IN THE SUPREME COURT OF THE STATE OF OREGON

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

REPLY BRIEF OF PETITIONER ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Lincoln County
Honorable THOMAS O. BRANFORD, Judge

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

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STATEMENT OF THE CASE

At the heart of this case—and of the companion case, *State v. Ritz* (S063292)[1]—is the scope of the exigent circumstances exception to the warrant requirements of Article I, section 9, of the Oregon Constitution, and of the Fourth Amendment to the United States Constitution. Specifically, the issue in this case is how those exceptions apply to a warrantless home entry for the purposes of securing evidence that is necessarily being destroyed—here, evidence of impairment, including blood-alcohol content (BAC) evidence, possible drug-impairment evidence, and other observational evidence of impairment.

The state files this reply brief to respond to defendant's arguments: (1) that the exigent circumstances rule from *State v. Machuca*, 347 Or 644, 227 P3d 729 (2010), and *Schmerber v. California*, 384 US 757, 86 S Ct 1826, 16 L Ed 2d 908 (1966), are limited to evidence seizures via forced blood draws and do not apply to warrantless home entries; (2) that warrantless home entries can occur only for felonies or misdemeanor crimes of violence; (3) that officers are required to attempt to obtain a warrant before entering the home; (4) that a

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[1] This case and *Ritz* have been consolidated for oral argument, to be held on January 12, 2016.

defendant must be intentionally destroying evidence to justify a warrantless home entry; (5) that the officer was only entering defendant's home for the purpose of "requesting" consent to search—which is not sufficient to establish an exigency; (6) that the state did not have a significant interest in enforcing its DUII laws; and (7) that the Fourth Amendment would require suppression in this case. For the reasons explained below, none of defendant's arguments withstand scrutiny. Instead, this court should conclude that the state's proposed rule—allowing a warrantless home entry for the limited purpose of securing dissipating impairment evidence—respects the constitutional significance of a government entry into the home while remaining true to the foundation of the exigency exception.

A. *Machuca* and *Schmerber* apply broadly to dissipating impairment evidence.

Defendant first argues that *Schmerber* and *Machuca* apply only when the search performed was a warrantless blood draw and not to a warrantless search of a home. (Resp BOM 13-18). Such a narrow read of those cases, however is not warranted. The question in *Machuca* was whether "the undisputed evanescent nature of alcohol in the blood," 347 Or at 656, necessarily established that blood-alcohol evidence was being destroyed for the purposes of the exigent circumstances analysis. Similarly, the Fourth Amendment question in *Schmerber* was whether the necessary destruction of BAC evidence through

dissipation was a sufficient emergency to allow a "warrantless intrusion[] into the human body" via a non-consensual blood draw. 384 US at 767. Both *Schmerber* and *Machuca* held that such warrantless searches were reasonable because of the exigency created by the destruction of the impairment evidence.

Although both of those cases arose in the context of a search of the defendant's blood via a warrantless blood draw, the legal question that those cases address—whether the natural dissipation of alcohol in a suspect's blood is an "exigency" that would justify a warrantless search—is the same question before this court in this case. Those cases did not turn on the limited nature of the search—in fact, both recognized that forced blood draws are very invasive. Rather, the holdings in those cases turned on the nature of the exigency—that evidence would necessarily be lost while waiting for a warrant.

Defendant next mischaracterizes the state's argument as being that "a person's entry into his 'castle' would instantly authorize governmental intrusion," and then declares that argument to be "repugnant to the common law tradition" and to the constitution. (Resp BOM 16). Of course, the state's argument is not nearly so broad. Rather, the rule of law advocated by the state—and supported by this court's cases—is that destruction of evidence is an exigent circumstance that would permit a warrantless home entry, *State v. Girard*, 276 Or 511, 515, 555 P2d 445 (1976), and that impairment evidence (both BAC evidence and observational evidence of impairment) is destroyed

with every breath a person takes, *Machuca*, 347 Or at 656-57. Recognizing the constitutional significance that a warrantless home entry entails, the state's proposed rule allows law enforcement to enter a home to seize a DUII suspect for the sole purpose of securing dissipating impairment evidence only: (1) if the officer has probable cause to believe that evidence of intoxication will still be detectable; and (2) if the suspect is in the home and is knowingly preventing the officer from securing that evidence by refusing to leave. (Pet BOM 2-3). The state's narrow rule remains true to the philosophical basis for the exigency exception while respecting the constitutional significance of a government intrusion into a home.

B. Warrantless home entries are not limited to felonies or misdemeanors of violence.

Defendant also argues that the "seriousness of the crime he is suspected of committing" is a factor in determining whether an exigency exists. (Resp BOM 18). He does not, however, identify any source in Oregon law for the proposition that the *existence* of an exigency depends on the officer's subjective belief about what offenses the suspect may have committed. Although the seriousness of the offense that officers are investigating may be relevant in determining the reasonableness of the officers' subsequent actions, it is not relevant to determining whether an exigency exists.

To be sure, in *Welsh v. Wisconsin*, 466 US 740, 104 S Ct 2091, 80 L Ed 2d 732 (1984), the United States Supreme Court concluded that the state could not rely on exigency as a basis for a warrantless home entry for the sole purpose of making an arrest for a non-jailable traffic offense. The Court held that, because the "State of Wisconsin has chosen to classify the first offense for driving while intoxicated as a noncriminal, civil forfeiture offense for which no imprisonment is possible," the state's interest in making a warrantless home entry to preserve BAC evidence was so low that no exigency existed. 466 US at 754.

Of course, in Oregon, DUII is a criminal offense—and potentially a felony. *See* ORS 813.010(5) (describing circumstances that would convert DUII from a Class A misdemeanor to a felony). And, in the 30 years that have passed since *Welsh*, no one now "can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." *Missouri v. McNeely*, 569 US ___, 133 S Ct 1552, 1565, 185 L Ed 2d 696 (2013) (internal quotation omitted). So, the state's interest here is much greater than was the state's interest in *Welsh*. Moreover, at the time an officer has to make the decision to enter or wait for a warrant, he or she may have no way of knowing whether a DUII suspect has prior offenses that would convert the current offense into a felony or if there are other associated offenses not yet known by the officers.

So, the "significance of the offense" factor is important only in situations where the on-scene law enforcement officers know that the only offense they are investigating is a noncriminal (or at least non-jailable) offense. Other states interpreting *Welsh* have reached similar conclusions. *See People v. Thompson*, 135 P3d 3, 8-9 (Cal 2006) (distinguishing *Welsh* on the ground that "in California, driving under the influence is not an 'extremely minor' offense"); *State v. Keenan*, 325 P3d 1192, 1200 (Kan App 2014), *rev granted* (April 29, 2015) (distinguishing *Welsh* on the ground that even misdemeanor DUI in Kansas is a jailable offense). *See also Illinois v. McArthur*, 531 US 326, 121 S Ct 946, 148 L Ed 2d 838 (2001) (distinguishing *Welsh*; allowing law enforcement to prevent people from entering a home for two hours while they obtained a warrant to search for drug possession evidence to prevent destruction of the evidence before a warrant could be obtained).

Additionally, it is worth reiterating that even if the significance of the offense is a factor in the exigency analysis under the Fourth Amendment, this court has never identified it as a factor under Article I, section 9. Rather, this court's exigency analysis simply focuses on whether "immediate action is necessary to prevent the disappearance, dissipation, or other loss of evidence."[2]

[2] Other types of exigencies that might justify warrantless searches or seizures include any emergency situations "requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the

Footnote continued…

State v. Mazzola, 356 Or 804, 811, 345 P3d 424 (2015) (internal quotation omitted). This court has applied the same exigency analysis whether the crime being investigated was a misdemeanor DUII (*Mazzola*), a felony burglary (*Girard*), or unspecified traffic offenses (*State v. Snow*, 337 Or 219, 225, 94 P3d 872 (2004)).

C. The exigent circumstances exception does not require police to first attempt to obtain a warrant before conducting a warrantless search or seizure.

Defendant next suggests that the arresting officer should have first attempted to get a warrant, and that if he "had tried, but failed, to track down a magistrate, the record might establish * * * that the exigency **was** 'sufficient to justify' forcibly invading defendant's home 'without a warrant.'" (Resp BOM 27; quoting *McNeely*, 133 S Ct at 1568; bold in defendant's brief). Defendant bolsters this argument by suggesting that telephonic warrants could be quickly obtained, thus suggesting that improvements in communications technology might dispense with the need for the exigent circumstances exception in cases such as this. (Resp BOM 26) The implication of defendant's argument is that law enforcement officers on the scene where evidence is being destroyed must first attempt to contact a judge to obtain a warrant before they can act to

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(…continued)
imminent escape of a suspect[.]" *Girard*, 276 Or at 515 n 2 (quoting *People v. Ramey*, 545 P2d 1333 (Cal 1976)).

preserve the evidence. Such a requirement turns the exigent circumstances exception on its head.

Loss of evidence is one of the exigencies that this court has recognized will dispense with the warrant requirement of Article I, section 9. *See Snow*, 337 Or at 223 (quoting *State v. Stevens*, 311 Or 119, 126, 806 P2d 92 (1991)) ("An exigent circumstance is a situation that requires police to act quickly to prevent danger to life or serious damage to property, or to forestall a suspect's escape or the destruction of evidence."). Although it is true that communications technology has dramatically improved since the adoption of Article I, section 9, and even in the years following some of this court's seminal exigency cases, that does not mean that warrants can be obtained instantaneously (or even generally as fast as the hour suggested by defendant). In order to obtain a warrant, an officer typically must prepare a supporting affidavit that details all of the evidence to establish probable cause. *See* ORS 133.545 (detailing warrant application process). The officer has to locate a judge who is willing to hear the warrant application (in this case on a weekend). Moreover, the officer has to find a judge who is willing to issue a warrant electronically (although telephonic and electronic warrants are allowed by statute, there is nothing requiring judges to issue electronic warrants). Additional time is often needed to have a district attorney review the warrant before it is submitted. Occasionally, a judge will ask a law enforcement officer

to make changes to the warrant application, so additional time is needed for those changes to be made. Finally, an officer needs to obtain a hard copy of the warrant.[3] *See* ORS 133.575(3) (requiring officer to "give a copy of the warrant" to the person in control of the premises being searched). All the while, the officer needs to secure the scene to prevent the suspect from escape and to attempt to observe whether the suspect is permanently altering the evidence by ingesting additional intoxicants.

Additionally, here, the evidence in the record was that a warrant would have taken "several hours" to obtain. So, obtaining a warrant is not the simple process defendant envisions.[4]

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[3] In the case of a warrant for a blood draw—which would usually occur at a police station or a medical facility where printers would likely be located—such a requirement might not add significant time to the process. But, in a situation like this case, finding a printer while the officer is at the suspect's house could add significant time to the process.

[4] In *McNeely*, the Supreme Court explained that,

> "we by no means claim that telecommunications innovations have, will, or should eliminate all delay from the warrant-application process. Warrants inevitably take some time for police officers or prosecutors to complete and for magistrate judges to review. Telephonic and electronic warrants may still require officers to follow time-consuming formalities designed to create an adequate record, such as preparing a duplicate warrant before calling the magistrate judge. * * * And improvements in communications technology do not guarantee that a magistrate judge will be available when an officer needs a warrant after making a late-night arrest."

Id. at 1562 (citation omitted).

Regardless, even if it were a simple process, *Machuca* explains that impairment evidence is constantly being destroyed. Therefore, any delay necessitated by obtaining a warrant is a delay that causes significant evidence to be lost. This court has never held that Article I, section 9, requires the state to sacrifice evidence to obtain a warrant. Where police have probable cause to believe that evidence is being destroyed, they are entitled to make warrantless home entries to prevent that destruction. *Girard*, 276 Or at 515-16. And, when it comes to impairment evidence, such evidence is always dissipating. *Machuca*, 347 Or at 657.

Only if the process of obtaining a warrant could be completed before a search or seizure is conducted would the exigent circumstances exception not apply. That is what this court meant in *Machuca*, when it left open the possibility that in rare cases a warrant may still be required to perform a blood draw. That is, there might be a situation where police physically could not obtain a blood draw for several hours (due to the availability of qualified personnel to draw the blood, for instance) where a warrant would be required because obtaining the warrant would not delay the search or seizure.

Here, however, every minute that police would have spent applying for and obtaining a warrant would have equated to a minute of delay in obtaining crucial BAC or observational impairment evidence. Law enforcement officers had probable cause that defendant had driven while impaired just moments

earlier. They also knew that he had locked himself in his house and he would not come out voluntarily when asked to do so. Under those circumstances, any time taken to obtain a warrant would have resulted in the loss of evidence. That is precisely the situation that the exigent circumstances exception seeks to avoid.

D. The exigent circumstances rule does not require that a person be purposefully destroying evidence.

Defendant also argues 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)." (Resp BOM 30; bold in original). Because his subsequent drinking was "to control pain," and not an intentional effort to destroy evidence, defendant contends that there is no exigency. (Resp BOM 31). Defendant's argument is flawed for two reasons.

First, the purpose of the exception is to prevent evidence from being lost. The exception does not care how or why the evidence is lost. In fact, as this court explained in *Machuca*, the exigent circumstances exception even applies where evidence is being destroyed by the natural process of dissipation from the person's blood.

Second, the fact that defendant continued to drink after he returned home is one of the concerns that animate the need to secure evidence of impairment as close to the time of driving as possible. Drinking after the time of driving—

whether for the intentional purpose of permanently altering BAC evidence or not—renders subsequent use of techniques such as retrograde extrapolation unreliable for purposes of identifying BAC at the time of driving. When a defendant is not in custody or under observation, the possibility of continued drinking or ingestion of other intoxicants creates an exigency situation where swift police action is necessary.

E. The officers' entry was to secure impairment evidence—it was not "merely for the purpose of requesting consent to search."

Defendant next argues that the exigent circumstances exception does not apply here because the officers entered only for the purpose of "requesting" that defendant consent to a search. (Resp BOM 33-34). This argument misstates the purpose of Officer Sites' entry.

It is true that Officer Sites first requested that defendant come out of the house to perform field-sobriety tests and then informed defendant that he was under arrest and ordered defendant out of the house. But, the mere fact that defendant did not voluntarily come out of his house does not mean that Officer Sites was unlikely to obtain any evidence.

Defendant's argument assumes that the only evidence of impairment that law enforcement is seeking during a DUII investigation is BAC evidence. In addition to BAC evidence, however, officers investigating a suspected DUII are also seeking to secure other relevant evidence. Specifically, officers are

gathering observational evidence of a DUII suspect's appearance and behavior as close to the time of driving as possible. BAC is but one way of proving DUII. The state also can prove DUII by establishing that defendant was impaired to a noticeable and perceptible degree at or near the time of driving. ORS 813.010(1)(b), (c). Moreover, even if a defendant refuses to submit to a breath or a blood test, that refusal can be used as evidence in a criminal proceeding. *See* ORS 813.310 (evidence of refusal to submit to chemical test admissible in DUII trial). So, rather than being *unlikely* to produce evidence, a warrantless entry to detain a DUII suspect is almost certain to produce evidence (observational evidence and either BAC evidence or refusal evidence).

Second, Oregon's implied consent law does more than simply allow officers to "request consent." ORS 813.100(5) allows police officers to obtain breath or blood analysis through any "lawful means." Those would include searches or seizures conducted pursuant to a warrant or exigent circumstances.

Third, defendant's argument that a person who retreats into his home is unlikely to cooperate with a breath or blood test is proven empirically false in both this case and in *Ritz*. In both of these cases, after the police entered the defendants' homes and arrested them, they both submitted to breath tests.

F. The state has a significant interest in investigating and enforcing its DUII laws.

Defendant's final argument is that because the crime at issue here was "a completed and non-violent misdemeanor," there is no exigency. (Resp BOM 36). As noted above, the "seriousness of the offense" is not typically a factor that this court has considered in its exigency analysis. But, even if it were, defendant's argument would fail.

First, defendant's argument assumes that Officer Sites knew that he was not investigating a felony DUII—or some other potential crime. As noted above, if defendant had previously been convicted three other times in the previous 10 years, his current offense would be a felony. Moreover, defendant may have committed other offenses while driving which might have been felonies. The fact that defendant was convicted of only two misdemeanors is the same type of "impermissible hindsight" that defendant's own argument cautions against. (Resp BOM 28, 30). *See also Snow*, 337 Or at 225 ("The proper focus is on the reasonableness of the officers' actions at the time they took them in response to the exigency[.]").

Second, even misdemeanor DUII is a significant offense. "'No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it.'" *McNeely*, 133 S Ct at 1565 (citing *Michigan Dept. of State Police v. Sitz*, 496 US 444, 451, 110 S Ct 2481, 110 L Ed 2d 412 (1990)

(upholding DUII checkpoints)). "And [BAC] evidence is important. A serious and deadly crime is at issue. According to the Department of Transportation, in 2011, one person died every 53 minutes due to drinking and driving. * * * * * Evidence of a driver's [BAC] is crucial to obtain convictions for such crimes." *McNeely*, 133 S Ct at 1571 (Roberts, C. J., concurring in part, dissenting in part). The state has a significant interest in keeping impaired drivers off of its roadways. The most important way it does that is by investigating and enforcing its DUII laws.

G. This court should reject defendant's Fourth Amendment argument.

Finally, defendant also argues that, in the event this court disagrees with the Court of Appeals' Article I, section 9, exigency analysis, it should nonetheless affirm on Fourth Amendment grounds. (Resp BOM 3). In the Court of Appeals, the state argued that defendant's Fourth Amendment claim was unpreserved, and—because it reversed on state constitutional grounds—the Court of Appeals did not address that claim. *State v. Rice*, 270 Or App 50, 54, 346 P3d 631, *rev allowed*, 357 Or 550 (2015). This court should not reach defendant's Fourth Amendment argument.

If this court agrees with the state that no Article I, section 9, violation occurred, the proper remedy would be to remand to the Court of Appeals to consider whether defendant's Fourth Amendment argument was preserved and—if it was—to consider the merits of that argument. Alternatively, for the

reasons identified in the state's briefing in *Ritz*, this court should conclude that the exigent circumstances exception to the Fourth Amendment also permitted the warrantless home entry in this case.

CONCLUSION

For all of the reasons explained here, and in the state's opening brief, this court should affirm the trial court's denial of defendant's motion to suppress and it should reverse the decision of the Court of Appeals.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on December 22, 2015, I directed the original Reply Brief of Petitioner on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Jesse Wm. Barton, attorney for 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 3,670 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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