IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Appellant, Respondent on Review, vs. CHARLES STEVEN MCCARTHY, Defendant-Respondent, Petitioner of Review.	Marion County Circuit Court Case No. 16CR75546 CA A165026 SC S067608

PETITIONER'S BRIEF ON THE MERITS

Review of the Decision of the Court of Appeals
on Appeal from an Order of the Circuit Court for Marion County
Honorable Lindsay R. Partridge, Judge

Opinion Filed: January 29, 2020
Author of Opinion: James, J.
Concurring Judges: Lagesen, P.J. and Sercombe, S.J.

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Nature of the Proceeding

This case involves discretionary review of a Court of Appeals decision that reversed a circuit court order that granted, in part, defendant's motion to suppress evidence. *State v. McCarthy*, 302 Or App 82, 459 P3d 890 *rev allowed*, 366 Or 691 (2020). The issues on review are (1) whether the automobile exception to the warrant requirement applies only upon a showing of an actual, nontheoretical, exigency existing at the time of the search, and (2) if so, whether the state bears the burden of production and persuasion to establish that an actual exigency existed at the time of the search before that evidence can be used against the accused.

Questions Presented and Proposed Rules of Law

First Question Presented

To rely on the automobile exception to the warrant requirement, must the state establish that an exigency existed at the time of the search?

First Proposed Rule of Law

Yes. The automobile exception to the warrant requirement excuses an officer's failure to obtain a warrant when, under the totality of the circumstances present at the time of the search, an actual, nontheoretical, exigency existed.

Second Question Presented

Does the state, when relying on the automobile exception, bear the burden of production and persuasion to prove that an actual exigency existed at the time of the search?

Second Proposed Rule of Law

Yes. Because a warrantless search is presumptively unreasonable, both Article I, section 9, of the Oregon Constitution and ORS 133.693(4) require the prosecutor—at a hearing on a motion to suppress—to carry the burden of production and persuasion.

Summary of Argument

This court should revisit the "automobile exception" to the warrant requirement of Article I, section 9, that it created in *State v. Brown*, 301 Or 268, 721 P2d 1357 (l986). The exception, a categorical rule of legally created exigence of all mobile vehicles, (1) was intended only as a temporary accommodation to the state pending technological advancements that have, in fact, come to fruition, (2) is difficult to apply in practice, and (3) cannot be harmonized with Article I, section 9's prohibition on searches that are not reasonable under all the particular circumstances.

Instead, this court should abandon the categorical nature of the exception and return to this court's pre-*Brown* practice of reviewing warrantless automobile searches for whether they fall within the exigent circumstances, search incident to arrest, or consent exceptions to the warrant requirement.

Finally, this court, consistent with Article I, section 9, and ORS 133.693(4), should place the burden of production and persuasion on the prosecutor to prove that a warrantless search of an automobile is justified by an exception to the warrant requirement. In doing so, this court will ensure officers are trained on how to access

and use technology that can expedite the warrant application process.

Summary of Facts

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

> "Two detectives, Garland and Bidiman, were surveilling a suspected drug house when they saw defendant and two other men in a truck outside. The detectives followed the truck because they recognized defendant as a person of interest based on previous investigations. While following defendant, the detectives saw the truck drift into the bike lane and pulled it over. Defendant drove the truck into a tavern parking lot and legally parked the vehicle. Garland blocked the truck from leaving by parking his unmarked police car behind the truck in the parking lot. Another detective, Smith, shortly arrived on the scene as backup.
>
> "Garland asked defendant for his driver's license, registration, and proof of insurance. Defendant immediately told the detective that his license was suspended, that he did not own the truck he was driving, and that he did not know which insurance company insured the truck. While interacting with defendant, the detectives noticed that defendant and his two passengers appeared nervous and that they had black tar stains on their hands that the detectives considered consistent with handling heroin. Smith asked defendant about the black tar stains on his hands and defendant claimed the stains were from food and working on engines.
>
> "Smith told Garland and Bidiman that Street Crimes Unit Detective Carney still had probable cause to arrest defendant for conspiracy to deliver heroin stemming from an investigation five months earlier. From the tavern parking lot, Smith called Carney and explained that the detectives had pulled over defendant. Carney requested that they arrest defendant.
>
> "However, the detectives did not immediately arrest defendant; instead, the detectives decided to call Trooper Freitag, a drug enforcement K9 officer. When Freitag arrived, the detectives removed defendant and his passengers from the truck and arrested defendant for conspiracy to deliver heroin. The drug dog alerted to the interior passenger door, and Freitag concluded that it was more likely than not that the truck contained drugs. The detectives had also called the

> registered owner of the truck but had to detain him on an outstanding warrant when he arrived. The detectives could not tow the truck because the tow policy at the Salem Police Department did not authorize the detectives to impound a legally parked truck in a public parking lot. Moreover, the detectives believed that applying for a warrant would have taken at least four or five hours. So, the detectives searched the truck relying on the automobile exception to the warrant requirement and discovered drug paraphernalia with heroin and methamphetamine residue. The state charged defendant with possession of heroin and delivery of heroin."

McCarthy, 302 Or App at 83-85.

Procedural History

Before trial, defendant moved to suppress various items seized after his arrest, including the items discovered during the search of the truck. At that hearing, the trial court and Garland engaged in the following colloquy:

> "THE COURT: So, what—once the defendant is detained, what prohibits you from getting a search warrant to search the vehicle at that point?
>
> "[GARLAND]: (no audible response)
>
> "THE COURT: In other words, why not go get a warrant at that point? He's not going to drive the car away.
>
> "[GARLAND]: I—I mean, yeah, could we have wrote—applied for a search warrant? We could have. But I also believe the vehicle was still mobile at that—that particular time.
>
> "THE COURT: How was it mobile?
>
> "[GARLAND]: (No audible response)
>
> "THE COURT: Who's going to drive it?
>
> "[GARLAND]: One of the other occupants. I mean it's possible. I don't—I mean, I don't have an answer for you there."

Tr 60-61. Garland also admitted that, despite his testimony, there was no actual, nontheoretical, risk of the truck being tampered with or driven off because multiple officers were present, defendant's truck was blocked off by Garland, and all occupants were already out of the vehicle. Tr 61, 66-67. Garland testified that procuring a warrant would take several hours because his agency was prohibited from seeking a telephonic warrant. Tr 68.

The trial court ruled on the motion in two separate letter opinions, concluding that the automobile exception did not apply because: (1) the detectives did not demonstrate an actual exigency given the possibility of a telephonic warrant, and (2) the otherwise legally parked truck was immobile. In its first letter opinion, dated April 11, 2017, the court found:

> "3. During the 'lull' Officer Garland had contact with Agent Carney and Agent Carney requested that Officer Garland arrest defendant for an alleged drug offense on May 16, 2016.
>
> "* * * *
>
> "5. Immediately prior to the traffic stop the vehicle was mobile. During the traffic stop the vehicle was lawfully parked in a parking lot accessible to the public.
>
> "6. Once defendant was in custody[,] the vehicle was at least temporarily immobile. * * *
>
> "7. Probable cause existed to believe the vehicle would contain contraband due to the following:
>
> "a. Officer Garland observed defendant leaving from a residence that he knew to be a known drug house[;]
>
> "b. Police officers knew there was probable cause to arrest

> defendant for a drug offense from May 16, 2016;
>
> "c. During the traffic stop officers observed stains on defendant's shirt and fingers consistent with tar heroin;
>
> "d. Defendant appeared nervous and shaky during his contact with police;
>
> "e. A drug detection dog alerted to the presence of controlled substances during the traffic stop."

302 Or App at 85. The trial court explained that "Oregon appellate courts have clarified that the mobility of the vehicle and the existence of probable cause to believe defendant has committed a crime must exist at the same time for the exception to apply." *Id.* at 86. Given that understanding, the trial court ruled that

> "the police did not develop probable cause that defendant committed a crime until after the vehicle was stopped. Additionally, during the investigation of the traffic stop, the police determined that neither defendant nor the registered owner could move the vehicle. * * * The police developed probable cause to search the vehicle after that point [and] the vehicle was unoccupied at * * * the point probable cause was developed."

Id. Thus, the trial court ruled:

> "The legal basis for applying the automobile exception is based upon the concern that a vehicle containing evidence of a crime will be moved and the state will lose the ability to seize such evidence. However, the exception requires that the state demonstrate at least a realistic likelihood that someone will move the vehicle prior to the police obtaining judicial authorization to search the automobile. In this case, the state only presented a general theory that the vehicle was operable. However, neither the registered owner nor defendant could move the vehicle as both were in custody. The vehicle was unoccupied and otherwise was parked in a manner that did not create a safety hazard. The state presented no other evidence that the vehicle could be moved. Accordingly, the warrantless search of the vehicle [was] not justified through the automobile exception."

Id. The state sought reconsideration and requested a second evidentiary hearing. Defendant, relying on ORS 133.673(2) (permitting reconsideration of a motion to suppress that "has been denied"), objected. The court granted the state's request and held a second evidentiary hearing with further argument.

At that second hearing, Deputy District Attorney Katie Suver, "the trial team supervisor of the major crimes team," revealed that there is a "longstanding procedure in Marion County" that prohibits local law enforcement from obtaining a telephonic warrant. Tr 201, 204. Ms. Suver trains law enforcement officers on search and seizure law and testified that she was "confident that [she has] consistently instructed law enforcement that we do not have telephonic search warrants in Marion County" and was "comfortable saying that [any other Marion County Deputy District Attorney] would have the same training message, and that is we don't do telephonic search warrants in Marion County." Tr 209.

In fact, in 2013, Ms. Suver contacted then-presiding Judge Rhoades to get the court's input on whether the district attorney's office "would agree to telephonic search warrants" if the court, similarly, agreed to allow that practice in a small category of cases. App Br ER-2.

On May 3, 2017, in its second letter opinion, the trial court addressed some arguments raised by the state at the second hearing regarding the automobile exception. The trial court explained:

"The court must give more than lip service to the axiom that warrantless searches are *per se* unreasonable under Art. I, Section 9 and the Fourth Amendment. The rationale for the automobile exception is that evidence of crime may be lost as the automobile drives away from the traffic stop. It takes into account the reality that the evidence is mobile. However, that rationale does not exist under the facts of this case.

"The state presented no evidence that anyone would move the automobile from the scene while the police sought judicial authorization for the search. At the supplemental hearing, the state went to great lengths to discuss the time-consuming process to obtain a written search warrant. One rationale proposed by the state for not seeking a search warrant is the need for accuracy when presenting the warrant to a judge. * * *

"However, the state fails to prove how inconvenient it would have been to obtain judicial authorization in this case. The arrest occurred on a regular working day in the early afternoon. The state fails to address why one of the officers could not avail themselves of an existing process under Oregon law, make a call on a cell phone to the courthouse, lay out the facts under oath to a judicial officer and have the judicial officer determine if probable cause existed. The answer seems to be that 'we just don't do it that way.'

"Additionally, the state seemed to argue that there is a 'policy' from the Marion County Circuit Court bench that judges will not accept telephonic warrant requests. The court rejects that such a policy exists although acknowledges the bench has had discussions about some of the practical problems associated with telephonic warrants.

"In the final analysis the state must show that conducting a warrantless search is reasonable. Under the facts in this case no showing has been made. The holding in *Brown* has never been universally accepted by all judges. At the time of the *Brown* decision, Justice Linde pointed out how the statute and technology back in 1986 called into question the bright line test in *Brown*. No one would dispute that the technology today is even much more advanced 30 years later.

"Today, everyone has a cellphone. * * * It is unreasonable under the circumstances in this case that no one even considered the idea of calling a judge from the site of the traffic stop to seek judicial authorization. Accordingly, this court cannot find that the state has

proven that the warrantless search of the automobile was reasonable."

McCarthy, 302 Or App at 86-87. Ultimately, the trial court granted, in part, defendant's motion to suppress evidence discovered as a result of the warrantless search of the truck. The state filed a timely interlocutory appeal.

On appeal, the state argued that the search was lawful under the automobile exception. *Id.* at 83. Defendant responded that, after this court's holding in *State v. Andersen*, 361 Or 187, 390 P3d 992 (2017), the automobile exception is not a *per se* exception and the state failed to carry its burden by proving an actual exigency existed at the time of the search. *Id.* The parties disagreed over the significance of this court's statement:

> "We do not foreclose the possibility that *Brown* held out—that changes in technology and communication could result in warrants being drafted, submitted to a magistrate, and reviewed with sufficient speed that the automobile exception may no longer be justified in all cases Nor do we foreclose a showing in an individual case that a warrant could have been drafted and obtained with sufficient speed to obviate the exigency that underlies the automobile exception."

Andersen, 361 Or at 200-01 (internal citations omitted). The Court of Appeals "agree[d] with defendant that, in making that statement" this court, "echoing *State v. Brown*, 301 Or 268, 274, 721 P2d 1357 (1986), was contemplating the effects of technology on the assumptions underlying the automobile exception." *McCarthy*, 302 Or App at 83. However, after *Andersen*—and after the trial court ruled—this court issued *State v. Bliss*, and stated that "the court intended the automobile exception to apply to all lawful roadside stops of mobile vehicles[.]" 363 Or 426,

434, 423 P3d 53 (2018). The Court of Appeals struggled to reconcile *Andersen* with *Bliss*:

> "If *Andersen* created some uncertainty about the *per se* nature of the Oregon automobile exception, *Bliss* appears to have retreated from that view[.] * * * In light of *Bliss*, whatever *Andersen* contemplated by a 'showing in an individual case that a warrant could have been drafted,' the possibility of such a showing does not undermine the presumptively *per se* nature of the automobile exception. And, in turn, such a possibility does not create any extra burden upon the state to avail itself of the exception."

McCarthy, 302 Or App at 90. Ultimately, the Court of Appeals reversed the trial court's order. Defendant petitioned for review and, on July 2, 2020, review was granted.

Argument

Defendant's argument proceeds in three parts. Section I describes the origins of the automobile exception to the warrant requirement of Article I, section 9, as articulated in *State v. Brown*, 301 Or 268, 721 P2d 1357 (l986), and argues that Oregon's "automobile exception" can no longer survive in its current construct because the exception (1) was intended only as a temporary accommodation to the state pending technological advancements that have, in fact, come to fruition, (2) is difficult to apply in practice, and (3) cannot be harmonized with Article I, section 9's prohibition on searches that are not reasonable under all the particular circumstances.

Section II asserts that abandoning *Brown*'s rule of legally created exigence and returning to a consideration of all the circumstances, including mobility, is more

faithful to the notion that warrantless searches are presumptively unreasonable and that warrantless searches can be excused on account of necessity, as opposed to convenience.

Section III concludes that this court, consistent with Article I, section 9, and ORS 133.693(4), should place the burden of production and persuasion on the prosecutor to prove that a warrantless search of an automobile is justified by an exception to the warrant requirement. In doing so, this court will ensure officers are trained on how to access and use technology that can expedite the warrant application process.

I. THE AUTOMOBILE EXCEPTION—A "ONE-SIZE-FITS-ALL" RULE OF EXPEDIENCE—IS INCONSISTENT WITH ARTICLE I, SECTION 9'S PROHIBITION ON SEARCHES THAT ARE NOT REASONABLE UNDER ALL THE CIRCUMSTANCES AND IS DIFFICULT TO APPLY IN PRACTICE.

Article I, section 9, of the Oregon Constitution provides:

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

Though the text of that provision does not directly speak to conduct by members of the executive branch, it has long been understood to apply to police conduct. *State v. McDaniel*, 115 Or 187, 209, 231 P 965 (1925) (noting provision applies to "every officer of the state"). Accordingly, in Oregon, a seizure occurs when an officer significantly interferes with a person's possessory or ownership interest in property.

State v. Juarez-Godinez, 326 Or 1, 6, 942 P2d 772 (1997). A search is an invasion of a privacy—rather than a possessory—interest. *State v. Meredith*, 337 Or 299, 303, 96 P3d 342 (2004).

Generally, police must obtain a warrant before executing a search. *State v. Bliss*, 363 Or at 430. A warrantless search is unreasonable, unless it falls within one of the "specifically established and well delineated exceptions" to the warrant requirement. *State v. Nagel*, 320 Or 24, 36, 880 P2d 451 (1994) (citation omitted); *State v. DeFord*, 120 Or 444, 449, 250 P 220 (1926) (noting provision's "language implies that there were reasonable searches and seizures recognized as such at the time our Constitution was framed and adopted").

The "touchstone" of any Article I, section 9, inquiry is "reasonableness." *State v. Fair*, 353 Or 588, 602, 302 P3d 417 (2013). To make that determination, this court—with one notable exception—requires lower courts to engage in a fact-specific inquiry, considering the totality of the circumstances, to determine the "reasonableness" of a particular search that results in the discovery of evidence.[1] This court departed from that practice when it decided *State v. Brown*, 301 Or at 276.

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[1] *See, e.g.*, *State v. Unger*, 356 Or 59, 72, 333 P3d 1009 (2014) (noting "proper test" for consent exception requires fact specific inquiry under "totality of the facts and circumstances"); *State v. Bridewell*, 306 Or 231, 236, 759 P2d 1054 (1988) (noting facts did not demonstrate exigent circumstances); *State v. Bates*, 304 Or 519, 747 P2d 991 (1987) (engaging in fact-specific inquiry to determine whether "officer safety" exception applied); *State v. Jimenez*, 357 Or 417, 426, 353 P3d 1227 (2015) (refusing to adopt *per se* rule recognizing exigent circumstances in all cases).

A. *Brown*'s holding of imputed exigence for all mobile vehicles, regardless of circumstance, is anomalous among this court's Article I, section 9, jurisprudence and inconsistent with that provision's requirement that all searches be reasonable under all the circumstances.

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

Before *Brown*, this court recognized the "exigent circumstances" exception, which allows police to search when they have probable cause, no warrant, yet are confronted with a specific exigency that requires police to act swiftly. *State v. Greene*, 285 Or 337, 342, 591 P2d 1362 (1979).

But, in adopting a rule of presumed exigence, the *Brown* court was clear that it does not matter whether a passenger might take custody of a car, whether the police have adequate personnel to support an arrest, whether a tow truck is available, whether a threatening crowd is present, or whether, like here, a magistrate could have issued a warrant. 301 Or at 278. Instead, all a trial judge must find is: "(1) the car was mobile at the time it was stopped by the police; and (2) the police had

probable cause to believe that the car contained contraband or crime evidence." *Id.*

The *Brown* majority believed that adoption of a "*per se* exigency rule" would provide "the clearest guidelines for police in conducting automobile searches," and that "[e]xigencies should not be determined on a case-by-case basis." *Id*. Instead, the majority felt "[p]olice need clear guidelines by which they can gauge and regulate their conduct rather than trying to follow a complex set of rules dependent upon particular facts regarding the time, location and manner of highway stops." *Id.* To provide that clarity, the court "reject[ed] the language that anything in addition to the mobility of an automobile at the time it is lawfully stopped is required to create exigency under the automobile exception as defined in this case." *Id.* at 277.

Thus, assuming police have probable cause to search a car, the single controlling factor in whether the automobile exception may be invoked is whether the car was mobile at the time police stopped it. *Id.* at 278.

Though the *Brown* majority created the "automobile exception" based on an interpretation of the Oregon Constitution, it did not engage in any substantive state constitutional analysis. Instead, the *Brown* majority was persuaded by United States Supreme Court decisions interpreting the federal constitution, including *Carroll v. United States*, 267 US 132, 45 S Ct 280, 69 L Ed 543 (1925), and three California Supreme Court cases. *Id.* at 274.

In *Carroll*, federal prohibition agents and a Michigan state police trooper stopped a car in transit and then searched it without a warrant based on probable

cause to believe that the car was being used to ferry alcohol in violation of the National Prohibition Act. *Carroll*, 267 US at 134-35. Confronted with a claim that the search violated the Fourth Amendment, the Court noted that the Fourth Amendment had long been construed as viewing a search of a stationary structure differently than a search of "a movable vessel" that "readily could be put out of reach of a search warrant." *Id.* at 151. The Court held that, because of an automobile's mobility, warrantless searches of automobiles when there is probable cause to believe the automobile is carrying "contraband or illegal merchandise" does not violate the Fourth Amendment. *Carroll*, 267 US at 153-54.

The *Brown* court also noted approvingly the observation from *Chambers v. Maroney*, 399 US 42, 52, 90 S Ct 1975, 26 L Ed 2d 419 (1970), that "[f]or constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant." *See Brown*, 301 Or at 276 ("We agree with the proposition that if police have probable cause to believe that a person's automobile, which is mobile when stopped by police, contains contraband or crime evidence, the privacy rights of our citizens are subjected to no greater governmental intrusion if the police are authorized to conduct an immediate on-the-scene search of the vehicle than to seize the vehicle and hold it until a warrant is obtained.").

As announced in *Brown*, then, the automobile exception to the warrant

requirement of Article I, section 9, is a rule of *per se* exigency for all mobile automobiles. And, based on the court's adoption of the *Chambers* observation—that there is no significant difference in searching a car with probable cause with or without a warrant—the "automobile exception" is a rule of expedience as much as a rule of exigence.

Exceptions to our state constitutional warrant requirement are generally grounded in practical necessity.[2] *Brown*'s automobile exception is not. The exception relieves the state from demonstrating an inability to comply with the warrant requirement based on the circumstances confronting officers in a particular

[2] *See, e.g.*, *Greene*, 285 Or at 342 ("exigent circumstances requirement is based upon practical necessity"); *State v. Baker*, 350 Or 641, 649, 260 P3d 476 (2011) (recognizing emergency aid exception when police believe "that a warrantless entry is necessary to either render immediate aid to persons, or to assist persons who have suffered, or who are imminently threatened with suffering, serious physical injury or harm"); *State ex rel Juv Dept v. MAD*, 348 Or 381, 394, 233 P3d 437 (2010) (recognizing a "school search" exception when state officials "can point to specific and articulable facts that reasonably create a risk of immediate and serious harm to the officials or others"); *State v. Stevens*, 311 Or 119, 126, 806 P2d 92 (1991) (recognizing an "exigent circumstance" exception when police must "act swiftly to prevent danger to life or serious damage to property, or to forestall a suspect's escape or the destruction of evidence"); *State v. Milligan*, 304 Or 659, 668-69, 748 P2d 130 (1988) (noting search incident to arrest exception is based on "the fact of arrest" which "motivates the arrested person to take immediate steps to destroy any incriminating evidence on his or her person"); *State v. Bates*, 304 Or 519, 524, 747 P2d 991 (1987) (recognizing an "officer-safety" exception when an officer develops reasonable suspicion "that the citizen might pose an immediate threat of serious physical injury to the officer or to others then present"); *State v. Atkinson*, 298 Or 1, 4-5, 688 P2d 832 (1984) (recognizing "inventory" exception based on the need to protect property while in government custody and the need to protect government from claims of lost or stolen property).

case. Instead, exigence is imputed by law. Accordingly, *Brown* dispenses with the warrant requirement even in the absence of a necessity for doing so. The *Brown* decision was rationalized based, in large part, on police convenience. Consequently, *Brown* is anomalous when compared to other judicially recognized exceptions to Article I, section 9.

B. Brown was controversial at its inception and has remained so over the past 30 years.

Justices Linde and Lent vigorously dissented from the four-vote majority in *Brown*.[3] Justice Linde disagreed with the premise that "in every case, the search of the trunk of a mobile vehicle, once it has been stopped, is 'exigent *per se*' regardless of individual circumstances." *Brown*, 301 Or at 280 (Linde, J., dissenting). Relatedly, in Justice Linde's view, "[t]he fatal flaw in the majority's position is its statement that 'exigencies should not be determined on a case-by-case basis.'" *Id*. at 292. Justice Linde reasoned that statement is flawed because "[e]xigencies are emergencies, circumstances that require urgent action; of course, they arise case by case." *Id*. And, "the proposition that it always, or generally, is impossible to obtain a warrant to search a vehicle after it has been stopped in transit is simply contrary to fact, especially in cases where the occupants have been placed in custody outside the vehicle." *Id*.

Justice Linde also rejected as faulty the majority's assumption that conducting

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

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

Finally, Justice Linde was concerned that the decision was not sufficiently grounded in an independent interpretation of the Oregon Constitution and that the *per se* rule would likely lead to confusion, not clarity, in the area of vehicle searches. *Id*. at 284-88, 290-91.

In *State v. Bennett*, 301 Or 299, 308, 721 P2d 1375 (1986)—a companion case decided the same date as *Brown*—Chief Justice Peterson confessed that the rule announced in *Brown* bothered him, but he joined the opinion to make a majority and put the issue to rest. *See Bennett*, 301 Or at 308 (Peterson, C.J., concurring) ("I confess that the result in this case troubles me. * * * I aim at putting the question to

rest, to the end that everyone will know and understand what is the rule. I therefore join in the opinion of the majority"); *see also Brown*, 301 Or at 281 (Linde, J., dissenting) (noting position of Chief Justice).

In *State v. Kosta*, 304 Or 549, 748 P2d 72 (1987), another automobile exception case, Justice Lent observed that whenever the court believes that it may have erred in its constitutional interpretation, it should rectify the error because the only other way to change the court's erroneous interpretation is through the cumbersome process of constitutional amendment. 304 Or at 556 (Lent, J., concurring). He then noted the court's majority decision in *Brown*, over his and Justice Linde's dissent, and lamented, "I hope someday that error will be rectified by this court." *Id*.

In *State v. Meharry*, 342 Or 173, 149 P3d 1155 (2006), decided 20 years after *Brown*, Justice Durham joined in the majority's decision but expressed reservations about the *Brown* rule:

> "The proposition that Article I, section 9, of the Oregon Constitution allows the police to search every stopped vehicle in Oregon without a warrant based on a flexible criterion like 'mobility' remains controversial. The *Brown* majority adopted that proposition to lend certainty to the decisionmaking process of law enforcement officers. That is, of course, a worthwhile goal. But, in my view, the *Brown* court's decision oversold the notion that it would lead to certainty. Whether a vehicle is 'mobile,' or *sufficiently* mobile under the particular facts to permit a warrantless search, can change with every stop.

> "The decision in *Brown* also understated the constitutional policy requiring a judicial examination of the particular facts to determine whether a particular search is reasonable. The one-size-fits-all rule of *Brown* for searching a citizen's property is difficult to harmonize with the state constitutional prohibition on searches that are not reasonable under all the particular circumstances."

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

C. *Andersen* altered the categorical nature of the automobile exception.

The disconnect in *Brown*'s rule of imputed exigence and the constitution's prohibition on searches that are not reasonable under all the circumstances—as recognized by Justices Linde, Lent, and Durham—appeared to be rectified when this court, in *Andersen*, stated:

> "We do not foreclose the possibility that *Brown* held out—that changes in technology and communication could result in warrants being drafted, submitted to a magistrate, and reviewed with sufficient speed that the automobile exception may no longer be justified in all cases. Nor do we foreclose a showing in an individual case that a warrant could have been drafted and obtained with sufficient speed to obviate the exigency that underlies the automobile exception."

361 Or at 200. To be sure, in *Andersen*, this court did not expressly overrule *Brown*. *Id.* at 201 ("we decline to overrule the automobile exception in all cases"). However, *Andersen* marked a significant shift from the categorical nature of the *Brown* rule. By (1) acknowledging advancements in technology could mean "that the automobile exception may no longer be justified in all cases" and (2) permitting "a showing in an individual case" that a warrant could be obtained with "sufficient speed to obviate the exigency that underlies" the exception, *Andersen* retreated from the one-size-

fits-all approach that *Brown* created.

That shift was emphasized by Chief Justice Walters:

> "I write to emphasize an important point that the majority makes and with which I agree: The Oregon automobile exception permits a showing, in an individual case, 'that a warrant could have been drafted and obtained with sufficient speed to obviate the exigency.' Thus, although the majority does not overrule [*Brown*], the majority recognizes that the exception created in that case is and must be aligned with other Oregon exigency exceptions to the warrant requirement."
>
> "* * * *
>
> "In permitting that same case-by-case analysis when the state relies on the automobile exception to justify a warrantless search, the majority assures that, unless exigent circumstances are actually present, a neutral magistrate, and not the individual who performs the search, will determine whether there is probable cause to search. That mode of analysis is essential to protect Oregonians' right to privacy. Any other rule would 'improperly ignore the current and future technological developments in warrant procedures,' and 'diminish the incentive for jurisdictions to pursue progressive approaches to warrant acquisition that preserve the protections afforded by the warrant while meeting the legitimate interests of law enforcement.'"

Id. at 201-03 (Walters, J., concurring) (quoting *Missouri v. McNeely*, 569 US 141, 156, 133 S Ct 1552, 185 L Ed 2d 696 (2013)). That apparent rectification, however, was short-lived.

D. *Bliss* brought confusion to police, litigants, and lower courts attempting to reconcile that holding with *Andersen*.

Just a year after this court decided *Andersen*, it decided *Bliss*. 363 Or 426. There, a divided court appeared to retreat from *Andersen* when it stated that "the court intended the automobile exception to apply to all lawful roadside stops of mobile vehicles." *Id.* at 434. The majority reiterated that the goal of the automobile

exception was to "provide law enforcement with 'simple guidelines' and a '*per se*' rule for all highway stops, rather than a 'complex set of rules dependent on particular facts regarding the time, location and manner' of the stop." *Id.* (quoting *Brown*, 301 Or at 277).

Chief Justice Walters, joined by Justice Nakamoto, dissented and stated:

> "In *Brown*, this court assumed the existence of an exigency with the understanding that that assumed exigency would be short-lived—that, due to anticipated technological advances, there would be 'a time in the near future when the warrant requirement of the state and federal constitutions can be fulfilled virtually without exception.' That was over 30 years ago, and technological advances have occurred. Officers should now be able to obtain warrants without significant delay. * * * To ensure constitutional compliance, we would do well to require that officers who stop drivers for traffic infractions and who believe that they have probable cause to search their vehicles for evidence of a crime obtain permission from a neutral magistrate to do so or be ready to prove the existence of exigent circumstances or some other exception to the warrant requirement."

Id. at 439-40. As the foregoing discussion demonstrates, Oregon's "automobile exception" was controversial among the members of this court from its inception and—at least as recently as this court's decision in *Bliss*—has continued to draw publicly stated questions from the court about its rationale, application, and continued viability in the digital age. For that reason, this court should revisit the exception.

E. The exception is difficult to apply in practice.

This court should also reconsider the rule it created in *Brown* because it is difficult to apply in practice. Since this court created the automobile exception in

Brown and *Bennett*, it has substantively discussed *Brown*'s "mobility" requirement on five occasions. The holdings of those cases are varied and demonstrate that *Brown*'s intended "bright line" is, in application, blurry.

1. In *Kock*, the automobile exception did not apply to a "parked, immobile, and unoccupied" car when officers had probable cause to believe that it contained contraband but never personally observed the car in motion.

In *State v. Kock*, 302 Or 29, 752 P2d 1285 (1986), police surveilled the defendant's parked car in a store parking lot where the defendant worked. 302 Or at 31. They watched the defendant leave the store, put a package in his car, and return to work. *Id*. at 31-32. Police, suspecting the defendant stole property from the store, searched the car without a warrant and discovered stolen diapers. *Id*. at 32. The state charged the defendant with theft, and the defendant moved to suppress the evidence seized from his car, arguing that the search violated Article I, section 9. *Id.*

This court held that, because the vehicle had been "parked, immobile and unoccupied at the time the police first encountered it in connection with the investigation of a crime[,]" the vehicle was not "mobile" for the purposes of the automobile exception. *Id*. at 33. Consequently, this court held that the warrantless search was unlawful. *Id.* Crucial to this court's holding was its desire to

> "draw the so-called bright line of *Brown* just where we left it in that case: Searches of automobiles that have *just been lawfully stopped by police* may be searched without a warrant and without a demonstration of exigent circumstances when police have probable cause to believe that the automobile contains contraband or crime evidence."

Id. at 32-33 (emphasis added). Thus, the fact that the defendant's car had not "just

been lawfully stopped by police" was significant in determining that *Brown* was inapplicable.

2. In *Meharry*, the automobile exception applied when police developed probable cause after the van was "parked, immobile, and unoccupied," by the driver, but the officer saw the van in motion for one-and-a-half blocks before the defendant parked it in a parking lot.

In *Meharry*, a fire chief saw the defendant drive erratically and reported those observations to the police department. 342 Or at 175. An officer responded to the call and saw the defendant drive by as he pulled out of the police station. *Id.* The defendant drove about a block and a half before she parked her van in a store parking lot. *Id.* The defendant exited and went inside. *Id.* Once the van was parked, immobile, and unoccupied by the driver, the officer blocked the van from leaving with his patrol car. *Id.* The officer then went into the store, made contact with the defendant and, ultimately, developed probable cause that she was driving under the influence. *Id*. at 176. After the officer conducted field sobriety tests, the defendant was arrested and a warrantless search of the van revealed contraband she later sought to suppress. *Id.*

This court held that the automobile exception applied. That result occurred even though the officer did not develop probable cause that the van contained contraband until after the van was parked, immobile, and unoccupied by the defendant. This court reasoned that, because the officer observed the van drive a block and a half before the defendant parked, it was sufficiently "mobile" to trigger

the exception. This court reasoned:

> "[t]he search occurred shortly after [police] observed the van in motion and had parked his police car behind [the defendant's] van. Nothing occurred between that time and the search that rendered the van immobile. [Police] had not impounded the van, and there was no physical or mechanical impediment to the van's being driven away once [police] relinquished control over it. In short, the van remained mobile and the exigency continued."

Id. at 180. This court could not "see a difference, for constitutional purposes between" (1) stopping an otherwise mobile van from resuming its journey and (2) causing a moving van to come to a stop. *Id.*

Thus, the effect of *Meharry* was twofold. It departed from *Brown*'s bright line—affirmed by *Kock*—that limited the exception to vehicles that were "just lawfully stopped by police" and extended the exception to circumstances where a vehicle was not moving when stopped by police. However, under the expanded rule, the vehicle must be moving at the time the police encountered it in connection with a crime.

3. In *Kurokawa-Lasciak*, the automobile exception did not apply when police developed probable cause after the van was "parked, immobile, and unoccupied," where video surveillance showed the vehicle in motion seconds before the defendant was stopped, but, police never saw the van in motion.

In *State v. Kurokawa-Lasciak*, this court held that the automobile exception did not support the warrantless search of the defendant's van. 351 Or 179, 263 P3d 336 (2011). There, the defendant was gambling at a casino and employees suspected that the defendant was laundering money. *Id.* at 181. The defendant was prohibited

from engaging in further cash transactions for 24 hours and his photograph was posted at the casino cashier cages. *Id*. That morning, the defendant attempted to engage in a cash transaction and, in the course of that attempt, reached into the cashier's cage and grabbed his photograph. *Id.* at 182.

Casino employees notified the police and monitored the defendant's movements via video surveillance. *Id.* Video surveillance demonstrated that the defendant left the casino, got into his van, and drove to a gas station. *Id.* Fifteen minutes later, he returned to the casino, parked his van, got out, and walked towards the casino. *Id*. When he was approximately 30 feet from his van, an officer saw the defendant and stopped him on suspicion of money laundering. *Id*. Neither that officer nor another officer who arrived later saw the defendant drive his van. *Id*. During the detention, officers developed probable cause that the van contained contraband and executed a warrantless search that discovered drugs and currency. *Id*. at 184-85.

In this court, the state argued that the "mobility" requirement is satisfied upon a showing that an automobile is "operable," and claimed that question was "left open" in *Meharry*. *Id.* at 192-93. In rejecting that approach, this court acknowledged the logic of the state's argument in that "it is just as likely that a person in control of an operable car will drive off with evidence or contraband as will a person in control of a car that was mobile at the time of the initial encounter and that remains mobile thereafter." *Id.* at 193. However, this court was

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

Id. Ultimately, this court held that the automobile exception did not apply and reiterated that "the vehicle that the police search must be mobile at the time that the police encounter it in connection with a crime." *Id*. at 192.

Thus, because the police never personally observed the van in motion, unlike *Meharry*, the automobile exception did not apply. It did not matter that, like in *Meharry*, (1) the van recently came to a stop, (2) nothing occurred between that time that rendered the van immobile, (3) the van was not impounded, or (4) there was no physical or mechanical impediment to the van's being driven away once the encounter ended. Rather, the single determinative factor, of constitutional significance, was the absence of an officer's visual observation of the van in motion.

4. In *Andersen,* the automobile exception applied when police had probable cause that a car contained contraband even though police never saw the car moving and instead "aurally" inferred that the car was mobile.

In *Andersen*, this court held that the automobile exception excused the warrantless search of the defendant's car even though officers never saw it in motion. 361 Or 187. There, two officers were waiting for the defendant's car to arrive at a WinCo parking lot to complete a drug sale. *Id.* at 189. One officer, from a remote location, listened as the defendant's passenger explained over his cell phone that he

and the defendant were arriving at the parking lot. *Id.* The second officer, located at the parking lot, went to where he believed the defendant would have entered the lot. *Id.* When he did not see the defendant's car, he returned to where he had been a minute earlier and saw the defendant's car parked across several parking spaces. *Id.* The defendant was sitting in the driver's seat, the engine was running, and two passengers exited the car and walked towards the location of the drug sale.

This court acknowledged that police did not see the defendant's car in motion. *Id.* at 198. Under *Meharry* and *Kurokawa-Lasciak*, that would end the inquiry. However, the court concluded that the "running account of the car's progress and arrival at the WinCo parking lot" provided police "with as clear a confirmation" of the car's mobility "as did the officer's sighting of the defendant driving her van erratically past the police station in *Meharry*[.]" *Id.* Put differently, this court held that

> "the fact that [police] learned aurally what the officer in *Meharry* learned visually—that the car was the subject of each officer's investigation was mobile when the officer first encountered it—provides no principled basis for distinguishing this case from either *Meharry* or *Brown*."

Id. Thus, after *Andersen*, the "bright line" of requiring visual observation of a car before imputing exigency—a determinative factor in *Meharry* and *Kurokawa-Lasciak*—was expanded to allow the exception to apply if an officer can "aurally" infer, in real time, that a car was in motion.

That distinction marked another departure from *Brown*'s bright line. Until *Andersen*, a crucial component of every automobile exception case turned on whether the officer observed, first hand, a vehicle in motion. That is, under *Brown*, *Bennett*, and *Kock*, the automobile exception would only apply if the car was just lawfully stopped by police. *Kock*, 302 Or at 33 (so stating). Though that rule was expanded in *Meharry*, and applied in *Kurokowa-Lasciak*, this court consistently maintained that the exception only applied if an officer visually observed the car in motion.

Unlike *Brown* and its progeny, however, *Andersen* permits warrantless roadside searches of automobiles when officers never observe, but, "aurally" infer that a car in motion.

5. In *Bliss*, the automobile exception applied when police first encountered the vehicle in connection with a violation, but, later developed probable cause that the car contained contraband.

In *Bliss*, the defendant was pulled over for a speeding violation. 363 Or at 428. During the violation investigation, officers developed probable cause that the car contained contraband and conducted a warrantless search. This court upheld that search under the automobile exception and reasoned that

> "whether a car is *mobile* when the police first encounter it is unrelated to whether the police are investigating a traffic infraction or a crime, and it is unrelated to whether the police have probable cause to search at the time of the stop or develop probable cause based on circumstances that only later become apparent."

363 Or at 432 (emphasis in original). Thus, *Bliss* again blurred *Brown*'s bright line.

Before *Bliss*, this court consistently limited the *Brown* rule to circumstances when police encounter the car in connection with a crime. *See, e.g.*, *Meharry*, 342 Or at 179 (noting blocking the defendant's van from leaving was a seizure justified by reasonable suspicion of DUII based on officer's observations in context of fire chief's report). In fact, in *Brown*, *Bennett*, *Kock*, *Kurokowa-Lasciak*, and *Andersen*, each seizure was effectuated to allow police to investigate criminal activity. *Bliss*, however, dispensed with that requirement and marked an additional expansion of the *Brown* rule.

After *Bliss*, as demonstrated in the following hypothetical, it is unclear whether, and under what circumstances, the exception applies:

> Suppose an officer hears from a credible source that a driver committed a traffic violation, lawfully parked her car, and went inside a store. The officer, intending to investigate the traffic violation, parks next to the driver's car, and goes inside the store to make contact. During that investigation, the officer develops probable cause that the car contains contraband.

Under this court's case law, it is not reasonable to expect an officer to "clearly" understand which side of *Brown*'s "bright line" a warrantless search of the car would fall. Is the search unlawful because the officer never visually observed the car in motion (*Kurokawa-Lasciak*) and the car was not "just stopped by the police" (*Kock*)? Or, is the warrantless search lawful because the officer "aurally" learned that the car was recently mobile (*Andersen*) and developed probable cause that it contained contraband after it was parked, unoccupied, and immobile (*Meharry*) even though the initial detention was to conduct a noncriminal traffic

investigation (*Bliss*)? Would it matter, constitutionally, if the officer blocked the defendant's car from leaving (*Meharry*)?

Applying *Brown* and its progeny is not only difficult in theory, it is difficult in practice. For example, the Court of Appeals has applied the exception to cars that are constructively "mobile" based on their mere capacity for motion,[4] and has declined to apply *Brown* to cars that are immobile when searched even though they were, in fact, mobile when stopped by police.[5]

Even though "*Brown* sets the outer limit for warrantless automobile searches without other exigent circumstances," *Kock*, 302 Or at 33, as the foregoing discussion demonstrates, whatever "outer limits" the *Brown* court intended are now muddled and amorphous.

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[4] *See, e.g.*, *State v. Mosley*, 178 Or App 474, 481, 38 P3d 278 (2001), *rev den*, 334 Or 121 (2001) (automobile exception applied to car that was parked and unoccupied when encountered by police because the defendant and his passenger were just outside the car and attempting to enter the car at the time of the encounter); *State v. Burr*, 136 Or App 140, 149, 901 P2d 873, *rev den*, 322 Or 360 (l995) (finding automobile exception applied to search of car parked on the shoulder of a road and unoccupied, because any of the four defendants standing outside of the car "need only have taken a few steps to have placed themselves in the vehicle in order to leave"); *State v. Cromwell*, 109 Or App 654, 659, 820 P2d 888 (l991) (finding that automobile exception allowed warrantless search of car parked in the middle of the road and occupied, because the defendant "could have driven away at any moment").

[5] *State v. Kruchek*, 156 Or App 617, 969 P2d 386 (l998) (*en banc*), *aff'd by an equally divided court*, 331 Or 664 (2001) ("Before [officer] impounded the van, it is arguable that, because the van had been lawfully stopped and had been mobile when stopped, the automobile exception could have applied to a search of it. However, once [officer] impounded the van, any exigency created by the van's mobility was extinguished. [Officer] was in control of the vehicle and could have kept it at the location of the stop until a warrant was issued.").

F. Technological advancements have rendered hollow the justifications for presuming an exigency exists for every mobile vehicle.

This court has consistently maintained that exceptions to the warrant requirement may not be used in ways that reach beyond the purposes of the particular exception. *See, e.g.*, *State v. Ghim*, 360 Or 425, 381 P3d 789 (2016) (noting that "[t]his court has long recognized that [a statutorily authorized] administrative subpoena * * * will comply with Article I, section 9, as long as the subpoena is * * * *no broader than the needs of the particular investigation*") (internal citations omitted) (emphasis added). And, in *State v. Arreola-Botello*, 365 Or 695, 451 P3d 939 (2019), in declining to adopt the "unavoidable lull" doctrine, this court emphasized that exceptions to the warrant requirement under Article I, section 9, "are limited in scope and duration," *Id.* at 709, and that, during a noncriminal traffic stop, "an officer is limited to investigatory inquiries that are reasonably related to the purpose of the traffic stop." *Id*. at 712. This court then held that police authority to stop a citizen in those circumstances "is founded on the assumption that temporary, investigative stops to investigate particular conduct are permitted for that particular purpose only." *Id*. at 710.

Recently, in *State v. Fulmer*, 366 Or 224, 237, 460 P3d 486 (2020), this court held that a tow policy violated Article I, section 9, when it failed to contain a provision permitting owners and occupants of vehicles to remove belongings from a vehicle before it was inventoried. This court reasoned that the failure to include

that provision "causes the scope of an inventory to exceed the purposes that justify the exception." *Id.* In reaching that conclusion, this court spent considerable time emphasizing that "the exceptions to the warrant requirement * * * must be applied consistently with the purposes animating the exception." *Id*. at 234. In other words, "the contours and scope of the particular exception are circumscribed by the justification for that exception." *Id.* at 234.

Here, the contours and scope of the automobile exception must be understood in light of what this court intended when it decided *Brown*. Notably, the *Brown* rule was never intended to live in perpetuity. In fact, after emphasizing that "under the 'automobile mobility' test it does not matter * * * whether a magistrate was available by telephone or otherwise," the majority, in a footnote, stated:

> "In this modern day of electronics and computers, we foresee a time in the near future when the warrant requirement of the state and federal constitutions can be fulfilled virtually without exception. All that would be needed in this state would be a central facility with magistrates on duty and available 24 hours a day. All police in the state could call in by telephone or other electronic device to the central facility where the facts, given under oath, constituting the purported probable cause for search and seizure would be recorded. The magistrates would evaluate those facts and, if deemed sufficient to justify a search and seizure, the magistrate would immediately issue an electronic warrant authorizing the officer on the scene to proceed. The warrant could either be retained in the central facility or electronically recorded in any city or county in the state. Thus, the desired goal of having a neutral magistrate could be achieved within minutes without the present invasion of the rights of a citizen created by the delay under our current cumbersome procedure and yet would fully protect the rights of the citizen from warrantless searches."

Brown, 301 Or at 278 n 6; *see also State v. Wise*, 305 Or 78, 82 n 3, 749 P2d 1179 (1988) ("It was the present unavailability of a general speedy warrant procedure that led the court to allow an exception for warrantless searches after stops of mobile vehicles, as Justice Jones noted in" *Brown* and *Bennett*). Accordingly, though the contours of the exception permitted warrantless searches upon probable cause and a theoretical exigency, the scope of that exception was limited temporally. That time has come.

Our current "modern day of electronics and computers," far surpasses the need to establish a brick and mortar "central facility" where magistrates are available via landline before issuing an "electronic warrant." *Riley v. California*, 573 US 373, 386, 134 S Ct 2473, 189 L Ed 2d 430 (2014) (noting cell phones "are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy"). Today, any on-duty magistrate can be available by phone and answer questions literally anywhere in the world. Pew Research Center, Mobile Fact Sheet—2019 Update (June 12, 2019), https://www.pewresearch.org/internet/fact-sheet/mobile/. (noting 96% of American adults own a cell phone). Phones, themselves, have computing capabilities that allow magistrates to send and receive e-mails with documents attached to them. *Id.* (noting 86% of cell phones owned in the United States are "smartphones"). Cell phone conversations can easily be recorded without the use of any external equipment. *See, e.g.*, *State v. Neff*, 246 Or App 186, 188, 265 P3d 62 (2011) (en

banc) (holding the defendant did not unlawfully obtain a communication where the defendant used "his cell phone to record his conversation with a police officer during a traffic stop"). "E-signatures" allow magistrates to paste an electronic signature to a proposed warrant without ever having to print, type, scan, or fax a document back to the officer-affiant. *See, e.g.*, ORS 133.545(8)(a) (permitting an affidavit to "be signed electronically" when an officer-affiant seeks telephonic warrant). In fact, if a magistrate was unsure whether the circumstances described by an officer-affiant established a sufficient nexus to the place to be searched, that same phone could be used to research law through a Westlaw App and ensure that a warrant is drawn with sufficient particularity to survive a subsequent challenge. None of those features—common as they may seem today—were widely available when *Brown* was issued.

G. Allowing warrantless roadside searches, in the absence of an actual exigency, encourages officers to use the automobile exception in ways that reach beyond what *Brown* intended.

Despite technological advancements that surely surpass anything *Brown* foresaw "in the near future," officers, like Garland, are using the automobile exception beyond the purposes of what *Brown* intended.[6] As noted, Garland

[6] That is particularly true when considering the relative ease with which an officer can initiate a traffic stop in a universe where—regardless of circumstance—courts will unquestionably allow evidence obtained pursuant to a warrantless search, so long as it was preceded by probable cause. *See, e.g.*, Lewis R. Katz, *"Lonesome Road": Driving Without the Fourth Amendment*, 35 Seattle U L Rev 1413, 1413 (2013) (commenting that "[o]ur streets and highways have become a police state where officers have virtually unchecked discretion about which cars to stop for the myriad of traffic offenses contained in state statutes and municipal ordinances"); David A. Moran, The New Fourth Amendment Vehicle Doctrine: Stop and Search

acknowledged that he "could have" "applied for a search warrant" but did not because he "also believe[d] the vehicle was still mobile at that * * * particular time." Tr 61. The court then asked Garland how, specifically, the truck was "mobile." *Id.* And, Garland eventually responded "I don't—I mean, I don't have an answer for you there." *Id.*

But, Garland is not alone. In *State v. Colman-Pinning*, 302 Or App 383, 461 P3d 994 (2020), *rev allowed* ___ Or___ (S067804), Lincoln County officers conducted a "*Brown* Stop" by luring a prospective drug dealer to drive from one location to another simply so officers could execute a traffic stop and conduct a warrantless roadside search premised on a theoretical, not actual, exigency.

Accordingly, because (1) the *Brown* rule cannot be harmonized with Article I, section 9's prohibition on searches that are not reasonable under all the circumstances, (2) the contours of the exception are difficult to apply in practice and, (3) modern technological reality has exceeded the temporally limited scope of what the *Brown* court intended, this court should abandoned *Brown* and permit

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Any Car at Any Time, 47 Vill. L.Rev. 815, 816 (2002) (discussing several United States Supreme Court cases establishing a "new, and greatly simplified, Fourth Amendment vehicle doctrine: the police may, in their discretion, stop and search any vehicle at any time"); Elizabeth Ahem Wells, Note, *Warrantless Traffic Stops: A Suspension of Constitutional Guarantees in Post September 11th America*, 34 U Tol L Rev 899 (2003) (arguing reasonable suspicion standard has "evolved into a veritable green light for police officers, resulting in a complete disregard for personal security").

warrantless searches of mobile vehicles only upon a showing that an actual, nontheoretical, exigency existed at the time of the search.

II. REQUIRING AN ACTUAL, NONTHEORETICAL, EXIGENCY TO JUSTIFY WARRANTLESS SEARCHES OF MOBILE VEHICLES IS FAITHFUL TO THE NOTION THAT WARRANTLESS SEARCHES ARE PRESUMPTIVELY UNREASONABLE UNLIKE *BROWN*'S RULE OF LEGALLY CREATED EXIGENCE.

A rule of "*per se* exigency," divorced from the particular facts of a case, is not consistent with Article I, section 9's requirement that all searches be reasonable. Whether the failure to obtain a warrant may be excused should not turn on whether a vehicle is parked or moving when first encountered by police, but instead on whether the circumstances make it impracticable to obtain a warrant. Factors relevant to that inquiry may include, among others: the time of day; the location of the stop; the ratio of officers to suspects; the presence of associates of the suspects; whether it is safe to leave the car unguarded; and whether another person is asserting a possessory interest in the car. Those factual inquiries necessarily take into account the underlying concern the *Brown* court faced; that is, whether the actual circumstances confronting the officer necessitated an immediate warrantless search.

In addition, "[o]ne relevant consideration with regard to exigencies might be whether the police attempted to get a telephonic warrant." *State v. Wise*, 305 Or 78, 82 n 3, 749 P2d 1179 (1988); *see also State v. Lowry*, 295 Or 337, 363 n 14, 667 P2d 996 (1983) (Jones, J., concurring) ("Warrants can and do take hours to obtain, but this time delay is not necessary with the advent of current electronic and

legislative innovation. Today a warrant can be obtained in a matter of minutes and be lawful"). By requiring a consideration of the availability of telephonic warrants, defendant is not suggesting

> "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. But technological developments that enable police officers to secure warrants more quickly, and do so without undermining the neutral magistrate judge's essential role as a check on police discretion, are relevant to an assessment of exigency."

McNeely, 569 US at 159 (internal citation omitted).[7]

Defendant's suggested approach will not limit an officer's ability to conduct a warrantless search when obtaining a warrant is otherwise impracticable. Trial courts regularly allow evidence discovered as a result of a warrantless search when that search was preceded by probable cause and an actual exigency. However, the

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[7] *See* Justin H. Smith *Press One for Warrant: Reinventing the Fourth Amendment's Search Warrant Requirement Through Electronic Procedures*, 55 Va La Rev 1592, 1619 (2002) (noting telephonic search warrant "procedures have an undeniable advantage: By creating an adaptive, flexible, and expedited method for warrant applications, they discourage law enforcement officers from engaging in warrantless searches."); *and* Donald L. Beci, *Fidelity to the Warrant Clause: Using Magistrates, Incentives, and Telecommunications Technology to Reinvigorate Fourth Amendment Jurisprudence*, 73 Denv U L Rev 293, 319-20 (1996) ("Advances in electronic telecommunications technology, however, have eliminated many of the temporal and geographic hurdles which previously prolonged the time needed to obtain a warrant.")

analytical framework defendant suggests will ensure that exceptions to the warrant requirement are limited to practical necessity as opposed to police convenience.

In short, an automobile exception that is premised on an actual, nontheoretical, exigency is far more faithful to the notion that warrantless searches are presumptively unreasonable than is the "*per se* exigency" rule of *Brown*. Determining exigency based on particular facts was the practice before *Brown, see, e.g.*, *Greene*, 285 Or at 345, and an exception to the warrant requirement of Article I, section 9, beyond those few specifically established and carefully delineated exceptions, is not consistent with the scope of the Article I, section 9, privacy right.

For that reason, this court should abandon the automobile exception articulated in *Brown* in favor of returning to the pre-*Brown* practice of approving warrantless searches in cases of exigent circumstances, consent, and searches incident to arrest.

III. THE PROSECUTOR, LIKE ALL WARRANTLESS SEARCHES, BEARS THE BURDEN OF PRODUCTION AND PERSUASION TO PROVE AN ACTUAL EXIGENCY EXISTED AT THE TIME OF THE SEARCH.

ORS 133.693(4) provides:

> "Where the motion to suppress challenges evidence seized as the result of a warrantless search, the burden of proving by a preponderance of the evidence the validity of the search is on the prosecution."

Should this court adopt defendant's suggestion and abandon the rule it created in *Brown*, then, placing the burdens of production and persuasion on the prosecutor to prove the validity of the search ensures compliance with ORS 133.693(4) and this

court's Article I, section 9, jurisprudence. *See, e.g.*, *State v. Ritz*, 361 Or 781, 790, 399 P3d 421 (2017) ("state has the burden of proving that the circumstances at the time of the warrantless search fall within the exigent circumstances exception").

However, should this court adhere to the automobile exception, as modified by *Andersen*, defendant submits that the burden of proving the unavailability of procuring a telephonic warrant must still rest with the state.

A. Placing the burden on the state to prove the existence of an actual, nontheoretical, exigency will motivate the state to ensure that police use existing technologies that expedite the warrant application process.

As noted, in *Andersen*, this court permitted "a showing in an individual case that a warrant could have been drafted and obtained with sufficient speed to obviate the exigency that underlies the automobile exception." 361 Or at 201. *Andersen* did not elaborate, however, on how such a showing would be made, nor upon whom the burden of production and persuasion falls. Below, the Court of Appeals surmised that "*Andersen* appears to cast the theoretical exigency that underlies the automobile exception as a rebuttable presumption." *McCarthy*, 302 Or App at 89. That is, "*Andersen* seems to imply by its wording that it is not the state's burden to show unavailability of a telephonic warrant," and that "[d]efendant, not the state, would be the party with motivation" to make a showing that a warrant could have been obtained. *Id.* Then, in a footnote, the court of appeals explained:

> "In so doing, *Andersen* appears to make the automobile exception something of a unicorn, being the only warrant exception in Oregon containing a component for which it is a defendant's burden to prove the exception *does not* apply."

Id. at n 2 (emphasis in original). That court's confusion is understandable. If, in *Andersen*, this court meant what was implied—that it is a defendant's burden to prove that an exception *does not* exist—the state, as demonstrated by the facts of this case, would have no motivation to ensure officers are trained and have access to existing technology that, when used properly, can expedite the warrant application process.

In this case, all four on-scene officers had access to telephones and computers that could be used to procure either a telephonic or written warrant.[8] Specifically, Bidiman testified that he utilized an iPhone to call State Farm Insurance in an attempt to verify whether defendant's truck was insured. Tr 80-81. The reception was strong enough for him to stay on hold for eleven minutes before Trooper Freitag arrived

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[8] In *Andersen*, the defendant argued that *Brown* should be overruled "because warrants can now be obtained within minutes." 361 Or at 199. This court "question[ed] the premises on which [the] defendant's argument rests" and went on to discuss, at length, what it perceived as procedural obstacles the officer in *Andersen* was faced with before a warrant could be obtained. 361 Or at 199-201. However, that discussion focused *exclusively* on the written warrant application process and made no mention of telephonic warrants, ORS 133.545(7); a statute enacted with the purpose of expediting the warrant application process. *See Brown*, 301 Or at 278 n 6 (noting "[i]n this modern day of electronics and computers," a day will come when the warrant requirement can be fulfilled expeditiously); *see also Kurokawa–Lasciak*, 351 Or at 188, 263 P3d 336 (discussing desirability of "a neutral magistrate's evaluation of probable cause" and anticipating "advances in technology permit[ting] quick and efficient electronic issuance of warrants").

with his K-9. Tr 83. Rogers Smith, also used his cell phone to call Detective Carney to determine if probable cause existed to detain defendant on a stale drug investigation. Tr 117. Smith also used his phone to call Trooper Freitag on his cell phone to request that Freitag arrive on scene to deploy his dog. Tr 120. Smith also had access to a "mobile data computer" and a radio. Tr 108. Garland, himself, had a cell phone and a computer in his patrol car that had access to information stored on remote servers. Tr 49, 116. Given those circumstances, there was no technological impediment to Garland procuring a telephonic warrant with an on-duty magistrate. *See Riley*, 573 US at 401 (discussing "[r]ecent technological advancements" that have "made the process of obtaining a warrant itself more efficient").

The impediment, however, rested on local law enforcement's belief that telephonic warrants were unavailable in Marion County. Garland testified that he was unfamiliar with telephonic warrants and had never received training on how to apply for a warrant telephonically. Tr 687-68. Smith testified that he was trained by the Marion County District Attorney's Office that telephonic search warrants are not available in the Marion County Circuit Court. Tr 180-81, 195-96. Deputy District Attorney Katie Suver affirmed that she, and other attorneys in her office, consistently trained local law enforcement that "we don't do telephonic search warrants in Marion County." Tr 209. The trial court specifically rejected that any such policy exists. Tr 221.

If this court adheres to the rule implicitly announced in *Andersen*—that a defendant is burdened to prove that a warrant could have been obtained with sufficient speed to obviate the exigency underlying the exception—then, the state will have no motivation to train officers on how to procure a warrant more expeditiously using technology that every on-scene officer in this case stored in his pocket or patrol car. *See, e.g.*, *McNeely*, 569 US at 156 ("adopting the state's *per se* approach [for warrantless blood draws] would improperly ignore the current and future technological developments in warrant procedures, and might well diminish the incentive for jurisdictions 'to pursue progressive approaches to warrant acquisition that preserve the protections afforded by the warrant while meeting the legitimate interests of law enforcement.'") (quoting *State v. Rodriguez*, 2007 UT 15, ¶ 46, 156 P3d 771).

B. In this case, the state failed to carry its burden of proving an actual, nontheoretical exigency existed at the time of the search.

Here, the prosecutor failed to prove that an actual, nontheoretical, exigency existed at the time of the warrantless search. The stop occurred at 1:30 p.m. on a Monday. Tr 31. Defendant's truck was lawfully parked and blocked in by Garland's patrol car, thus, diminishing the likelihood that the truck could be moved out of the jurisdiction. Tr 31. At the time of the search, all occupants of the vehicle were outside the truck in handcuffs. By the time the search was conducted, officers

outnumbered defendant and his associates. Those collective circumstances demonstrate that no actual exigency existed.

To be sure, there is evidence in the record that a telephonic warrant could not have been obtained. Arguably, the unavailability of a telephonic warrant could result in a finding of exigent circumstances. However, police cannot create their own exigencies by failing to familiarize themselves with statutory mechanisms that enable officers to procure a warrant more expeditiously. *See*, *State v. Fondren*, 285 Or 361, 367, 591 P2d 1374 (1979) ("the officer cannot create exigency circumstances by his own inaction"); *see also Wise*, 305 Or at 82 n 3 ("One relevant consideration with regard to exigencies might be whether the police attempted to get a telephonic warrant").

Accordingly, because the prosecutor failed to prove, under the totality of the circumstances, that an actual, nontheoretical exigency existed at the time of the warrantless search, the trial court correctly granted, in part, defendant's motion to suppress. The Court of Appeals erred in concluding otherwise.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I directed that the foregoing **PETITIONER'S BRIEF ON THE MERITS** be e-filed on September 21, 2020, by submitting the electronic form in Portable Document Format (PDF) that allows texts searching and allows copying and pasting text into another document to

http://appellate.courts.oregon.gov

I further certify that I directed that the foregoing **PETITIONER'S BRIEF ON THE MERTIS** to be served by regular mail to:

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05

Brief length: I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b)(i)(A), and, (2) the word-count of this brief s 12,348.

Type size: I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(3)(b)(2).

DATED: September 21, 2020

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