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

REPLY 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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PETITIONER'S REPLY BRIEF

Defendant offers this reply to the state's respondent's brief on the merits.

SUMMARY OF ARGUMENT

Defendant's argument that the seizure of his cell phone and all derivative evidence should have been suppressed has three main parts: 1) Police did not have probable cause to believe his phone contained evidence of the shooting; 2) Exigent circumstances did not justify the seizure of his phone to search for evidence of identity theft, and 3) Exigent circumstances did not justify the seizure of his phone for five days before obtaining a warrant. Defendant responds to the state's challenges to each of those assertions.

The state's claim that police had probable cause to search for evidence of the shooting is based primarily on the belief that defendant probably knew more about the shooting than he was telling. But that does not mean that evidence of that knowledge would be on his cell phone. The only specific evidence *on the phone* that the state cites is the time at which the user made any communications and their geographic location while doing so. But whether that information exists or will lead to evidence of the crime is unduly speculative.

Regarding defendant's identity theft argument, the state claims that the state's need for the evidence is not part of the exigent-circumstances analysis. However, that contradicts this court's opinions in *Snow* and *Mazzola*.

Moreover, police are capable of making the kind of assessments required by those opinions, especially in this case, when the need for the evidence is obviously lacking.

Regarding the five-day delay in obtaining the search warrant, the state argues that when police seize personal property under the exigent circumstances exception, it has the same authority to hold the property for trial *as though the seizure occurred pursuant to a judicial warrant*. It claims that the only limitation on the duration of the seizure is Fourth Amendment reasonableness. However, the state's proposal ignores the principle that *a warrant exception is limited to the purposes of the exception*. Because a seizure is an ongoing interference with a person's possessory interests, the justification for the seizure must continue for the duration of the seizure. But the exigency that drives the destruction-of-evidence exception dissipates when the police seize the property upon suspicion that it contains evidence. The seizure is reasonable only because *taking the time to obtain a warrant* presents the risk of destruction. Consequently, police must obtain a warrant as soon as practicable to adhere to the purposes of the exception. That is how long the exigency—and its concomitant justification—lasts.

Finally, defendant preserved his argument that the court should have suppressed the second half of the interview; the court's failure to do so was harmful.

ARGUMENT

I. Police did not have probable cause to believe defendant's cell phone contained evidence of the shooting.

A. The trial court's ruling was not predicated on whether police had probable cause to search defendant's cell phone for evidence of the shooting.

The state claims that the trial court "ruled that the officer also had probable cause to believe that the phone contained evidence relevant to the shooting investigation. (Tr 137)." The record does not support the state's assertion.

In its initial ruling, the trial court explicitly relied on probable cause of *identity theft* to deny the motion to suppress and expressed only doubts as to whether police had probable cause that the phone would contain evidence of *the shooting*.

> "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 (emphasis added).

Defendant then argued that even if police had probable cause to believe that his phone contained evidence of his identity, "that doesn't justify a seizure *for five days*, a protective seizure." Tr 134 (emphasis added). The court responded:

> "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. Thus, the court continued to rely on the probable cause for identity theft to seize the phone. And it continued to claim that whether police had probable cause "on the shooting" was "a closer call." The court's equivocation that "it sure seems likely" that information may be on the phone was not necessary to its ruling that police had probable cause to seize the phone at "the instant in time" that they did so. Its musing about "information" also was not a conclusion that criminal evidence would be found on the phone. And, in any event, whether something "sure seems likely" does not equate to the "more likely than not" standard for probable cause. *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.").

The trial court did not conclude that police had probable cause to believe defendant's phone contained evidence of the shooting. Furthermore, any such ruling would be legal error.

B. Any belief that defendant's cell phone might contain evidence of the shooting was speculative.

The state argues that police had probable cause to believe defendant's cell phone contained evidence of the shooting because: (1) police knew that defendant had been shot, and his behavior and description of the incident were consistent with a criminal act having occurred; (2) Detective Robertson reasonably believed that defendant was withholding information about the shooting (Tr 105-07); (3) Detective Robertson claimed that shooting victims often know the shooter or know "about other people surrounding the shooter" (Tr 106); (4) Detective Robertson claimed that cell phones are useful for establishing a timeline for a crime (Tr 106), and (5) the search warrant affidavit states that cell phones show the date and time of communications and the geographic location of the phone user (Pet BOM ER 7, 15). Resp BOM 20-24.

The state's first three points are that a crime likely has occurred, and that defendant probably knows more about the shooting than he is telling, possibly

including knowledge of the identity of the shooter. But that is not enough to seize defendant's phone. Police must have probable cause to believe that *evidence of the shooting will be contained in the phone*. As important as smart phones are to modern life, they do not map a person's knowledge and thoughts. A person's home contains lots of information about his life, but the fact that a person knows more about a possible crime than he is telling is not enough to get a warrant to search his house. The situation is no different here.

The state's fourth and fifth points are that cell phones may prove useful in establishing the location of a user at the time the user operates it—which, by extension, can be useful in determining the time and location of a crime that the user witnessed or communicated about. Such a rule would allow the police to seize a smart phone held by anyone who may have been near a crime or who may have communicated about a crime—whether a suspect, an eyewitness, or, as in this case, a gunshot victim seeking medical attention. The protection from unreasonable seizures provided by Article I, section 9, should not countenance the significant deprivation of the possessory interest in an intimate item needed for everyday life based on such a paltry justification.

Moreover, the "evidence" that the state seeks to safeguard here is not evidence of the crime—it is the physical receptacle of a wide swath of information some of which, based on broad speculation of ordinary human affairs, might be tangentially related—and thus "useful"—to an investigation.

It is speculative that such information would be "useful." Defendant may not have used his phone to communicate with anyone near the time of the shooting—some people go hours without calling or texting anyone. Although it is certainly possible that defendant's phone could contain helpful information that the police may find "useful," that hope is speculative, not probable.

The state's rule would allow police to seize and search the cell phone of any non-cooperative witness to a crime in the hope that it might contain something useful. Probable cause does not extend so far.

II. The need for the evidence is a relevant consideration in determining whether exigent circumstances exist.

In the opening brief, defendant argued that exigent circumstances did not justify the seizure of his cell phone to prevent the destruction of evidence of identity theft. In response, the state challenged defendant's claim that the need for the sought-after evidence is part of the exigent-circumstances analysis. Resp BOM 24-31. It relied on *State v. Snow*, 337 Or 219, 94 P3d 872 (2004), claiming that "*Snow* holds that the existence of alternative means of obtaining information similar to that sought does not undermine an officer's decision to take action based on the exigency at hand." Resp BOM 27.

In *Snow*, police searched the car driven by the suspect they were pursing in the hope of finding his name and address to facilitate apprehending him. Defendant acknowledges that the *Snow* court held that the fact that two people

had seen the defendant as he fled did not obviate the need for additional identification. The court explained:

> "An eyewitness's identification of a fleeing suspect, even if accurate, conveys only general information. It does not carry with it the same level of detailed information that a suspect's name and address do. The fact that other limited information about defendant was available does not mean that the officers had no right to seek more specific information that would help them apprehend defendant."

Snow, 337 Or at 224-25. Thus, in *Snow*, this court held that exigent circumstances justified the immediate search for higher quality, more specific information than the information already available.

That was not the situation in this case. Police claimed that they needed to search defendant's phone for evidence of his true identity. But they already knew defendant's authentic identity, based on at least two officers' personal knowledge of defendant, defendant's distinctive tattoos recorded in the Portland Police Data System, and the fact that his fingerprints and DNA were in the state's possession because he is a convicted felon. The evidence of his identity that might be gleaned from the cell phone in his possession is not comparable—a personally entered name, the phone numbers of other people, and possibly photos. Although defendant's true identity might be inferred from that information, its use for that purpose is negligible when compared to documented and objectively verifiable tattoos, fingerprints, and DNA evidence, and the officers' personal knowledge.

The state also disputes defendant's reliance on *State v. Mazzola*, 356 Or 804, 820, 345 P3d 424 (2015), for the proposition that an exigent circumstances search must be reasonable "in time, scope, and intensity." Resp BOM 27-28. It admits that "the scope of action taken in response to an exigency must be 'reasonable,' in that it is constrained by the exigency itself," but it claims that "whether an exigency existed does not change depending on the nature of the property that police seek to preserve." Resp BOM 28.

There are three problems with the state's reasoning. First, *Mazzola* did focus on the nature of the evidence that police sought to preserve—"evidence of current impairment" soon after the defendant had been seen driving. 356 Or at 820. That was "probative evidence of an element" that could not be obtained at a different time. *Id*. And no one suggested that the police already had comparable evidence from a different source. Thus, the need for the evidence is part of the exigency analysis under *Mazzola*. Here, the need for additional evidence of defendant's identity was non-existent.

Second, *Mazzola* focused on the level of intrusion—"[t]he [FST] tests at issue were limited in scope and intensity." *Id*. Here, although police merely seized defendant's cell phone before obtaining a warrant, the ultimate goal was the search of his smart phone. That was a major intrusion into defendant's

privacy that was not reasonable merely to obtain additional evidence of his identity.[1]

Third, the state tries to tie the scope of the search to the risk of loss while ignoring the reasonableness component of the analysis. Resp BOM 28 (stating that "the scope of the police action was reasonable in response to the nature of the exigency: the risk of loss of evidence"). But *Mazzola* requires an exigency to be "assessed in light of the reasonableness of the search in time, scope, and intensity." 356 Or at 820. The mere fact that police have probable cause to believe that evidence exists and will be lost is not enough by itself to satisfy the exigent circumstances exception. The police action must also be reasonable.

The state also argues that police "cannot fairly be expected to assess—and to arrive at a single correct conclusion about—not only the evidentiary value of the information sought but its degree of value when compared to other evidence that exists or could be obtained to prove the same point at trial." Resp BOM 30. But police make those kinds of determinations all the time. They must determine whether they have reasonable suspicion or probable cause

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[1] The fact that by the time police applied for a warrant five days after the seizure, they may have gathered enough information to make the search of defendant's cell phone for evidence of the shooting reasonable does not make the seizure of defendant's cell phone at the hospital for evidence of identity theft reasonable. See Resp BOM 28-29 (arguing that *warranted* intrusion into cell phone was reasonable).

before taking most actions. They must decide whether a contemplated action elevates a mere conversation to a seizure. They must ensure that any search incident to arrest is reasonable in time, scope, and intensity. They must decide whether an object they encounter is evidence of a crime. Requiring the same reasonableness assessment in the exigent-circumstances context is unremarkable.

Finally, the state argues that even if defendant was not likely to destroy or dispose of his cell phone to prevent police from obtaining evidence of his identity, which defendant knew they already had, "it was reasonable to believe that he was likely to destroy—or at least make unavailable—the phone itself or any information relating to the shooting." Resp BOM 31. But that is mixing probable cause—whether police may seize the phone for evidence of identity theft must be analyzed separately from whether they may seize it for evidence of the shooting. If police do not have probable cause to believe the phone contains evidence of the shooting, they may not seize it for evidence of something else they don't need on the grounds that defendant might destroy the evidence for which they don't have probable cause. The state cannot claim an exigency because evidence for which they do not have probable cause might be destroyed.

III. A seizure is ongoing and must be justified for the duration of the seizure; if the justification is exigent circumstances, the exigency must be ongoing.

The state argues that "[a]fter police seized the phone pursuant to exigent circumstances, the exigency exception did not limit their authority to *retain* it." Resp BOM 31 (emphasis in original). That is incorrect. "[E]xceptions 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). The exigent circumstances exception allows police to "act swiftly * * * to forestall * * * the destruction of evidence." *State v. Stevens*, 311 Or 119, 126, 806 P2d 92 (1991). Once that goal has been accomplished, police must obtain a warrant to allow the continued invasion of a person's possessory interest in an object. Just as an exigency to search dissipates when the emergency is over, so does the exigency to seize. When the danger that the evidence will be destroyed before police obtain a warrant has ended (by the immediate seizure), police must obtain a warrant to continue that seizure. The exigency lasts only as long as it takes to obtain the warrant.

The fact that a warrant is rarely obtained when police rely on the exigent circumstances exception is because most exigent-circumstance cases involve warrantless *searches*. Once the search has occurred, a person's privacy rights have been lost. If the exigent circumstances exception applies, that loss occurred legally. At that point, police may seize contraband within plain view.

See State v. Miller, 300 Or 203, 229-30, 709 P2d 225 (1985) (holding that although exigency ended when police entered hotel room and found victim dead, thus preventing any further search, police could seize evidence already in plain view). Because in the case of a warrantless *seizure* the intrusion on a defendant's possessory rights is ongoing, police must continue to justify the seizure. Once the exigency has dissipated, the only way to do that is with a warrant.

The state suggests that the only limit on the amount of time police have to obtain a search warrant after seizing an item is the Fourth Amendment standard of "reasonableness." Resp BOM 35-41. Although that standard sets the outer limit on the time police have to obtain a warrant and applies in multiple contexts, the exigent circumstances exception has its own limits—the duration of the exigency. To reiterate, a warrant exception is limited to the purposes of the exception. *Fulmer*, 366 Or at 233. Once the exigency dissipates, police must find a different justification for the continuing invasion of a person's possessory interests that covers every moment of the invasion. Just as consent lasts until the person revokes that consent, the exigent circumstances exception to the warrant requirement lasts for the length of time it would take police to obtain a warrant. As the state recognizes, "the scope of the police conduct [under the exigent circumstances exception] is limited to terminating the exigency." Resp BOM 29. Then police must obtain a warrant.

The state argues that defendant's possessory interests were "diminished" by the fact that he did not seek the return of his cell phone. Resp BOM 38-40. However, it is the state's burden to justify an invasion of a possessory or privacy right. Defendant is not required to independently assert a right that already exists in order to protect it. When police announce that they are going to search a person's house rather than seeking consent and the person merely acquiesces without protesting, the search is not justified. *State v. Tennant*, 310 Or App 70, 77, 483 P3d 1226 (2021) ("But it is not defendant's burden to prove acquiescence; it is the state's burden to prove affirmatively that defendant consented rather than merely acquiesced.").

The aforementioned principles are more obvious in the context of the seizure of a house. Police may seize a residence that they have probable cause to believe contains crime evidence and prevent anyone (including the owner) from entering to avoid the destruction of evidence inside, pursuant to the exigent circumstances exception. But that seizure is limited to the amount of time that it takes to get a warrant. It is not based on an independent reasonableness analysis. Nor is it based on whether the owner seeks entry. Police may not wait for someone to seek entry and then claim an exigency to continue the seizure; they are required to obtain a warrant as soon as they have probable cause to do so. *See State v. Matsen/Wilson*, 287 Or 581, 587, 601 P2d 784 (1979) (holding that exigent circumstances did not justify warrantless entry

when police did not seek warrant because they wanted to catch the defendant in the act of delivery); *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 officer waited four hours after establishing probable cause to seize a parked automobile because an "officer cannot create exigent circumstances by his own inaction").

One final point: the state argues that "Police can hold lawfully seized evidence for use in evidence in a trial—and can even 'observe, feel, smell, shake and weigh' the evidence—without violating a possessory interest of the defendant." Resp BOM 32. It cites cases involving an inventory, a search incident to arrest, and an unspecified exception. *See also* Resp BOM 32 (noting that "the retention of seized items—after a seizure under *any* warrant exception, or even after a seizure pursuant to a warrant—is governed by an overall standard of 'reasonableness'"). But it is important to realize that every police action of constitutional magnitude must be justified, and the action must match the justification. The justification for an administrative inventory is different from that of a search incident to arrest, which is different from a warranted search. The length of time that police may hold a seized item under each of those justifications varies depending on the justification and the nature of the item. In the case of a warranted search, police action, including the seizure of

evidence, is approved by a neutral magistrate. That is not so under the exigent circumstances exception. Consequently, the ability of police to retain personal property is limited to the exigency. Once it dissipates, a warrant—with its accompanying judicial oversight—is needed to continue the seizure.

IV. Defendant's claim that the second half of his interview should be suppressed is preserved.

The state claims that defendant's challenge to the second half of the interview was not preserved because it was too late and limited to a few statements, not the remainder of the interview. Resp BOM at 42.

Defendant's challenge to the interview statements was not too late, because the trial court acknowledged and accepted his claim that he was seeking suppression of his subsequent interview statements through the motion to suppress. Tr 171-72 at Pet BOM 19-20. The "later hearing" when that exchange occurred took place immediately after the litigation of the motion to suppress—it was part of a day's worth of pre-trial motions. And the state did not object to defendant's clarification, either on timeliness or scope grounds.

Defendant's objection encompassed the remainder of the interview when he said that "the interview would have flowed differently without the State's — the officer's ability to confront * * * [defendant] about what was on his phone." Tr 172. That is an exploitation argument as to the remainder of the interview. It placed the burden on the state to prove that *defendant* was not affected by the

reference to the cell phone information and influenced to make statements he would not otherwise have made.

V. The erroneous admission of the second half of the interview was harmful.

The state argues that defendant's admissions after police invoked the cell phone information were "not qualitatively different from the incriminating aspects of his statements before that point." Resp BOM 50-52. But although defendant changed his story before the cell phone invocation, the highlighted statements in the reply brief that occurred after the invocation show defendant's guilty mind because he repeatedly states that he does not want to get the victim in trouble. Pet BOM 47-48. That is powerful evidence that defendant knows he was in the wrong.

The remainder of the state's harmlessness argument is that "evidence of defendant's guilt was overwhelming despite his interview statements." Resp BOM at 53-54. But in Oregon, "[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." *State v. Davis*, 336 Or 19, 32, 77 P3d 1111 (2003).

CONCLUSION

For the foregoing reasons and those contained in his brief on the merits, 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,

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Signed
By Anne Fujita Munsey at 2:13 pm, Feb 17, 2022

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05

Brief length

I certify that (1) this brief does not comply with the word-count limitation in ORAP 5.05 and (2) the word-count of this brief is 4,217 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 Reply Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on February 17, 2022.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Petitioner's Reply 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,

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