behavior from their

training and experience[.]"); *State v. Ehly*, 317 Or 66, 854 P2d 421 (1993) ("Whether [an officer's] suspicion is reasonable often will depend on the inferences drawn from the particular circumstances confronting the officer, viewed in the light of the officer's experience.").

Even when this court announces a preference for a bright-line rule, historically this court has not prevented courts and officers from considering the totality of circumstances to determine the constitutionality of police action. Under Article I, section 12, for example, officers must give *Miranda* warnings to a person who is in "full custody" or in circumstances that "create a setting which judges would *and officers should* recognize to be 'compelling.'" *State v. Roble-Baker*, 340 Or 631, 638, 136 P3d 22 (2006) (emphasis added). Yet this court looks to "a host of factors" to assess whether circumstances were sufficiently compelling such that an officer "should recognize" *Miranda* warnings are required. 340 Or at 640-41 (listing four non-exclusive factors).

The state's proposed rule of law for Oregon's automobile exception permits officers to rely upon the totality of the surrounding circumstances to infer whether a vehicle is currently in use and capable of immediate flight. It is a rule that will produce reasonable results, even among the infinite variety of factors that police officers could potentially face when encountering vehicles that are in use.

CONCLUSION

In summary, the state proposes that the automobile exception of Article I, section 9's warrant requirement should authorize a warrantless search of a vehicle that has recently moved and is capable of immediate mobility when the police have probable cause to believe that the vehicle contains contraband or evidence of a crime. That proposed rule of law is consistent with the text of and historical circumstances surrounding the adoption of Article I, section 9, in addition to this court's jurisprudence. It is also more consistent with the concept of "mobility" in general and adheres to the reasoning behind having an automobile exception.

For these reasons, the Court of Appeals' ruling in defendant's case is incorrect. Defendant's vehicle was demonstrably "mobile" in that defendant had recently pulled up in the vehicle, was seated in the driver's seat, still had the engine running, and expressed a desire to leave when the police contacted

her. Accordingly, this court should reverse the decision of the Court of Appeals and affirm the judgment of the circuit court.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on October 7, 2015, I directed the original Brief on the Merits of Petitioner on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Ingrid MacFarlane, attorneys for appellant, by using the court's electronic filing system.

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

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 8,514 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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