

1 Terri Wood, OSB #88332  
2 Law Office of Terri Wood, P.C.  
3 730 Van Buren Street  
4 Eugene, Oregon 97402  
5 541-484-4171

6 Attorney for Kevin Bush

7  
8 IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR JACKSON COUNTY

9  
10 STATE OF OREGON,  
11 Plaintiff,

CASE No. 09-XXXX-FE

12 -VS-

13 KEVIN BUSH,

MEMORANDUM OF LAW IN SUPPORT OF  
MOTION TO SUPPRESS EVIDENCE

14 Defendant

15  
16 **SUMMARY OF ARGUMENT**

17  
18 Trooper Gaither lawfully stopped Mr. Bush and co-defendant Raymond Chance  
19 in their rental car for driving 10 mph over the posted 55 mph speed limit on  
20 Interstate 5. The stop occurred at 12 noon on Friday, May 8, 2009. Rather than issue  
21 the speeding citation, Trooper Gaither engaged in a series of acts to investigate her  
22 suspicion that the men were transporting narcotics back to Washington. After Bush  
23 refused to consent to the search of the car, Gaither called for a drug detection dog  
24 to be brought to the scene.  
25

1           The dog arrived at 1:22 p.m.; during this one hour and twenty-two minute  
2 detention, Bush repeatedly asked to leave; most of that time he and Chance were  
3 required to stand or sit on the right-of-way of the highway, outside of their vehicle,  
4 under guard of Gaither and back-up officers. During this lengthy period, most of which  
5 Gaither spent simply waiting for the dog to arrive, she did not seek to obtain a  
6 telephonic warrant to either seize the rental car, or seize and search the car. The dog,  
7 whose drug-detection reliability is at issue, allegedly alerted on one of the items of  
8 luggage that officers had removed from the trunk of the car, without consent.  
9

10           After removing all of the baggage from the trunk and placing it on the  
11 pavement, officers opened one or more items of baggage, then opened closed  
12 opaque container(s) found within the baggage, where they discovered marijuana.  
13 Officers stopped their search to place Bush and Chance in handcuffs and under formal  
14 arrest at 1:37 p.m., and then resumed opening pieces of luggage and closed opaque  
15 containers inside the luggage, where they discover more marijuana.  
16

17           In particular, Trooper Gaither and assisting officers violated Article 1, Section 9  
18 of the Oregon Constitution, and the Fourth and Fourteenth Amendments to the  
19 United States Constitution, in one or more of the following respects:  
20

21           1. The officer unlawfully extended the duration of the traffic stop by inquiring  
22 about a non-drug odor she detected from the vehicle and the source of the odor,  
23 rather than taking steps to issue the citation, without reasonable suspicion that  
24 defendants were committing a crime;  
25

1           2. The officer unlawfully extended the duration of the traffic stop by  
2 requesting and waiting for receipt of a criminal history check on both defendants,  
3 after their driver's licenses came back valid, rather than completing the issuance of  
4 the citation, without reasonable suspicion that defendants were committing a crime.  
5

6           3. The officer unlawfully extended the duration of the stop by requesting  
7 consent to search their car, rather than issuing the citation, without reasonable  
8 suspicion that defendants were committing a crime.

9           4. The officer unlawfully extended the duration of the stop by separately  
10 questioning both defendants concerning their course of travel and their relationship,  
11 rather than issuing the citation, without reasonable suspicion that defendants were  
12 committing a crime.  
13

14           5. Even if the officer had reasonable suspicion to extend the duration of the  
15 stop to make brief inquiry as to whether defendants were committing a crime, the  
16 duration of the stop—from noon until past 1:30 p.m.—was unreasonable and not  
17 supported by probable cause, warrant, or any exception to the warrant requirement.  
18

19           6. Officers unlawfully seized defendants' car when, without probable cause,  
20 they deprived defendants of the use of their car and access to its contents for more  
21 than one hour while waiting for the arrival of a drug detection dog.

22           7. Even if officers had probable cause to seize defendants' car prior to the  
23 alleged alerts by the drug detection dog, no exigency existed to justify the  
24 warrantless seizure of the car.  
25

1           8. Officers unlawfully searched defendants' vehicle when, without probable  
2 cause, they opened the car doors, hood and trunk for the purpose of conducting a  
3 canine sniff of these interior compartments.

4           9. Officers unlawfully seized and searched the luggage inside the trunk of  
5 defendants' vehicle when, without probable cause, they removed all of the luggage  
6 from the trunk and placed it outside the vehicle.

7           10. The alleged alerts of canine Charlie to the vehicle or the luggage did not  
8 give rise to probable cause to search.

9           11. Even if officers had probable cause to search the vehicle and remove the  
10 luggage from inside the trunk once the canine alerted, no exigency existed after the  
11 passage of more than 90 minutes from the time of the stop when the vehicle was  
12 last "mobile," to justify this warrantless search of the vehicle's interior compartments  
13 or the search of the luggage by removing it from the vehicle.

14           12. Even if there was probable cause to open a backpack upon which the  
15 canine alerted, and probable cause to open a small tin container inside the backpack  
16 which contained less than one ounce of marijuana, that did not give rise to probable  
17 cause to open the remainder of the luggage.

18           13. Even if there was probable cause to open and search the luggage and the  
19 closed, opaque containers found inside the luggage, no exigency existed after the  
20 passage of more than 90 minutes from the time of the stop, to justify the  
21 warrantless search of the luggage and closed opaque containers found inside the  
22 luggage, once the luggage was removed from the trunk of the car.

1 MEMORANDUM OF LAW

2 Standing

3 1. An assertion of standing is not necessary under Article 1, Section 9, of the  
4 Oregon Constitution. A criminal defendant always has standing to challenge the  
5 admission of evidence introduced by the State. See, e.g., *State v. Tanner*, 304 Or  
6 312 (1987). The defendant does not have to assert any privacy interest in property  
7 if the search is warrantless. *State v. Tucker*, 330 Or 85 (2000); *State v. Cook*, 332  
8 Or 601 (2001). Defendant's person, vehicle and property each represent distinct  
9 privacy interests, and the state must have an articulable basis for invading any  
10 privacy interest. *State v. Brown*, 110 Or App 604 (1992); *State v. Barnum*, 136 Or  
11 App 167 (1995).  
12

13 Remedy For Violation Of Article 1, Section 9

14 2. Exclusion of evidence is the proper remedy for a violation of a person's  
15 constitutional rights pursuant to Article I, Section 9, of the Oregon Constitution.  
16 *State v. Tanner, supra.*  
17

18 Good Faith of Officer Is Not A Factor

19 3. The good faith of the police officers in seizing evidence may not be  
20 considered with regard to the reasonableness of any search or seizure. *State v.*  
21 *Carsey*, 295 Or 32 (1983); *State v. Miller*, 116 Or App 174 (1992). The reason for  
22 the exclusionary rule under the Oregon Constitution is to protect the privacy  
23 interests of its citizens and not simply to deter police misconduct. *State v. Tanner,*  
24 *supra.*  
25

1 What Constitutes A “Stop”

2 4. “A ‘stop’ is a temporary restraint of a person’s liberty by a peach officer  
3 lawfully present in any place.” ORS 131.605; see *Terry v. Ohio*, 392 US 1 (1968). As  
4 explained by *State v. Dupay*, 62 Or App 798, 805-806 (1983):

5  
6 *Terry* and the Oregon statutes recognize an exception to the  
7 requirement that Fourth Amendment seizures of persons and  
8 effects be based on probable cause. The narrow exception  
9 permitted by *Terry* and the Oregon statutes, however, is confined  
10 to (1) a stop of the person, (2) a brief inquiry regarding the  
11 immediate circumstances that aroused the officer's suspicions,  
12 (3) a protective frisk if the officer reasonably suspects that the  
13 person is armed and presently dangerous to the officer or other  
14 persons present and (4) seizure of weapons found by the frisk.  
15 This limited search and seizure is allowed to ensure the safety of  
16 the officers and other persons nearby. A warrantless search or  
17 seizure of broader scope than permitted by ORS 131.605 to ORS  
18 131.625 must be based on probable cause and exigent  
19 circumstances, or consent.

20 A "stop" occurs when a person is approached by a law enforcement officer  
21 who demands and retains a person's identification. *State v. Gonzalez-Galindo*, 146 Or  
22 App 291 (1997); *State v. Hall*, 339 Or 7 (2005). A “stop” is a seizure under Article  
23 1, Section 9. *Hall, supra*, 339 Or at 19. There is a stop when a defendant gives the  
24 license to the officer voluntarily and the officer retains it. *State v. Campbell*, 207 Or  
25 App 585 (2006). Running a records check on a passenger is a stop. *State v.*  
*Thompin*, 341 Or 368, 377-379 (2006). A stop also occurs if the person must  
change his/her direction in order to talk with the police officer. *State v. Johnson*, 105  
Or App 587 (1991). During these encounters a person cannot refuse to cooperate  
and walk away. *Brown v. Texas*, 443 US 47, 99 S Ct 2637 (1977); *State v. Starr*, 91  
Or App 267 (1988).

1           The test is whether the police, through some "show of authority," restrained a  
2 person's liberty so a reasonable person would not feel free to refuse to cooperate or  
3 leave the scene of the investigation.

4           Scope of a Traffic Stop

5           5. The scope of a valid stop is limited to inquiry about the immediate  
6 circumstances that aroused the initial suspicion of the officer, and must also be  
7 limited to a reasonable amount of time. *State v. Rozzell*, 87 Or App 424, 428  
8 (1987)(continued questioning of burglary suspect for 13 minutes before arrest not  
9 unreasonable); ORS 131.615(3). Traffic stops should be the "minimum possible  
10 intrusion" on Oregon motorists, and not an excuse to begin questioning, searching, or  
11 investigating subjects unrelated to the reason for the stop. *State v. Carter/Dawson*,  
12 287 Or 479 (1979); *State v. Wight*, 48 Or App 731 (1980). When investigating a  
13 traffic infraction, police are limited to the inquiry specified in ORS 810.410.

14           Prolonged Or "Excessive" Stop Is Unlawful

15           6. Even if the initial traffic stop of a defendant was reasonable, his continued  
16 detention by law enforcement officers may be excessive, becoming an unlawful stop,  
17 unless supported by reasonable suspicion that the defendant is committing a crime.  
18 "A seizure that is justified solely by the interest in issuing a warning ticket to the  
19 driver can become unlawful if it is prolonged beyond the time reasonably required to  
20 complete that mission." *Illinois v. Caballes*, 543 US 405, 407 (2005).

21           An officer's authority to retain a person's drivers license ends when the officer  
22 has all the evidence needed to issue a citation. *State v. Dow*, 116 Or App 542  
23

1 (1992)(running records check on defendant’s license was unnecessary for issuance of  
2 citation for failure to register vehicle).

3 A traffic stop becomes excessive when, as an alternative to processing the  
4 infraction, the officer delays by questioning the motorist about unrelated matters,  
5 even if the questioning takes only a minute or two. *State v. Rodgers*, 219 Or App  
6 366, 368-69, 372 (2008), review allowed, 345 Or 301 (2008); *State v. Ehret*, 184  
7 Or App 1 (2002)(when officer, rather than handing defendant the traffic citation,  
8 asked him to get out of the car and questioned him about whether there were drugs  
9 in the vehicle, he unlawfully extended the traffic stop); *State v. Raney*, 215 Or App  
10 339, 343 (2007)(officer can lawfully detain a driver in association with a traffic stop  
11 only for “the time reasonably required to complete a citation and any other  
12 documents that must be given to the citizen in connection with the detention”). In  
13 the absence of reasonable suspicion that the defendant has committed a crime, the  
14 officer has no lawful authority to extend the stop, and any ensuing conversation,  
15 consent and search are also unlawful. *State v. Hall, supra*.

16 Questioning on matters unrelated to the traffic infraction, or a request to  
17 search, that do not occur “during an unavoidable lull in the [traffic infraction]  
18 investigation,” unlawfully extends the duration of a stop beyond the time reasonably  
19 required to cite a defendant for the traffic infraction. *State v. Foland*, 224 Or App  
20 649, 653-654 (2008)(quoting *Rogers, supra*); *State v. Huggett*, 228 Or App 569  
21 (2009)(same); *State v. Broughton*, 221 Or App 580, 590 (2008)(“To allow an  
22 officer to elicit potentially incriminating information from a motorists while that  
23  
24  
25



1 officer considers whether to issue a citation allows an officer to extend a stop for too  
2 long.”).

3 Reasonable Suspicion Of Crime Required To Extend Traffic Stop

4 7. A "stop" of a person is unreasonable when the officer has insufficient  
5 articulable facts providing a reasonable suspicion that a crime has been committed.  
6 ORS 131.615; *State v. Hall*, 339 Or 7 (2005). An officer may broaden the scope of  
7 the investigation of a traffic infraction if there is a reasonable suspicion that a  
8 defendant has committed illegal acts other than the traffic infraction. A reasonable  
9 suspicion is defined as an objective test that requires an officer to point to specific,  
10 articulable facts giving rise to a reasonable inference that the defendant committed a  
11 crime. *State v. Morton*, 151 Or App 734, 738 (1997). An officer’s subjective belief  
12 that the stopped person is committing a crime fails to establish “reasonable  
13 suspicion” if that belief is not “objectively reasonable.” *State v. Guest*, 207 Or App  
14 395 (2006).  
15

16 Trooper Gaither Lacked Reasonable Suspicion That A Crime Was Committed

17 8. The Court must analyze sequentially each action by Trooper Gaither that  
18 delayed issuance of the speeding ticket as she began investigating her suspicion of  
19 drug trafficking, to determine at what point—if any—her suspicion became reasonable  
20 so as to justify the continued detention of Bush and Chance. Suspicion based on a  
21 strong non-drug odor emanating from the car cannot be the entire basis for  
22 reasonable suspicion, and delay in processing the citation by making inquiries about  
23 the odor is unlawful. *See, e.g., State v. Villemeyer*, 227 Or App 193, 198 (2009)(An  
24  
25

1 officer's "special intuitions" cannot form the entire basis for reasonable suspicion, and  
2 intuitions include such things as suspecting criminal activity based on the observation  
3 that a person "looked real sharp" or "like a typical pusher, to me").

4           Obtaining conflicting stories, or evasive responses, even in combination with  
5 other factors, does not give rise to reasonable suspicion. *See, e.g., State v. Frias*, 229  
6 Or App 60, 62-63 (2009)(Facts that defendant was evasive in response to officer's  
7 questions during traffic stop, was awaiting sentencing on drug charges, and had dark  
8 circles under eyes did not provide reasonable suspicion that defendant possessed  
9 drugs at time of stop). In *Broughton, supra*, 221 Or App 580, police stopped  
10 defendant for a broken taillight and to investigate suspicions defendant had  
11 committed a drug transaction, based on observing defendant's short visit to a house  
12 under surveillance for drug activity. After running a records check, the officer began  
13 questioning defendant about stopping at the drug house. His suspicions were  
14 increased when defendant said she stopped to drop off laundry, but he knew her  
15 hands had been empty. The Court of Appeals reversed the trial court, holding the  
16 officer did not have reasonable suspicion defendant had committed a crime when he  
17 began the inquiry which unlawfully delayed him issuing the citation.

18           Refusal to consent to search, and nervous behavior, likewise does not provide  
19 reasonable suspicion to prolong a traffic stop. *See, e.g., State v. Foland*, 224 Or App  
20 649, 655-656 (2008)(defendant's demeanor and refusal to consent to search after  
21 officer inquired about drugs inside a container cannot contribute to reasonable  
22 suspicion of drug crime).

1 An Excessive “Stop” Constitutes A Seizure That Requires Probable Cause

2 9. An excessive "stop" constitutes a seizure of the person that requires  
3 probable cause; prolonged detention may constitute an illegal arrest if not based on  
4 probable cause. *Dunaway v. New York*, 442 US 200 (1979); *State v. Carter/Dawson*,  
5 287 Or 479 (1979); *State v. Morgan*, 106 Or App 138 (1991); *see also, State v.*  
6 *Bishop*, 157 Or App 33 (1998).

8 Property is “seized” for the purposes of Article I, section 9, when the police  
9 significantly interfere, even temporarily, with a person's ownership and possessory  
10 interests in the property. *State v. Smith*, 327 Or 366, 375 (1988). Depriving  
11 Defendants of the use of their car and access to its contents for over an hour and 30  
12 minutes constituted a seizure requiring both probable cause and a warrant. *See*  
13 *Smith*, 307 Or at 375. Invasion of possessory rights are no less significant than  
14 invasions of privacy rights under the Oregon Constitution. *Id.*

16 In *State v. Dupay*, 62 Or App 798, 806 (1983), the court held that even if  
17 brief detention of defendant and baggage was supported by reasonable suspicion that  
18 defendant was transporting narcotics, prolonged detention of one hour and 20  
19 minutes while awaiting arrival of drug detection dog was impermissible in the absence  
20 of a warrant. More recently, the Oregon Supreme Court held that probable cause and  
21 a warrant were required to support the seizure of a vehicle for less than an hour for  
22 the purpose of subjecting it to a drug dog sniff. *State v. Juarez-Godinez*, 326 Or 1  
23 (1997)(car stopped for speeding and detained a total of 46 minutes before dog  
24 arrived).  
25

1 While police may seize personal property upon reasonable suspicion that the  
2 items contain contraband, a seizure lasting 90 minutes for purposes of subjecting an  
3 item to a drug detection dog sniff, as a predicate to obtaining a warrant, was  
4 unreasonable and violated the Fourth Amendment. *United States v. Place*, 462 US  
5 696 (1983). “When the nature and extent of the detention are minimally intrusive of  
6 the individual's Fourth Amendment interests, the opposing law enforcement interests  
7 can support a seizure based on less than probable cause.” *Id.*, at 703. In the case at  
8 bar, Trooper Gaither stopped Mr. Chance and Bush for going 10 miles over the speed  
9 limit in a construction zone at 12 noon, and detained them on the highway off ramp  
10 for more than one hour and thirty minutes before the drug detection dog allegedly  
11 alerted to a suitcase that officers had taken out of the trunk of the car. This is far  
12 beyond what could reasonably be viewed as a “minimal intrusion” of their liberty  
13 interest.  
14  
15

#### 16 Meaning of “Probable Cause” To Seize or Search

17 10. "Probable cause" requires articulable facts that must lead a reasonable  
18 person to believe that evidence of a crime will probably be found in the location to be  
19 searched or the property to be seized. *See, State v. Anspach*, 298 Or 375 (1984).  
20 This is the more-likely-than-not requirement. A "well-warranted suspicion" is not  
21 probable cause because a suspicion, no matter how well-founded, does not rise to the  
22 level of probable cause. *State v. Verdine*, 290 Or 553 (1981); *State v. Spencer*, 101  
23 Or App 425 (1990).  
24  
25

1 Trooper Gaither Lacked Probable Cause To Seize Defendants' Car

2 11. The outcome of this case on this issue is controlled by the Supreme  
3 Court's decision in *State v. Juarez-Godinez*, 326 Or 1 (1997), which turned on  
4 strikingly similar facts. The Court found that the following evidence gathered by  
5 police during the course of a 46-minute detention did not amount to the requisite  
6 probable cause: "(1) defendant and his companions were Hispanic and expensively  
7 dressed, (2) the car's occupants were making a long trip with no visible luggage, (3)  
8 the car was owned by a drug offender, (4) defendant was "visibly nervous" and  
9 unable to produce identification, and (5) the car smelled of aromatic air fresheners  
10 and was registered to a third party who was on probation for delivery of a controlled  
11 substance." 326 Or at 9. "Even when viewed through the filter of [the officer's]  
12 training and experience, those observations did not amount to probable cause and  
13 were, consequently, insufficient to support the issuance of the search warrant." *Id.*

14  
15  
16 In the case at bar, many of the circumstances identified by Gaither are not  
17 suggestive of any illegal activity: renting a car for a long trip even though carrying  
18 insurance on three vehicles; renting a car for three days; no luggage in the passenger  
19 compartment; and allowing the passenger, who was not on the rental agreement, to  
20 drive. The primary facts that objectively support an inference of criminal activity were  
21 (1) the strong odor or air freshener or deodorizer coming from the car, with no  
22 source in plain view; (2) conflicting statements from the defendants regarding how  
23 long they had known each other; and (3) both defendants having criminal histories,  
24 with Bush's including drug convictions. Even if the innocuous circumstances regarding  
25

1 the car rental and operation are factored in, these circumstances fail to reach the  
2 level of probable cause.

3 Officers Needed A Warrant To Seize Defendants' Car

4 12. In *State v. Juarez-Godinez, supra*, the Court held that officers violated  
5 Article I, Section 9 when they seized the defendant's vehicle following his arrest  
6 rather than release it to a passenger, and held it for 46 minutes (30 minutes post-  
7 arrest) pending arrival of a drug detection dog: "We have stated, on various  
8 occasions, that a warrantless seizure is unconstitutional unless it is justified under one  
9 of a few carefully circumscribed exceptions to the warrant requirement. We do not  
10 find that any exception applies to the circumstances in this case. We conclude that  
11 the seizure of the car was invalid." 326 Or at 8-9.

12 All Evidence Obtained By Exploiting Unlawful Stop Or Seizure Is Excluded

13 13. Any and all evidence obtained as the result of an illegal stop must be  
14 suppressed as "fruit of the poisonous tree." *State v. Valdez*, 277 Or 621 (1977);  
15 *State v. Gonzalez-Golinda, supra*. This includes any and all oral derivative evidence.  
16 *State v. Olson*, 287 Or 157 (1979); *State v. Morgan*, 106 Or App 138 (1991).

17 Possession Of Less Than One Ounce Does Not Create Probable Cause

18 14. Additional facts beyond the discovery of less than an ounce of marijuana is  
19 required to justify a belief that more is present, so as to support a search of a  
20 vehicle. "As a matter of law, possession of less than one ounce cannot by itself  
21 create probable cause to search for more." *State v. Tallman*, 76 Or App 715, 720  
22  
23  
24  
25

1 (1985). This follows from the Legislature’s decriminalization of small quantities of  
2 marijuana. *Id.*

3 What Constitutes A “Search”

4 15. Police conduct a search within the meaning of Article I Section 9, of the  
5 Oregon Constitution when the officer opens the door of the vehicle to inspect the  
6 interior compartment of the vehicle for evidence. *State v. Turechek*, 74 Or App 228  
7 (1985); *State v. Rhodes*, 315 Or 191, 196197 (1992). Likewise, a search occurs  
8 when an officer inserts his head into an open car window. *State v. Hendricks*, 151 Or  
9 App 271 (1997). Opening of a car trunk is a search. *State v. Kosta*, 304 Or 549, 554  
10 (1987).  
11

12 A dog sniff performed on the exterior of a car while the driver was lawfully  
13 seized for a traffic violation does not violate the Fourth Amendment. *Illinois v.*  
14 *Caballes*, 543 US at 409. When officers open the door to a vehicle and permit the  
15 dog to enter the vehicle, that constitutes a search. *United States v. Winningham*, 140  
16 F.3d 1328, 1330-31 (10<sup>th</sup> Cir. 1998). A dog sniff of luggage that is located in a  
17 public place is not a search within the meaning of the Fourth Amendment. *Place*,  
18 *supra*, 462 US at 707. The interior of a car trunk is not a “public place”. *Cf. State v.*  
19 *Smith*, 327 Or 366, 646 (1998)(dog sniff conducted in public place of odor  
20 molecules in the air outside of a clearly defined, private space, is not a “search” under  
21 the Oregon Constitution; sniff of exterior of closed storage unit).  
22

23  
24 Police conduct a search within the meaning of the Fourth Amendment when  
25 they move an item to check for a serial number, *Arizona v. Hicks*, 480 US 321

1 (1987); or when they physically manipulate a carry-on bag aboard a bus, *Bond v.*  
2 *United States*, 529 US 334 (2000). No search can be conducted without probable  
3 cause. *Id.* When the officers began handling and moving defendants' luggage around  
4 inside the vehicle, including picking up and placing each piece outside of the vehicle  
5 on the pavement, they effected a search of the luggage.

6  
7 Officers Needed A Warrant To Search Defendants' Car

8 16. In *State v. Brown*, 301 Or 268 (1986), a divided Supreme Court  
9 recognized for the first time an "automobile exception" to the warrant requirement of  
10 Article 1, Section 9: If the automobile is "mobile" and there is probable cause to  
11 search at the time of the stop, the Court held the police are not required to obtain a  
12 warrant prior to searching the car. *Brown* noted in particular there need be no inquiry  
13 into "whether a magistrate was available, whether by telephone or otherwise." 301 Or  
14 at 278.

15  
16 On closer examination, *Brown* is clearly inapplicable to the search of  
17 Defendants' car. *Brown* presented "the question whether police officers are required  
18 to obtain a warrant before [immediately] searching the trunk of a lawfully stopped  
19 automobile when the officers who arrested the driver have probable cause to believe  
20 that the trunk contained relevant evidence of the crime for which the arrest could  
21 have been made." 301 Or at 270. "We hold that under these circumstances no  
22 warrant was required and the search of the trunk and the seizure of the crime  
23 evidence did not violate Article I, section 9, of the Oregon Constitution, or the Fourth  
24 Amendment to the United States Constitution." *Id.*



1 Trooper Gaither had probable cause to stop Defendants' car and to cite co-  
2 defendant Chance for speeding. Although "mobile" at the time of the stop, there was  
3 no probable cause at the time of the stop to search the car for drugs. Assuming,  
4 *arguendo*, that a canine alert to the right rear quarter panel of the car provided  
5 probable cause to search the trunk for drugs, the car had not been "mobile" for about  
6 an hour and a half before that search; rather, it had been parked on the right-of-way,  
7 guarded by at least two officers, with the occupants detained outside the vehicle.  
8 *Compare, Brown, supra* 301 Or at 277("[We] hold that probable cause to believe that  
9 a lawfully stopped automobile which was mobile at the time of the stop contains  
10 contraband or crime evidence justifies an *immediate* warrantless search of the entire  
11 automobile for the object of the search, despite the absence of any additional exigent  
12 circumstances")(emphasis supplied); *State v. Kock*, 302 Or 20, 33 (1986)("Searches  
13 of automobiles *that have just been lawfully stopped* by police may be searched  
14 without a warrant and without a demonstration of exigent circumstances when police  
15 have probable cause to believe that the automobile contains contraband or crime  
16 evidence.")(emphasis supplied); *State v. Herrin*, 323 Or 188, 193 n.1 (1996)("police  
17 may search a lawfully stopped automobile without waiting to obtain a warrant if: (1)  
18 there is "probable cause to believe that the lawfully stopped automobile contains  
19 contraband or crime evidence" and (2) *exigency is present, because the automobile is*  
20 *mobile at the time*. Provided that those elements are met, the exception "justifies an  
21 *immediate* warrantless search of the entire automobile for the object of the search,  
22 despite the absence of any additional exigent circumstances.")(emphasis supplied).  
23  
24  
25

1 Under the facts of the instant case, to search without a warrant is an  
2 unreasonable search. *See, Brown, supra*, 301 Or at 278 n.6 (“In this modern day of  
3 electronics and computers, we foresee a time in the near future when the warrant  
4 requirement of the state and federal constitutions can be fulfilled virtually without  
5 exception . . . . [T]he desired goal of having a neutral magistrate could be achieved  
6 within minutes without the present invasion of the rights of a citizen created by the  
7 delay under our current cumbersome procedure and yet would fully protect the rights  
8 of the citizen from warrantless searches”; discussing telephonic warrants); *State v.*  
9 *Wise*, 305 Or 78, 82 n.3 (1988)(“It was the present unavailability of a general  
10 speedy warrant procedure that led the court to allow an exception for warrantless  
11 searches after stops of mobile vehicles, as Justice Jones noted in *State v. Brown*”);

12  
13  
14 Probable Cause Plus Exigent Circumstances Required To Search Luggage

15 17. No probable cause and exigent circumstances justified the warrantless  
16 search of any closed container seized from defendants’ vehicle. Exigent  
17 circumstances include, among other things, situations in which immediate action is  
18 necessary to prevent the disappearance, dissipation, or destruction of evidence. *See,*  
19 *State v. Stevens*, 311 Or. 119, 126 (1991)(explaining that “[a]n exigent  
20 circumstance is a situation that requires the police to act swiftly to prevent danger to  
21 life or serious damage to property, or to forestall a suspect's escape or the  
22 destruction of evidence”). Once the officers had removed the luggage from  
23 defendants’ vehicle and placed the bags on the pavement, the bags were no longer  
24 “mobile” so as to come within the automobile exception. *See, State v. Kruchek*, 156  
25

1 Or App 617 (1998), *aff'd by an equally divided court*, 331 Or 664 (2001)(A closed  
2 ice chest could not be searched as part of an automobile inventory search, even  
3 though the smell of marijuana was emanating from that container, because the  
4 container did not announce its entire contents; *State v. DeLong*, 43 Or App 183  
5 (1979)(camera bag lawfully seized by police during valid automobile exigency to  
6 warrant clause could not be opened without first securing a warrant); *State v. Lane*,  
7 135 Or App 233 (1995)(Defendant arrested for DUI; officer searched vehicle and  
8 seized and unlawfully searched wallet and closed film canister; no probable cause or  
9 exigent circumstances for search of these items); *State v. Walker*, 173 Or App 46  
10 (2001)(container discovered during inventory after defendant was removed from the  
11 vehicle and no longer in control nor in reach of it could not be searched without a  
12 warrant; any exigency created by vehicle's mobility had been extinguished).

13  
14  
15 The police may not search a closed opaque container they have seized without  
16 a warrant unless the container announces its contents "to the world." In other words,  
17 the officer cannot rely on his personal expertise to understand what the container  
18 holds. *State v. Heckathorne*, 218 Or App 283 (2008). A canine alert on an opaque  
19 container does not justify a warrantless search of the container. *See, United States v.*  
20 *Place, supra*.

#### 21 22 No Exigent Circumstances When Officers Had Time To Obtain Telephonic Warrant

23 18. Exceptions to the warrant requirement are narrow, and the state has the  
24 burden of proving probable cause and that exigent circumstances exist that outweigh  
25 the strong interest in requiring a warrant. *State v. Peller*, 287 Or. 255, 598 P.2d 684

1 (1979). One relevant consideration is whether the police attempted to get a  
2 telephonic warrant, and it is no excuse that police are unfamiliar with the procedure.  
3 *State v. Wise, supra; State v. Stoudamire*, 198 Or App 399, 412 (2005) (“Warrants  
4 are available by telephone, ORS 133.545(5) and 133.555(3), and the availability of  
5 such a warrant is to be considered in determining the existence of exigent  
6 circumstances.”), The state’s burden of establishing the existence of exigent  
7 circumstances requires it to offer evidence on the availability of a telephonic warrant.  
8 *Id. See, State v. Wynn*, 102 Or App 1 (1990)(Exigent circumstances did not exist to  
9 support warrantless entry into defendant’s home to arrest him when police had time  
10 to obtain telephonic warrant).

11  
12 Remedy for Unlawful Search Or Seizure

13  
14 19. Any and all evidence derived from an unreasonable search and/or seizure  
15 must be suppressed as "fruit of the poisonous tree." *State v. Warner*, 284 Or 147  
16 (1978). This includes any and all oral derivative evidence. *State v. Olson*, 287 Or 157  
17 (1979); *Dunaway v. New York*, 442 US 200 (1979).

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24 TERRI WOOD, OSB #88332  
25 ATTORNEY FOR DEFENDANT