IN THE SUPREME COURT OF THE STATE OF OREGON

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| STATE OF OREGON,<br><br>Plaintiff-Appellant,<br>Respondent on Review,<br><br>v.<br><br>CHARLES STEVEN MCCARTHY,<br><br>Defendant-Respondent,<br>Petitioner on Review. | Marion County Circuit Court No. 16CR75546<br><br>CA A165026<br><br>SC S067608 |

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# BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, STATE OF OREGON

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Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Marion County
Honorable LINDSAY R. PARTRIDGE, Judge

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

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*Continued…*

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## INTRODUCTION

In *State v. Brown*, 301 Or 268, 721 P2d 1357 (1986), this court held that the mobility of a vehicle creates a *per se* exigency that justifies a vehicle search when probable cause exists. Just two years ago, this court reaffirmed the *Brown* rule in *State v. Bliss*, 363 Or 426, 423 P3d 53 (2018). In doing so, it confirmed that the need for "clear guidelines" justified *Brown*'s bright-line approach. And it applied the *Brown* rule to a traffic stop materially indistinguishable from the one in this case. Applying *Brown* and *Bliss* to the traffic stop here, the Court of Appeals correctly concluded that the automobile exception permitted the search.

In arguing to the contrary, defendant contends that *dictum* from *State v. Andersen*, 361 Or 187, 390 P3d 992 (2017), established that the automobile exception is not a *per se* rule. But defendant reads too much into that *dictum*. The court did not fundamentally transform the requirements of Oregon's automobile exception. Instead, it identified the possibility of a rare case in which the record established that a warrant could be obtained despite the exigency. Nor are defendant's general policy concerns about the automobile exception any different from the concerns that this court has already rejected. Regardless, none would justify overruling a 34-year-old precedent that officers

apply to traffic stops on a daily basis. For the third time in three years, this court should adhere to *Brown*.

## QUESTION PRESENTED AND PROPOSED RULE OF LAW

### Question Presented

Should this court overrule *State v. Brown*, 301 Or 268, 274, 721 P2d 1357 (1986), which announced the automobile exception to the warrant requirement under Article I, section 9, of the Oregon Constitution?

### Proposed Rule

No. The automobile exception permits a warrantless vehicle search if an officer knows that the vehicle was mobile when stopped and has probable cause to believe that contraband or crime evidence will be found inside. The core idea is that a vehicle's mobility creates a *per se* exigency. That bright-line rule provides clear guidelines for officers and stable expectations for citizens. Although this court has left open the possibility of a rare case where a warrant could be obtained despite the exigency, that possibility does not justify abandoning the *Brown* rule.

## SUMMARY OF ARGUMENT

For over thirty years, this court has adhered to the rule from *Brown* that the mobility of a vehicle creates a *per se* exigency that justifies a warrantless search based on probable cause. Defendant suggests that *dictum* in *Andersen* effectively uprooted *Brown*'s *per se* exigency rule and replaced it with a case-

by-case exigency rule. But this court in *Andersen* did not, in a single sentence, abrogate the *Brown* rule only paragraphs after expressly reaffirming it. This court's decision in *Bliss* confirms that understanding. In *Bliss*, issued only a year after *Andersen*, this court made clear that the automobile exception consists of only two requirements: (1) mobility and (2) probable cause. *Brown* remains the rule for the automobile searches in Oregon.

Because *Brown* remains the rule for automobile searches, defendant must convince this court to overrule it. This court does not overrule its precedents lightly, and defendant therefore must meet the heavy burden of establishing that *Brown* was clearly wrong. Yet in arguing that this court should abandon *Brown*, defendant advances no arguments that this court has not already considered and rejected in the last three years. The state also has significant reliance interests in the automobile exception, a rule in place for the last three decades.

Finally, even if this court were open to revisiting *Brown*, it should not do so here because the outcome of the case would be the same under either party's rule of law. An exigency exists for an automobile search if a vehicle is mobile and it would take officers hours, not minutes, to obtain a warrant. In this case, the state offered uncontroverted evidence that drafting an affidavit and warrant would have taken four to five hours. Because the detectives risked losing

evidence if they applied for a warrant, an exigency justified their search of defendant's truck.

## BACKGROUND

### A. Detectives pulled over defendant for a traffic infraction and developed probable cause that his vehicle contained drugs.

Detectives Garland and Bidiman of the Salem Police Street Crimes Unit were surveilling a suspected drug house near downtown Salem. (Tr 22–24). The detectives saw defendant leave the house with two other men and start driving a truck toward Center Street. (Tr 24–27). While following the truck, the detectives observed it drift into the bike lane in violation of a traffic rule, and Detective Garland pulled it over. (Tr 29–30). Defendant parked the truck in a tavern parking lot. (Tr 30–31). Shortly afterward, another detective, Detective Smith, arrived on the scene as backup. (Tr 109).

Detective Garland asked for defendant's driver's license, registration, and proof of insurance. (Tr 31–32). Defendant told him that his license was suspended, that he did not own the truck, and that he did not know which insurance company insured the truck. (Tr 32). During their interactions with defendant, the detectives noticed some signs that defendant and the passengers might have recently handled heroin. (Tr 34, 37, 78–79, 117, 122–23).

Another detective, Detective Carney, had investigated defendant's drug crimes over the last year and still had probable cause to arrest defendant for conspiracy to deliver heroin from an investigation five months earlier. (Tr 116–

17, 119). When Detective Smith called Detective Carney and told him about the traffic stop, Detective Carney requested that they arrest defendant. (Tr 116–17, 119). Instead of immediately detaining defendant, the detectives called Trooper Freitag, a drug-enforcement K9 officer, to conduct a drug-dog sniff on defendant's car because they knew of defendant's past involvement in drug sales. (Tr 40, 120). After the detectives removed defendant and the passengers from the truck and detained them, the drug dog, Keno, alerted to a seam in the interior passenger door. (Tr 42, 67, 98). Trooper Freitag concluded that it was more likely than not that the truck contained drugs. (Tr 98).

By that point, the detectives had called the truck's registered owner to the scene but discovered an outstanding warrant and detained him. (Tr 44). The detectives did not know if anyone else had access to the truck. (Tr 64). They could not tow it to a secure lot to prevent access to it, because the tow policy at the Salem Police Department did not authorize the impoundment of vehicles parked legally in a public parking lot. (Tr 192–93, 197). And they knew that drafting and obtaining a warrant would have taken at least four hours. (Tr 69–70). Believing they had probable cause based on the drug-dog alert, they searched the truck immediately and discovered drug paraphernalia and heroin. (Tr 43, 165). The state charged defendant with delivery and possession of heroin based on the amount found in the truck. (ER-1).

Before trial, defendant moved to suppress the items seized during the search of his truck. The trial court considered the lawfulness of the search at two different evidentiary hearings.

**B. After the first hearing, the trial court ruled that the state failed to establish that anyone would move defendant's vehicle before a warrant could be obtained.**

The first evidentiary hearing on defendant's motion to suppress produced evidence consistent with the facts described above. The trial court found that "[i]mmediately prior to the traffic stop the vehicle was mobile." (ER-14). It also concluded that "[p]robable cause existed to believe the vehicle would contain contraband." (ER-14–15). But it then found that the vehicle was "at least temporarily immobile" while detectives were investigating, particularly because the registered owner was not able to move the vehicle. (ER-14).

Based on those findings, the court concluded that the detectives' warrantless search of defendant's truck was not justified by the automobile exception. (ER-16). It reasoned that "the [automobile] 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." (ER-16). It concluded that the "police lacked any reason to believe an imminent threat existed that someone would move the vehicle prior to obtaining a warrant." (ER-16). And, for those reasons, it determined that the

state failed to show that the automobile exception applied to the search. (ER-16).

### C. At the second hearing, the state established that obtaining a warrant would have taken hours, not minutes.

The state moved for reconsideration of the trial court's suppression ruling, and the trial court granted the motion.[1] At the second hearing, the state offered evidence showing that it would have taken several hours to draft and obtain a warrant under the circumstances.

#### 1. Drafting the affidavit would have taken at least four hours.

Detective Smith testified that drafting both an affidavit and search warrant could take "[e]asily four or more hours." (Tr 173–74). Detective Smith explained that, in completing the affidavit and search warrant, he must confer either in-person or by phone with other detectives who contributed information. (Tr 174). He would need to draft a written narrative and review it to ensure its accuracy. (Tr 174–75). He would then write the search warrant itself, including the description of the place or thing to be searched. (Tr 176). The entire process may require multiple conversations with other officers. (Tr 174–76).

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[1] A medical emergency had prevented the district attorney who had originally prepared the case from appearing at the first hearing, and the state wanted an opportunity to offer more evidence about how long it would have taken to secure a warrant. (ER-17–21).

**2. District-attorney review would have added time to the process.**

At the time, the Marion County District Attorney's Office had a policy requiring that district attorneys review all search-warrant applications. (Tr 181). Even on a normal business day it was sometimes difficult to reach a district attorney. (Tr 183–84). The district attorney might ask for substantive changes that an officer must implement. (Tr 177–78). And even after multiple layers of review by the district attorney and other officers the district attorney would often find discrepancies or mistakes that needed to be fixed—all of which added time to the process. (Tr 180).

**3. Finding a judge to approve the warrant could have taken up to an hour.**

The final stage of the process, Detective Smith explained, was finding a judge. (Tr 177). He testified that "[i]f it's during work hours, it's not as hard. You come to the—the courthouse, and then you look for a judge that is available and willing to review the affidavit. If it's after hours or on weekends, you then have to begin calling judges at home, which at times can take a while." (Tr 177–78). An officer may have to contact five or more judges before finding one who can review the application. (Tr 178). Under ordinary circumstances during normal work hours, the process could take about an hour. (Tr 196).

**4. A telephonic warrant would not have expedited the process.**

At the time of the search, the Marion County Circuit Court had not yet established procedures for securing telephonic warrants. (Tr 181 (Detective

Smith so testifying)). Nor was Detective Smith aware of any on-call judges in Marion County prepared to receive telephonic search warrants. (Tr 182).

Similarly, Deputy District Attorney Katie Suver testified that Marion County Circuit Court had not created formal procedures for requesting warrants telephonically. (Tr 206–07). The Marion County District Attorney's Office had tried, unsuccessfully, to clarify those procedures. (Tr 202). In 2013, after a statutory change made the telephonic warrant process less costly,[2] DDA Suver approached the presiding judge of the Marion County Circuit Court and asked that the judges consider a policy that would make telephonic warrants more widely available. (Tr 202). Marion County judges seemed reluctant. (Tr 202–03). Some judges had expressed concern that they would not "be able to essentially absorb information if it was read to them by telephone." (Tr 203). They were also concerned about "other logistical problems," including "middle-of-the-night phone calls and trying to understand perhaps a complex fact pattern in articulating probable cause." (Tr 203).

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[2] In 2013, the Oregon Legislative Assembly removed the requirement that an officer's oral statement be transcribed. *See former* ORS 133.545(5) (providing that "the oral statement shall be recorded and transcribed"). Instead, the legislature would permit the judge to retain a "recording" of the oral statement and certify that the sworn oral statement is a true recording of the original oral statement. *See* Or Laws 2013, ch 225, § 1.

Regardless of the existing telephonic warrant request policy, DDA Suver testified that use of a telephonic warrant likely would not have saved significant time. As she explained, in cases with complicated facts, affidavits tended to be longer and thus took more time to create and to review. (Tr 204–05).

**D. The trial court adhered to its ruling suppressing the evidence.**

In its second letter opinion, the trial court adhered to its previous findings and to its conclusion that the automobile exception did not justify the search of defendant's truck. (ER-23). It reiterated that the state's primary failure was to present evidence that defendant's truck might be moved from the scene while detectives applied for a warrant. (ER-23). It also noted that the state could have tried to obtain a warrant telephonically. (ER-23). It reasoned:

> Today, everyone has a cellphone. In Marion County, there are 14 elected judges and four pro tem judges. The record in this case is absent of any evidence that anyone would move the automobile during the period of time it would take to get judicial authorization for the search. If [in] fact [] someone had attempted to move the automobile during this period of time, *then* clearly the rationale for the automobile exception would apply.

(ER-24) (emphasis in original).

It thus concluded that the state failed to meet what the court perceived as a necessary requirement of the automobile exception—namely, showing that, under the circumstances, detectives could not obtain a warrant before the truck could be moved: "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." (ER-24) (emphasis in original).

### E. The Court of Appeals reversed the trial court's order suppressing evidence from the search.

The state appealed the pretrial ruling, and the Court of Appeals reversed the trial court's order. It reasoned that the automobile exception had two requirements: (1) the vehicle must be "mobile" at the time it is stopped by governmental authorities; and (2) probable cause must exist to search the vehicle. *State v. McCarthy*, 302 Or App 82, 88, 459 P3d 890 (2020) (citing *Brown*, 301 Or at 274). It rejected defendant's argument that the state had an obligation to establish that someone was likely to move the vehicle if detectives did not seize it or that a telephonic warrant was unavailable. *Id.* at 92. Although it observed that *Andersen* "created some uncertainty about the *per se* nature of the Oregon automobile exception," it determined that *Bliss* had "retreated from that view." *Id.* at 90. It likewise concluded that, whatever *Andersen* might have suggested about the possibility of showing that a warrant could have been obtained before evidence would be lost, that possibility "does not create any extra burden upon the state to avail itself of the [automobile] exception." *Id.* Defendant petitioned for review, and this court allowed his petition.

## ARGUMENT

### A. Under *Brown*, the automobile exception applies if (1) a vehicle is mobile when officers first encounter it and (2) officers have probable cause to search it.

Article I, section 9, of the Oregon Constitution requires that officers obtain a warrant before conducting a search. But a warrantless search is permissible if it falls within one of the "few specifically established and well-delineated" exceptions to the warrant requirement. *Brown*, 301 Or at 273. The automobile exception is one of those well-delineated exceptions. *Id.* at 274. Under *Brown*, police may conduct a warrantless search of an automobile when two conditions are met: (1) "the automobile is mobile at the time it is stopped by police or other governmental authority" and (2) "probable cause exists for the search of the vehicle." *Id*.

What makes the *Brown* rule distinct is that it creates a "'*per se* exigency rule' for mobile automobiles" because "[a] vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *State v. Kosta*, 304 Or 549, 555, 748 P2d 72 (1987); *State v. Meharry*, 342 Or 173, 177, 149 P3d 1155 (2006) (quoting *Brown*, 301 Or at 275–76). The primary reason for a bright-line exigency rule is that it creates a set of "simple guidelines" as opposed to a "complex set of rules" that depend on varying, unpredictable circumstances. *Bliss*, 363 Or at 433 (quoting *Brown*, 301 Or at 277) (internal quotation marks omitted). It thus "provides the clearest guidelines for police in

conducting automobile searches" by enabling officers to "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." *Brown*, 301 Or at 277.

Here, defendant does not dispute that his vehicle was mobile when detectives stopped it for a traffic violation or that detectives developed probable cause that his vehicle contained contraband. (Pet BOM 43–44 (arguing only that the state failed to establish an actual exigency that would excuse the warrant requirement)). Nor does he contend that the facts in his case differ in any material way from those of *Bliss* in which an officer developed probable cause after stopping the defendant's vehicle for a traffic infraction. *Bliss*, 363 Or at 438 (so concluding). Under *Brown* and *Bliss*, therefore, the automobile exception applied to the search, and the trial court erred by granting defendant's motion to suppress.

**B. This court has repeatedly reaffirmed the automobile exception and expressly declined to overrule it.**

In arguing to the contrary, defendant takes a far more expansive view of the requirements of the automobile exception. In his view, it does not consist only of two requirements—(1) mobility and (2) probable cause—but also requires that the state prove that officers lacked the time to draft and obtain a warrant. On that view, the automobile exception is not based on a *per se*

exigency, as *Brown* held. It is based on an exigency that must be determined on a case-by-case basis.

For over thirty years, this court has consistently rejected that position. Just three years ago, in *Andersen*, this court expressly declined to overrule the automobile exception in all cases. And one year later, in *Bliss*, this court confirmed that the automobile exception consists of only two requirements: (1) mobility and (2) probable cause. Defendant's contrary arguments misunderstand the import of *dictum* in *Andersen* and do not justify abrogating the *Brown* rule.

### 1. This court in *Andersen* expressly declined to overrule *Brown* and did not indicate otherwise in *dicta*.

In *Andersen*, this court considered whether officers had stopped a "mobile" vehicle when no officer had actually seen the vehicle moving. In rejecting the defendant's argument, this court confirmed that an aural account of the vehicle's movements was sufficient to demonstrate mobility under the automobile exception. *See Andersen*, 361 Or at 197–99 (reasoning that a vehicle is mobile if officers perceive the movements of a car even if they do not actually see it move). Because the vehicle was mobile, and because the parties agreed that the officers had probable cause, the automobile exception applied. *See id.* at 198–99.

But the defendant in *Andersen* had a backup argument: He urged this court to overrule the automobile exception altogether. In advancing that argument, the defendant made all the arguments that defendant here makes.[3] In fact, the defendant in *Andersen* devoted most of his brief on the merits to it. *See* Resp BOM, *State v. Andersen* (S063169) 23–41; State's Reply, *State v. Andersen* (S063169) 3–16.[4] But this court declined to overrule *Brown*, stating expressly, "we decline to overrule the automobile exception in all cases, as

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[3] *Compare Andersen* Resp BOM at 25–28 (arguing that "*Brown* was controversial at the time of its recognition and remains so") *with* Pet BOM 17–20 (arguing that "*Brown* was controversial at its inception and has remained so over the past 30 years"); *Andersen* Resp BOM 29–31 (arguing that "*Brown* was intended to be a temporary accommodation pending technological advancements that have been realized") *with* Pet BOM 32–35 (arguing that "[t]echnological advancements have rendered hollow the justifications for presuming an exigency exists for every mobile vehicle"); *Andersen* Resp BOM 31–38 (arguing that "the rule of per se exigency for automobiles has not proved easy to apply") *with* Pet BOM 22–32 (arguing that "the exception is difficult to apply in practice"); *Andersen* Resp BOM 41–42 (arguing that only "the impracticability of obtaining a search warrant," not a presumed exigency, can justify a warrantless search of an automobile) *with* Pet BOM 13–17 (arguing that the "imputed exigence for all mobile vehicles" is not sufficient to show that a search is reasonable).

[4] The defendant's brief on the merits in *Andersen* is available online through the State Law Library's digital collection at http://digitallawlibrary.oregon.gov/Content/Oregon%20Supreme%20Court%20Briefs/SC/SC063169/357or595_361or187BRMR.pdf

The state's reply brief is available at http://digitallawlibrary.oregon.gov/Content/Oregon%20Supreme%20Court%20Briefs/SC/SC063169/357or595_361or187BRRP.pdf

defendant urges." *Andersen*, 361 Or at 201; (*see also* Pet BOM 20 ("To be sure, in *Andersen*, this court did not expressly overrule *Brown*.")).

Defendant nonetheless seizes on a single sentence in *Andersen* suggesting that *Brown* would not "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." (Pet BOM 20 (quoting *Andersen*, 361 Or at 201)). In defendant's view, that single sentence "marked a significant shift from the categorical nature of the *Brown* rule." (Pet BOM 20). But defendant misses the larger point.

The larger point of *Andersen* was that this court retained *Brown*'s mobility-triggered exigency rule while acknowledging its practical limits. It continued to agree with *Brown* 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." *Andersen*, 361 Or at 200–01. In doing so, this court recognized that, in rare cases, it might be obvious that officers could draft and obtain a warrant quickly enough to avoid losing evidence. *Id.* at 201. And, in *that* case, the automobile exception might not apply.

But *Andersen*'s recognition of *Brown*'s practical limits did not create a new case-by-case exigency requirement that the state must satisfy any time it invokes the automobile exception. If it did, this court would have needed to

overrule the *per se* exigency rule entirely, replacing the mobility-triggered exigency rule with a broader case-by-case exigency rule. Yet that is what this court expressly rejected in *Andersen*, which turned entirely on the mobility requirement, not a totality-of-the-circumstances determination of exigency that considered mobility as only one factor of many. *Andersen*, 361 Or at 201 (expressly "declin[ing] to overrule the automobile exception in all cases, as defendant urges").

Put another way, this court in *Andersen* acknowledged that the *Brown* rule consists of two parts. First, a vehicle's mobility creates an exigency in itself. *See id.* (assuming that a vehicle's mobility creates an "exigency"). Second, in rare cases, officers might be able to obviate the mobility-triggered exigency. By identifying that second aspect, this court signaled that it was open to a "showing" on it in extraordinary cases. But the larger point of *Andersen* is that the vehicle's mobility is enough to establish an exigency in the ordinary case. The *per se* nature of the *Brown* rule remains in effect.

**2. In *Bliss*, the court again reinforced the *per se* nature of the exigency created by the automobile exception.**

*Bliss* confirms that understanding of *Andersen*. In *Bliss*, this court considered whether the *Brown* rule should apply when an officer formed probable cause to search the defendant's vehicle only after it had come to a stop. *Bliss*, 363 Or at 429–30. In rejecting the defendant's argument that the

*Brown* rule should not apply to routine stops for traffic offenses, this court reasoned that "the 'bright line' that *Brown* established was simply that '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 438 (quoting *State v. Kock*, 302 Or 29, 33, 725 P2d 1285 (1986)) (emphasis in original removed; emphasis added). It thus confirmed that the *Brown* rule consisted of two and only two requirements—probable cause and mobility. *Id.* at 438. And it did so over a dissent suggesting that the exigency cannot be "assumed" but must be "established" by evidence. *Id.* at 439 (Walters, C.J., dissenting). If defendant were correct that *Andersen* created a new rule requiring the state to prove an actual exigency, this court could not have sidestepped that new rule on the facts of *Bliss* and there would be no dissent.

### C. Defendant has not established that *Brown* and its progeny were "clearly incorrect" or "cannot be fairly reconciled" with subsequent cases.

Because *Andersen* and *Bliss* confirm the "bright line" that *Brown* established, the only way for defendant to prevail is to show that *Brown* is clearly incorrect or inconsistent with this court's other case law. He cannot do so.

To overrule a constitutional precedent, defendant must clear a high bar: This court "do[es] not overrule [its] precedents lightly." *Horton v. OHSU*, 359 Or 168, 186, 376 P3d 998 (2016). As this court has recognized, "a philosophical disagreement with a conclusion is not grounds for reconsideration." *Multnomah County v. Mehrwein*, 366 Or 295, 313, 462 P3d 706 (2020). Nor does *stare decisis* "permit this court to revisit a prior decision merely because the court's current members may hold a different view than its predecessors about a particular issue." *Couey v. Atkins*, 357 Or 460, 485, 355 P3d 866 (2015).

Instead, in deciding whether to overrule a constitutional holding, this court generally determines whether a prior case falls into one of three narrow categories:

> (1) "cases in which a prior pronouncement amounted to dictum or was adopted without analysis or explanation";
>
> (2) "cases in which the analysis that does exist was clearly incorrect—that is, it finds no support in the text or the history of the relevant constitutional provision"; and
>
> (3) "cases that cannot be fairly reconciled with other decisions of this court on the same constitutional provision."

*Mehrwein*, 366 Or at 314. But "[p]lacing a decision in one of those three categories does not exhaust consideration of other factors that can bear on whether to adhere to or overrule that decision." *Horton*, 359 Or at 187. Other

factors include reliance, the age of the decision, and the extent to which the issues have been fully litigated. *Id*. (citing those factors).

Because this case does not involve "a prior announcement amount[ing] to dictum" or adopted "without analysis," defendant can prevail only if he can establish (1) that *Brown* was "clearly incorrect" in that it finds "no support in the text or history" of Article I, section 9; or (2) that *Brown* cannot "fairly be reconciled" with other Article I, section 9, cases. Defendant can do neither.

**1. The *Brown* rule was not clearly incorrect.**

To show that the *Brown* rule is "clearly incorrect," defendant must establish that it finds support in neither the text nor the history of Article I, section 9.[5] Article I, section 9, provides that "[n]o law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure." The broad goal of Article I, section 9, is "to prevent arbitrary and oppressive interference by [law] enforcement officials with the privacy and personal security of individuals." *State v. Tourtillott*, 289 Or 845, 853, 618 P2d 423 (1980) (quoting *United States v. Martinez-Fuerte*, 428 US 543, 554, 96 S Ct 3074, 3081, 49 L Ed 2d 1116 (1976)) (analyzing

[5] Because commentators agree that the drafting history and contemporaneous case law do not illuminate the meaning of "unreasonable search[] or seizure," the state confines its analysis to the text and apparent purposes of Article I, section 9. *See, e.g.*, Hon. Jack L. Landau, *The Search for the Meaning of Oregon's Search and Seizure Clause*, 87 Or L Rev 819, 837–40 (2008).

Fourth Amendment and Article I, section 9); *see also State v. Watson*, 353 Or 768, 773, 305 P3d 94 (2013) (observing that Article I, section 9, is meant to protect citizens against "arbitrary and oppressive interference" by the police). But it does not prohibit all warrantless searches. It prohibits only those warrantless searches that are unreasonable. *See State v. Davis*, 295 Or 227, 237, 666 P2d 802 (1983).

The key to determining the reasonableness of a warrantless search is the practical need for it: As this court has observed, "what is practical may also be reasonable." *Brown*, 301 Or at 274 (citing *State v. Quinn*, 290 Or 383, 390–91, 623 P2d 630 (1981)). Relatedly, a warrant exception is limited by its purposes, and if any particular application of the exception does not serve those purposes, that application may be unreasonable. *See State v. Fulmer*, 366 Or 224, 233, 460 P3d 486 (2020) (concluding that a warrantless search would not be reasonable if it "reach[es] beyond the purposes of the particular exception").

Judged by those standards, the *Brown* rule is a paradigmatic example of a reasonable warrantless search based on practical needs. It stems from the need to give officers clear guidance in determining whether to search an area that, by its nature, could easily be moved, carrying away crime evidence with it. And it is limited by two facts that depend on the particular circumstances facing an officer: the mobility of a vehicle and the existence of probable cause to search

it. For those reasons, defendant has not shown that the *Brown* rule finds *no* support in the text of Article I, section 9, and is thus "clearly incorrect."

**2. *Brown* can be fairly reconciled with other search and seizure cases.**

*Brown* can also be "fairly reconciled" with this court's other automobile search cases. Indeed, for almost a century, this court has consistently allowed warrantless searches of mobile vehicles based on probable cause, because of the unique exigency that they create. *See State v. DeFord*, 120 Or 444, 455, 250 P 220 (1926) ("The automobile is a swift and powerful vehicle * * * [which] furnish[es] for a successful commission of crime a disguising means of silent approach and swift escape unknown in the history of the world before [its] advent.") (citing *People v. Case*, 220 Mich 379, 190 NW 289 (Mich 1922)); *State v. Duffy*, 135 Or 290, 307, 295 P 953 (1931) ("Moreover, the search of an automobile can be more readily sustained than that of a stationary piece of property."); *State v. Krogness*, 238 Or 135, 142, 388 P2d 120 (1963) (noting that warrant exceptions are justified in part because of the "mobility of criminals and of their pursuers"); *State v. Greene*, 285 Or 337, 345, 591 P2d 1362 (1979) (upholding the warrantless search of a parked car due to the inherent mobility of the vehicle because of the "distinct possibility that someone might try to [remove the car or evidence] before a warrant could be obtained"). *Brown* thus made express what the logic of prior Oregon vehicle-

search cases implied: The mobility of vehicles creates an exigency as a matter of law. Far from being irreconcilable with those cases, *Brown* is the consummation of them.

The *Brown* rule is likewise consistent with Article I, section 9, cases involving other kinds of searches. The only potentially distinct aspect of the *Brown* rule is that it takes a bright-line approach, assuming an exigency if officers observe that a vehicle is mobile. But that aspect of the *Brown* rule is not unique among warrant exceptions. For instance, the search-incident-to-arrest exception applies automatically on a showing of a lawful arrest. *See State v. Mazzola*, 356 Or 804, 812, 345 P3d 424 (2015) (characterizing arrest as creating exigency); *State v. Milligan*, 304 Or 659, 669, 748 P2d 130 (1988) (noting that an arrest "creates a type of exigency justifying a warrantless search of the arrested person for, *inter alia*, evidence that he or she has committed a crime"). In that respect, both the automobile and the search-incident-to-arrest exceptions presume an exigency when the state can establish probable cause and certain facts—mobility for the automobile exception, arrest for the search-incident-to-arrest exception. But neither exception requires a case-by-case showing of exigency, even though in an individual case officers might have time to obtain a warrant before they lose evidence.

For his part, defendant acknowledges that the reasonableness requirement for searches may be based on practical necessities and cites cases in support of

that principle. (Pet BOM 16). Yet the most relevant cases that he cites lend as much support to the state's rule as to defendant's rule. *Greene*, for instance, upheld an automobile search by rejecting exactly the arguments that defendant advances in this case. 285 Or at 344–45 (concluding that an exigency existed to search a vehicle regardless of whether officers could have obtained a warrant). *Milligan* turned on the exigency created automatically by the fact of arrest. 304 Or at 669. And *State v. Atkinson*, 298 Or 1, 6–12, 688 P2d 832 (1984), applies a categorical rule to all items taken to a government facility that are subject to inspection under a validly promulgated inventory policy.

Put simply, a mobility-triggered exigency comports with other exigency rules triggered by discrete facts. And, more broadly, bright-line rules are not "unreasonable" under Article I, section 9, simply because of their categorical nature. For those reasons, defendant fails to show that *Brown* was clearly wrong.

**3. Significant reliance interests also compel adherence to *Brown*.**

Other compelling factors likewise favor adhering to *Brown*: The state has significant reliance interests, this court recently considered and reaffirmed the *Brown* rule, and the arguments that defendant advances have already been fully litigated and considered in factually similar cases.

First, the state has a significant reliance interest in adhering to the *Brown* rule. Reliance interests favor adherence to precedent when decisions have

become "an integral part of the fabric" of a certain area of law or have "been applied repeatedly" in previous cases. *See State v. Cuevas*, 358 Or 147, 154, 361 P3d 581 (2015) (declining to overrule two decisions interpreting sentencing guidelines rules, in part, because those decisions had "been applied repeatedly in calculating innumerable sentences"). In Oregon, the automobile exception has become "an integral part of the fabric" of law-enforcement training and practice for over thirty years. *See, e.g.*, Oregon Criminal Justice Commission, *Statistical Transparency of Policing Report Per House Bill 2355 (2017)*, 1, 13 (2019), available at https://www.oregon.gov/cjc/CJC%20Document%20Library/STOP_Report_Final.pdf (last accessed Oct 27, 2020) (describing recent data about prevalence of traffic stops and searches).

Relatedly, the state and its counties have legitimate reliance interests in the *Brown* rule. Not every county has the same procedures for telephonic warrants, and not every county has the same resources to process warrant applications. *See, e.g.*, *State v. Gerety*, 286 Or App 175, 177, 399 P3d 1049, *rev den*, 362 Or 39 (2017) (noting that, according to Tigard police officer, Washington County did not have telephonic warrant procedures in place). If this court abrogates the *Brown* rule, it might create a patchwork of standards that vary depending on the location of the vehicle search, the present policy for

DDA warrant-application review, and the availability of magistrates to consider warrant applications.

Second, this court has recently addressed and settled the rule that defendant challenges. *Horton*, 359 Or at 187 (identifying that factor as relevant to *stare decisis* analysis). Just three years ago, in *Andersen*, this court expressly declined to overrule *Brown*. Only seventeen months later, in *Bliss*, this court reaffirmed *Brown*'s *per se* exigency rule. This court has repeatedly declined to overrule *Brown*. Nothing has changed in the last two years that would suggest that this court should do so now.

Finally, the arguments that defendant advances are essentially the same arguments that this court considered and rejected in *Brown*, *Andersen*, and *Bliss*. In 1986, when this court held in *Brown* that the automobile exception was based on a *per se* exigency, it did so over a dissent that sounded many of the same objections that defendant now repeats. Those criticisms did not win the day then. And arguments like them have likewise failed to convince the majority of other jurisdictions to abandon the *per se* exigency rule for their states' automobile exceptions. *See State v. Storm*, 898 NW2d 140, 148 n 4 (Iowa 2017) (collecting cases from jurisdictions and observing that all but five

jurisdictions adhere to a *per se* exigency rule for the automobile exception).[6] Nor did this court accept those same arguments when the defendants in *Andersen* and *Bliss* repackaged them. Defendant here does not offer any substantially different reason for overruling *Brown* now.

**4. A *per se* exigency rule provides the certainty and predictability needed to guide officers in the field.**

A *per se* rule is also the more practicable rule. It provides certainty and predictability to officers in the field without intruding on privacy significantly more than alternative approaches.

The purpose of the automobile exception is to provide "clear guidelines" for law enforcement and clear expectations for citizens. *Brown*, 301 Or at 277. Without such guidelines, officers would need to apply a "complex set of rules dependent on particular facts regarding the time, location and manner" of the stop—sometimes while on the side of a highway or other dangerous locations—and *still* might not know whether an exigency has arisen or whether they should apply for a warrant. *Id.* The *Brown* rule fairly accounts for those practical

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[6] Of the jurisdictions that adhere to a *per se* exigency rule, five experimented with a case-by-case exigency rule and later restored the *per se* exigency rule because of the practical problems that arose. *Storm*, 898 NW2d at 150–52 (discussing recent changes in Nevada, New Jersey, North Dakota, Oklahoma, and Rhode Island and explaining how each jurisdiction restored a *per se* exigency rule after abandoning it).

needs, creating reasonable guidelines and expectations for officers and citizens, without permitting a search of any and all vehicles.

In arguing to the contrary, defendant overstates the difficulties of the *Brown* rule and understates the problems with a case-by-case exigency rule. To begin, defendant suggests that *Brown*, as confirmed by *Bliss*, has caused significant confusion in the lower courts. (Pet BOM 21–22). But he cites no case law or data suggesting a need for clarification. If anything, as the Court of Appeals explained, *Bliss* has *already* clarified the import of *Andersen* by reaffirming that the automobile exception does not require a case-by-case showing of exigent circumstances. *See McCarthy*, 302 Or App at 90 (so explaining).

To support his point that the automobile exception causes confusion generally, defendant surveys a few cases from this court interpreting the mobility requirement. (Pet BOM 22–31 (discussing *Kock*, *Meharry*, and *Andersen*, among others)). If defendant means to suggest that the mobility requirement has created a small set of borderline cases that require litigation, he makes a fair but trivial point. *Every* warrant exception turns up borderline cases that require litigation. And the small size of the borderline cases in the context of the automobile exception—essentially 5 cases over 34 years that this court has had to resolve—suggests that the *Brown* rule provides the clear guidance

that this court intended. By sticking with *Brown*, this court would not perpetuate the kind of doctrinal trouble that defendant suggests.

If any trouble looms, it comes from the significant practical problems that would follow from abandoning *Brown*. Defendant's proposed rule would replace one concept ("mobility") with a far more indefinite concept ("exigency"). As case law has shown, determining when an "exigency" has arisen is no less difficult—and, indeed, probably more difficult—than determining whether a vehicle is "mobile." *Compare, e.g.*, *State v. Machuca*, 347 Or 644, 657, 227 P3d 729 (2010) (concluding that the evanescent nature of a suspect's blood alcohol content is an exigent circumstance that will ordinarily permit a warrantless blood draw regardless of the defendant's consent), *with State v. Ritz*, 361 Or 781, 797–98, 399 P3d 421 (2017) (concluding that the evanescent nature of a suspect's blood alcohol content is not an exigent circumstance that permits a warrantless blood draw if it is not clear whether the defendant would ultimately consent to a blood draw). By urging this court to adopt a case-by-case exigency requirement, defendant's proposed rule would not bring more clarity to the law.

Indeed, if defendant's goal is to minimize litigation or reduce confusion, it makes little sense to replace a bright-line rule with a case-by-case rule. To the contrary, as Justice Linde explained, "the goal of a clear and comprehensive statement of Oregon law will not be achieved by the Court's approach of case-

by-case matching against the facts and holdings of Supreme Court decisions." *Greene*, 285 Or at 351 (Linde, J., specially concurring). The better way is to express search-and-seizure doctrine "in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged." Wayne R. LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 S Ct Rev 127, 141. A bright-line rule is far more "readily applicable by the police" than a case-by-case determination of exigency.

**5. Defendant's proposed rule would not protect a person's privacy interests significantly more than the *Brown* rule.**

Nor is it obvious that defendant's proposed rule would protect privacy significantly more than the *Brown* rule. Defendant does not describe exactly what the detectives in this case should have done to preserve the evidence or what officers should do more generally if they develop probable cause during a traffic stop to search a vehicle. He may be suggesting that officers should seize a suspect and her vehicle, or simply monitor the vehicle to see if anyone tries to move it, as they wait for other officers to complete a warrant application. But that approach poses at least two problems.

First, it is not clear that officers could seize a person or vehicle based on a general concern that evidence will be lost while they apply for a warrant. *See, e.g.*, *State v. Juarez-Godinez*, 326 Or 1, 8–9, 942 P2d 772 (1997) (concluding

that officer with suspicion that the defendant's car contained drugs lacked adequate justification for seizure when passengers did not suggest that they would try to drive the car away); *State v. Peller*, 287 Or 255, 265, 598 P2d 684 (1979) (requiring indications of "imminent" action to support exigency necessary to justify seizure of person). Nor is it clear why, if officers have adequate justification to *seize* a vehicle based on exigency, they lack adequate justification to *search* it for the same reason.

Second, it is not clear that defendant's approach would better protect a person's general interest against government intrusion. It delays a search based on a probable cause by forcing a prolonged seizure based on the same probable cause. *See, e.g.*, *Chambers v. Maroney*, 399 US 42, 52, 90 S Ct 1975, 1981, 26 L Ed 2d 419 (1970) ("For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant."). *Brown* itself contemplated the same dilemma when it explained that "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." *Id.* at 276. Defendant does not explain why the alternative to the *Brown* rule—a prolonged seizure of one's person or car or

extensive monitoring of the vehicle—intrudes significantly less on a citizen's freedom from intrusion than the *Brown* rule itself.

**6. A case-by-case exigency rule will not provide significantly more protection against pretextual stops.**

Defendant and *amici* overstate the connection between the automobile exception and the potential for invasive pretextual stops. As an initial matter, police officers and district attorneys have every incentive to use warrants where warrants can be obtained before evidence will be lost. Not only is a warrant typically safer for officers and the persons searched, but a search based on a warrant is easier to defend if challenged. ORS 133.693(3) (specifying that the party who moves to suppress evidence obtained pursuant to a warrant on the ground that the warrant was invalid has the burden of proving the invalidity of the warrant); *State v. Walker*, 350 Or 540, 555, 258 P3d 1228 (2011) (observing that a defendant has the burden of showing that a search based on a warrant was invalid). Officers with time to secure a warrant likely will try—and will be encouraged by prosecutors to try—to obtain one.

Moreover, other constitutional doctrines will protect a defendant's interests against pretextual stops regardless of whether the *Brown* rule or a case-by-case exigency rule applies. For instance, during a traffic stop, an officer may not ask a defendant questions about matters outside the scope of the traffic investigation. *See State v. Arreola-Botello*, 365 Or 695, 712, 451 P3d 939

(2019) ("[A]n officer is limited to investigatory inquiries that are reasonably related to the purpose of the traffic stop or that have an independent constitutional justification."). By the same token, officers may not undertake investigative activities irrelevant to the reason for the stop. *See id.* Those doctrines far more directly protect people against pretextual stops than a case-by-case exigency rule.

Equally important, defendant's proposed rule might make coercive encounters more likely, not less likely. Under defendant's rule, officers might need to detain persons and their vehicle for hours while other officers seek to obtain a warrant. That kind of seizure would infringe on a person's personal liberty no less than a five-minute search based on probable cause. And, in that situation, a person would feel much more subjective pressure to consent to a search. *See, e.g.*, *State v. Witt*, 223 NJ 409, 443–44, 126 A3d 850, 870 (2015) (explaining that, after the New Jersey Supreme Court adopted a case-by-case exigency rule for its automobile exception, nearly 95% of detained motorists gave consent to search during traffic stops).

Hence, if defendant and *amici* start from the assumption that this court should reduce an officer's incentives to stop a vehicle based on factors beyond just those that would justify the stop, defendant's rule hardly helps the cause. It would replace a slight diminishment of privacy rights with an infringement on freedom of movement and make little difference to the outcome of most

encounters if drivers feel overwhelming pressure to consent. If defendant and *amici* want a workable solution, abrogation of the *Brown* rule is not a fruitful place to find it. The better source, as explained below, is the legislature.

**7. The legislature, not the judiciary, should craft rules when technological advances render a warrant exception unnecessary.**

A more fundamental problem with defendant's proposed rule is that it overlooks the complexity of the warrant-application process. Because of that complexity, the legislature, not the judiciary, is better positioned to craft warrant rules for automobile searches.

The warrant-application process is often complicated. It includes not just transmitting a warrant application, but also drafting one in the first place. As this court observed in *Andersen*, and as the record in this case shows, that process can take significant time and resources: "Depending on the complexity of the circumstances that give rise to probable cause and the significance of the case, some warrants will require a longer time to prepare and obtain than others." *Andersen*, 361 Or at 199. And courts cannot assume that "the only impediment to obtaining a warrant quickly is the time that it takes to transmit a completed warrant application to a magistrate and have the magistrate review and act on the application." *Id.* at 199–200. "An officer must prepare the warrant application before submitting it to a magistrate for approval, and the process of preparing a warrant application can sometimes entail a substantial

amount of time." *Id.* at 200. So regardless of whether "technology has made it easier to prepare and transmit completed applications" the applications themselves are still "subject to technical requirements that are intended to protect citizens' privacy." *Id.* Not only does it take time to create the warrant application, but those applications must also "withstand scrutiny in later motions to suppress if evidence discovered while executing the warrant leads to a criminal prosecution." *Id.* For that reason, too, "district attorneys may review warrant applications drafted by officers who may be experienced in criminal matters but untrained in the law." *Id.* As this court recognized, "[t]hose human efforts can sometimes entail substantial expenditures of time despite technological advances." *Id.*

Another complication is that different counties have created different procedures and expectations for telephonic warrants. For instance, in this case, the state provided evidence that, as of 2013, Marion County judges were reluctant to entertain telephonic warrants except in a small set of cases that did not include routine traffic stops. (Tr 202–03 (Marion County DDA testifying that she had approached the presiding judge of Marion County to make telephonic warrants more widely available and was told that the judges were reluctant to do so)). Similarly, as Oregon appellate courts have recognized, not all counties have established telephonic warrant procedures. *See, e.g.*, *Gerety*, 286 Or App at 177 (noting that Washington County lacked one). And although

ORS 133.545 permits officers to transmit warrants telephonically, no statute *requires* their use or requires that a certain number of magistrates always be available to review applications.

Nor does the mere existence of statutory authority permitting telephonic warrants prove that the mobility-triggered exigency underlying the *Brown* rule is obsolete. The telephonic warrant statute existed when this court decided *Brown*. *Brown*, 301 Or at 278 n 6 (recognizing ORS 135.545(5) (1986) as authorizing telephonic warrants). Indeed, *Brown* noted that the availability of telephonic warrants was "only a first step in the process." *Id.* *Brown* envisioned that the state would also need "a central facility with magistrates on duty and available 24 hours a day" that any officer in any county could call. *Id.* But the legislature has not yet developed that kind of system. The legislature also has not specified ways to speed up the drafting of warrants so that quicker transmission will result in quicker review. Nor does defendant suggest an alternative approach.[7]

[7] Instead, he suggests that, because everyone has a smartphone, officers should always be able to reach an on-duty magistrate and a magistrate should always be able to consider a warrant affidavit. (Pet BOM 32–35). But, as *Andersen* shows, defendant's suggestion would make only *transmission* of the warrant application slightly faster. It would not speed up creating the warrant, particularly when the affidavit is complicated and an officer seeks DDA review.

For those reasons, the legislature, not the judiciary, is better positioned to design rules and procedures for warrants and automobile searches. Even Justice Linde dissenting in *Brown* understood that the legislature has a role to play in creating rules beyond those that the constitution may require. *Brown*, 301 Or at 297–98 (Linde, J., dissenting). His regret was that this court chose a baseline that gave more authority to the government than protection to the individual. *See id.* But nothing prevents the legislature from building on the constitutional baseline to provide uniform guidelines that authorize and limit criminal investigation. That is what the legislature did for stops generally and for community caretaking. *See* ORS 131.615 (authorizing stops and inquiries); ORS 131.625 (authorizing frisks for weapons under certain circumstances); ORS 133.033 (authorizing community-caretaking functions within certain limits). For searches involving automobiles, the legislature is uniquely situated to identify and allocate the costs of a rule that might result in vastly more warrant applications, particularly when counties have varying levels of public resources and different needs. The legislature can also balance privacy against practical law-enforcement needs with direct input from the constituencies most affected by the rule.

**D. In any event, the trial court erred when it concluded that the state had failed to establish an exigency.**

Because the *Brown* rule applies straightforwardly to the facts, defendant relies on the possibility described in *Andersen* that *Brown* might not always apply to vehicle searches. But, as explained above, *Andersen* did not create any new requirements for the automobile exception. At most, it suggested that the automobile exception may not apply in the rare circumstance when officers could secure a warrant quickly enough to avoid the exigency necessarily created by the vehicle's mobility. In supporting that principle, this court cited *Machuca*, in which this court held that the natural dissipation of blood alcohol creates an assumed exigency that would almost always justify a warrantless blood draw except when officers could obtain the same result based on a warrant "*significantly* faster" than the actual process used. *Machuca*, 347 Or at 657 (emphasis in original). By citing *Machuca* for that principle, *Andersen* was acknowledging that even a bright-line rule was not entirely irrebuttable. In rare but obvious circumstances, officers might be able conduct a warranted search "significantly faster" than a search under the automobile exception.[8] This case

[8] For instance, if officers had already secured a warrant to search a vehicle, found the vehicle in transit, and then searched it under the warrant, they could not rely on the automobile exception if the warrant proved defective. *See Coolidge v. New Hampshire*, 403 US 443, 462, 91 S Ct 2022, 29 L Ed 2d 564 (1971) (plurality op) (rejecting application of automobile exception where officers had already secured and tried to execute a warrant). Likewise, suppose that officers form probable cause that a vehicle contains contraband during a

*Footnote continued…*

is not that rare and obvious circumstance. As explained above, drafting and obtaining a warrant would have taken several hours. Because a warranted search would not have been faster than a search under the automobile exception, the rare limit to the ordinary application of *Brown* does not apply.

But even if defendant were right that *Andersen* did not identify a rare circumstance falling outside the automobile exception, and instead created a new affirmative burden for the state, he would *still* lose. Under *Andersen*, the state establishes an exigency if it demonstrates mobility and probable cause. And officers cannot obviate that exigency if it would take "hours, not minutes," to draft and obtain a warrant. *Andersen*, 361 Or at 201; *id.* at 204 (Walters., C.J., concurring) (so concluding even though the trial court did not make express findings on the issue).

Here, an exigency existed because, as defendant concedes, defendant's vehicle was mobile when detectives stopped it, and the detectives had probable cause to search it for drugs. Nor could officers obviate that exigency by seeking a telephonic warrant. The state offered unrebutted evidence that complicated facts supported probable cause, and it would have taken four to

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stake-out and continue to watch the car for a full day, gaining no more information than they had originally but waiting to see if someone eventually drove the car. In that circumstance, applying for a warrant to search the car would be "significantly faster" than pursuing a wait-and-see approach and relying on the automobile exception.

*Footnote continued…*

five hours to draft a warrant and obtain judicial approval, even if detectives had sought a telephonic warrant.[9] *See id.* at 204 (Walters, C.J., concurring) (considering those factors relevant). A warranted search, therefore, would not have been faster than a search under the automobile exception. *See id.* at 201; *Machuca*, 347 Or at 657. In focusing almost exclusively on the potential for telephonic transmission of a warrant application, the trial court applied the wrong legal standard for determining exigency. This court can and should affirm by applying the correct standard to the record showing that it would take hours, not minutes, to draft and obtain a warrant.

For those reasons, this case is a poor vehicle for deciding whether to abrogate the *Brown* rule and for specifying what standards should replace it. Even if *Brown* did not apply, defendant cannot win under his reading of the dictum in *Andersen*.

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[9] For example, because the detectives formed probable cause based on a drug-dog alert, the warrant affidavit would have need to describe specific facts attesting to the "reliability of the particular dog involved" and the "handler team's training, certification, and performance." *State v. Foster*, 350 Or 161, 171, 252 P3d 292 (2011).

## CONCLUSION

This court should affirm the judgment of the Court of Appeals.

Respectfully submitted,

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## NOTICE OF FILING AND PROOF OF SERVICE

I certify that on December 1, 2020, I directed the original Brief on the Merits of Respondent on Review, State of Oregon, to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Zachary J. Stern, attorney for petitioner on review, and upon Rosalind M. Lee, attorney for amici curiae, by using the court's electronic filing system.

## CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(1)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b) and (2) the word-count of this brief (as described in ORAP 5.05(1)(a)) is 9,546 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(3)(b).

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