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Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. DARIUS LESHAWN THOMPSON, Darius Lawshawn Thompson, Defendant-Appellant Petitioner on Review.	Multnomah County Circuit Court Case No. 14CR29087 CA A160396 SC S068639

BRIEF ON THE MERITS OF PETITIONER ON REVIEW

Petition to review the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court
for Multnomah County
Honorable David F. Rees, Judge

Opinion Filed: January 27, 2021
Before DeHoog, Presiding Judge, and Egan, Chief Judge, and Aoyagi, Judge
Concurring Judges: DeHoog, P.J. Aoyagi, J., Egan, C.J. in part
Dissenting Judge: Egan, C.J. in part
Authors of Opinions: Aoyagi, J. and Egan, C.J.

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STATEMENT OF THE CASE

Nature of the Proceeding

In this criminal case, defendant seeks reversal of his convictions for first-degree robbery, second-degree assault, and identity theft, because the state presented evidence at trial derived from an unlawful seizure of his cell phone.

After defendant was shot in the leg, he went to the hospital for treatment and presented false identification. When police arrived, they recognized defendant and correctly identified him by his tattoos. They seized his cell phone under the exigent circumstances doctrine on two theories: (1) the phone contained evidence of the shooting, and (2) the phone contained evidence of defendant's true identity. They waited five days before obtaining a warrant to search the phone. Police used information found on the phone during defendant's interrogation to obtain admissions and other statements regarding his involvement in a robbery.

Before trial, defendant filed a motion to suppress the seizure of his cell phone and all derivative evidence. He argued that the police did not have probable cause to seize his phone and that exigent circumstances could not justify holding his phone for five days without a warrant. The trial court denied the motion. Defendant later noted, and the trial court acknowledged, that

defendant's statements during the interrogation after being confronted with information from his phone constituted derivative evidence from the seizure of the phone. The state played those portions of the interrogation at trial, and the jury returned guilty verdicts that resulted in the convictions noted above.

Defendant appealed, assigning error to the trial court's denial of his motion to suppress his cell phone "and all derivative evidence." In the opening brief, after demonstrating that the trial court erred in denying the motion to suppress, defendant identified two derivative statements played for the jury that likely affected its verdict and, thus, required reversal. The state's primary argument in the answering brief was that denial of the motion to suppress was harmless. Consequently, defendant's reply brief identified three additional harmful statements played from the interrogation. The Court of Appeals refused to consider the three additional statements and then concluded that any error in denying the motion to suppress was harmless. In a dissenting opinion, Judge Egan would have considered those additional statements and held that the trial court committed reversible error.

Defendant petitioned, and this court allowed review. *State v. Thompson*, 308 Or App 729, 481 P3d 921, *rev allowed*, 368 Or 637 (2021).

Questions Presented and Proposed Rules of Law

First Question Presented

Is the warrantless seizure of a gunshot victim's cell phone to prevent the potential destruction of unspecified evidence constitutionally justified under the exigent circumstances exception?

Proposed Rule of Law

The mere fact that a gunshot victim possesses a cell phone, without more, does not provide probable cause to believe that the cell phone contains evidence of the shooting.

Second Question Presented

Is the warrantless seizure of an identity-theft perpetrator's cell phone to preserve potential evidence of the person's identity constitutionally justified under the exigent circumstances exception when the police know who the person is and have ample evidence of his true identity?

Proposed Rule of Law

When police already know a person's true identity and have ample evidence to prove it, they cannot justify the warrantless seizure of his cell phone under the exigent circumstances exception.

Third Question Presented

May police hold a suspect's cell phone for five days without obtaining a warrant under the exigent circumstances exception?

Proposed Rule of Law

The exigent circumstances exception to the warrant requirement only allows police to seize a phone pursuant to an exigency for the length of time that it would take to obtain a warrant. It does not allow them additional time to investigate the crime in order to bolster their probable cause in support of the warrant.

Fourth Question Presented

When a defendant-appellant assigns error to the denial of a motion to suppress a cell phone and "all derivative evidence," identifies derivative evidence as including statements made during an interrogation when police confronted the defendant with evidence found on the cell phone, and then identifies particularly harmful statements from the interrogation in the reply brief in response to the respondent's harmless error argument, must the appellate court consider the statements identified in the reply brief in its harmless error analysis?

Proposed Rule of Law

When a defendant-appellant assigns error to the admission of "all derivative evidence" and argues that police used information from an unlawfully obtained cell phone during an interrogation to elicit statements from the defendant, the appellant has sufficiently identified the evidence the defendant seeks to suppress—namely, all of the defendant's statements after the use of the unlawfully obtained information. If the defendant identifies a few specific statements from the interrogation that were particularly harmful in a reply brief in response to the state's harmless error argument, he has not raised an additional "ground for reversal" for the first time in a reply brief, and the appellant court must consider those statements when deciding whether the trial court's error in denying the motion to suppress was harmful.

Summary of Argument

Police unlawfully seized defendant's cell phone while he was at the hospital to treat a gunshot wound, in violation of Article I, section 9, of the Oregon Constitution. The state attempted to justify the warrantless seizure under the exigent circumstances exception on the theory that it needed to preserve evidence of the shooting and of the identity-theft crime that defendant committed by presenting false identification at the hospital.

The exigent circumstances exception is a narrow doctrine of practical necessity that allows police to respond to emergency situations, including taking action to prevent the destruction of evidence of crimes for which police have probable cause. As with all warrant exceptions, it is governed by the standard of reasonableness. In determining whether the state has proven that exigent circumstances exist, the court considers the need for the intrusion into a person's constitutional rights, the level of intrusion, and the importance of the information sought.

In this case, police did not have probable cause to believe that defendant's phone would contain evidence of the shooting. At the time, defendant claimed that he had been shot from two unknown cars as he was walking to his sister's apartment. Nothing indicated that he was using his cell phone at the time of the shooting, that it was turned on, or that it would contain evidence of his interaction with his "unknown" assailants. Any belief that his cell phone contained such information was mere speculation and did not rise to the level of probable cause. Consequently, the state cannot justify its warrantless seizure of defendant's cell phone based on the exigency that evidence of the shooting probably would be destroyed if police did not seize the phone.

Nor can the state justify the seizure to prevent the destruction of evidence related to the identity theft. The only other evidence the state claimed would be

on the phone was evidence of defendant's correct identity. However, police already knew defendant's true identity before they seized his phone. The search of a modern cell phone involves a significant intrusion into a person's privacy. Yet the state's need for the evidence was minimal, if not non-existent. It is unlikely that a neutral magistrate would issue a warrant under such circumstances. To do so would not be reasonable. Add to that the fact that it is unlikely that a defendant would bother to destroy evidence of his true identity when police already know it, the circumstances in this case did not present an emergency situation.

And even if the state was justified in seizing defendant's cell phone at the hospital, it was not justified in holding the phone for five days without a warrant. Any exigency dissipated after the time it would have taken to get a warrant—in this case six to ten hours. The fact that police were engaged in "an active, ongoing investigation," does not cure the problem. An exigency is an emergency situation justifying prompt action and expeditious follow-through, not a matter of police convenience.

The state failed to prove that, without the unlawful seizure, the police would have been able to obtain the information from the phone pursuant to the search warrant that it eventually obtained. The unlawful seizure was the reason that the phone was on hand and in police possession, which allowed the police to execute the warrant. And it is uncontested that police used information from

the phone during the interrogation of defendant at the police station. Consequently, defendant's statements made after police invoked that information were tainted by the unlawful seizure, they constituted derivative evidence, and they should have been suppressed.

Some of the statements made during that portion of the interrogation were harmful because they indicate that defendant was lying about not being the person who attacked the victim with the knife. Additionally, one could infer from his statements that he had a guilty mind.

Finally, the fact that defendant directed the Court of Appeals to those particular statements in the reply brief did not justify the Court of Appeals decision not to consider them. The Court of Appeals was confusing the assignment of error and preservation requirements with the harmful error analysis. Defendant properly identified and assigned error to the ruling that constituted legal error (the denial of his motion to suppress), noted the evidence that he sought to suppress in the trial court (the cell phone and evidence derived from its unlawful seizure, including defendant's statements when confronted with evidence found on the cell phone during his interrogation), and argued that the error required reversal of his convictions. And defendant preserved those points and arguments below before the trial court. Whether any part of the challenged evidence was harmful —or, more properly stated, not harmless—

such that the trial court's ruling constituted an error requiring reversal is a separate analysis.

Furthermore, the purpose of a reply brief is to respond to the arguments in the answering brief, like an argument that the appellate court must affirm notwithstanding trial court error because an error is harmless. By specifically identifying additional harmful statements in the reply brief in response to the state's harmless error argument, defendant did exactly what he was supposed to do. Had the state desired an opportunity to respond with additional argument on that point, it could have sought leave to file a surreply brief, filed a memorandum of additional authorities, or presented its analysis at oral argument. The Court of Appeals, on the other hand, could not simply ignore defendant's responding contentions.

Summary of Facts

I. Historical Facts (presented at trial)

On November 18, 2014, Norton (the robbery victim) wanted to sell the in-dash DVD player in his car. Tr 416-17. Isaac Beacock, known as "Pree," agreed to help. Tr 416-17. After driving around the Portland area for much of the afternoon and evening and smoking some methamphetamine, Pree directed Norton to the Holly Ridge Apartments. Tr 418-20, 444-49. Pree went into one of the apartments and returned with defendant. Tr 424.

Norton showed defendant what he wanted to sell (a stereo, the in-dash player, and a speaker), and they agreed on a price. Tr 424-25. Defendant told Norton to unhook the in-dash player, and he and Pree walked away together. Norton was suspicious, so he moved his gun, which he had shown Pree earlier, from the camouflage pouch on his right side to his left jacket pocket. Tr 425-27.

Defendant leaned in the passenger seat to collect the equipment. Tr 427-29. A woman began removing the other equipment from the back seat. Tr 427, 431-32, 439, 458-59. Defendant lurched at Norton and held a knife to his throat. Tr 431, 434-35, 444, 457; Ex 8-9. Norton grabbed the knife, cutting his finger. Tr 431, 433, 435-36; Ex 10-12. The two struggled. Tr 432, 477. Meanwhile, Pree opened the driver's side door and reached over to Norton's right side, where he thought the gun remained. Tr 431-32, 461-62. Norton reached into his left pocket and pulled the trigger. Tr 432, 436, 464. When the gun went off, everyone scattered. Tr 432, 465. Norton fired it two more times towards Pree and defendant. Tr 432, 436-37, 466-67.

Norton left the area and went to the residence where he had dropped off his son. Tr 439, 470. The next day he called Pree attempting to get his stuff back. Tr 440, 471. When that failed, he tried to return to California the next night, but he was stopped by police heading south on I-5 in Salem and arrested for felon in possession of a firearm and attempt to elude. Tr 441-42, 471-72.

They questioned him about the shooting and he described the robbery. Tr 259-60, 475.

Defendant returned to his sister's apartment, then went to the hospital, where he presented an identification card with the name Marcus Tyler. Tr 238; Ex 1. When police interviewed him at the hospital, he admitted that he knew that it was illegal to use another person's identification to obtain medical services. Tr 239, 246. He told police that he had been the victim of a drive-by shooting. Tr 246-53; Ex 2.

Police searched defendant's cell phone and found calls from Pree to defendant on November 18 at 11:05, 11:09, 11:14, 11:29, and 11:31 p.m. Tr 340. They also found a text message from Pree to defendant on November 19, at 1:48 a.m. that said, "Hey bro, you all right?" Tr 340-41.

Police interviewed defendant at the Gresham Police Department on November 26, 2014. Tr 266; Ex 20. Initially, he reiterated the drive-by shooting story, but eventually he admitted to being present when Pree tried to rob Norton. Tr 274-76, 280-83. He said that Pree wanted him there for "protection," and that he got shot as a bystander. Tr 281. And when pressed, he made statements from which the jury could infer that he was lying or that he had a guilty mind. Tr 285, 286, 289.

Police searched defendant's sister's apartment and found a knife with blood on it, the victim's identification, a prescription bottle with defendant's

name on it and other items associated with defendant. Tr 295-300, 308-15; Ex 24-26, 30, 32-34.

II. Motion to Suppress

A. Search Warrant Affidavit[1]

On November 18, 2014, at 11:03 p.m., defendant entered the Mount Hood Medical Center Emergency Room with a gunshot wound to his outer left thigh, likely from a small caliber handgun. Hospital staff contacted police to investigate. Defendant identified himself as Marcus Tyler and displayed an Oregon Identification Card with that name.

Officer Friderich responded to the hospital and identified defendant by his correct name of "Darius Thompson." She said that she knows defendant from several previous police incidents in the late summer and early fall of 2014. She recognized the tattoos on defendant's neck (a black hand) and some additional tattoos on his arms. Those tattoos are described as belonging to defendant in the Portland Police Data System. Friderich discovered through a

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[1] Defendant presents the facts from pages 2-5 of the search warrant affidavit because they provide the most detailed information regarding what police knew at the time they seized defendant's cell phone. The full warrant is attached at ER 1-20. Although the search warrant affidavit was not entered as an exhibit at the hearing on the motion to suppress the cell phone, it was before the trial court during the immediately preceding hearing on the motion to suppress the search of the residence and the prior motion to controvert the affidavit. See TCF, Defendant's Second Motion to Suppress (Affidavit for Search Warrant attached).

police record check that defendant was a convicted felon and on felony probation in Multnomah County for possession of methamphetamine.

Officer Robertson interviewed defendant at the hospital. Defendant admitted that he knew that using another person's identification card to falsely identify himself to hospital staff was a crime. He said, "I just hate hospitals."

When asked to describe the shooting incident, defendant said that he was at Shari's restaurant near 182nd and Powell in Gresham playing video poker. He left to walk to his sister's apartment less than a mile away. He said that two cars drove past him at about 15 miles per hour when he was a half-mile from his sister's apartment. He heard two gunshots, which he believed came from one or both of the cars. He ran to his sister's apartment. When he arrived, he realized that he had been shot. He said that he had his cell phone with him, but he did not call the police. He said that his sister and his girlfriend brought him to the hospital. He has been staying with his sister frequently, but he does not have a permanent address.

When Robertson attempted to ask clarifying questions about the shooting, defendant was "vague and uncooperative." He said that he would be unable to identify who shot him, and he indicated that he did not want to know who shot him. Another officer interviewed defendant's sister and his girlfriend separately, and their statements were inconsistent with defendant's and each other's.

Officers seized defendant's cell phone and clothing, including a baseball cap with the letters "N O" on it. Officer Robertson knew that defendant's street name is "N.O."

Defendant was discharged from the hospital at 1:30 a.m. on November 19, 2014. He was given instructions to set up an appointment to have the bullet removed at a later date.

B. Officer Brad Robertson's testimony

On November 19, 2014, Officer Brad Robertson responded to the Mt. Hood Medical Center emergency room to investigate a person who had been admitted with a gunshot wound—defendant. Tr 104-05. Robertson knew defendant from past experience. Tr 105. Officers Fredrick and Meyers told Robertson that defendant had used an identification card with the name Marcus Tyler, which was not defendant's name, to identify himself to hospital staff. Tr 105, 108-11; Ex 1001. That immediately made Robertson suspicious of what defendant was going to say. Tr 105. Defendant was not forthcoming and was sometimes evasive during the conversation of how he got shot, and he provided information that Robertson was not able to verify. Tr 105-06.

Robertson testified that he usually asks shooting victims for consent to search their cell phone because often the victims know the shooter or people present and it is helpful for establishing a timeline. Tr 106, 111-12. However, he did not seek consent from defendant:

> "[ROBERTSON]: I sensed that [defendant] was going to be resistant had I asked for consent, and since I believed that there was already probable cause to charge him with the identify theft, I also knew that there was going to be evidence on that phone specific to that crime, because I know that cell phones have identifying information on them, subscriber information. So at that time, along with his clothes we also seized the cell phone as evidence with the intent to apply for a search warrant later."

Tr 106-07. The clothes and cell phone were in a stack in defendant's hospital room. Tr 112. Robertson seized defendant's "smart" phone because he was concerned about the potential loss of evidence because people can destroy cell phones in their possession, shut down their cell phones, and do other things over the internet to delete evidence from cell phones. Tr 107-08. He did not search the phone until he had obtained a warrant. Tr 108.

Robertson testified that he could have gotten a telephonic warrant to seize the phone that evening in six to 10 hours. Tr 113-14. However, he did not believe that "there was exigency" to obtain a search warrant at that time:

> "[ROBERTSON]: [Y]es we were investigating him getting shot, we also had the I.D. theft on top of that. Since the hospital explained to us his injuries were not life threatening, the exigency of obtaining that warrant to go through the phone, I didn't believe that there was one at the time. I thought there were more circumstances that we needed to confirm based on [defendant's] lack of cooperation in answering questions, I knew that there was more than likely more to the story to sort it out. So, I didn't feel there was exigency to apply for the search warrant like right then and there."

Tr 114-15. He seized the phone to prevent any destruction of evidence:

> "[ROBERTSON]: Based on his statements that evening, evidence on that cell phone could have corroborated some of the things that

> he had said or not corroborated them. So it was important for us to have that evidence secured and away from him so it wasn't potentially changed, deleted, or destroyed."

Tr 116.

The warrant to search the cell phone was signed on November 24, five days after the phone was seized. Tr 131. During those five days, police continued to investigate and gather information that was used in the warrant affidavit. Tr 131-32.

Police knew defendant's real name when they spoke to him at the hospital, and he confirmed it during that conversation. Tr 133. Police used the information from defendant's cell phone to confirm the timeline for the case. Tr 133. Police also used the information from the cell phone during the interrogation of defendant at the police station on November 24, 2014. Tr 144; TCF, Motions *In Limine* to Exclude Items #1-50 of Defendant's Videotaped Interview.

C. Parties' Arguments and Trial Court Ruling

Defendant filed a motion to suppress "the seizure of defendant's cell phone, as well as all derivative evidence," arguing that the police did not have probable cause to seize his cell phone. Defendant's First Motion to Suppress at ER 21-25. He further noted that "[the cell phone's] subsequent search – via a warrant – was fruit of the poisonous tree and likewise should be suppressed." *Id*. at ER 25.

At the June 15, 2015, pre-trial suppression hearing, defendant reiterated his argument that the police were not justified in seizing his cell phone. Tr 116-20, 125-27, 130, 134.[2] He cited *State v. Williams*, 270 Or App 721, 349 P3d 616 (2015), for the proposition that "when a person is shot, there needs to be something more than just skepticism about their story to search property." Tr 117-18. He also argued that there was no reason to believe the cell phone would contain evidence of identity theft. Tr 118.

The state responded that "the key analysis" was "is there probable cause to believe there's evidence there and is there exigent circumstances?" Tr 121. It argued that police had probable cause to believe the phone contained evidence "because of the circumstances of the shooting, his behavior at the hospital, lying to the police, the identify theft component," Tr 121, and that the exigency was the potential loss of evidence. Tr 125.

Defendant replied that the seizure of a cell phone is a significant intrusion, Tr 125-26, that the warrant to search the cell phone contained much more information than the officers had at time they seized the phone, Tr 126, and that the police waited several days after seizing the phone to apply for a warrant, "[s]o even if there was a right to seize to preserve while you get a

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[2] Defendant has attached the transcript of the motion to suppress argument in the trial court for the court's convenience. Tr 116-37 at ER 26-47.

warrant, you can't just hold the phone indefinitely until there's a warrant." Tr 127.

The trial court denied the motion:

> "THE COURT: I think that there is probable cause that the phone would contain evidence of his identity. It's a harder question to me as to whether the -- whether there's probable cause to conclude -- whether there's a basis to conclude that it's more likely than not that there's evidence of the shooting in the phone just by virtue of the fact that [defendant] was acting in a suspicious manner in presenting a false I.D. and was actually a shooting victim.
>
> "But I'm going to deny -- I'm going to deny the Motion to Suppress because I do think that the phone would contain direct evidence of [defendant's] identity which is an element of his identity theft charge at that point in time. So I think there is probable cause to seize the phone and then -- and exigent circumstances to seize the phone. The exigent circumstances would not extend to actually accessing the phone until you get a warrant."

Tr 129-30.

Defendant then asked the court to take additional evidence regarding obtaining the warrant, which the court granted. Tr 130. He argued

> "[DEFENSE COUNSEL]: So, essentially even if, which we are not conceding, but even if Your Honor finds probable cause because his name might be on the cell phone, that doesn't justify a seizure for five days, a protective seizure."

Tr 134. He noted that the state presented no evidence of when the police might have developed additional probable cause of a crime connected with the shooting, so the justification for a protective seizure could only last the six to

ten hours it would have taken to obtain a warrant. Tr 134. The trial court again denied the motion:

> "THE COURT: Okay. I think that the -- I mean, it essentially amounted to a five day delay, but it's an active, ongoing investigation. I think at the moment -- the instant in time where he seized the phone, there was probable cause for the I.D. theft. It's a closer call on the shooting, although, boy, it sure seems likely that there's going to be evidence of -- you have a shooting victim who is non-cooperative, it sure seems likely that there's going to be information in his phone.
>
> "So, the motion is denied."

Tr 136-37.

The court next addressed defendant's motion *in limine* challenging multiple statements from the second interview of defendant at the police station on November 24, 2014. Tr 137; TCF, Motions *In Limine* to Exclude Items #1-50 of Defendant's Videotaped Interview. During argument on those motions, defendant pointed out and the trial court acknowledged that defendant's statements during the interrogation after police confronted defendant about what they found on his cell phone were derivative of the seizure of the phone:

> "[DEFENSE COUNSEL]: And I just want to mention one thing for the purposes of appeal. There was something that the Court had allowed in on section three on page 20, I'm not rearguing the Court's ruling on number 3 at all, but *there's a lot of discussion regarding what is on the Defendant's phone*, and so obviously our position would be if the phone -- *the State had made*

> *the argument that the seizure of the phone didn't provide any additional evidence*.[3]
>
> "THE COURT: I know what you're saying. *So you're preserving the argument with respect to my ruling on the phone with respect to those statements as well*.
>
> "[DEFENSE COUNSEL]: *Right. Those statements would not have come in, and arguably the interview would have flowed differently without the State's — the officer's ability to confront –*
>
> "THE COURT: Okay.
>
> "[DEFENSE COUNSEL]: -- *[Defendant] about what was on his phone*."

Tr 171-72 (emphasis added). Thus, the trial court recognized that defendant's interview statements would have been suppressed if it had granted defendant's motion to suppress the seizure of the cell phone. The state subsequently played video of the interrogation that, while redacted in parts for other reasons, included the statements referenced by defendant. Tr 283-93.[4]

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[3] During argument on the motion to suppress the seizure of the cell phone, the state claimed that "the evidence that is obtained from the phone will also come in through various other means," *e.g.*, Beacock's phone. Tr 128. However, it was not willing to forgo the use of defendant's cell phone evidence. Tr 129.

[4] The transcript of the interview including and following Officer Robertson's invocation of the cell phone information, as played for the jury after the redactions, is appended to this brief for the court's convenience. Tr 283-93 at ER 48-58.

III. Proceedings on Appeal

Defendant assigned error to the trial court's denial of "defendant's motion to suppress his cell phone and all derivative evidence." App Br 11. In the preservation of error section, he directed the Court of Appeals to the above-quoted passage, stating: "[D]efendant argued that if the phone had been suppressed, the statements about what was on the phone would not have been available to the state to use to when interrogating defendant, and the interview would have flowed differently. Tr 171-72." App Br 14.

At the end of his argument section, defendant claimed that police exploited the unlawful seizure of his cell phone by using information from it during the second interrogation of defendant. App Br 24. He argued that the interview "was a significant part of the state's case" and pointed to two admissions by defendant during the interview that he claimed were harmful. App Br 24-25.

In its answering brief, the state's primary argument was that defendant had failed to show harm:

> "But [defendant's motion to suppress] argument is not a basis for reversing the convictions. First, defendant fails to show that, even if the court erred in denying his suppression motion, he was prejudiced by the error. He does not identify with the requisite specificity the evidence he claims should have been suppressed and that was then presented to the jury, or demonstrate that whatever evidence should have been suppressed likely affected the jury's verdict with respect to any of the convictions. In short, defendant fails to show that any error was not harmless."

Resp Br 1; *see also* Resp Br 2 (including harmless error argument in its answer to defendant's assignment of error); Resp Br 10-12 (suggesting that Court of Appeals begin with harmless error analysis and arguing that defendant has failed to satisfy his burden to show harm).

Defendant responded to the state's harmless-error argument in the reply brief. Reply Br 3-7. First, he quoted the portion of the interview where police used information from the cell phone to challenge defendant's version of events. Reply Br 4. Then he identified and quoted three subsequent statements by defendant that showed a guilty mind and explained why they were harmful. Reply Br 5-7. He continued to rely on those statements to prove harm during oral argument.

In its opinion affirming defendant's convictions, the Court of Appeals "assume[d] without deciding" that the trial court erred in denying suppression. *Thompson*, 308 Or App at 735. Instead, the court concluded that any error was harmless. *Id*. at 735, 738. However, in doing so, it refused to consider harm as to the three interview statements specifically noted in his reply brief, characterizing them as a new "ground for reversal." *Id*. at 737. Chief Judge Egan dissented on that point. *Id*. at 741-44 (Egan, C.J., concurring in part, dissenting in part).

Defendant filed a petition for reconsideration, explaining that he had identified his interview statements as derivative evidence both at trial and in the

opening brief. Pet Recons 1-4. He argued that the specific statements highlighted in the reply brief were portions of the total evidence he sought to suppress. Pet Recons 5-6. He explained that he was merely elaborating on his previous harm argument by identifying additional harmful statements in response to the state's answering brief. Pet Recons 7-9. The Court of Appeals denied reconsideration. Defendant petitioned and this court allowed review.

ARGUMENT

This case presents both a substantive issue—whether the trial court erred in denying defendant's motion to suppress, and a procedural issue—whether the Court of Appeals erred in refusing to consider the harm arguments in defendant's reply brief. Defendant addresses the substantive issue first because it arose first chronologically and it provides background for assessing the Court of Appeals decision.

I. Any seizure of personal property under the exigent circumstances exception to the warrant requirement must be reasonable, necessary, and supported by probable cause to believe the item is or contains evidence of a crime.

A. The state attempted to justify the seizure and retention of defendant's cell phone under the exigent circumstances exception.

Article I, section 9, of the Oregon Constitution protects individuals against *unreasonable* searches and seizures.[5] A search occurs when the government invades an individual's privacy interests. *State v. Owens*, 302 Or 196, 206, 729 P2d 524 (1986). A seizure, on the other hand, occurs when the government significantly interferes with an individual's possessory or ownership interests in a piece of property. *Id*. at 207. "The seizure of an article by the police and the retention of it (even temporarily) is a significant intrusion into a person's possessory interest in that 'effect.'" *Id*.; *see also State v. Barnthouse*, 360 Or 403, 413, 380 P3d 952 (2016) (same); *State v. Juarez–Godinez*, 326 Or 1, 6, 942 P2d 772 (1997) (same).

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[5] Article I, section 9, provides:

> "Unreasonable searches and seizures. 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."

A seizure is unreasonable and, therefore, unlawful under Article I, section 9, unless it is supported by probable cause and a warrant or it is justified under one of a few carefully circumscribed exceptions to the warrant requirement. *Barnthouse*, 360 Or at 413-14; *Juarez-Godinez*, 326 Or at 8-9. The state bears the burden of proving that circumstances existing at the time of the seizure were sufficient to satisfy any exception to the warrant requirement. *State v. Ritz*, 361 Or 781, 790, 399 P3d 421 (2017); *State v. Baker*, 350 Or 641, 647, 260 P3d 476 (2011).

The police in this case did not have a warrant when they seized defendant's cell phone at the hospital nor while they held it for five days before obtaining a warrant. The state attempted to justify both seizures under the exigent circumstances exception to the warrant requirement.[6] That exception has two requirements: (1) probable cause to believe that a crime has been committed, and (2) exigent circumstances requiring immediate action. *State v. Stevens*, 311 Or 119, 126, 806 P2d 92 (1991); *State v. Bridewell*, 306 Or 231, 235-36, 759 P2d 1054 (1988). "An exigent circumstance is a situation that

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[6] The state cannot rely on the search incident to arrest exception to the warrant requirement, because defendant was not arrested at the hospital when police seized his cell phone. *State v. Owens*, 302 Or 196, 200, 729 P2d 524 (1986) ("Under Article I, section 9, a search incident to arrest for crime evidence is limited to a search for evidence of the crime for which the arrestee is arrested.").

requires the police to act swiftly to prevent danger to life or serious danger to property, or to forestall a suspect's escape or the destruction of evidence." *Stevens*, 311 Or at 126.

B. This court's case law shows that the exigent circumstances exception is a narrow doctrine of "practical necessity."

This court has equated "exigent circumstances" with the existence of an "emergency." *Bridewell*, 306 Or at 236. It is a doctrine of "practical necessity." *State v. Peller*, 287 Or 255, 262, 598 P2d 684 (1979) (quoting *State v. Greene*, 285 Or 337, 591 P32d 1362 (1979)). As this court explained, "In certain cases, the societal interest in a warrantless search or seizure is simply believed to outweigh the interest in requiring prior judicial approval of such government action." *Peller*, 287 Or at 262.

The classic example of exigent circumstances is entering premises to locate a potential murder victim in the hope that the person is still alive. *State v. Miller*, 300 Or 203, 229, 709 P2d 225 (1985) (allowing entry into a hotel room to confirm that boy was dead); *Stevens*, 311 Or 128-32 (allowing entry into residence to look for third kidnap victim). In both cases, this court emphasized that the scope of the search was limited to the exigency that justified it. *Stevens*, 311 Or at 130 ("The scope of the first warrantless search was properly limited to the exigency that justified it."); *id*. at 132 ("The second search, like the first, was properly limited to the exigency that created it.");

Miller, 300 Or at 229 (holding that after the officer found the victim dead, "the emergency situation ceased"); *see also State v. Davis*, 295 Or 227, 240, 666 P2d 802 (1983) (holding that any emergency "dissipated" when the potential victim walked out of the door of the motel room unharmed).

This court has also found exigent circumstances to prevent an ongoing crime. *State v. Fessenden/Dicke*, 355 Or 759, 772-73, 333 P3d 278 (2014) (holding that officer was justified in entering onto private property to seize a neglected horse to prevent it from falling, thus preventing the ongoing crime of animal neglect). Again, the court emphasized that the officer's reasonable belief that the horse would suffer serious imminent harm if he refrained from acting "assures us that a true emergency was presented." *Id*. at 774; *but see State v. Miskell/Sinibaldi*, 351 Or 680, 698, 277 P3d 522 (2012) (holding that exigent circumstances do not include preventing "defendants' continuing involvement in undesirable activities that the police reasonably would wish to stop 'as soon as possible,' but that do not constitute an immediate threat to persons, property, or law enforcement efforts").

Preventing escape is another situation in which this court has applied the exigent circumstances doctrine. *State v. Snow*, 337 Or 219, 224, 94 P3d 872 (2004) (holding that police in "hot pursuit" of the driver of an eluding vehicle were justified in searching the defendant's car for identification in an attempt to locate him and prevent his escape); *State v. Girard*, 276 Or 511, 515, 555 P2d

445 (1976) (holding that police could enter a house to arrest a burglary suspect to prevent his escape when they heard someone say, "Hurry, they are coming"). However, "the mere possibility" that the defendant might attempt to escape does not give "rise to exigent circumstances." *Peller*, 287 Or at 264 (holding that exigent circumstances did not justify entry into the defendant's house to prevent his escape when police had no indication that he would attempt to "make a break").

Another situation in which this court has applied the exigent circumstances doctrine is when the seizure or search is necessary to prevent the destruction of evidence. *State v. Greene*, 285 Or 337, 344, 591 P32d 1362 (1979) (allowing the warrantless seizure and subsequent search of an automobile that was involved in an armed theft at a residence, because someone could remove the evidence or drive the car away at any time). Notably, when the emergency is to prevent the destruction of evidence, the information to be preserved must be evidence of the crime for which the police have probable cause. *Greene*, 285 Or at 341 (requiring "probable cause to believe that the vehicle contained some of the property stolen the night before or some evidence of the crime" to allow the warrantless seizure of an automobile that was involved in an armed theft under the exigent circumstances doctrine); *see also State v. Machuca*, 347 Or 644, 657, 227 P3d 729 (2010) (allowing warrantless blood draw of person arrested for driving under the influence of alcohol to

determine the person's BAC after car accident, based on the dissipating nature of BAC evidence); *State v. Milligan*, 304 Or 659, 666, 748 P2d 130 (1988) (same); *State v. Mazzola*, 356 Or 804, 819-20, 345 P3d 424 (2015) (allowing warrantless administration of roadside FSTs when officer had probable cause to believe seized person was driving under the influence of controlled substances, based on the dissipating nature of the evidence); *State v. Nagel*, 320 Or 24, 33, 880 P2d 451 (1994) (same for driving under the influence of alcohol).

Finally, when determining whether exigent circumstances exist, this court has emphasized the necessity to balance multiple factors: the need for the evidence, the level of intrusion, and the timeliness of the officer's action:

> "As pertinent here, *Milligan*, *Heintz*, and *Machuca* teach us that, where a warrantless search for evidence of the crime of DUII is supported by probable cause to arrest the defendant, *the issue of exigency should be assessed in light of the reasonableness of the search in time, scope, and intensity*. Here, limited testing designed to detect evidence of current impairment was performed on a person who already had been validly stopped and also was subject to arrest for DUII. The tests at issue were limited in scope and intensity; they did not intrude into defendant's body; rather, they assessed her coordination, balance, and motor skills. Those tests constituted probative evidence of an element—current impairment—of the crime of defendant's arrest, they were administered soon after defendant had been observed driving, and they immediately preceded her arrest. With respect to exigency, there also was evidence that 'over time the body filters drugs and they dissipate in one's body,' that various drugs can dissipate at different rates, and that the effects of drugs wear off over time. Again, the challenged FSTs assess a motorist's impairment at the time of driving, not at a later time. In light of the limited scope and intensity of those tests, and their proximity in time to defendant's arrest, the described evidence established a sufficient

> exigency to justify the warrantless administration of the FSTs in this case."

Mazzola, 356 Or at 819-20 (citation omitted; emphasis added).

Those cases show that although the exigent circumstances exception applies in a variety of situations, it is applied narrowly to the specific circumstances facing police at the time of the search or seizure. The touchstone is "reasonableness." *Ritz*, 361 Or at 789. In assessing whether exigent circumstances exist, the court considers the need for the intrusion into a person's constitutional rights, the level of intrusion, and the importance of the information sought.

II. The warrantless seizure of defendant's cell phone at the hospital was not justified by probable cause and exigent circumstances.

As explained above, to justify a warrantless seizure under the exigent circumstances exception, police must have (1) probable cause to believe that a crime has been committed, and (2) demonstrate that exigent circumstances exist. *Stevens*, 311 Or at 126; *Bridewell*, 306 Or at 235-36. Furthermore, when the exigent circumstance is the destruction of evidence, the information to be preserved must be evidence of the crime for which the police have probable cause. *Greene*, 285 Or at 341. Here, Officer Robertson claimed that he seized the phone because he believed that it would contain evidence of the shooting and the crime of identity theft.

A. Police lacked probable cause to seize defendant's cell phone for evidence of the shooting.

"Probable cause" in this context means that it is more likely than not that relevant evidence will be found in the place to be searched. *State v. Pittman*, 367 Or 498, 529-30, 479 P3d 1028 (2021) ("In Oregon, the 'probable cause' standard reflects a 'substantial objective basis' to believe that, 'more likely than not,' something has occurred."); (*State v. Mansor*, 363 Or 185, 187, 216, 421 P3d 323 (2018) ("A warrant to search a computer or other digital device for information related to a crime must be based on probable cause to believe that such information will be found on the device."); *id*. at 218 ("The warrant to search a computer must be based on affidavits that establish probable cause to believe that the computer contains information relevant to the criminal investigation."); *State v. Anspach*, 298 Or 375, 381-82, 692 P2d 602 (1984) ("The probable cause requirement means that the facts upon which the warrant is premised must lead a reasonable person to believe that seizable things will probably be found in the location to be searched.").

The probable cause analysis for a warrantless search or seizure is the same as for a warranted one. *State v. Foster*, 350 Or 161, 169, 252 P3d 292 (2011); *State v. Davis*, 295 Or 227, 235, 666 P2d 802 (1983). It is based on the facts known to police at the time of the search or seizure. *State v. Bonilla*, 358 Or 475, 488-89, 366 P3d 331 (2015). "Subsequent validation of the officer's

subjective or objective belief as to the existence of probable cause * * * is irrelevant to the inquiry." *State v. Vasquez-Villagomez*, 346 Or 12, 23, 203 P3d 193 (2009). The state has the burden to show that a warrantless search or seizure was supported by probable cause. *Foster*, 350 Or at 169-70.

When police seized defendant's cell phone at the hospital, they had the following information. Defendant was being treated for a gunshot wound to his outer left thigh. He had presented a false identification card to hospital staff and police. Police knew defendant's correct identity from previous police contacts and his identifying tattoos. Defendant was on felony probation for possession of methamphetamine. Defendant claimed that he was shot from two cars driving by at 15 miles per hour when he was walking back to his sister's apartment. He was not able to identify who shot him and he indicated that he did not want to know. He was "vague and uncooperative," and his sister and girlfriend provided conflicting information.

That information was insufficient to provide probable cause to believe that defendant's cell phone contained evidence of the shooting. Although defendant had his cell phone with him at the time of the shooting, nothing indicated that it was turned on or was recording video or audio evidence of the shooting. Any such conclusion would be mere hopefulness.

The fact that defendant provided a false identification at the hospital and to police indicates that he did not want to be identified, possibly because he was

on probation at the time, but it does not indicate that his cell phone would contain any evidence of the shooting.

Finally, defendant's uncooperativeness and suspicious account of the shooting might indicate that he was not telling the truth about the incident, but it does not indicate that his cell phone would contain answers to police questions. The belief that defendant's cell phone contained evidence of the shooting was mere speculation. It certainly did not rise to the level of more likely than not.

Because police lacked probable cause to believe that defendant's cell phone contained evidence of the shooting, the state cannot justify its warrantless seizure based on the exigency that evidence of the shooting probably would be destroyed if police did not seize the phone.

B. Exigent circumstances did not justify the seizure of defendant's cell phone for evidence of identity theft.

The trial court concluded that even if the police did not have probable cause to believe that defendant's cell phone contained evidence of the shooting, it likely contained evidence of defendant's correct identity. However, that fact does not give rise to *exigent circumstances* to seize defendant's cell phone.

The exigent circumstances exception to the warrant requirement involves "a situation that requires the police to act swiftly to prevent * * * the destruction of evidence." *Stevens*, 311 Or at 126. However, it is a narrow doctrine involving an "emergency" situation. *Bridewell*, 306 Or at 236;

Fessenden/Dicke, 355 Or at 774. The "mere possibility" that evidence might be destroyed does not give "rise to exigent circumstances." *Peller*, 287 Or at 264. And the existence of an exigency must "be assessed in light of the reasonableness of the search in time, scope, and intensity." *Mazzola*, 356 Or at 820. The "touchstone" under Article I, section 9, is "reasonableness." *Ritz*, 361 Or at 789.

The state's justification for seizing defendant's cell phone is that it likely contained evidence of defendant's true identity. Tr 106-07, 127-28. However, police already knew defendant's correct identity and had ample evidence of it. The officers knew defendant personally, he had distinctive tattoos that were identified as belonging to him in the Portland Police Data System, and his fingerprints and DNA were in state possession because he is a convicted felon.

Under those circumstances, any evidence of defendant's true identity that might be in his cell phone (if the cell phone even belonged to defendant or contained his correct identifying information) was not necessary to a prosecution for identity theft, and obtaining that information did not present an "emergency" situation. This case contrasts with *Mazzola*, in which this court relied on the fact that the field sobriety tests yielded evidence of the defendant's intoxication near the time of driving—an element of the crime for which police had probable cause—as an important factor in satisfying the exigency requirement. *Mazzola*, 356 Or at 820.

The level of intrusion is also a relevant factor when assessing exigency. The *Mazzola* court focused on the fact that the field sobriety tests involved "limited testing" that "did not intrude into defendant's body" on "a person who already had been validly stopped and also was subject to arrest for DUII." 356 Or at 820. Thus, they constituted a limited intrusion into the defendant's constitutional rights. Here, the ultimate goal in seizing defendant's cell phone purportedly was to search it for evidence of defendant's true identity. But many courts have found, and this court agrees, that because of the extensive amount of personal information contained on a cell phone, the search of a cell phone is akin to the search of a person's home. *Riley v. California*, __ US __, 134 S Ct 2473, 2491, 189 L Ed 2d 430 (2014). To invade a person's privacy to that extent to obtain information that police already have is not constitutionally "reasonable."

Notably, it is questionable whether a neutral magistrate would issue a warrant for the search of a cell phone for evidence of a person's identity when police already have that information. Under the trial court's reasoning, any arrest for identity theft would justify issuing a warrant to search a person's home, his mail, his health and financial records, and any other aspect of his life for evidence of the person's "true identity." And given that the defendant's identity is a necessary element of any offense, the logical consequence of the state's argument would allow for almost limitless invasions of privacy.

If it is not constitutionally reasonable to issue a warrant when exigency is *not* a requirement, then when the state is required to prove that the need to preserve the sought-after evidence constitutes an emergency, such an intrusive search for duplicative information cannot be justified. *Compare Miller*, 300 Or at 229 ("When the premises is a dwelling, the state must make a strong showing that exceptional emergency circumstances truly existed.").

Another reason that the state has failed to prove an exigency is that it presented no specific and particularized facts to support the belief that defendant was likely to destroy any potential evidence on his cell phone. Such a belief was mere speculation. That is particularly true when the "evidence" police were concerned about being destroyed was evidence of defendant's true identity, which police already knew. When police know someone's identity from familiarity, verifiable physical traits, and official records, it is a non sequitur to conclude that that person has any motivation to destroy verifying information contained on their cell phone. No one would destroy a cell phone or alter its contents to conceal such evidence. *See Peller*, 287 Or at 264 (concluding that exigent circumstances did not justify entry into the defendant's home to prevent his escape when police had no indication that he would attempt to "make a break). Officer Robertson testified that "it was important for us to have that evidence secured and away from him so it wasn't potentially changed, deleted, or destroyed." Tr 116. But "mere possibility" does not give rise to

exigent circumstances. *Peller*, 287 Or at 264. Because the "potential" for evidence tampering does not constitute exigent circumstances, the state failed to prove that the seizure of the phone was constitutionally justified.

III. The continued warrantless seizure of defendant's cell phone for five days before obtaining a warrant was not justified under the exigent circumstances exception to the warrant requirement.

Even if police were justified in temporarily seizing defendant's phone to prevent the destruction of evidence while they sought a search warrant, they were not justified in seizing it for five days while they gathered additional evidence to support the search warrant. They could only seize it for the length of time that it took to get a warrant, in this case six to 10 hours (for a telephonic warrant). Tr 113-14. That is because "exceptions to the warrant requirement may not be used in ways that reach beyond the purposes of the particular exception." *State v. Fulmer*, 366 Or 224, 233, 460 P3d 486 (2020); *cf*. *State v. Watson*, 353 Or 768, 780-81, 305 P3d 94 (2013) (stating that the scope of a warrantless search is "limited to its constitutionally permitted purpose and must be reasonably necessary to effectuate that purpose").

A seizure under the exigent circumstances exception is justified because police would not have time to obtain a warrant before the evidence was destroyed. The warrantless seizure buys the police the necessary time to obtain the requisite warrant. Once that time has expired, the emergency has "dissipated." *Davis*, 295 Or at 240 (holding that any emergency "dissipated"

when the potential victim walked out of the door of the motel room unharmed); *State v. Quinn*, 290 Or 383, 392, 623 P2d 630 (1981), *overruled on other grounds by State v. Hall*, 339 Or 7, 115 P3d 908 (2005) (holding that the 22-hour delay between seizing automobile based on exigent circumstances and searching the car rendered the intrusion unlawful, because "[e]xigent circumstances do not last forever").

The continued seizure of defendant's phone invaded defendant's possessory rights. Oregon courts have recognized the significant intrusion into a person's privacy rights of searching a cell phone. *Pittman*, 367 Or at 528; *Mansor*, 363 Or at 201-02. The officer in this case respected defendant's privacy rights by merely seizing the phone with plans to later obtain a warrant. However, the officer ignored defendant's *possessory* rights by holding the phone for five days without a warrant. Defendant was deprived of the use of his phone for those five days. Not only is a modern cell phone an extensive receptacle for large amounts of private information, it is also an important tool that most people use on a daily basis. It is our contact with the rest of the world. It allows us to get in touch with family, friends, and business associates. It provides access to the internet. It is a source of entertainment. It keeps track of important dates, grocery lists, and other daily reminders. Being without that critical possession was a significant intrusion into defendant's possessory rights that the state failed to justify.

The trial court justified the continuing five-day warrantless seizure of defendant's phone on the ground that "it's an active, ongoing investigation." Tr 137. That could mean either of two things: (1) police did not have enough information to establish probable cause at the time of the seizure and were attempting to gather more, or (2) they were engaged in other activities. Neither theory is justified.

Police were required to have probable cause to seize the phone at the time of the seizure. The probable cause required to seize is the same probable cause that is required to obtain a warrant. If additional information was needed to establish the probable cause to obtain a search warrant, then the initial search or seizure was unjustified.

If the initial seizure was justified by probable cause, police were required to act on it expeditiously to obtain a warrant, rather than continuing to invade defendant's possessory rights under the exigent circumstances exception. *Quinn*, 290 Or at 392. As this court has explained, the passage of time is a strong indication that exigent circumstances do not (or no longer) exist. *See Bridewell*, 306 Or at 236 (holding that "the passage of the intervening hours [between the nighttime report and the police investigation the following morning] significantly dissipated any possible exigency"); *State v. Matsen/Wilson*, 287 Or 581, 587, 601 P2d 784 (1979) (finding no exigent circumstances when police gathered information regarding a drug house for two

weeks, but desired to catch the defendant in the act of delivery, so did not seek a warrant, instead making a warrantless entry shortly after the defendant arrived); *State v. Fondren*, 285 Or 361, 366-67, 591 P2d 1374, *cert den*, 444 US 834 (1979), *overruled on other grounds by State v. Brown*, 301 Or 268, 721 P2d 1357 (1986) (holding that exigent circumstances did not exist when an officer waited four hours after establishing probable cause to seize a parked automobile, the maximum time for obtaining a warrant was four hours, and the officer was not concerned that someone else would gain access to the car in the intervening time). Police may not delay a search for their own convenience. *Quinn*, 290 Or at 392 (holding that delayed search "for the convenience of the police and the owner of the stolen property" under the exigent circumstances doctrine was invalid).

Even if additional information would have strengthened the search warrant affidavit, police were not justified in depriving defendant of his possessory interest in his cell phone during that time without a warrant. Once the exigency had expired, police needed a warrant to retain possession of defendant's cell phone. Because they failed to obtain that warrant for five days, defendant's constitutional possessory rights were violated, and the resulting evidence must be suppressed.

IV. Police exploited the unlawful seizure of defendant's cell phone to obtain his statements during the second interrogation.

The state may not use unlawfully obtained evidence to convict a defendant. *State v. Hall*, 339 Or 7, 24, 115 P3d 908 (2005) ("the right to be free from unreasonable searches and seizures under Article I, section 9, also encompasses the right to be free from the use of evidence obtained in violation of that state constitutional provision"). The state generally bears the burden to prove that any evidence used was not derived from a prior illegality. *Id.* at 25 (holding that state has burden to prove inevitable discovery, independent source, and attenuation).

A. The state failed to prove that it would have been able to search the cell phone pursuant to the warrant even if the phone had not been illegally seized.

Police unlawfully seized defendant's cell phone. However, the state ultimately searched that cell phone pursuant to a warrant. Consequently, the exploitation analysis is governed by this court's decisions in *State v. Johnson*, 335 Or 511, 73 P3d 282 (2003), and *State v. DeJong*, 368 Or 640, 497 P3d 710 (2021).

In *Johnson*, police unlawfully seized the defendant's clothing and boots without a warrant and placed them in an evidence locker. *Id*. at 514. When the trial court ruled that the seizure was illegal, the state secured a warrant to seize the items. *Id*. at 515. In determining whether the state satisfied its burden to prove an independent source for the second seizure, this court established a

burden-shifting framework that applies when a warranted search is preceded by an illegality. It held that

> "the defendant has the initial burden to establish a minimal factual nexus between the illegality and the challenged evidence. If the defendant does so, the burden shifts to the state to establish that the challenged evidence was untainted by the illegality."

DeJong, 368 Or at 642 (citing *Johnson*, 335 Or at 520-21). The *Johnson* court found that the defendant satisfied the minimal factual nexus because "the police used information derived from that earlier unlawful seizure, *viz.*, the fact that the clothes could be found in a police evidence locker, when they later applied for a search warrant." *Johnson*, 335 Or at 521. It then deferred to the trial court's determination that the state failed to prove that the warranted seizure was wholly independent of the initial illegal seizure. *Id*. at 521-26.

In *DeJong*, police seized the defendant's residence without a warrant or exigent circumstances, located a witness in the basement and obtained her statements, then used those statements in obtaining a warrant. 368 Or at 643-44. This court adhered to the *Johnson* burden-shifting framework while clarifying that the "[d]efendant's burden of establishing a factual nexus is *minimal* and intended merely to rebut the presumption of regularity attendant to warranted searches." *Id*. at 654-55 (emphasis added). It held that the minimal factual nexus was established because the detective used the witness's statements obtained during the unlawful seizure to obtain the warrant. *Id*. at

655. The fact that the warrant established probable cause without those statements did not matter. *Id*. It then concluded that the record did not contain legally sufficient evidence to prove that the state would have inevitably discovered the evidence. *Id*. at 659.

In this case, defendant easily satisfied his burden to establish a minimal factual nexus between the illegal seizure of his cell phone and the information obtained from the phone pursuant to the warrant. As in both *Johnson* and *DeJong*, the warrant in this case relied on information obtained from the prior illegality. The search warrant affidavit alleged that it had probable cause to search, among other things, "a gray in color AT&T HTC cell phone, #971-221-0765, which belongs to [defendant], *currently being held in the Gresham Police Evidence Division*." Search warrant at ER 17 (emphasis added).

And the state has made no effort to prove that the information obtained pursuant to the search warrant stemmed from an independent source, would have been inevitably discovered, or was attenuated from the illegal seizure. If Officer Robertson had not seized defendant's cell phone at the hospital, no one knows whether police would have been able to seize it later or whether it would have contained the same evidence. *Hall*, 339 Or at 25.

B. Police used information from the cell phone during the second interrogation of defendant.

Neither is there any dispute that police used information derived from the unlawful seizure—and subsequent tainted search—of defendant's cell phone during the second interrogation of defendant at the police department. Part way through the interrogation, Officer Robertson invoked the cell phone information to challenge defendant's statements:

> "OFFICER ROBERTSON: And then the search warrant also included a search of your cell phone, the AT&T HTC cell phone 971-221-0765. That's your cell phone, right?
>
> "[DEFENDANT]: (No audible response)
>
> "OFFICER ROBERTSON: The one that you had with you that day at the hospital?
>
> "[DEFENDANT]: (No audible response)
>
> "OFFICER ROBERTSON: Okay. And then we've got DNA standards from you. This is just a copy of the search warrant and the paperwork there. It's just not. This is your phone log from your phone, okay? So we would download a phone and analyze those. There are five calls, one, two, three, four, five. This is Pree's number, okay? This call happens at 11:05 p.m. the night of the shooting, okay? You told me that you've never talked to him on the phone or anything like that before, so I wonder why he has your phone number in the first place. But then also the time frame, this happens right after the shooting, so he was even calling you when you were at the hospital. Because you got to the hospital about, what, like 11:30, I think?"

Tr 283-84 at ER 48-49; Ex 20.

Because Robertson used that information to put pressure on defendant to change his story, all of defendant's subsequent statements from the interview

are tainted as derivative evidence of the unlawful seizure of the cell phone. Tr 283-93 at ER 48-58; *cf. State v. Nichols*, 361 Or 101, 114, 390 P3d 1001 (2017) ("trial court did not err in granting defendant's motion to suppress all the interview statements that he made following his invocation [of his right against compelled self-incrimination]").

V. The erroneous admission of defendant's tainted statements likely affected the verdict.

An appellate court may affirm despite trial court error only if it determines that there is "little likelihood that the error affected the verdict." *State v. Hansen*, 304 Or 169, 180, 743 P2d 157 (1987); Or Const, Art VII (Amended), § 3.

In *State v. Davis*, 336 Or 19, 77 P3d 1111 (2003), this court explained that in an Oregon constitutional harmless error analysis, "[t]he correct focus of the inquiry regarding affirmance despite error is on the possible influence of the error on the verdict rendered, not whether this court, sitting as a fact-finder, would regard the evidence of guilt as substantial and compelling." *Id*. at 32. It discussed several factors to consider: (1) the relationship between the error and the jury's determination of its verdict, (2) how important the error was to a contested issue in the case, and (3) whether the excluded (or erroneously admitted) evidence was of the same quality as other evidence in the case. *Id*. at 32-35.

From the beginning, defendant has challenged all derivative evidence resulting from the unlawful seizure of his cell phone. As explained in the preceding section, that includes his statements during the second police interrogation that occurred after police invoked the information they obtained from the cell phone. A redacted video of that interrogation was played for the jury.

During that video, after the point at which police invoked the cell phone information, defendant makes incriminating statements. The police repeatedly attempt to ascertain the source of the knife that cut the victim. Defendant denies having the knife and states that he does not know whether Pree had the knife, a statement that Robertson challenges:

> "OFFICER ROBERTSON: But before you told me that he [Pree] had a knife and he held it to * * * Norton's neck, and now you're saying that you don't know what he had.
>
> "[DEFENDANT]: No, I said that (inaudible) I didn't know if he had it on him or not."

Tr 286 at ER 51. The jury could infer from defendant's conflicting statements that he was lying about not having the knife himself. It could also infer that if Pree did not have the knife, which defendant now seems unwilling to positively assert (instead claiming that he does not know), then defendant must have had it. According to defendant, he and Pree were the only people present besides the victim. Tr 286 at ER 51.

Thus, not only could the jury infer from defendant's interview statements that he was lying so could not be trusted, it could also infer that he was the one who attacked the victim with the knife. That inference is stronger in light of defendant's other statements.

At an earlier point, defendant says that he does not know whether he wanted to kill the victim:

> "OFFICER ROBERTSON: Okay. So you're saying you didn't want to kill him?
>
> "[DEFENDANT]: I don't know."

Tr 285 at ER 50. Of course, arguably that fragment is taken out of context, as defendant was merely trying to avoid the officer's questions, but a jury could take that statement as an admission of guilt.

Both of those negative inferences are reinforced by later statements when defendant makes it very clear that he does not want the victim to get in trouble for shooting him:

> "[DEFENDANT]: I don't want to -- I don't want this dude to get in trouble for shooting me (inaudible).
>
> "OFFICER ROBERTSON: Why would you not want him to get in trouble for shooting you?
>
> "[DEFENDANT]: Because he didn't know any better, bro. He was just shooting at somebody --"

Tr 288 at ER 54; *see also* Tr 289 at ER 55 ("I don't want the dude to get in trouble for shooting at us[.]"); Tr 291 at ER 57 ("I don't want this dude to get in

trouble, you know what I'm saying?"). From that, the jury could infer that defendant believed that the victim was acting in self-defense, which indicates that defendant had in fact attacked the victim with the knife.

All of those statements, taken together, show defendant's reluctance to pin the responsibility for the incident on others, increasing the likelihood that he was the person who held the knife to the victim's throat and was thus guilty of robbery and assault. No one disputed the fact that a robbery was attempted and that the victim was attacked with a knife. The only issue was the identity of the perpetrator. Thus, the challenged evidence went to the heart of the case.

Furthermore, because defendant did not testify at trial, his interview statements were the jury's only opportunity to assess his credibility and the only evidence of defendant's version of events. Given that defendant himself was unwilling to accuse the other participants of wrongdoing, the most likely inference the jury would draw from that is that he was the guilty party. Under those conditions, this court cannot say that the challenged evidence had little likelihood of affecting the verdict.

VI. The Court of Appeals erred in not considering defendant's harm arguments in the reply brief.

In its opinion, the Court of Appeals refused to consider the three statements defendant identified in his reply brief in its harmless error analysis:

> "Finally, in his reply brief, defendant identifies three additional interview statements that he claims should have been

> suppressed and may have influenced the verdict. ORAP 5.45(4)(a)(iii) expressly provides that, '[i]f an assignment of error challenges an evidentiary ruling, the assignment of error must quote or summarize the evidence that appellant believes was erroneously admitted or excluded.' Also, '[w]e will not consider a ground for reversal that is raised on appeal for the first time in a reply brief.' We therefore reject defendant's argument as to those statements, which cannot fairly be characterized as "merely *** a factual clarification" to the argument in his opening brief."

Thompson, 308 Or App at 737 (citations omitted). The problem with the majority's analysis, as explained in the petition for reconsideration, is that it confuses the assignment of error and preservation requirements with the harmful error analysis. Pet Recons 5-6.

A. Defendant adequately identified, both in the trial court and on appeal, the evidence that he was challenging.

Assignments of error are required in all appellant's opening briefs. ORAP 5.45(1). An assignment of error "identif[ies] precisely the legal, procedural, factual, or other *ruling* that is being challenged." ORAP 5.45(3) (emphasis added). Thus, when the assignment of error is the denial of a motion to suppress (a legal ruling), it is the motion to suppress that identifies the evidence that the defendant was seeking to suppress. And because motions to suppress are usually litigated before trial, it is not always clear what role the evidence sought to be suppressed will play in the ensuing trial. Thus, motions to suppress generally identify a broad category of evidence that was illegally obtained by the state, *e.g.*, the contents of a house that was searched pursuant to a bad warrant. If the warrant was illegal, the defendant is entitled to the

suppression of all evidence seized, whether or not the state intends to use it at trial. The defendant is also entitled to suppression of all derivative evidence from the illegal search, such as any statements he made when confronted with the evidence. *State v. Ayles*, 348 Or 622, 638-39, 237 P3d 805 (2010) (suppressing defendant's statements in response to officer's questions during illegal seizure).

The Court of Appeals relies on ORAP 5.45(4)(a)(iii), which requires that assignments of error challenging an evidentiary ruling "must quote or summarize the evidence that appellant believes was erroneously admitted or excluded" in the "preservation of error" section. That rule is directed at evidentiary rulings under the evidence code, which often come up during trial and are directed at specific pieces of evidence sought to be admitted. It is less appropriate for pretrial motions to suppress under the constitution, which often seek to suppress broad categories of illegally obtained evidence prior to trial. Thus, a motion to suppress need not list every item seized during the search of a house or vehicle, and it would not be appropriate to list them all in an appellant's brief. To the extent that ORAP 5.45(4)(a)(iii) does apply to assignments of error challenging the denial of a motion to suppress, the statement in the motion of the evidence sought to be suppressed sufficiently identifies the challenged evidence for purposes of appeal. *Compare* ORAP 5.50(f) (requiring in conditional plea cases under ORS 135.335(3) that the

defendant include in the excerpt of record the writing in which the defendant reserved for review on appeal the trial court's adverse determination of a pretrial motion). As long as the challenged evidence is identified in the trial court and the preservation section of the appellant's brief directs the court to where that identification occurred, the requirements of ORAP 5.45 are satisfied.

The questions of how the challenged evidence was used at trial and whether its admission likely affected the verdict is a completely separate issue, as recognized by the trial court in this case. During argument on the motion to suppress, when the state explained that the evidence from defendant's cell phone would come in through other means, the trial court responded that that fact was irrelevant to its decision:

> "THE COURT: Well, that's not -- *that's neither here nor there to decide this constitutional issue*, right? I mean, in some ways you're saying maybe I should grant the motion because you'll get the evidence in a different way.
>
> "[PROSECUTOR]: No, I'm saying maybe it's moot.
>
> "THE COURT: Well, do you want to not introduce the evidence? I mean --
>
> "[PROSECUTOR]: No, I want to introduce the evidence, but I think that that point is a factor in whether or not -- I mean -- I don't know. Why don't we rule on the motion and then we can look at -- because I think the evidence is going to come in elsewhere as well."

Tr 128-29 at ER 38-39 (emphasis added).

Harmless error is a constitutional doctrine. Article VII (Amended), section 3, of the Oregon Constitution provides in relevant part, "If the supreme court shall be of opinion, after consideration of all the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed, notwithstanding any error committed during the trial[.]" Or Const, Art VII (Amended), § 3. That doctrine is applied at the end of the appellate process, after the court has determined whether an error occurred. It is assessed in light of the error. *Davis*, 336 Or at 32-35. Thus, the court considers the erroneously admitted evidence in its entirety and decides whether its admission likely affected the verdict.

The fact that an appellant focuses on certain portions of the erroneously admitted evidence to prove harm does not retroactively define or alter the evidence that he sought to suppress at trial. It is true that an appellant must properly segregate admissible and inadmissible evidence when objecting to it at trial to satisfy preservation requirements. *State v. Jones*, 339 Or 438, 441, 121 P3d 657 (2005) (stating that appellant must segregate evidence in trial court to preserve for appeal issue that some challenged evidence is admissible); *State v. Carlson*, 311 Or 201, 219, 808 P2d 1002 (1991) (holding that an objection to evidence as a whole is insufficient as a basis for reversal on appeal when any part of the evidence objected to is admissible); *Sproul v. Fossi*, 274 Or 749,

755, 548 P2d 970 (1976) ("It is well established that when evidence is offered as a whole and an objection is made to the evidence as a whole and is overruled, the trial court will ordinarily not be reversed on appeal if any portion of the offered evidence was properly admissible, despite the fact that other portions would not have been admissible had proper objections been made to such portions of the offered evidence."). However, that doctrine does not operate in reverse. Once the issue of which evidence is being challenged is properly preserved in the trial court, the fact that an appellate choses to highlight certain evidence in the harm analysis in no way jeopardizes the appeal.

Here, as demonstrated in the Motion to Suppress section of the Summary of Facts, *supra* II. C., at trial defendant sought suppression of "the seizure of defendant's cell phone, as well as all derivative evidence." He later alerted the trial court to the fact that the derivative evidence included his statements during the second interrogation at the police department. That adequately preserved the evidence that defendant was challenging in the trial court.

And when defendant assigned error to the trial court's denial of the motion to suppress, he continued to challenge the admission of that same evidence on appeal. *Supra* Summary of Facts, section III, Proceedings on appeal. Furthermore, he properly identified in the preservation section the portion of the trial court record in which that challenge was preserved in the lower court.

When defendant later highlighted specific statements he made during the interrogation as being particularly harmful, he did not in any way alter which evidence he was challenging on appeal.

B. The purpose of a reply brief is to respond to arguments in the respondent's brief.

Reply briefs are governed by ORAP 5.70. That rule states in relevant part:

> "A reply brief shall be confined to matters raised in the respondent's answering brief or the answering brief of a cross respondent; reply briefs that merely restate arguments made in the opening brief are discouraged."

ORAP 5.70 (1)(b). The purpose of a reply brief is to respond to the arguments made in the answering brief. The rule limits a reply brief to those "matters."

However, a reply brief should not "merely restate arguments made in the opening brief"—that is "discouraged." Thus, an appellant is *expected* to come up with *new* arguments in a reply brief.

In this case, defendant argued in the opening brief that the erroneously admitted statements from defendant's second interview were harmful. He complained that the "interview was a significant part of the state's case" and mentioned two statements that were harmful. App Br 24-25. The state, in its answering brief, argued that the Court of Appeals should affirm because defendant had failed to meet his burden to prove harm. Resp Br 10-12. It stated, "Defendant makes no effort to describe the evidence from his cell phone

that the jury received, or to explain how—in light of other evidence introduced—evidence from the phone might have prejudiced him sufficiently to warrant reversal." Resp Br 11. In response to that argument, defendant identified three more statements in the reply brief that he contended were particularly harmful. Those are the three statements discussed in defendant's harm section in this brief and the three statements that the Court of Appeals refused to consider.

Defendant did exactly what he was supposed to do in a reply brief—respond to a matter brought up by the state by making new arguments not already put forth in the opening brief. Defendant simply identified additional statements that he believed were harmful that were taken from the entire body of evidence that defendant sought to have suppressed. If defendant had identified the same statements in the reply brief that he had identified in the opening brief as being harmful, he would have been "merely restat[ing] arguments made in the opening brief."

Because the harm argument in defendant's reply brief was proper under the rules of appellate procedure, the Court of Appeals should have considered it.

CONCLUSION

For the foregoing reasons, defendant respectfully prays that this court reverse the decision of the Court of Appeals, reverse defendant's convictions, and remand for further proceedings.

Respectfully submitted,

ERNEST G. LANNET
CHIEF DEFENDER
CRIMINAL APPELLATE SECTION
OFFICE OF PUBLIC DEFENSE SERVICES

Signed
By Anne Fujita Munsey at 3:48 pm, Dec 09, 2021

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Attorneys for Defendant-Appellant
Darius Leshawn Thompson

EXCERPT OF RECORD INDEX

#1

GRESHAM POLICE DEPARTMENT
Search Warrant Checklist

INSTRUCTIONS: Check the boxes (x) as you proceed through the following requirements.

1. ( ) 11-24-2014 (Warrant Number) 11-24-14 (Date Issued) 11-26-14 (Date Served) _____ (Date Returned)

2. ( ) Place/person/item to be searched:
2700 W. Powell #0226, Gresham / Merc. Sable OR-844ETK / Cell Phones per S.W. order / DNA

3. (X) There is probably cause to believe the item(s) listed in the warrant are at the location or on the person described and/or named in the warrant.

4. ( ) The informant has not provided criminal information to a police agency in the past. However, the information he/she provided has been verified by:

5. ( ) The informant has a documented record with the Gresham Police Department or other police agencies which establishes him/her as being reliable. This information is verified and documented in the affidavit.

6. ( ) The informant's information source has been documented in the affidavit.

7. (X) ***The Planned Operations Risk Assessment has been completed and reviewed by supervisor.***

8. (X) The above requirements were discussed, evaluated and complied with. We recommend that a warrant be issued. Date: 11-24-14 Time: 1300

Brad Robertson 50042 _____
Signature of Officer / Detective — Signature and rank of supervisor

9. (X) A police supervisor was not available. The information, affidavit and warrant were presented directly to the DDA below.

10. (X) A Deputy District Attorney has reviewed the facts as presented, the affidavit and the warrant, (X) in person, ( ) by phone, ( ) by Fax and recommends that a warrant be issued.

_____ 11/24/14 1:10 p.m.
Signature or name of DDA Brenda Allen — Date — Time

11. (X) This affidavit and warrant have not been presented to another Magistrate (X) 50042

12. (X) The affidavit and warrant were presented to the Magistrate named below.

_____ 11/24/14 2:20 p.m.
Signature of Magistrate — Date — Time

13. (X) A copy of the search warrant and the original affidavit will be left with the issuing Magistrate.

14. (X) Retain the original of this form for inclusion into case # 14-712749.

East Metro Gang Enforcement Team, #14-711717

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR MULTNOMAH COUNTY

SEARCH WARRANT

IN THE NAME OF THE STATE OF OREGON TO ANY POLICE OFFICER:

YOU ARE HEREBY COMMANDED TO SEIZE, SEARCH, AND ANALYZE:

1. The apartment at 2700 West Powell Blvd. #D226, in the City of Gresham, Multnomah County for:

   items of identification for Marcus Tyler (original name/identity used by Darius Thompson at MHMC); items of identification of Michael Norton; Social Security Card of Michael Norton; California Identification of Michael Norton; items of identification of Bradley Graham; debit card of Bradley Graham; Melissa Warkentin's black and white Samsung Galaxy S4 cell phone, valued at $200.00, phone #971-300-5978; items of identification of Darius Thompson; knives and bladed weapons; clothing with blood, gun powder residue, or trace evidence; items taken from Michael Norton including an in-dash car stereo Milion Brand, an amplifier black in color, and a fifteen inch Kicker brand speaker; and wallets.

2. A 1999 Mercury Sable, black in color, Oregon license 844ETU, and VIN 1MEFM502XA620320, which is currently being held in Gresham Police Department's Evidence Division and to seize view, examine, analyze, test and photograph those items for evidence not limited to fingerprints, DNA, blood evidence, gun powder residue, other trace evidence, cell phones, identification cards, ammunition, ammunition casings, spent bullets, firearms, knives, and bladed weapons relevant to this investigation.

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR MULTNOMAH COUNTY

STATE OF OREGON	AFFIDAVIT FOR
	SEARCH WARRANT
COUNTY OF MULTNOMAH	

1.

Authority

I, Bradley S. Robertson, being duly sworn, do depose and say that I am currently and have been a sworn law enforcement officer for over the past nine (9) years. I am currently a police officer for the Fairview Police Department in Multnomah County and have been so since September of 2008. Prior to the Fairview Police Department, I was a sworn deputy sheriff and deputy coroner for the Cascade County Sheriff's Office in the State of Montana from March 2004 through August 2008.

As a police officer in Oregon, I hold Basic, Intermediate, and Advanced Police Officer Certifications – accredited by the Oregon Department of Public Safety Standards & Training (DPSST). Throughout my law enforcement career I have worked as a deputy sheriff, deputy coroner, patrol officer, SWAT operator, evidence technician, detective, and gang enforcement officer. I have attended hundreds of hours of police training, most of which is recognized by Oregon DPSST.

I am currently assigned as a gang enforcement officer to the East Metro Gang Enforcement Team, or EMGET. EMGET is a multi-agency team combining law enforcement officers from Fairview Police, Gresham Police, Troutdale Police and the Multnomah County Sheriff's Office- all agencies in Multnomah County. EMGET specifically focuses on investigating gang related

crimes, gang outreach, gang intelligence gathering, gang surveillance, gang intervention, and public awareness of gangs. EMGET performs frequent public presentations on gang awareness to various schools, social groups, and government organizations. EMGET additionally attends monthly meetings for gang investigations and human trafficking intelligence with the Portland Police Bureau, Oregon State Police, and Federal Bureau of Investigation.

Prior to my employment as a sworn law enforcement officer, I was an enlisted soldier in the US Army and trained and worked in military intelligence as an Arabic translator. I hold Bachelors of Arts degrees from the University of Montana in Economics and the Spanish Language.

During my employment as a sworn law enforcement officer, I have investigated hundreds of criminal incidents and made subsequent arrests. Those criminal incidents include, but are not limited to: assaults, thefts, computer crimes, robberies, burglaries, forgeries, identity thefts, weapons offenses, narcotics offenses, prostitution offenses, sex offenses, and homicides.

2.
Case Summary

On 18 November 2014 at approximately 2303 hours, Sgt. David Schmidt told me a male entered the Mount Hood Medical Center (MHMC) Emergency Room with a gun shot wound to the leg. MHMC Staff contacted police to investigate the situation. MHMC initially reported the victim to be identified as Marcus Tyler (DOB: 03/05/1984). Gresham Police Officer Harris-Meyers (DPSST #52706) responded and was the first police officer on scene at MHMC. I watched GPD Officer Harris-Meyers contact the wounded individual and again this person identified himself at Marcus Tyler, and even displayed an Oregon Identification card of Marcus Tyler with the identification #9695199. GPD Officer Friderich (DPSST #38601) also responded to MHMC and I heard her positively identify the gun-shot victim, not as Marcus Tyler, but as Darius Thompson (DOB: 11/21/1989). GPD Officer Friderich told me she knows Darius Thompson from several previous police incidents in the late summer and early fall of this year (2014). She recognized his tattoos on his neck (a black hand) and additional tattoos on his arms. Furthermore, these

tattoos are also described with the identifiers of Darius Thompson in the Portland Police Data System.

Officer Friderich also told me she found through a police records check that Darius Thompson was a convicted felon and on felony probation in Multnomah County for possession of methamphetamine.

I was called at home off-duty to respond to assist with this investigation. I responded and first met with EMGET Officer Brooder (DPSST #49900) at the EMGET Rockwood Office. Together, we went to MHMC to investigate and interview the gun-shot victim, Darius Thompson.

When I arrived at MHMC, Officer Harris-Meyers showed me the Oregon Identification card of Marcus Tyler, used by Darius Thompson to falsely identify himself to MHMC staff and initially to police. Officer Harris-Meyers indicated that the gun shot injury was likely a small caliber hand gun. I looked at photos taken of the wound and it appeared to be a small hole entering into the outer left mid-thigh. The hole was smaller than the circumference of a dime.

I contacted Darius Thompson for an interview in MHMC ER Room #2 with Officer Brooder and Officer Harris-Meyers present. I began an audio recording for the interview, and I told Darius Thompson he was being audio recorded. He indicated he understood. I read Darius Thompson a Miranda Rights Advisory from a card, and after each advisory statement I asked him if he understood, and he answered affirmatively, stating "Yes" or "Yeah". I asked him if he saw the card from which I read his rights, and he answered "Yeah".

I asked Darius Thompson if he understood that by using someone else's identification card to falsely identify himself to MHMC staff that he was committing the crime of identity theft. He admitted that he did know this was a crime and he stated "I just hate hospitals".

I asked Darius Thompson if he could tell me what happened earlier this evening when he was shot. He said he was at Shari's restaurant near 182nd and Powell in Gresham playing video poker and left to walk to his sister's apartment at 2700 West Powell Blvd. (a distance of less than one mile). He said that two cars drove past him at about fifteen miles an hour near 190th and West Powell in Gresham (approximately half of one mile from 2700 West Powell Blvd.), and that he heard two gun shots, which he believed came from one or both of the cars. After the gun shots he said he then ran to his sister's apartment at 2700 West Powell Blvd. He said once at his sister's apartment, he realized he was shot. The distance he described that he ran is approximately half of one mile. I asked him if he had his cell phone with him, and he indicated he did. I asked him if he called the police and he indicated that he did not.

Darius Thompson said his sister drove him to MHMC. His sister was later identified as Stephanie Thompson (DOB: 07/06/1992). Darius Thompson said his girlfriend, later identified as Marlo Roberts, was also at his sister's apartment when he arrived after being shot and went with him to MHMC. Darius Thompson indicated he has been staying with his sister, Stephanie Thompson, often, but does not have a current address.

I attempted to ask clarifying questions about his experience, and Darius Thompson was vague and uncooperative. He told me he would be unable to identify who shot him. He indicated he did not want to know who shot him.

EMGET Officer Brooder interviewed Darius Thompson's sister (Stephanie Thompson), while she was in the waiting area of the MHMC ER. Stephanie Thompson told Officer Brooder that when her brother, Darius Thompson, arrived at her apartment at 2700 West Powell Blvd., Apartment #D226, in Gresham, she discovered that he had been shot in the leg. Stephanie Thompson added that Darius Thompson made mention of "some white guy" being present during the course of him being shot. She indicated she drove him to MHMC with Marlo Roberts.

EMGET Officer Brooder also interviewed Marlo Roberts in a separate waiting room at MHMC away from Stephanie Thompson and Darius Thompson. Marlo Roberts told Officer Brooder that Darius Thompson walked from the apartment at 2700 West Powell, #D226, to go to the store, and he arrived back at the apartment about 20 minutes later, and had been shot in the leg. She said she did not know anything more.

The statements between Darius Thompson, Stephanie Thompson, and Marlo Roberts were inconsistent. Evidence was collected by Officer Harris-Meyers from Darius Thompson, and this evidence included a gray in color AT&T HTC Phone #971-221-0765. Clothing was collected as evidence, which included a baseball cap with the letters "N O" on it. I know from previous police interactions with Darius Thompson that his street name is "N.O.".

In my training and experience, it is very common for communications, including but not limited to: text messages, phone call logs, and emails; sent by both victims and suspects to contain relevant information to an investigation. For this reason, Darius Thompson's phone, a gray in color AT&T HTC Phone #971-221-0765, was seized as evidence. I believe there may be evidence specific to this investigation on this phone.

At MHMC medical staff informed me that the bullet which struck Darius Thompson was not recovered during medical treatment. Darius Thompson told me that this bullet remained in his left leg when he was discharged from the hospital on 19 November at approximately 0130 hours, and he said he received instructions to set up an appointment to have it removed at a later date.

On 20 November 2014, Oregon State Police contacted EMGET Sgt. Schmidt early in the morning at approximately 0100 hours. Oregon State Police Senior Trooper David Kammerman informed Sgt. Schmidt that OSP Troopers had just been in a pursuit with Michael Norton, and were currently interviewing his fifteen year old son, Anthony Norton. Senior Trooper Kammerman indicated that Anthony Norton was in the car from which Michael Norton ran from OSP Troopers at the end of a pursuit that started in Linn County and ended in Marion County. OSP Troopers believed Anthony Norton knew information specific to this EMGET investigation.

EMGET Officer Brooder and EMGET Sgt. Schmidt were able to interview Anthony Norton at the OSP Milwaukie Office in Oregon. Anthony Norton told Officer Brooder and Sgt. Schmidt that he was told by his father, Michael Norton, that he shot a man in self-defense in Gresham while being robbed. Anthony Norton said Michael Norton was robbed at knife point and had the knife held up to his neck. Anthony Norton said his father was selling stereo equipment in Gresham, when a black man who was initially interested in buying the stereo equipment pulled out a knife and held it to Michael Norton's neck. Anthony Norton said his father, Michael Norton, struggled with the man, and grabbed the knife, injuring his hand. Anthony Norton said at the time Michael Norton was armed with a handgun. Anthony Norton said the male with the knife was also trying to steal the hand gun. Anthony said Michael Norton removed the hand gun from his pocket, and struggled with the male over the hand gun. Anthony Norton said Michael Norton shot the gun twice, once striking the male with the knife in the leg. Anthony said Michael Norton left from the area hurriedly and when he was shifting his car into gear, fired the gun again, accidentally into the ceiling of the car.

On 20 November 2014 at approximately 1100 hours EMGET Officer Brooder learned that OSP Troopers arrested Michael Norton in Marion County for their investigation and on outstanding arrest warrants, and transported Michael Norton to the OSP Office at 3710 N Portland Ave in Salem, Oregon. EMGET Officer Brooder and I went to that office to speak with Michael Norton. Michael Norton was interviewed at approximately 1500 hours on this day.

During the interview with Michael Norton, a white male, he told me that he was in Gresham to sell stereo equipment through a friend of his, he only knew as "Pree". Michael Norton indicated that "Pree" introduced him to a black male, unknown name, at apartments on Powell Boulevard in Gresham to sell stereo equipment. He described the area in the apartment complex, which was very close to the proximity per his description to Apartment #D226, Stephanie Thompson's apartment. He said he was armed with a .25 caliber pistol in his pocket at the time. He indicated his friend, "Pree", and the unknown black male bartered with him over the stereo equipment. He said the unknown black male offered to pay him in "dope" (common street slang for

methamphetamine). Then, after bartering over the stereo, Michael Norton said both "Pree" and the unknown black male attacked him, while he was in the driver's seat of his car (1999 Mercury Sable, Oregon license 844ETU, and VIN 1MEFM502XA620320). He indicated a female, possibly black, took the stereo equipment from his vehicle, while he was being attacked. The stereo equipment included an in-dash car stereo Milion Brand, an amplifier black in color, and a fifteen inch Kicker brand speaker. He indicated "Pree" attacked him from the driver's side door, and the unknown black male sat in the passenger seat initially, but pulled out a black knife and held it to his neck forcibly during the attack. Michael Norton said he thought he was going to be stabbed in the throat, stating "I'm dead, dude". Michael Norton said he grabbed the knife with his right hand and struggled to not let it go. Michael Norton was visibly upset as he told me this. He stated several times that the knife was at his neck. Michael Norton said the unknown black male stole his wallet, containing about $60 cash, his California ID, and his Social Security Card. Michael Norton indicated he believed that the purpose of "Pree" arranging this meet to sell goods was actually so that his pistol and stereo equipment could be stolen. Michael Norton said the unknown black male attempted to also grab the gun from him, and Michael Norton said he struggled over the gun with him. He said he did pull the gun from his pocket and shot it twice to defend himself. He said he believed he shot the unknown black male in the leg one time and missed with the other shot. Next, Michael Norton indicated the unknown black male fled from his vehicle, and "Pree" attempted to re-enter. Michael Norton said he told "Pree" to leave him alone and "Pree" fled, and then Michael Norton drove away. Michael Norton said as he was putting the car in gear to leave, he fired another round into the ceiling of the car by accident.

During the interview, Officer and Brooder and I both noticed injuries to Michael Norton's right hand and arm, consistent with being cut by a knife, and slight injury to his neck, also consistent with being cut by a knife. On his right hand and arm he had lacerations. One laceration on his right hand ring finger cut a large flap of skin deeply into the pad of the tip of the finger. Another laceration was on his right forearm and about 3 inches long. There appeared to be several small cuts on his neck, just above his collar bone and against the left side of his neck.

Officer Brooder and I showed Michael Norton a series of photos pursuant to current policy for identifying suspects of crimes, in this case amongst the six photos shown was one photo of Darius Thompson. Michael Norton was read an admonition about the photo identification process. Michael Norton picked two photos from the six, and said he believed the unknown black male that attacked him with the knife was in one of the two photos, but he wasn't 100% sure which one. A photo of Darius Thompson was one of those two photos.

Based on Michael Norton's statement and the totality of the circumstances, I believe it is likely that blood evidence, latent finger print evidence, and other forensic evidence is in Michael Norton's vehicle, a 1999 Mercury Sable, Oregon license 844ETU, and VIN 1MEFM502XA620320.

OSP Troopers retrieved items in the course of their investigation when they took Michael Norton into custody, including a Phoenix Arms Raven model .25 caliber pistol, serial #3055302, with two magazines and a cell phone, packaged by OSP and labeled with the number SP14365698. The .25 caliber pistol and magazines and cell phone were turned over to EMGET Officer Brooder and the Gresham Police Department for evidence for this case. Officer Brooder submitted these items into the Gresham Police Evidence Division on 20 November 2014.

Significant to this case, on the evening of 18 November 2014, the Bureau of Emergency Communications (BOEC) dispatch center received no other reports about anyone being admitted to a Portland Metro area hospital with a gun shot wound. Darius Thompson was the only person reported to have been admitted to an emergency room with a gun shot wound in the time frame of this investigation on 18 November 2014.

Also significant to this case is that the statements given to police officers and investigators about this incident on 18 November 2014 from Darius Thompson and Michael Norton were generally consistent with the events occurring in the area around and at the apartment complex at 2700 West Powell Blvd., in the City of Gresham, even though their statements about what events actually occurred were very different.

3.

Background of other cases involving Darius Thompson

Per PPDS records GPD Officer Heer (DPSST #53816) took a robbery report from victim Bradley Graham at 2700 West Powell in Gresham by verified suspect Darius Thompson, which occurred on 27 September 2014, Gresham Police case #14-710909. In the report written by Officer Heer, it states victim Graham was punched in the jaw by a black male with lots of tattoos, whom he knew as "N.O.", and after being punched "N.O." took his wallet, cash and identification card. According to Officer Heer's report, he made contact with Stephanie Thompson at apartment #D226, and she said that her brother is Darius Thompson, also known as "N.O." and that he doesn't live there, but visits her at the apartment.

Per PPDS records, GPD Officer Van Beek (DPSST #37265) detained Darius Thompson as a verified suspect for the investigation of a robbery at knife point of a black and white Samsung Galaxy S4 cell phone, valued at $200.00, phone #971-300-5978, from victim Melissa Warkentin. This incident took place on 24 September 2014 also at 2700 West Powell, Gresham Police case #14-710774. According to Officer Van Beek's report, Melissa Warkentin said a black male known to her as "N.O." asked to borrow her phone, and when she allowed him to, he ran to apartment #D226. Warkentin stated she chased "N.O." to that apartment after he took her phone and she knocked on the door. She said "N.O." answered the door and said "bitch, I don't even know you", then he brandished a knife and said "Bitch I'm gonna stab you". Melissa Warkentin then left and contacted police. GPD Officer Van Beek responded to the apartments at 2700 West Powell in Gresham. He contacted Warkentin and took her statement. He also contacted the occupants of apartment #D226, Darius Thompson and Stephanie Thompson. Darius Thompson

and Stephanie Thompson permitted Officer Van Beek into the apartment, and there Officer Van Beek found the SIM card to Warkentin's phone, but not the phone itself, and it has yet to be recovered. As part of his investigation, he detained Darius Thompson and brought him back to the Gresham Police Department for additional interviews and investigation, but Darius Thompson was not charged this day. Darius Thompson was released.

As part of this investigation, I confirmed over the phone on 19 November 2014 with Lumina Apartment management at 2700 West Powell Blvd. that Stephanie Thompson lives in apartment #D226. Furthermore, I was informed by Lumina Apartment Management that Darius Thompson has created several complaints from other tenants on the property recently and that he currently is trespassed from the property. I confirmed this same information with Gresham Police Neighborhood Enforcement Team Officers Leake and Estes, who specifically work with apartment management throughout the City of Gresham to address trespass issues and tenant complaints.

4.

Open Source Internet Information

In my training and experience, law enforcement can often find significant investigative information using open source internet search engines to search for Facebook, Instagram, Twitter, and other social media information of suspects. In this case, I discovered a Facebook page for Darius Thompson in which he identifies himself as "N.o. Lasean Thompson". For reference, Darius Thompson's middle name is "Lasean" and he has stated to me and other police officers that his nickname is "N.O.", as indicated prior in this affidavit. The following are images of Darius Thompson from this Facebook page.

Darius Thompson images from the "N.o. Lasean Thompson" Facebook page-
https://www.facebook.com/FolkNationTBE/photos_all

Additional photos from "N.o. Lasean Thompson" Facebook page-
https://www.facebook.com/FolkNationTBE/photos_all




Comment from "N.o. Lasean Thompson" Facebook page from 2 October 2014-
https://www.facebook.com/FolkNationTBE

N.o. Lasean Thompson Say my GB'$ I'M in Portland killing these divinity...Lol... I have robbed every pussy niggardly and fake bitch out here....I'm da king of dis bitch.... I have fucked all they bitches... from baby mama to girl friends....I'm an OG at 24...LIVING DA BOSS LIFE..THESe niggas can't handle us coast boys...folk 74...GB for life ya heard me!!!

October 2 at 1[illegible] 4

I know from my training and experience on the East Metro Gang Enforcement Team that "GB's" likely means "ghetto boys", and an "OG" refers to an "Original Gangster." Last, the "folk 74" is also a gang reference to a criminal street gang known as the "Gangster Disciples."

5.

Investigator's Evidentiary Knowledge

I know from my training and personal experience, that persons who are involved in firearm related crimes and those who possess a handgun and use it for and during the commission of a crime, frequently have other items associated with the care, maintenance, storage and operations of the handgun. These items may include but are not limited to holsters, ammunition and gun cleaning supplies. I know from my training and experience that most people who have purchased or possess a handgun, will not readily discard such items of monetary value. And that person(s) who commit or are about to commit violent crimes often take and/or keep property or items as mementos or souvenirs.

I know from my training and experience, during the course of most searches pursuant to a search warrant, items of identification such as vehicle registrations, vehicle titles, driver licenses, letters, bills, checks, check stubs, receipts, left or discarded electronic devices, telephone and address books or papers which reflect names, addresses and/or telephone numbers may be found within the property being searched and will aid in the identity of those subjects involved with the items found therein.

I know from my training and experience as a police officer, that subjects who handle property often leave identifiable latent fingerprints that can be developed several months later; Latent fingerprints can be developed and compared to rolled fingerprints of suspects. I further know that trace evidence including blood, saliva and other body fluids contain "DNA" even after the fluid is in a dry state and that this DNA from trace evidence can be compared to DNA from possible suspects. I know that trace evidence of all types, but specifically DNA, can be found on surfaces including but not limited to clothing, drink containers, on persons and other items used by suspects and commonly found in vehicles and/or residences for extended periods of time up to years. I know the Oregon State Police Crime Lab can test items of physical evidence for the existence of blood, bodily fluids and trace evidence to determine its origin or donor. I know this testing can be comparison testing or identification testing to include DNA forensic testing.

6.

Investigator's Cellular (Cell) Phone Knowledge

I know from training and experience that cellular telephones, when turned on, can show the phone number for that specific phone. Information found within the phone can be used to identify the owner of the phone, cellular telephone company supplying service to that telephone, telephone numbers called from that cellular telephone and telephone numbers calling into that telephone. A search of a phone's information can also reveal information related to text messages sent by that telephone, text messages sent to that telephone, and the time and date that these communications were made.

I know from my training and experience that cellular telephones also have memory capabilities that can be accessed, revealing stored pieces of information, including but not limited to: addresses, pictures, video, telephone numbers called by the specific cellular telephone, numbers calling in to the specific cellular telephone, voicemails and histories of voicemails accessed, text messages sent from the specific cellular telephone, text messages sent to the specific cellular telephone, and the time and date the pieces of information were generated; digital or electronic files, emails, history of emails, and electronic gateways to storage devices accessed through the cell phone.

I know from my training and experience that the pieces of information stored or otherwise contained in a cellular phone can include but are not limited to information regarding the geographic location of the phone user, the times messages were sent to and from associates and possible witnesses, the names and addresses of associates, witnesses, or possible suspects, photographs of associates, witnesses or possible suspects; and messages specifically pertaining to events or circumstances surrounding a crime. I know that often times the information stored or otherwise contained on a cellular phone constitutes evidence that can be used to establish that a crime has or has not been committed, to identify witnesses and suspects, and can lead to the discovery of additional such evidence.

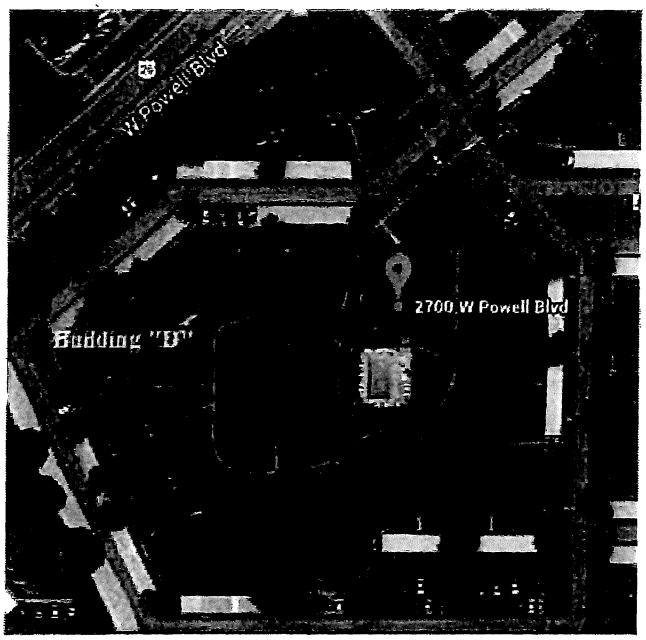
I know from my training and experience that those persons who are engaged in various types of criminal behavior, including but not limited to violent activity, gang activity and/or drug related offenses, utilize cellular phones to communicate via text message and verbal conversation to plan such activities. Cellular telephones have accessible memory storage capabilities which often store pieces of information including, but not limited to: addresses, pictures, video, telephone numbers called by the specific cellular telephone, numbers calling in to the specific cellular telephone, text messages sent from the specific cellular telephone, and text messages sent to the specific cellular telephone. I know based upon my training and experience that analysis of this cell phone will detect and reveal incoming phone calls, outgoing phone calls, incoming text messages, outgoing text messages, videos, photographs, and the date and times in which they had occurred.

7.
CONCLUSION

Based upon the above information, I have probable cause to believe that evidence of the crimes of Robbery I (ORS 164.415), Assault II (ORS 163.175), Theft II (ORS 164.045), Unlawful Use of a Weapon (ORS 166.220), and Identity Theft (ORS 165.800) will be located:

1. Inside the apartment located at 2700 West Powell Boulevard, #D226, in the City of Gresham, Multnomah County, State of Oregon. This apartment is known as the Lumina Apartment complex, and it consists of several buildings one, two and three stories, generally all beige in color with brown roofs. The apartment "D226" conspicuously marked with the letter "D" on the outside of the building, and the number "226" on the entry to the apartment. This apartment is on the second floor. A map for illustration purposes only follows next.

Map of 2700 West Powell Blvd, Lumina Apartments, City of Gresham
Building "D" labeled in yellow



2. In a gray in color AT&T HTC cell phone, #971-221-0765, which belongs to Darius Thompson, currently being held in the Gresham Police Evidence Divison

3. In a 1999 Mercury Sable, black in color, Oregon license 844ETU, and VIN 1MEFM502XA620320, which is currently being held in Gresham Police Department Evidence Division.

4. On a Phoenix Arms Raven model .25 caliber pistol, serial #3055302, currently being held at the Gresham Police Evidence Division

5. In a cell phone, packaged by OSP in a metal container and labeled with the number SP14365698, currently being held at the Gresham Police Evidence Division

6. DNA standards by oral swabs of Darius Thompson

7. DNA standards by oral swabs of Michael Norton

I, therefore, pray the above entitled court to issue a search warrant to search the aforementioned item #1, the apartment at 2700 West Powell Blvd. #D226, in the City of Gresham, Multnomah County for:

> items of identification for Marcus Tyler (original name/identity used by Darius Thompson at MHMC); items of identification of Michael Norton; Social Security Card of Michael Norton; California Identification of Michael Norton; items of identification of Bradley Graham; debit card of Bradley Graham; Melissa Warkentin's black and white Samsung Galaxy S4 cell phone, valued at $200.00, phone #971-300-5978; items of identification of Darius Thompson; knives and bladed weapons; clothing with blood, gun powder residue, or trace evidence; items taken from Michael Norton including an in-dash car stereo Milion Brand, an amplifier black in color, and a fifteen inch Kicker brand speaker; and wallets.

I, therefore, pray the above entitled court to issue a search warrant to search the aforementioned items #3, a 1999 Mercury Sable, black in color, Oregon license 844ETU, and VIN 1MEFM502XA620320, which is currently being held in Gresham Police Department's Evidence Division and to seize view, examine, analyze, test and photograph those items for evidence not limited to fingerprints, DNA, blood evidence, gun powder residue, other trace evidence, cell phones, identification cards, ammunition, ammunition casings, spent bullets, firearms, knives, and bladed weapons relevant to this investigation.

I, therefore, pray the above entitled court to issue a search warrant to search the aforementioned item #4, a Phoenix Arms Raven model .25 caliber pistol, serial #3055302, currently being held at the Gresham Police Evidence Division, and to seize, view, examine, analyze, test and photograph

those items for evidence not limited to fingerprints, DNA, blood evidence, gun powder residue, and other trace evidence relevant to this investigation.

I, therefore, pray the above entitled court to issue a search warrant to search the aforementioned items #2, a gray in color AT&T HTC cell phone, #971-221-0765, which belongs to Darius Thompson, currently being held in the Gresham Police Evidence Division, and item #5, a cell phone packaged by OSP in a metal container and labeled with the number SP14365698, currently being held at the Gresham Police Evidence Division, and to seize, view, examine, analyze, test, photograph, duplicate and otherwise process the named cell phone and its contents including but not limited to any media stored on the device, digital or electronic files, voice messages, text messages, and emails; any history of emails, text messages, voice messages or phone usage stored on the device, including information relating to dates, times, and websites accessed; any electronic files stored on the devices to include any digital pictures, digital video, phone calls received and sent, voice mails, or electronic gateways to storage devices accessed through the cell phones; for evidence relevant to this investigation.

I, therefore, pray the above entitled court to issue a search warrant to search the aforementioned items #6 and #7 by DNA standards for oral swabs to seize, test, and analyze the aforesaid items for evidence relevant to this investigation.

The searches of items #1 through #7 are specific to this investigation for the crimes of Robbery I (ORS 164.415), Assault II (ORS 163.175), Theft II (ORS 164.045), Unlawful Use of a Weapon (ORS 166.220) and Identity Theft (ORS 165.800).

Due to the scope of this investigation involving three separate incidents over several months, the multiple items to be searched, the employ of a forensic cell phone technician and technicians at the OSP Crime Lab to assist with the search, and the lack of staffing due to the upcoming

Thanksgiving holiday, I would ask for a time period of ten (10) days to make return of this warrant to the magistrate after execution thereof.

50042

EMGET Officer Brad Robertson, DPSST #50042, Affiant

Subscribed and sworn to before me this 24th day of November, 2014:

Judge of the Circuit Court of the

State of Oregon for Multnomah County

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON, Plaintiff, vs. DARIUS LESHAWN THOMPSON, Defendant.	No. 14CR29087 DEFENDANT'S FIRST MOTION TO SUPPRESS **ORAL ARGUMENT REQUESTED**

COMES NOW the defendant, by and through his counsel, Ryan Scott, and moves this Court for an order suppressing the seizure of defendant's cell phone, as well as all derivative evidence.

Pursuant to UTCR 4.050, defendant requests oral argument, official court reporting services, and estimates the time necessary for this hearing will not exceed one hour.

This Motion is, in the opinion of counsel, well-founded in law and not made nor filed for the purpose of delay.

DATED this 31st day of May, 2015.

/s/ Ryan Scott

Ryan Scott, OSB #95526
Counsel for Defendant Thompson

POINTS AND AUTHORITIES:

Oregon Constitution, Art. I, Secs. 9, 12

United States Constitution, Amendments IV, V, XIV

State v. Williams, 270 Or App 721, (2015)

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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON, Plaintiff, vs. DARIUS LESHAWN THOMPSON, Defendant.	)	No. 14CR29087 MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS

FACTS

The following facts are taken from police reports and a search warrant affidavit. Nothing in this motion should be construed as a wholesale adoption of those facts.

On November 18, 2014, the police were summoned to the Mount Hood Medical Center on report of a gunshot victim. Although the victim had given the name and identification of Marcus Tyler, the police recognized him as Darius Thompson. Mr. Thompson had a bullet wound to the back of his thigh.

Police Officer Brad Robertson asked for details regarding the shooting from Mr. Thompson, his sister Stephanie Thompson and his girlfriend Marlo Roberts. Mr. Thompson claimed he had been the victim of a drive-by shooting, and that he could not identify the shooter. Neither Ms. Thompson nor Ms. Roberts saw the shooting but assisted Mr. Thompson during the aftermath. Officer Robertson found the statements of Mr. Thompson, Ms. Roberts and Ms. Thompson

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inconsistent.

In sum, Officer Robertson found the circumstances suspicious. For this reason, he seized Mr. Thompson's phone.

LAW and ARGUMENT

I. There was no probable cause to seize the phone.

Mr. Thompson does not dispute there was probable cause to arrest him for identity theft. However, the facts would not support a search of his phone "incident to arrest." Any search or seizure incident to arrest must be related to the reason for the arrest. *State v. Anfield*, 313 Or 554, 561, 836 P2d 1337 (1992). In other words, the search or seizure must be to discover evidence relevant to the crime for which the defendant was arrested. *State v. Hoskinson*, 320 Or 83, 86, 879 P2d 180 (1994).

In *State v. Owens*, 302 Or 196 (1986), the Supreme Court noted:

> Under Article I, section 9, a search incident to arrest for crime evidence is limited to a search for evidence of the crime for which the arrestee is arrested. In order to justify a search, incidental to an arrest, the arrest must be for a crime, evidence of which reasonably could be concealed on the arrestee's person or in the belongings in his or her immediate possession at the time of the arrest. Thus, for example, if the person is arrested for a crime which ordinarily has neither instrumentalities nor fruits which could reasonably be concealed on the arrestee's person or in the belongings in his or her immediate possession, no warrantless search for evidence of that crime would be authorized as incident to that arrest. Of course, a pat-down or limited search for weapons to protect the officer or to prevent escape would be justified whenever a person is taken into custody.

Id. At 200.

Here, there was no reason to believe evidence that would support the identity theft would be on the phone. In *State v. Lovaina-Burmudez*, 257 Or App 1, 303 P3d 988 (2013), the defendant was shot by police. While there was probable cause to arrest the defendant for a robbery that had

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occurred a week before, the Court of Appeals – in rejecting the state's argument that such probable cause was sufficient to seize his clothing -- approvingly quoted the defendant as follows:

> "[T]he state presented no evidence that, at the time of the seizure, any officer had observed anything about either the shoes or the clothing that gave rise to any belief that they had any evidentiary value with respect to any crime committed by defendant, let alone the crime for which he is arrested—the robbery of the taco stand six days [earlier]."

Nor does Mr. Thompson expect the state to argue that the seizure of the phone was related to the identity theft that resulted from presenting a fake ID to the hospital. The reason for the seizure appeared to be Officer Robertson's skepticism regarding Mr. Thompson's story about how he was shot.

But that skepticism does not provide probable cause either. Leaving aside exigency for a moment, the defendant intends to focus on probable cause that there would be evidence related to his being shot on Mr. Thompson's phone.

In *State v. Williams*, 270 Or App 721 (2015), an officer's similar skepticism merited suppression. Although Officer Goodwin of the Portland Police Bureau described the shooting victim and defendant as being involved in the crime and relied upon her training and experience to aver that people involved in firearm crimes sometimes leave evidence in cars, that was insufficient to support a finding that evidence related to the crime would probably be found in defendant's car, as all the facts established was that the victim was shot and defendant came to the victim's aid. Since evidence was insufficient to show evidence related to the crime would probably be found in defendant's car, the trial court erred in denying defendant's motion to suppress.

Unlike Williams, in this case the defendant and shooting victim are one and the same. But

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like Williams, an officer's skepticism about the circumstances surrounding a shooting do not support seizure of evidence related to the victim or a Good Samaritan.

CONCLUSION

The seizure of defendant's phone was unlawful. Its subsequent search – via a warrant – was fruit of the poisonous tree and likewise should be suppressed. See also *Lovaina-Burmudez,* cited above, on the failure of a search warrant to cure the original, unlawful seizure.

DATED this 30th day of May, 2015.

/s/ Ryan Scott

Ryan Scott, OSB #955267
Attorney for Defendant Thompson

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phone in Mr. Thompson's possession?

A. Yes, that was a concern absolutely.

Q. And so it was based upon that that you seized the phone?

A. Correct. Based on his statements that evening, evidence on that cell phone could have corroborated some of the things that he had said or not corroborated them. So it was important for us to have that evidence secured and away from him so it wasn't potentially changed, deleted, or destroyed.

MR. VASQUEZ: No further questions.

THE COURT: Okay, Officer, you can step down. Thanks.

THE WITNESS: Thank you, sir.

THE COURT: Any other evidence from the State on this issue?

MR. VASQUEZ: No, Your Honor.

MR. SCOTT: No additional -- no witnesses from the Defense, Your Honor.

THE COURT: Okay. Do you want to present argument on the motion?

MR. SCOTT: Yes. Although the case isn't exactly on point, the closest case I could find was cited in my memorandum, and I brought a copy here, *State v. Williams*. If Your Honor would like, I can forward it to

the Court?

THE COURT: Sure.

MR. SCOTT: It's from the courtroom next door, as Your Honor probably knows.

THE COURT: Judge Bushong or Judge Dailey?

MR. SCOTT: Judge Bushong. And there are some factual differences, it's *State v. Williams*, and it's just from this spring. And that involved -- certainly if the Court wants to find factual distinctions you could, but basically defendant was shot -- not the defendant -- a person was shot in *State v. Williams,* the police were skeptical about the circumstance of the shooting and they knew that somebody had fired back. And the defendant in this case was a good samaritan who had assisted the victim to the -- drove him to the hospital. And the police got a search warrant to search the automobile of the victim, and there are a number of justifications and rationalizations given to this, largely from the officer's training and experience, which the court goes into, which I don't need to go through here. Obviously the big difference is, is this was the person who drove the victim to the hospital as opposed to the victim.

But the bottom line that I think to take from Williams is that when a person is shot, there needs to be something more than just skepticism about their story to

search property. And, in fact, even the officer said, you know, some of what he could find could corroborate, some of it may not corroborate what actually happened. Ultimately none of that -- his speculation about what a phone might theoretically have in it is not by itself enough to seize the phone without a warrant. Had there been a warrant in this case, I don't think it could have risen to the level of probable cause.

Even with the I.D. theft, the fact that there is a hard I.D. of Marcus Tyler, there's just no reason to think that any evidence related to the providing the I.D. to the hospital is going to be found in the phone. There's speculation, sure. One can speculate that there may be some evidence to it, but there's nothing actually tying the crimes to the phone in any substantial way. It is -- I understand why the officer might think there could be, he doesn't really trust Mr. Thompson's version of events, but it is just speculation that there might -- for any of the crimes that there might be evidence on that cell phone. And then further --

THE COURT: Can you remind me just what the sequence of events is in terms of what the officer knew at the time of the phone seizure? He had already interviewed the Defendant, right or not?

MR. SCOTT: Well, he -- he had interviewed the

Defendant.

THE COURT: And he'd interviewed the Defendant's sister and girlfriend, right?

MR. SCOTT: Well that's not in evidence at this point.

THE COURT: Okay.

MR. SCOTT: So I don't know that the Court can consider it. And, frankly, I don't know -- I couldn't say with certainty whether -- no, I'm pretty certain he'd taken the phone, hypothetically, from the police reports after interviewing them, but he had not in fact said so on the witness stand and that's not in evidence. So there's some --

THE COURT: Well, he said that they took it in part to either refute or corroborate what the Defendant told him.

MR. SCOTT: Right. And ultimately I don't -- that's not a basis for seizure of the Defendant's property.

And the reason I offered Officer Lindsay Fredrick's report is because of course is the assumption that under the case law that in a probable cause to seize or to search, officers have sort of communal knowledge imputed to them. And so even if Officer Robertson didn't know it, Officer Fredrick knew, as evidenced by Defense

Exhibit 1001, that the I.D. hadn't even been -- there's no evidence it was held by the Defendant in that situation. It was provided to the hospital by a third party and so even more remote the relationship between the I.D. -- the I.D. theft and Mr. Thompson's phone.

THE COURT: Mr. Vasquez?

MR. VASQUEZ: Well, Your Honor, I first would start off by saying that the officer spoke directly with Mr. Thompson and he told them that he was this Marcus Tyler. And so he himself was representing and lying right out of the gate, and thus his statements -- you know, he is, you know, adopting that yes that I.D. that was being used was him. And so it is his adopted admission and how he presents it that creates identify theft.

All that aside, which I think that provides a basis for us to look at the phone, when we step back and we think how do we want officers to behave, we want them to come get search warrants, we want them to do this, and that's exactly what they did. The case law surrounding telephones has been largely about officers who pick up phones and just start searching, just going through them. But here the officer talked to Mr. Thompson right off the get go --

THE COURT: Is there any case law -- I understand what you're saying, and I guess what I'm -- it's sort of a

more limited intrusion, right? I mean, it's just seizing the cell phone for a limited period of time to develop --

MR. VASQUEZ: Yes.

THE COURT: -- a case and develop probable cause to actually search it, but that way you preserve -- it's basically a seizure for preservation not for actual searching.

MR. VASQUEZ: Yes.

THE COURT: So, is there case law that says that a -- there's any kind of lower threshold for that kind of seizure?

MR. VASQUEZ: I don't know about a lower threshold. I would think that the threshold still would be --

THE COURT: It's a more limited intrusion into somebody's privacy, right?

MR. VASQUEZ: Yes. I think the key analysis, is there probable cause to believe there's evidence there and is there exigent circumstances? And here there is both. That's, I think, plain from the circumstances of what's going on. It's not even really whether he committed a crime, although he did with the identity theft, it is more the issue of did he -- is there evidence going to be found on that phone? And that's the real issue, is there evidence going to be found on that phone? And the answer

to that question is, we look at, you know, by a preponderance is there, you know, more probable than not there's going to be evidence there, the answer clearly is yes, because of the circumstances of the shooting, his behavior at the hospital, lying to the police, the identify theft component. When you put all that together this is an officer who is acting very reasonably and that he's not just, you know, being a bull in a china shop just, you know, going through the -- going through all the phone and everything, he's doing what we want. He's going out, he's applying for a search warrant which, as we know, was approved.

THE COURT: Well, the difficulty I'm having, and I'm looking at *State vs. Williams,* the fundamental holding in that case was that the evidence was insufficient to show that evidence related to the crime would probably be found in the Defendant's car. So what -- how do you think the record supports that evidence of a crime would probably be found? You know, at the time the officer makes the decision to seize the phone --

MR. VASQUEZ: Well, there's --

THE COURT: What evidence exists at that point in time that makes it more likely than not that there's evidence of a crime in that phone?

MR. VASQUEZ: Well, first and foremost, one of

the biggest differences when we're talking about the *Williams* case and this one is that, that's a vehicle that was used to drive someone to the hospital. It wasn't -- and this is the person's cell phone that they have. The person that's directly involved in the shooting is his cell phone.

THE COURT: But I asked you a different question.

MR. VASQUEZ: Sorry.

THE COURT: I understand you're distinguishing *Williams,* but I'm not -- I'm not asking you to distinguish *Williams,* I'm asking you to tell me what is in the record for the Court to conclude that it's more likely than not that there's evidence in the cell phone of a crime?

MR. VASQUEZ: The officer's testimony specifically about his training experience with cell phones and what evidence and what information can be found on cell phones related to crimes.

THE COURT: So any shooting victim that presents in the ER, there's probable cause to seize their phone?

MR. VASQUEZ: I think any shooting victim that behaves in the way that Mr. Thompson did, yes. Because he's behaving in a way that indicates deception, that indicates that he is specifically trying to avoid the officers from obtaining information. His actions specifically go to the fact that there's more to the story

than what he's bringing out, and so it's time to look for it. And if it was the victim saying, "I was," you know, "I was shot. There was a guy in a car that I know, his name is John, I was right here," and the officer is like, "Wow, he's working with us. He's ready to take us out to the location and show us right where he was shot." But the officers clearly testified that no, Mr. Thompson was being deceptive, he was trying to avoid, he was not cooperative with the investigation. So it's a much different situation than where you have someone who is presenting and, you know, either: (A) consenting to a search, or (B) saying, "Here's all the things I'll do, I'll show you. Here's -- you know, I'll tell you all about my activities that night, I'll go through everything that occurred." So, I mean, what you have here is a much different situation and Mr. Thompson is the one that creates the situation particularly by lying about his name in the hospital to start it off and then in his identification, and then from there being deceptive about the circumstances surrounding the shooting.

So I think those are the key factors when we talk about giving probable cause if there's a crime and that the information can be found within the phone, when you combine that specifically with the officer's training and experience. And that is a very valid, relevant point

because Officer Robertson went through it, he has had multiple investigations involved with this, multiple investigations where cell phones have been used and he has found evidence that has contributed to the investigation. So I think those, when you combine all of that together, that's where you get there.

And again, what we're doing here, is we're looking back in time to an officer who is trying to do the right thing and apply for search warrants. If you don't -- if he lets that phone walk out the door, (A) we may never see it again, (B) you know, information can be deleted, destroyed, so there's a lot that can happen. So the exigency is the question of what happens right at that moment.

THE COURT: Well, it's an interesting question because there's either probable cause to seize the phone in exigency or there's not. Well I guess there wouldn't be exigency for actually accessing the phone, the exigency would just be to seize the phone to preserve the evidence. Okay.

Do you want the last word, Mr. Scott? It's your motion.

MR. SCOTT: Just very briefly. I would disagree with the analysis that it is a lesser intrusion. I think if somebody -- if a police officer takes somebody's cell

phone, especially these days, that's a very very big intrusion.

THE COURT: Well, I mean -- I mean, look the case log equates a cell phone now with a house.

MR. SCOTT: Right.

THE COURT: So I get that. I think what I was working through in my mind is, you know, the officer applied for a warrant and didn't access the phone until he obtained the warrant. And I guess what I'm thinking through is, well hey if there was probable cause to begin with then why did he need to apply for the warrant, but the reason he did was because there was no exigency for accessing the phone, there was only exigency for seizing and preserving the phone.

MR. SCOTT: Right. Well, and also I would note the warrant later on, get a lot more information than he had at the time that the phone was seized.

THE COURT: It's sort of like -- it's sort of like, you know, the officers have a probable cause to believe that there's evidence of a crime inside a premises and they can't just -- you know, there's no exigency to go into the premises necessarily, but there might be an exigency to secure the premises to preserve the crime scene and the evidence.

MR. SCOTT: During the period of time where they

go and get a warrant.

THE COURT: While they go apply for one.

MR. SCOTT: But of course -- you know, perhaps we should put Officer Robertson back on the stand. He said it would take six to ten hours to get a telephonic warrant, that's not when he got the warrant, it was a number of days later. So even if there was a right to seize to preserve while you get a warrant, you can't just hold the phone indefinitely until there's a warrant. And if the Court hinges on that opinion, I would like -- or on that issue, I would like to call Officer Robertson. But again, the problem gets to the fact that the officer's speculation as to what might be on the phone is just not probable cause, it's well warranted skepticism about what Mr. Thompson told him. But in terms of there being specific evidence of a shooting that as far as he knew occurred on the street, that that was certainly the only information he had, that somehow there would be evidence then on the phone, I think it would obliterate the meaning of probable cause to find that the officer's skepticism is sufficient to believe more likely than not there would be specific evidence to the shooting on the phone.

MR. VASQUEZ: Your Honor, it just dawned on me that -- two big points. One is, the identify theft piece is still there and the phone certainly can contain

identifying information for Mr. Thompson.

THE COURT: There's nothing tying the I.D. theft to the phone. I mean, he didn't use the phone to conjure up any kind of I.D. or there's no link.

MR. VASQUEZ: There is, and it's this, Judge -- sorry to cut you off. The State has to prove that it's not Marcus Tyler, that it is in fact the Defendant, and so the phone can be a point of proving who it is.

THE COURT: Oh, yeah, I guess that's true.

MR. VASQUEZ: You know, because the Defendant can deny every element of the criminal charge, so the State has the burden of proving every element of the criminal charge.

THE COURT: True.

MR. VASQUEZ: So that's one big point.

The second one though is that in this case that will be -- the evidence that is obtained from the phone will also come in through various other means. Really what we're talking about is Isaac Beacock, the co-Defendant, calling and having, you know, conversations leading up to the robbery and then phone calls afterwards. Well, we have Isaac Beacock's phone, we have the same information, so there is this connection piece there. So the evidence is largely going to come in that way.

THE COURT: Well, that's not -- that's neither

here nor there to decide this constitutional issue, right? I mean, in some ways you're saying maybe I should grant the motion because you'll get the evidence in a different way.

MR. VASQUEZ: No, I'm saying maybe it's moot.

THE COURT: Well, do you want to not introduce the evidence? I mean --

MR. VASQUEZ: No, I want to introduce the evidence, but I think that that point is a factor in whether or not -- I mean -- I don't know. Why don't we rule on the motion and then we can look at -- because I think the evidence is going to come in elsewhere as well.

THE COURT: I think that there is probable cause that the phone would contain evidence of his identity. It's a harder question to me as to whether the -- whether there's probable cause to conclude -- whether there's a basis to conclude that it's more likely than not that there's evidence of the shooting in the phone just by virtue of the fact that Mr. Thompson was acting in a suspicious manner in presenting a false I.D. and was actually a shooting victim.

But I'm going to deny -- I'm going to deny the Motion to Suppress because I do think that the phone would contain direct evidence of Mr. Thompson's identity which is an element of his identity theft charge at that point

in time. So I think there is probable cause to seize the phone and then -- and exigent circumstances to seize the phone. The exigent circumstances would not extend to actually accessing the phone until you get a warrant.

MR. SCOTT: Your Honor, if I could put Officer Robertson on the stand to say when he did get a warrant? Because respecting your ruling, I'd like to say there was an exigency to go past I think ten hours, that he had testified to that it would take six to ten hours to get a warrant. There comes a point where the seizure of the phone can't outlast. If the seizure -- if the purpose is preservation in the same way as Your Honor talked about having the house, the seizure of the --

THE COURT: They have to seize it for a reasonable period of time and then get the warrant. I mean, I see your point. I mean, is there -- I mean, you can re-call him to establish that issue.

MR. SCOTT: I'd just like to say when he actually got the warrant, November 19th was when he seized the phone.

THE COURT: Okay.

THE COURT: Come on back up. Round three.

COURT CLERK: Do I need to re-swear him?

THE COURT: No, there's no need to re-swear him.

BRAD ROBERTSON,

being re-called as a witness, previously sworn according to law, was examined and testified as follows:

RE-CROSS EXAMINATION

BY MR. SCOTT:

Q. Hopefully very simple, one question Officer Robertson.

A. Yes, sir.

Q. On what day did you get the search warrant signed to search the phone?

A. I think it states November 24th.

Q. November 24th?

A. I believe so.

Q. Okay. Pretty confident of that though?

A. Yeah. I'd have to double check on the affidavit.

THE COURT: I mean, I have it right here.

MR. SCOTT: Yeah. That's fine. Okay. Then no further questions.

MR. SCOTT:

Q. Oh, just to be clear, so that's five days after you seized the phone?

A. Correct. A lot happened during that period of time.

Q. Okay. Thank you.

RE-DIRECT EXAMINATION

BY MR. VASQUEZ:

Q. In that five day period, were you gathering

information, investigation which then went towards that search warrant?

A. Yes, absolutely.

Q. Did you have to drive to Salem at different times as part of this investigation?

A. Yes, we did.

Q. Did you talk to multiple witnesses of which their information later went into the search warrant?

A. Yes, we did. We did that, we canvassed the area for potential surveillance video, there were phone calls to the apartment management, a variety of other things that we had to do as part of the investigation.

Q. So the investigation wasn't say as simple as a DUI case where you fill out a form and e-mail it in to a judge?

A. No, absolutely not, because when it develops, and we ended up finding a lot of information from the Oregon State Police and then also from Michael Norton, it became relatively complex, there were a lot of moving parts and a lot of information that we needed to try to verify. We also had to tow a car and coordinate that from a private dealership in Salem back to Gresham to have that car looked at by forensic techs. There were a lot of more intricate pieces of this case than any sort of DUI case.

MR. VASQUEZ: Thank you. No further questions.

FURTHER RE-CROSS EXAMINATION

BY MR. SCOTT:

Q. I may, since I brought it up. How long -- how much of those five days were spent in trying to identify Darius Thompson's real name?

A. Of those five days? We knew his real name -- we knew his name specifically on the night that we were at the hospital.

Q. Okay. And he'd actually confirmed to you that was his real name?

A. That's correct.

Q. Okay. And at that point your further investigation did not go to what his real name was?

A. Not specific to his name, no, there were a lot of other -- like I mentioned the idea of a timeline or the concept of a timeline in an investigation, that's something that's very important to verify a lot of different facts and statements. So that cell phone was also used to establish a timeline for this case.

Q. Okay. Thank you.

MR. SCOTT: No further questions.

THE COURT: Okay. You can step down again, Officer.

THE WITNESS: Yes. Thank you.

THE COURT: Sorry for the multiple rounds.

THE WITNESS: No problem.

MR. SCOTT: So, essentially even if, which we are not conceding, but even if Your Honor finds probable cause because his name might be on the cell phone, that doesn't justify a seizure for five days, a protective seizure.

THE COURT: I mean, then you get in this game about well, at some point during that investigation there's probable cause to continue to hold the phone for a different investigation, an investigation of a shooting.

MR. SCOTT: Correct. Maybe. There might be. But let's assume that's the case, the State put on no evidence as to when that occurred. Would have taken six to ten hours to get a warrant, under the officer's explanation. We don't know when they would have developed additional probable cause to seize the phone, whether it would have been two, three, four days later, it simply is not in the record. So, if Your Honor is looking at this as a protective seizure and that justifies a lack of warrant to seize the phone, then I submit the protective seizure can only last six to ten hours.

THE COURT: Mr. Vasquez, I mean, ultimately I don't think you can support the seizure of the phone with anything other than exigent circumstances to preserve the evidence, right? I mean, I'm not -- there's nothing other

than -- the only exigency is preservation.

MR. VASQUEZ: Yes.

THE COURT: So why is he wrong?

MR. VASQUEZ: Well, first there's no hard fast rule of, you know, ten hours, five hours, I mean there's just not. There's not -- as much as Defense would like that to be the case, there's never been a case that has cited that piece. When in the exigency that they talk about is more in terms of like DUI and dissipation of alcohol, what we're talking about is a phone and the data on there and the exigency lasts. At any point that they give it back to the Defendant it could have that problem. Now I'm not saying that they should hold onto it for months.

THE COURT: You mean -- I mean, yeah, they could theoretically hold onto it for months or years or weeks or...

MR. VASQUEZ: But this is not a case of like police neglect or unreasonable activity. You heard from the officer, he continued a very active, complex investigation involving the shooting of Darius Thompson. So, I mean, he's acting in a very responsible manner, they're pursuing leads, they're going -- I mean, he's talking about having to go to Salem, they're towing vehicles, there's a lot that's going on that happened.

So, I mean, again when we step back and look at the situation, how do we want officers to behave? Do we want officers to seek search warrants? Do we want officers to act in a reasonable manner? And I think the answer here is Officer Robertson has done that. He went out, he conducted a thorough investigation. He obtained a lot of information, he put it in a very lengthy search warrant and that was approved by the court.

So, I mean, this is a case where I think the officer has really tried his best to go out and do a really thorough and thoughtful investigation to provide the Court with as much information as it can when looking at that cell phone.

And, you know, if there's an issue about, you know, when he talked to, you know, Mr. Norton and, you know, developed further probable cause about the shooting, you know, defense counsel re-called him, we can re-call him a fourth time and ask him that, I mean, if the Court would like more information about that to help --

THE COURT: No, I'm done.

MR. VASQUEZ: I mean, I think this is a situation where the officer tried very hard to take a reasonable approach by obtaining a search warrant which is, again, what we want him to do.

THE COURT: Okay. I think that the -- I mean, it

essentially amounted to a five day delay, but it's an active, ongoing investigation. I think at the moment -- the instant in time where he seized the phone, there was probable cause for the I.D. theft. It's a closer call on the shooting, although, boy, it sure seems likely that there's going to be evidence of -- you have a shooting victim who is non-cooperative, it sure seems likely that there's going to be information in his phone.

So, the motion is denied.

So, what do we have left? We've got to get going here.

MR. VASQUEZ: We have the Motion in Limine, which quite frankly, Judge, is lengthy.

THE COURT: Okay.

MR. VASQUEZ: By Defense. It's just -- I don't know of any other way to put it than that.

THE COURT: Are we playing a video then or do you want me to look at a transcript? That I apparently have in my e-mail, I'll try to pull it up.

MR. VASQUEZ: Well, this is Defense's motion, so I don't want to speak on their behalf, how they best would like to do it.

MR. SCOTT: Well, why don't we go through the transcript initially and then depending on how the argument goes for each individual item, we can decide

Mike Norton at the apartment complex before that day, is that so?

DARIUS THOMPSON: (No audible response)

OFFICER ROBERTSON: You said you heard two shots, right?

DARIUS THOMPSON: (No audible response)

OFFICER ROBERTSON: Was it like boom and then 10 or 15 seconds and then boom, or was it like boom, boom?

DARIUS THOMPSON: Boom, boom.

OFFICER ROBERTSON: Okay. I'm just wondering why he would shoot you at all if it was Pree that had the knife. Why would he even shoot you?

DARIUS THOMPSON: I guess he thought that I was there trying to fucking help Pree, which I wasn't. As soon as I seen what was going on (inaudible). I've been in -- I've been in too much bullshit (inaudible).

OFFICER ROBERTSON: And then the search warrant also included a search of your cell phone, the AT&T HTC cell phone 971-221-0765. That's your cell phone, right?

DARIUS THOMPSON: (No audible response)

OFFICER ROBERTSON: The one that you had with you that day at the hospital?

DARIUS THOMPSON: (No audible response)

OFFICER ROBERTSON: Okay. And then we've got DNA standards from you. This is just a copy of the search

warrant and the paperwork there. It's just not. This is your phone log from your phone, okay? So we would download a phone and analyze those. There are five calls, one, two, three, four, five. This is Pree's number, okay? This call happens at 11:05 p.m. the night of the shooting, okay? You told me that you've never talked to him on the phone or anything like that before, so I wonder why he has your phone number in the first place. But then also the time frame, this happens right after the shooting, so he was even calling you when you were at the hospital. Because you got to the hospital about, what, like 11:30, I think?

DARIUS THOMPSON: 11:03.

OFFICER ROBERTSON: 11:03. Yeah, so all of these were when you're at the hospital. So he's calling to check on you because he knows you got shot, but he wasn't the one with the knife that night. Okay? Will you agree on that that Pree didn't have the knife?

DARIUS THOMPSON: I didn't have any weapons on me.

OFFICER ROBERTSON: But Pree didn't have any weapons on him either, did he? He didn't have a knife.

DARIUS THOMPSON: I don't know what Pree had on him. All I know --

OFFICER ROBERTSON: But Pree never held the knife to Michael Norton's neck. Pree never had a knife -- Pree

never had a knife and cut Michael Norton, that never happened.

DARIUS THOMPSON: I don't know what -- what he did, but I'm just (inaudible) to what I did and I was --

OFFICER ROBERTSON: So, I'm -- I'm just wondering like were you guys trying to actually just straight up kill Mike Norton because you didn't like him or was it just a robbery gone bad?

DARIUS THOMPSON: I didn't -- I didn't know (inaudible).

OFFICER ROBERTSON: Okay. So you're saying you didn't want to kill him?

DARIUS THOMPSON: I don't know.

OFFICER ROBERTSON: Okay.

DARIUS THOMPSON: I don't know, (inaudible).

OFFICER ROBERTSON: Okay.

DARIUS THOMPSON: The only person who knew was Pree.

OFFICER ROBERTSON: Uh-huh.

DARIUS THOMPSON: Mmm-hmm.

OFFICER ROBERTSON: Right.

DARIUS THOMPSON: So...

OFFICER ROBERTSON: And I talked to Mike Norton, he said he's never met you either, he didn't know you either, okay? He said he only knew Pree, and I knew that

Pree is kind of the middle man with all of this. Was there anybody else there?

DARIUS THOMPSON: No.

OFFICER ROBERTSON: There wasn't a girl there?

DARIUS THOMPSON: (No audible response)

OFFICER ROBERTSON: You sure? Positive about that?

DARIUS THOMPSON: Positive. Just me and Pree.

OFFICER ROBERTSON: Okay. Nobody else there had a knife?

DARIUS THOMPSON: I didn't. I don't know what Pree had. I can't vouch for him.

OFFICER ROBERTSON: But before you told me that he had a knife and he held it to Michael Norton's neck, and now you're saying that you don't know what he had.

DARIUS THOMPSON: No, I said that (inaudible) I didn't know if he had it on him or not.

OFFICER ROBERTSON: Well, wouldn't he have it on him if he pulled the knife out? Wouldn't the guy have a knife on him if he pulled it out?

DARIUS THOMPSON: I'm just telling you what I saw.

OFFICER ROBERTSON: Well, just let me -- let me -- let me put this in your head, Darius, okay? When was the last time you talked to Pree?

DARIUS THOMPSON: The last time I talked to Pree?

OFFICER ROBERTSON: Before you got shot, the night you got shot?

DARIUS THOMPSON: Mmm-hmm.

OFFICER ROBERTSON: Okay. That was the last time you saw him and talked to him?

DARIUS THOMPSON: Because I never met the dude a day in my life, why would I (inaudible).

OFFICER ROBERTSON: You never had met Pree?

DARIUS THOMPSON: No, I met Pree, but I never (inaudible).

OFFICER ROBERTSON: No, but what I'm saying is if Pree told us that, if Pree -- if Pree told us that you were the one with the knife during the robbery, would that surprise you?

DARIUS THOMPSON: It wouldn't surprise me.

OFFICER ROBERTSON: It wouldn't surprise you. Okay. Do you think he's lying?

DARIUS THOMPSON: If I had a -- yeah. Yeah.

OFFICER ROBERTSON: And you got shot and you were the one with the knife.

DARIUS THOMPSON: (inaudible) Pree had me for backup (inaudible).

OFFICER ROBERTSON: Pree is tiny. Pree is tiny. Do you think Pree could have pulled a knife -- and

actually, Mike Norton is bigger than Pree?

DARIUS THOMPSON: (inaudible) Pree. (inaudible).

OFFICER ROBERTSON: Then why did you lie from the get-go when we first contacted you at the hospital? You lied at the hospital, you lied to me again when you said that there were cars that drove by and a car shot at you, and then it's just today that you're telling me that it was Michael Norton that shot you and you have his I.D. and his social security card.

DARIUS THOMPSON: I don't want to -- I don't want this dude to get in trouble for shooting me (inaudible).

OFFICER ROBERTSON: Why would you not want him to get in trouble for shooting you?

DARIUS THOMPSON: Because he didn't know any better, bro. He was just shooting at somebody --

OFFICER ROBERTSON: Did he not know any better or was he defending himself because he was getting robbed?

OFFICER BROODER: Let's say that what you're saying is true and that you genuinely felt for this guy's situation and you understood why he shot --

DARIUS THOMPSON: Yeah, I do.

OFFICER BROODER: I understand that. A reasonable person understands that they can tell the police that and then choose not to be a crime victim, which is the case?

DARIUS THOMPSON: I don't want the dude to get in trouble for shooting at us because I understand Pree brought him to my -- to my attention, you know what I'm saying? Pree brought him around, you know what I'm saying? I never once (inaudible).

OFFICER BROODER: Okay.

DARIUS THOMPSON: And I -- he didn't have nothing that I wanted (inaudible) and I wasn't with him.

OFFICER ROBERTSON: Okay. So Pree knew this was going to go down though? Pree knew that it was going to -- you guys were going to hit a lick and take this guy's stereo and shit and you were going to try to take his gun too. Because Pree knew he had a gun, right?

DARIUS THOMPSON: Pree -- Pree told me (inaudible). I said (inaudible), you know what I'm saying?

OFFICER ROBERTSON: Mmm-hmm.

DARIUS THOMPSON: I said, well, (inaudible) something good going.

OFFICER ROBERTSON: Yeah, you guys brought a knife to a gun fight.

DARIUS THOMPSON: Not me. Because I didn't know Pree was going to do this.

OFFICER ROBERTSON: But you just told me -- you just told us that you knew it was going to be a robbery.

DARIUS THOMPSON: But I didn't know Pree was going to -- going to pull out a knife, you know what I'm saying? The whole time the dude was blowing his horn, Pree, "Oh, I feel for you, Bro. I'd do anything for you." You know what I'm saying? (inaudible)

OFFICER ROBERTSON: It sounds like Pree and Mike actually -- I don't know if they go back a ways, but they've known each other a while, right? And then all of a sudden Pree's setting him up to get fucked and get robbed.

DARIUS THOMPSON: I never (inaudible) I wasn't even in his vehicle, you know what I'm saying? I never once said (inaudible).

OFFICER BROODER: You just told us that Mike Norton --

OFFICER ROBERTSON: You just told us Mike Norton's I.D. is there.

DARIUS THOMPSON: Yeah, because it was brought to me.

OFFICER BROODER: And I understand, that's what you told us.

OFFICER ROBERTSON: Right. But Mike Norton told us that you guys stole his wallet that had his I.D. and his social security card and cash in it. And you just told us that you set him up for a robbery.

DARIUS THOMPSON: I don't have any of his cash.

OFFICER ROBERTSON: None of his cash?

DARIUS THOMPSON: No.

OFFICER ROBERTSON: Did Pree get the cash?

DARIUS THOMPSON: There was only (inaudible).

OFFICER ROBERTSON: But the plan was, is that you and Pree were going to rob the guy?

DARIUS THOMPSON: Pree told me (inaudible).

OFFICER BROODER: (inaudible). You know more about these things than we do. I've never robbed anybody. (inaudible) get the guy's gun. And if what you're telling us is true that you wanted no part of it, why did you even go out to that parking lot?

DARIUS THOMPSON: Because I wanted to see what Pree was doing. (inaudible) I stood beside.

OFFICER ROBERTSON: Do you realize how lucky you are, man?

DARIUS THOMPSON: I really, really realize that and I don't want this dude to get in trouble, you know what I'm saying?

OFFICER ROBERTSON: You could be dead.

DARIUS THOMPSON: I understand that. (inaudible) Pree.

OFFICER BROODER: Your sister could be dead. It wasn't more than a few weeks ago Officer Robertson and I

had to investigate a call where a little girl got shot through an apartment wall from a parking lot.

DARIUS THOMPSON: (inaudible) a dumb ass and thought I did, and I didn't.

OFFICER ROBERTSON: And the detectives that are helping us out on this whole case and they're at the apartment now searching it. Is there going to be any stolen stuff in there? Like is there going to be any stolen stereos, cell phones, anything like that? Any stolen items in there? Any guns in there? Any drugs in there?

DARIUS THOMPSON: (No audible response)

OFFICER ROBERTSON: Okay. Anything that police would be interested in while they're searching that apartment?

DARIUS THOMPSON: (No audible response)

OFFICER ROBERTSON: Anything that you think you can get in trouble for?

DARIUS THOMPSON: (No audible response)

OFFICER ROBERTSON: Or that Stephanie can get in trouble for?

DARIUS THOMPSON: I (inaudible) Safeway bag and it was full of stuff.

OFFICER ROBERTSON: Like what kind of stuff, like drugs or stolen stuff?

DARIUS THOMPSON: I don't know what's all in that.

OFFICER ROBERTSON: Okay.

DARIUS THOMPSON: We left that in the apartment.

OFFICER ROBERTSON: What stuff is in the bag though? Like is it --

OFFICER BROODER: Stuff from Safeway? Is it just random stuff that happens to be in a Safeway bag?

DARIUS THOMPSON: (inaudible)

OFFICER BROODER: Okay.

(End of audio)

_____

MR. VASQUEZ:

Q. Okay. Officer Robertson, I want to ask you a quick point. In the video Darius Thompson says that an unknown individual named Maya brings him an I.D. and social security card of Michael Norton. Were you ever able to identify this Maya person?

A. No, we were not.

Q. And in the interview, do you ask him when this alleged Maya individual spoke with Michael Norton?

A. Yes, we did.

Q. And what was Mr. Thompson's response?

A. Mr. Thompson told us that he spoke with Maya on the day of his birthday, which is November 21st.

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 and (2) the word-count of this brief is 13,286 words.

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.

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on December 9, 2021.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Petitioner's Brief on the Merits will be eServed pursuant to ORAP 16.45 on Jennifer Lloyd #943724, Attorney-in-Charge Criminal Appeals, attorneys for Respondent on Review.

Respectfully submitted,

ERNEST G. LANNET
CHIEF DEFENDER
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Signed
By Anne Fujita Munsey at 3:48 pm, Dec 09, 2021

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