OREGON DISTRICT ATTORNEYS' ASSOCIATION
SUMMER CONFERENCE

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APPELLATE UPDATE

By

Appellate Division
Oregon Department of Justice
(503) 378-4402

Covering Oregon cases from July 2012 through August 8, 2013
and
Criminal cases from the United States Supreme Court's 2012 term

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ACCOMPLICES

See also "Instructions," *below*.

^ ***State v. Everett***, 249 Or App 139, 274 P3d 297, *rev allowed*, 352 Or 377 (2012). Defendant attempted to run over Deputy Moss. Then, while in jail, he attempted to solicit Piatt, who was an enforcer for "the Outsiders" (an outlaw motorcycle gang) to murder Moss. But Piatt informed the police and testified before the grand jury, which indicted defendant for solicitation to commit aggravated murder of Moss, listing Piatt as a witness. Defendant then talked with another inmate who was about to be released, Van Alstine, and asked him to give information to the Outsiders about Piatt's ratting him off, hopefully tell Van Alstine that they would murder Piatt. But Van Alstine also was an informer, and defendant was charged with solicitation to commit aggravated murder of Piatt, too. At trial, Piatt testified at trial, admitted he had engaged in illegal activities as "enforcer," but he invoked the Fifth and refused to answer a question on cross-examination whether he had ever killed anyone. Defendant moved to strike Piatt's testimony or for a mistrial, but the trial court denied those motions. Defendant was convicted of those charges. *Held*: Affirmed. The trial court correctly denied defendant's motion for a judgment of acquittal on the charge that he solicited Van Alstine to murder Piatt. Although defendant intended that Van Alstine to be only a messenger to the Outsiders rather than the killer, if Val Alstine had provided the information he knowingly would have been an accomplice. "As a matter of law, a person commits the crime of solicitation when that person solicits an intermediary to procure a third party to commit the intended crime so long as the intermediary is aware of that intended crime."

^ ***State v. Phillips***, 242 Or App 253, 255 P3d 587 (2011), *rev allowed*, 351 Or 586 (2012). Defendant was charged with third-degree assault under ORS 163.165(1)(e) ("while being aided by another person actually present") after he and two others assaulted two brothers. At trial, there was conflicting evidence whether defendant directly assaulted the younger brother, or whether he had merely aided the assault by keeping the older brother at bay. Defendant asked the trial court to give a "*Boots* instruction" that 10 or more of the jurors had to agree on whether defendant committed third-degree assault as a principal or as an accomplice, the court refused to give that instruction, and the jury convicted him of that third-degree assault. *Held*: Affirmed. The trial court correctly refused to give the requested "*Boots* instruction" because when the state presents the alternative theories that a defendant caused the injury himself or aided and abetted another in doing so, the jury need not agree on the specific ground for liability.

ACCUSATORY INSTRUMENTS

See also "Demurrers / Motion in Arrest of Judgment," *below*.

State v. Kowalskij, 253 Or App 669, 291 P3d 802 (2012), *rev den*, 353 Or 748 (2013). Defendant stole mail from the mailboxes of various businesses and individuals, and he was charged with multiple counts of identity and mail theft. Defendant moved for a judgment of acquittal on one of the identity-theft counts, asserting that there was a material variance between the allegation against him and the proof at trial. Specifically, he argued that the indictment alleged that he had unlawfully obtained the personal identification of the Oregon Department of Transportation (ODOT), but the evidence at trial demonstrated that he obtained the personal identification of an *employee* of ODOT. The trial court denied the motion, and defendant was convicted. *Held*: Affirmed. There was no material variance between the indictment and the proof at trial. [1] "The identity of the victim is not material to the offense of identity theft." [2] The indictment sufficiently alleged that defendant obtained the identification of a person by alleging that he obtained "personal identification," and including ODOT as the victim was mere surplusage. [3] Furthermore, the variance between the allegation in the indictment and the proof at trial did not prejudice defendant, because his theories of

defense did not depend on the identity of the victim.

^ ***State v. Reinke***, 245 Or App 33, 260 P3d 820 (2011), *rev allowed*, 351 Or 541 (2012). Defendant was convicted of second-degree kidnapping, and the court found him to be a dangerous offender and imposed an 180-month sentence. *Held*: Defendant's challenge to the sentence on the ground that the dangerous-offender facts were not specially alleged in the indictment has no merit in light of *State v. Sanchez*, 238 Or App 259 (2010).

^ ***State v. Savastano***, 243 Or App 584, 260 P3d 584, *on recon*, 246 Or App 566, 266 P3d 176 (2011) (*per curiam*), *rev allowed*, 351 Or 678 (2012). Defendant embezzled hundreds of thousands of dollars from her employer in numerous individual theft transactions over a 16-month period. The district attorney applied ORS 164.115(5) to aggregate individual theft transactions that occurred within a six-month period, and defendant was charged with 10 counts of aggravated first-degree theft, and six counts of first-degree theft. Each count was based on aggregated thefts she had committed within each month. Before trial, defendant challenged the manner of aggregation, arguing that the prosecution did not have a consistent, coherent, systematic policy regarding aggregation and, accordingly, the aggregation violated Art I, § 20. The prosecutor responded that although the district attorney did not have a policy, he had aggregated the thefts to provide "a clear organizational outline for the jury." The trial court denied the defendant's motion and, following a conditional guilty plea, defendant appealed. *Held*: Reversed and remanded. [1] A prosecutor's decision regarding how to aggregate theft transactions implicates Art I, § 20, because, depending on what how the prosecutor chose to aggregate, defendant could be burdened with the need to defend against various numbers of charges, and could face penalties of varying seriousness. [2] Although defendant did not establish that the charging decision was unsystematic, the state conceded that it did not have a consistent policy. The trial court therefore should have granted defendant's motion to dismiss.

ANIMAL ABUSE

State v. Pinard, 255 Or App 417, 300 P3d 177, *rev den*, 353 Or 787 (2013). Defendant shot his neighbor's dog with a razor-bladed hunting arrow. The dog's injuries were so severe that her owners euthanized her at home, believing that she would not survive a trip to the vet. Defendant was charged with one count of aggravated first-degree animal abuse, ORS 167.322, and two counts of first-degree animal abuse, ORS 167.320. At his bench trial, defendant moved for judgment of acquittal, arguing that the state failed to prove that he caused the dog's death because it presented no evidence of whether the dog would have survived her injuries if she had been provided veterinary care. The trial court denied the motion, and convicted defendant on all counts. On appeal, he assigned error to the denial of the motion, and argued that the trial court plainly erred by not merging the aggravated first-degree animal abuse with the first-degree animal abuse count, and by not merging the two first-degree animal abuse counts with each other. The state conceded that the two first-degree animal abuse counts, which were based on a single incident, were subject to merger, but argued that aggravated first-degree animal abuse and first-degree animal abuse do not merge, because each crime requires proof of a different mental state—aggravated abuse requires proof of a "malicious" killing (killing with malicious intent), whereas abuse requires proof of a "cruel" killing (killing in a manner calculated to cause pain). *Held*: Reversed and remanded for entry of a single count of first-degree animal abuse; otherwise affirmed. [1] The record contained "ample evidence (including the location and nature of the wound and the dog's distressed condition) from which a trier of fact could find that defendant's arrow fatally wounded the dog." [2] The trial court did not plainly err in entering separate convictions for first-degree animal abuse and aggravated first-degree animal abuse. "[W]e need not conclusively resolve whether the two statutes require proof of different elements; the question is at least reasonably in dispute, and defendant's challenge therefore does not establish plain error." [3] As the state conceded, the trial court did plainly err in entering two convictions for first-degree abuse based on the single incident, and on remand should merge the two counts into a single

conviction.

^ ***State v. Nix***, 251 Or App 449, 283 P3d 442 (2012), *rev allowed*, 353 Or 410 (2013). Defendant was charged with 93 counts of first and second-degree animal neglect for neglecting horses and goats that he owned. The jury found him on 20 counts of second-degree animal neglect. At sentencing, defendant argued that all the verdicts should merge into a single conviction for second-degree animal neglect. The trial court agreed, holding that the animals were not separate "victims" under ORS 161.067(2); rather, the sole victim was the public generally. *Held*: Remanded for entry of separate convictions for each guilty verdict and for resentencing; otherwise affirmed. [1] Because ORS 167.325 does not expressly state who the "victim" is of an animal-neglect offense, "we examine the statute to identify the gravamen of the crime and determine the class of persons whom the legislature intended to directly protect by way of the criminal proscription." [2] Although an animal is not a "person," no provision "expressly or implicitly provides that the victim of a violation of the animal neglect statutes is a person," and neither 131.007(2) (which defines "victim" for much of the criminal code) nor Art I, § 44(3), by their terms, applies to the animal-neglect statutes or ORS 161.067. [3] "[T]he legislature has the power to designate, either expressly or by implication, a different meaning of victim than person. In fact, we have concluded, not infrequently, that the legislature has intended for the public, not a person or persons, to be the victim of a criminal offense. . . Thus, ever mindful of the ordinary meaning of victim, our objective remains to ascertain whether the legislature intended that meaning or a different meaning with respect to ORS 167.325." [4] "The gravamen of the offense of second-degree animal neglect is the defendant's 'fail[ure] to provide minimum care for an animal in such person's custody or control.' Thus, the fact that ORS 167.325 proscribes the failure to act with regard to 'an animal' indicates that the legislature intended to protect animals by creating the crime of second-degree animal abuse," as does the statutory definition of "minimum care." [5] **"**Our conclusion that the legislature intended to protect animals when it enacted ORS 167.325 is not the end of the inquiry, however, because it does not inexorably follow from that conclusion that the legislature intended for animals to be victims." "[G]eneralized legislative concern is not enough to establish who the victim is under ORS 161.067(2). Instead, there must be affirmative textual evidence of a deliberate choice by the legislature." [6] "For there to be a human victim in this case, it would be necessary to conclude that the legislature intended to treat neglected animals as property of their owners who, in turn, would qualify as victims of the offense. … Here, there is no textual indication that the legislature intended ORS 167.325 to protect the property interest of an animal's owner by criminalizing acts of neglect that would adversely affect that interest. … In light of the statute's focus on the harm to individual animals, that outcome likewise would make little sense. Thus, we conclude that the victim under ORS 167.325 is not a person." [7] "[B]ased on the text and context of ORS 167.325, it appears that the legislature's primary concern was to protect individual animals as sentient beings, rather than to vindicate a more generalized public interest in their welfare. . . The legislative history confirms that tentative conclusion." [9] "We conclude that the individual animal identified in each count of second degree animal neglect for which defendant was found guilty qualified as a separate victim under ORS 167.325 for purposes of the application of ORS 161.067(2). It follows that the trial court erred in merging those guilty verdicts into a single conviction."

APPEAL & REVIEW

See also "Sentencing: appeals," *below*.

Appeals: appealability

See also "Sentencing: appealable orders," *below*.

State v. Rogers, 255 Or App 389, 296 P3d 389 (2012) (*per curiam*), *rev den*, 353 Or 748 (2013). Defendant filed a motion for DNA testing under ORS 138.690. The trial court denied the

motion, and defendant appealed. The Court of Appeals dismissed the appeal, noting that the order was not appealable under *State v. Johnson*, 254 Or App 447 (2013).

State v. Nelson, 254 Or App 645, 295 P3d 684 (2013). Defendant was found guilty in municipal court of interfering with a peace officer, ORS 162.247. He appealed that judgment to circuit court pursuant to ORS 157.005. When defendant failed to appear in circuit court at the time scheduled for his hearing, the circuit court dismissed his appeal. Defendant filed a motion for relief from default in the circuit court, which was denied. Defendant then attempted to appeal from the order denying his motion for relief from default. *Held*: Appeal dismissed. [1] The circuit court judgment denying defendant's motion for relief from default of his appeal from a municipal court judgment was not an appealable order or judgment under ORS 138.053(1), because it was not an appeal from the underlying municipal court judgment, did not impose or suspend a sentence, and did not pertain to probation. [2] On the facts of this case, there was no statutory authority for defendant's appeal from an order of default in circuit court; accordingly, the circuit court dismissal did not violate defendant's constitutional rights to due process or equal protection.

State v. Johnson, 254 Or App 447, 295 P3d 677, *rev den*, 353 Or 747 (2013). In 1993, defendant was convicted of two counts of murder pursuant to a plea agreement under which he pleaded no contest. In 2007, defendant filed a motion in the trial court seeking DNA testing of certain evidence under ORS 138.690. The trial court (Judge Julie Frantz) denied the motion, concluding that the terms of defendant's plea agreement barred him from seeking that relief. *Held*: Appeal dismissed. [1] "To exist, the right of appeal must be conferred by statute." In the absence of such a statute, the court has no jurisdiction to consider an appeal and "may not reach any substantive issues presented." [2] The DNA-testing statute, ORS 138.690 *et seq.*, does not grant a right of appeal from an order denying such a motion. [3] ORS 138.650, which allows an appeal from a final judgment entered in a post-conviction proceeding, "does not provide a basis for appeal." [4] The states that generally govern appeals in criminal actions, ORS 138.040 to ORS 138.053, do not authorize an appeal from a post-judgment order under ORS 138.690. [5] ORS 19.205(3), which allows for an appeal from certain post-judgment orders entered in civil proceedings, does not apply here because "the order in question is not essentially civil in character and instead does, in the end, relate to the merits of the criminal action." (Distinguishing *State v. Curran*, 291 Or 119 (1981).) [6] ORS 19.205(5), which allows for an appeal entered in a "special statutory proceeding," does not apply because "a motion for DNA testing is intimately bound up with the underlying criminal proceeding." (Distinguishing *State v. Branstetter*, 332 Or 389 (2001).)

State v. Landahl, 254 Or App 46, 292 P3d 646 (2012), *rev den*, 353 Or 787 (2013). Defendant was charged with DUII and pleaded no contest in order to enter into diversion. The diversion agreement provided that the charge would be dismissed if he completed diversion and that, if he failed to complete diversion, a conviction would be entered based on his plea. Later, defendant moved to terminate diversion and dismiss the charge, asserting that he had completed diversion, and the court granted the motion. Shortly thereafter, the district attorney discovered that defendant had another DUII charge pending and moved to set aside the dismissal. The trial court granted the motion to set aside, terminated diversion, entered a DUII conviction, and imposed a probationary sentence. Defendant appealed and asserted only a claim that the trial court erred when it set aside the dismissal and entered a judgment of conviction; he did not challenge the sentence. *Held*: Appeal dismissed. [1] A defendant who has pleaded guilty or no contest may appeal under ORS 138.050 only when he "makes a colorable showing that the disposition" exceeds the maximum allowable by law or is unconstitutionally cruel and unusual. For purposes of ORS 138.050, "disposition" refers to the types of dispositions listed in ORS 138.053(1). [2] Under that statute, and in light of *State v. Cloutier*, 351 Or 68 (2011), entry of a conviction is not a "disposition." [3] The Court of Appeals does not have jurisdiction over defendant's appeal pursuant to ORS 138.050 because he challenges only the entry of the conviction itself and does not challenge the sentence imposed on his conviction.

Pedroso v. Nooth, 251 Or App 688, 284 P3d 1207 (2012), *rev den*, 353 Or 203 (2013). Petitioner, who was convicted of murder, petitioned for post-conviction relief, alleging a number of claims of inadequate assistance of his trial counsel. Pursuant to ORCP 21 A(8), the state moved to dismiss contending that his petition failed to comply with ORS 138.580 by not attaching sufficient evidence to support his claims. The post-conviction court granted the motion and dismissed the petition for failure to state a claim, ruling that, even if petitioner's information was true, it did not show that the alleged inadequacy of counsel had an adverse effect on the trial. *Held*: Appeal dismissed. [1] Under ORS 138.525(3), a petition that does not state a claim is meritless, and a judgment dismissing such a petition is not appealable. [2] "In this case, the court's oral ruling, order, and judgment are … unambiguous: the trial court granted the state's motion to dismiss for failure to state a claim. … And, as the court explained in [*Young v. Hill*, 347 Or 165 (2009)], the consequence is a harsh one: 'the statute is unambiguous: petitions that fail to state a claim are meritless, and a judgment dismissing a petition as meritless is not appealable.'"

Appeals: claims of error that may be moot or waived

See also "Sentencing: appeal—claims that may be moot, waived or harmless," *below*.

State v. Hemenway, 353 Or 498, 302 P3d 413 (2013). In *State v. Hemenway*, 353 Or 129, the Oregon Supreme Court modified the "exploitation" analysis in *State v. Hall*, 339 Or 7 (2005), and held that defendant's voluntary consent to three different searches made those searches lawful, even though the first two consents were given while defendant was unlawfully seized. After the decision issued, defense counsel alerted the court that defendant had died after oral argument but before the Supreme Court had issued its decision. They moved to vacate the decision based on *Yancy v. Shatzer*, 337 Or 345 (2004), and ORAP 8.05(2)(c)(ii), contending that the case was moot before the Supreme Court decided it. The state opposed the motion, contending that the court should exercise its discretion under the vacatur rule not to vacate its decision because the opinion "clarified prior decisions" and the "result will be confusion in the lower courts" if the opinion is vacated. *Held*: Opinion and judgment vacated. The Supreme Court vacated its decision, the Court of Appeals decision reversing defendant's conviction, and the underlying judgment of conviction. [1] Because the case became moot before the court issued its decision, the court lacked "judicial power" under Art. VII (Am), § 1, to decide the case. [2] Equitable considerations supported vacatur. First, because there are a number of other cases pending in the Supreme Court that present the same issue, "we will have ample opportunity" to decide the issue again in another published opinion. Second, defendant did not cause the mootness by his own "voluntary action," and it does not appear that his counsel was aware of his death "and failed to inform the court." Finally, the principle that a "criminal judgment should be vacated if a criminal defendant dies while pursuing a direct appeal that might result in a reversal of the conviction," militates "in favor of vacatur."

Rivas v. Persson, 256 Or App 829, __ P3d __ (2013). Plaintiff, who committed aggravated murder in 1987, petitioned for a writ of *habeas corpus*, asserting that the Board of Parole and Post-Prison Supervision failed to fully credit him for time served after his arrest. The trial court denied the petition, ruling that plaintiff had a remedy in post-conviction and, alternatively, that his petition was barred by issue preclusion. While his appeal was pending, the board held an exit interview and, finding that plaintiff suffered from a "present severe emotional disturbance," postponed plaintiff's projected parole release date by two years. Before filing its responsive brief, defendant (the state) moved to dismiss on mootness grounds, arguing that, even if plaintiff were to prevail in *habeas*, the board's postponement of his projected parole release date meant that he was not entitled to immediate release on parole. The appellate commissioner denied the motion, reasoning that "if plaintiff prevails on appeal, his release date will be 604 days sooner than it otherwise would be, so a ruling in plaintiff's favor would have a practical effect on his rights even if his release date is extended for two

years." The state reiterated its mootness argument in its brief. *Held*: Appeal dismissed as moot. Even if plaintiff could prove that he was entitled to the additional credit for time served, "he would, as in [*Janowski/Fleming v. Board of Parole*, 349 Or 432 (2010)], be entitled to have the release-consideration process commenced, starting with a hearing in the immediate future to establish a release date. After that hearing, the board would be permitted to conduct an exit interview to determine whether to postpone the release. But both of those events have already occurred. … Consequently, ordering the board to start the process again would have no practical effect on plaintiff's rights. It follows that plaintiff's appeal is moot."

Davenport v. Premo, 256 Or App 486, __ P3d __ (2013). Plaintiff is an inmate in the legal custody of the Department of Corrections. While he was incarcerated at Oregon State Penitentiary, he filed a petition for *habeas corpus* relief alleging that he has ADHD, that he previously was receiving Ritalin for that condition, that OSP ceased providing him with Ritalin, and that OSP thereby was being "deliberately indifferent to his serious medical condition." The trial court granted the state's motion to dismiss, and plaintiff appealed. While the appeal was pending, plaintiff was transferred from OSP to corrections facility in Connecticut pursuant to the Interstate Corrections Compact. Plaintiff advised the Court of Appeals of the transfer and argued that his case is not moot because he still is still not receiving Ritalin even though some other inmates at that facility are. *Held*: Appeal dismissed. [1] "A case is moot if the court's decision fails to have some practical effect on the rights of the parties to the controversy. However, even if the main issue in a controversy has been resolved, collateral consequences may prevent the controversy from being moot under some circumstances." [2] When an inmate who has a filed a *habeas corpus* petition is transferred to another correctional facility, "the inmate has the burden to show that the court's action would have a practical effect despite [his] transfer." [3] "Here, plaintiff has failed to present evidence that Oregon prison officials affect his treatment in Connecticut. … Plaintiff has not produced evidence that the state's decision to withhold Ritalin has consequences for his treatment in Connecticut. … The text of [the compact] contradicts plaintiff's position because it states that Connecticut will provide medical care or treatment 'in the same manner' as such medical treatment 'is provided prisoners of the receiving state,' *i.e.*, Connecticut in this case. There is no evidence that Connecticut prison officials are deferring to Oregon prison officials. From the current record, it appears that plaintiff's medical care, including any Ritalin prescription and medication, will be provided by Connecticut as it sees fit, independent of what Oregon does. Therefore, we are compelled to hold that resolution of plaintiff's appeal would have no practical effect on his legal rights in Connecticut, and we dismiss it as moot."

Appeals: offer of proof

See also "Evidence: offer of proof," *below*.

^ ***State v. Babson***, 249 Or App 278, 279 P3d 222, *rev allowed*, 253 Or 103 (2012). Defendants were charged with second-degree criminal trespass for conducting an around-the-clock anti-war protest vigil on the steps of the state Capitol, in violation of a Legislative Administration Committee (LAC) rule that prohibits overnight use of the Capitol steps. Defendants challenged their convictions, arguing that the rule on its face, and as applied to them, violated their state and federal constitutional rights to free speech and assembly. The trial court rejected those challenges and, based on the Debate Clause in Art. IV, § 9, the court also quashed their subpoenas to question legislators serving on the committee who, defendants alleged, had unlawfully ordered the rule to be enforced against them only because of the content of their protest. *Held*: Reversed and remanded. Defendants' claim that the trial court erroneously limited their examination of a witness regarding legislators' motivation for enforcement of the rules against them is not reviewable on appeal due to their failure to make an offer of proof.

Appeals: preservation of error and plain-error review

See also "Sentencing: appeals—preservation of error," *below*

Henderson v. United States, 568 US __, 133 S Ct 1121 (2013). Defendant pleaded guilty in federal court to a weapons offense, and the court imposed an upward-departure sentence in order to "try to help" him get into a substance-abuse program. Defense counsel did not object. While the case was on appeal, the Court decided *Tapia v. United States* in which it held that such a consideration is not a lawful basis for an upward departure. Defendant then relied on *Tapia* to argue that his sentence was error. The Fifth Circuit concluded that because the claim of error was not preserved, it could be reviewed only if it came within the "plain error" rule and that because that error was not "plain" at the time of sentencing, it could not grant relief on that claim even though it was now "plain" in light of *Tapia*. *Held*: Reversed and remanded. The court of appeals had authority to review defendant's claim under the "plain error" rule. For purpose of the federal "plain error" rule, "whether a legal question was settled or unsettled at the time of trial, it is enough that an error be 'plain' at the time of appellate consideration."

Note: The Oregon Court of Appeals previously adopted the same rule under our "plain error" exception, in *State v. Jury*, 185 Or App 132 (2002), *rev den*, 335 Or 503 (2003).

State v. Pitt, 352 Or 566, 293 P3d1002 (2012). Defendant was charged with sexual offenses involving a child. Prior to his trial, he filed a motion *in limine* to exclude evidence that would show that he previously had committed similar sexual assaults against the victim and another child in Lane County. The state contended that that evidence was relevant under OEC 404(3) both to show his intent when he touched the victim and to prove his identity as the person who had abused the victim (because each victim had seen him abuse the other victim). Defendant asserted that his intent was not at issue because he denied committing the alleged acts and did not plan on arguing that he touched the child accidently but without a sexual intent. The trial court concluded that the evidence was relevant to show that defendant intentionally committed the charged acts and to prove the identity of the perpetrator of the charged acts. The other-crimes evidence was admitted at trial without objection, and defendant was convicted. The Court of Appeals affirmed, ruling that the evidence was relevant because it tended to bolster the victim's identification of him as the perpetrator of the crimes. 236 Or App 657 (2010). *Held:* Reversed and remanded. [1] Even though defendant did not object during trial to admission of the other-crimes evidence, defendant's motion *in limine* adequately preserved his claim of error. "If a party rests his or her argument on appeal on a trial court's pretrial order declining to exclude certain evidence, we ordinarily will evaluate that argument in light of the record made before the trial court when it issued the order, not the trial record as it may have developed at some later point. We do not rule out the possibility that that conclusion may change due to unique circumstances in another case, such as an agreement of the parties or other developments during trial. But in the usual case, we will evaluate a claim of pretrial error on the basis of the same record that the trial court relied on in making the challenged ruling." [2] The evidence was not relevant to prove defendant's identity under the traditional "identity" exception. [3] At the time the trial court denied defendant's motion *in limine*, it was not yet relevant to prove that he committed the charged acts *intentionally* because the record did not yet establish as a fact that the charged acts had occurred. The defendant's "not guilty" plea did not put his intent at issue, and without a stipulation or other evidence that the charged acts had occurred, or without an instruction to the jurors that they could not consider the other-crimes evidence until it determined that he committed the charged acts, the uncharged misconduct evidence could not be admitted unconditionally, because the evidence tended to prove only that he acted in conformity with his character to commit such acts.

State v. Haynes, 352 Or 321, 284 P3d 473 (2012). The state appealed two pretrial rulings on evidentiary issues in this cold-case murder case. Defendant, a male prostitute, is charged with murdering the victim, who was likely a john, in 1994. The victim's body was found in the victim's

apartment, having bled to death after being stabbed repeatedly; circumstances suggested an attempted robbery. Male clothing was found near the scene. **Prior acts evidence**. Defendant was later arrested for DUII in Vancouver, after carjacking an elderly victim and attempting to rob him. When stopped, defendant was wearing women's clothing and had stuffed the clothing with found items (foliage and papers from the victim's car). The Vancouver charges ultimately were dropped, but Portland Police Bureau detectives later discovered that those events had occurred in the aftermath of the murder. Defendant was charged with intentional murder, manslaughter, and felony murder (on the theory that the murder was committed in the course and furtherance of a robbery) in 2011, and the state moved to admit evidence of the Vancouver arrest and the circumstances that led to that arrest. The state proffered several theories of admissibility, including arguments that the evidence, in conjunction with numerous other robberies committed by defendant, made it more likely that defendant had committed the homicide in the course of a robbery. The state also argued, albeit only orally at the motion hearing, that, even apart from any other robbery, defendant's "course of conduct" after the homicide was relevant to prove his "flight" from the scene. The circuit court rejected that theory without explanation other than that it was not "relevant." **Evidence of defendant's 2011 interview with detectives.** In 2011, before he was charged, defendant was interviewed by detectives; the interview was recorded by video. Throughout the 20-minute interview, defendant repeatedly claimed that he remembered nothing about what he was doing in 1994. But, at the end of the interview, when asked about the Vancouver DUII arrest, he explained that incident in detail. For that reason, the state sought to offer the entirety of the recorded interview; defendant objected, arguing that his denials were irrelevant. The trial court issued an order that expressly stated that certain admissions by defendant in the interview were relevant. The court also stated that the state would need to produce a redacted version of the recording. The state appealed, assigning error to both the exclusion of the prior-acts evidence and the court's order relating to the interview (which the state had interpreted to exclude every part of the recording other than those expressly found by the trial court to be relevant). *Held:* Orders affirmed; case remanded for further proceedings. The state did not preserve its argument that the evidence of the Vancouver incident was admissible because his conduct after the homicide (his flight from Portland to Vancouver) demonstrated both his proximity to the murder scene and consciousness of guilt; the prosecutor's use of the terms "flight" and "course of conduct" were insufficient.

State v. Wells, 257 Or App __, __ P3d __ (August 7, 2013). Defendant was convicted of two counts of first-degree sexual abuse in 2001, based, in part, on a diagnosis of sexual abuse in the absence of physical evidence of abuse. But because trial counsel objected only to the diagnosis in general terms, appellate counsel did not argue in the appeal in 2003 that the admission of the diagnosis violated OEC 403—an argument that the Supreme Court later would adopt in *State v. Southard*, 347 Or 127 (2009)—and the convictions were affirmed on appeal. This appeal resulted from the 2011 decision by a federal court that defendant was entitled to a delayed appeal due to ineffective assistance by appellate counsel in the 2003 appeal. The state argued that, even if, under *Southard* and *Lupoli*, the admission of the diagnosis is *now* treated as "plain error," the appellate courts in 2003 were routinely rejecting similar challenges (even when preserved). Thus, the state argued that the appellate court should not review the challenge because it would put defendant in a better position than he would have been in if his counsel had raised the issue on appeal in 2003. *Held*: [1] Trial counsel's objection at trial—that the diagnosis was "not a proper diagnosis"—did not preserve an argument based on OEC 403. [2] But whether an issue is one of "plain error" is determined based on the law existing at the time the appeal is decided. And, under *Southard*, the diagnosis would be inadmissible, so the error is plain on the face of the record. [3] The error warrants review because it goes to the reliability of the evidence supporting the conviction, and because the only "windfall" that defendant will receive is a correct application of the law.

State v. Whitmore, 257 Or App __, __ P3d __ (July 24, 2013). Defendant was stopped at 3:20 a.m., the officer arrested him for DUII, and he submitted to a breath test at 4:15 a.m., which

showed a BAC of 0.08%. Prior to trial, defendant filed a motion *in limine* to exclude any evidence "of retrograde extrapolation" without a proper foundation, contending that such an opinion would not be scientifically valid. The trial court tentatively denied the motion, ruling that such evidence would be admissible "assuming this officer comes in and lays out a foundation that … [would] be sufficient to … qualify her as an expert on this issue." Defense counsel asked for a "continuing objection," and the court said that that was fine. At trial, the state called Bray, who for 14 years has been a forensic scientist for the Oregon State Police Forensic Division. She testified at length—without any objection from defendant—about the general rate of dissipation of blood-alcohol from person's system over the course of time, about the Widmark formula, and about the numerous variables that may affect the rate of dissipation. The prosecutor then asked Bray a hypothetical question based on the facts of defendant's case—using his assertion that he had drunk only three beers between 9 p.m. and 2 a.m. and that he had a blood-alcohol content of 0.08 percent at 4 a.m.—and she opined that that hypothetical person would have had to have consumed "between seven and ten and a half drinks" during that time in order to still have a blood-alcohol content of 0.08 percent at 4 a.m. The jury found defendant guilty. On appeal, defendant claimed that the trial court erred when it denied his motion *in limine*—he did not assign error to Bray's testimony at trial. *Held*: Reversed and remanded. Defendant's claim of error is reviewable on appeal even though he did not object at trial to Bray's testimony: "Parties are not required to repeat their objections after the trial court has ruled against them." Moreover, the trial court granted defendant a "continuing objection."

Walker v. State of Oregon, 256 Or App 697, 302 P3d 469 (2013). The post-conviction court denied petitioner's petition and entered a judgment that contained no findings and simply provided: "The Court considered both state and federal questions. All questions were presented and decided." For the first time on appeal, petitioner contended that judgment failed to comply with ORS 138.640(1), as construed in *Datt v. Hill*, 347 Or 672 (2010). *Held*: Reversed and remanded "for the court to enter a judgment that includes findings complying with ORS 138.640(1)." [1] Petitioner's claim is reviewable as "plain error": "The dictates of preservation do not apply—and, hence, the 'plain error' construct is inapposite—where a party has no practical ability to object to the purported error before entry of judgment. Those principles control here. Until the post-conviction court issued its judgment, petitioner had no reason to know that it would not include findings comporting with ORS 138.640(1)." [2] The judgment on its face fails to comply with ORS 138.640(1).

State v. Cossette, 256 Or App 675, 301 P3d 954 (2013). Defendant was charged with unlawful possession of a controlled substance (hashish), and he requested a special jury instruction that would have informed the jurors that possession of less than an ounce of dried marijuana leaves, stems, and flowers is only a violation, not a crime. In support of the instruction, he argued that a jury could find, based on the evidence, that he had believed that he possessed only dried marijuana leaves, stems, and flowers and, therefore, did not know that he was committing a crime. The trial court denied that request based on *State v. Engen*, 164 Or App 591, 609, *rev den* (1999), which held that the state is "not required to prove a defendant's knowledge of the particular type of controlled substance possessed." The jury found defendant guilty. On appeal, defendant argued that the trial court erred when it refused to give his requested instruction. *Held*: Affirmed. "The argument that defendant makes on appeal is not adequately preserved for our review, and we do not address it." [1] Although the state noted that "defendant has shifted his argument slightly on appeal," it did not contend that his argument was not preserved. But the appellate court nonetheless has a "duty to determine, *sua sponte*, whether the arguments that an appellant raises on appeal are adequately persevered for our review." [2] "In this case, a preservation problem arises because the theory of the case that defendant presented to the trial court differs significantly from the theory that he advances on appeal. Defendant's argument to the trial court was premised entirely on his theory that the state had to prove that he knew that he possessed hashish, not just dried marijuana." "On appeal, defendant describes a fundamentally different theory of his case. He now argues that he was entitled to the jury instruction because the jurors could have found that he in fact did not possess hashish, but possessed only less

than one ounce of dried marijuana." [3] "Had defendant presented that theory to the trial court, the parties could have fleshed out their positions on whether the record would allow the jury to infer that defendant had possessed only dried marijuana, the state might have sought to introduce additional evidence on that point … , and—depending on the outcome of those events—the trial court might have decided to give the instruction."

State v. Alderman, 256 Or App 476, 300 P3d 308 (2013) (*per curiam*). Defendant was charged with unlawful delivery of marijuana for consideration, and the trial court found him guilty. On appeal, he argued for the first time that the trial court committed plain error "(1) by eliciting testimony from a defense witness that was irrelevant and impermissibly based upon defendant's confidential affidavit of indigency and (2) by commenting on the credibility of defendant's statements in his affidavit of indigency and relying on those statements in a manner that denied defendant a fair trial." *Held*: Reversed and remanded. Based on a review of the record, "the error is plain" and warrants a reversal and remand.

State v. Engerseth, 255 Or App 765, 299 P3d 567 (2013). After a jury trial, defendant was convicted of unlawful use of a weapon, menacing, and tampering with a witness. At sentencing, defendant stipulated that he was "on supervision" and, on that basis, the sentencing court imposed a 60-month sentence by upward departure. Defendant did not objection. Later, he filed a motion under ORS 138.083(1) to "correct" the judgment by deleting the departure term contending that the departure was unlawful because, despite the stipulation, the court did not obtain a *written* waiver of his right to a jury trial on the enhancement fact, as is required by ORS 136.773(1). The court denied that motion. *Held*: Affirmed. [1] Defendant failed to preserve the argument that he makes on appeal, because his motion to correct the judgment under ORS 138.083(1)(a) "preserved only the limited issue of whether the court abused its discretion in refusing to correct the judgment, not the issue of whether the sentence is erroneous." "Filing a post- judgment motion does not retroactively preserve predicate sentencing error." [2] The Court of Appeals declined to decide whether the sentencing court committed plain erred under ORS 136.773(1). "Because he stipulated to the enhancement fact, defendant was not prejudiced by any error. On this record, no reasonable factfinder could conclude anything other than that defendant was on supervision when he committed the relevant crime. Under those circumstances, any error is not grave, the state has a significant interest in avoiding a second, unnecessary sentencing hearing, and remanding to the trial court would not advance the ends of justice."

State v. Ferry, 255 Or App 625, 298 P3d 63 (2013). Defendant was charged with several sexual-abuse offenses relating to his daughters. At trial, the prosecutor asked to have each of the victims read aloud a letter she had written to the DA describing the impact the case had on her. For example, one letter stated: "This has been a difficult challenge for me to overcome. I had learn an important lesson from this. I learn from one of my school official and detective of the Hillsboro Police Department. They both said, 'It not your fault and your some brave little girl.' Another things that my school official said, 'Keep your head up and don't let people put your head down.' I so grateful that I have important people believe my story." Each victim expressed that she wished only for an apology, not jail, and wished to regain her personal dignity. The prosecutor asserted that the evidence was admissible under OEC 803(18a)(b). Defendant objected, claiming the letters contained hearsay within hearsay from the officials, which he also asserted constituted improper vouching. The prosecutor countered that the officials' hearsay statements were not offered for its truth, but only for its effect on the victims, to rebut defendant's claim that relatives put the victims up to this. The trial court overruled defendant's objection and allowed the victims to read the letters. The jury found defendant guilty. On appeal, defendant argued that the letters were inadmissible because "OEC 803(18a)(b) does not cover statements made by anyone other than the victim of abuse." *Held*: Affirmed. Defendant's claim on appeal that the imbedded hearsay in the letters was not admissible under OEC 803(18a)(b) is not reviewable because it was not preserved. He did not challenge the

state's "effect on the hearer" theory, but instead moved directly to a different objection.

State v. Gilbert, 255 Or App 203, 296 P3d 629 (2013). The case was tried to the court on stipulated facts, and the court found him guilty two misdemeanor charges. Although the court file did not contain a written jury waiver, and the transcript did not contain a waiver-of-jury colloquy or otherwise reference a jury waiver, the judgment recited that "defendant executed a written waiver of trial by jury." On appeal, defendant claimed that the court committed plain error by not obtaining a written jury waiver as required by Art I, § 11. *Held*: Reversed. [1] The error is plain—the record is not subject to competing inferences. Despite the recital in the judgment, nothing in this record establishes that the defendant executed a "knowing and voluntary" jury waiver. [2] The error is not harmless and reversal is required, because of the specific requirement in Art I, § 11, that a waiver of jury must be in writing.

State v. Stephens, 255 Or App 37, 296 P3d 598 (2013). Defendant was charged with a number of sex offenses after the 17-year-old victim disclosed that defendant had sexually abused him when he was an elementary school student in her fourth, fifth, and sixth grade classes. The victim reported that on one occasion he and defendant were alone in a locked classroom kissing, with defendant's shirt partially removed. According to the victim, they were interrupted when another teacher, Mahler, knocked on the door. The victim said that defendant ran to a room at the back of the classroom, while he went to open the door. Police contacted Mahler to corroborate the report. Initially, Mahler agreed to meet with police to speak to them, but subsequently she spoke to her attorney, who called the detective and informed him that Mahler would not meet with him. Mahler was subpoenaed to appear at trial. The state did not call her as a witness, but the defense did. Mahler testified that she recalled an incident when she had tried to open the classroom door and it couldn't, but that sometimes the doorknobs stuck. Mahler's version of events differed from the victim's—in Mahler's version, the victim had opened the door immediately and defendant had not emerged from a back room. When she asked why the door had been locked, they had told her that they had not known that it was. Mahler claimed that the incident seemed accidental and did not raise any "red flag" for her. The prosecutor cross-examined Mahler to show that she was biased due to her personal and employment relationship with defendant. He asked her why she had canceled her meeting with the detective. She answered that she had consulted her lawyer, who told her that she could talk to the detective if she chose to, but that she was not required to give a statement unless she was subpoenaed. The prosecutor continued to question Mahler about why she had refused to talk to the detective. Eventually, defense counsel objected, contending, that the fact that the lawyer gave her legal advice and then contacted the detective "would be … privileged." The trial court overruled that basis for objection, pointing out that Mahler had never asserted any privilege, and had waived any privilege by testifying on the subject. The prosecutor argued in closing that defendant had declined to talk to police because she did not want to provide incriminating evidence against defendant. Defendant also objected at trial to the admission the victim's testimony about uncharged incidents of sexual contact with the defendant, but the trial court allowed the evidence. Defendant was convicted and appealed, contending in her first assignment of error that the prosecutor's questioning and statements about Mahler's decision to speak with an attorney and not to speak with police were inadmissible under OEC 513(1) as impermissible comments on her exercise of a privilege. Defendant also argued that the court erred under OEC 404(3) in admitting evidence of additional uncharged incidents of sexual conduct because it was offered solely to prove propensity and was irrelevant to any fact at issue. The state responded that neither claim was adequately preserved, and in any event failed on the merits. *Held*: Affirmed. [1] Defendant's objection that the facts surrounding Mahler's consultation with her own attorney were "privileged" was sufficient to preserve her claim that the testimony violated OEC 513(1). But the objection was not timely. "Even if Mahler's decision to consult her attorney and remain silent with respect to the investigation was privileged, and questioning her about that decision violated OEC 513(1)—a concession that the state does not make and a conclusion that we do not address—defendant's objection to that line of questioning did not occur until well after that

information had been elicited without objection." By the time defendant objected, Mahler had waived any privilege she might have had and, in any event, the admission of the evidence to which defendant objected was harmless in light of the previous evidence to which defendant not objected. [2] Defendant's objection to evidence of other uncharged sexual abuse of the victim was sufficient to preserve a claim that the evidence was not relevant for any non-propensity purpose.

State v. Sturgeon, 253 Or App 789, 291 P3d 808 (2012) (*per curiam*). Defendant was convicted of assault in the fourth degree "constituting a crime of domestic violence," ORS 132.586, for assaulting the adult son of his live-in girlfriend, and the court ordered defendant to repay $610 in fees for his court-appointed attorney. For the first time on appeal, he contended that the evidence did not prove the "domestic violence" allegation and that there was insufficient evidence to show that he had the ability to pay CAA fees. *Held*: Reversed and remanded. [1] The evidence did not establish that defendant and the victim were "cohabitating" or were "family or household members" within the scope of ORS 135.230(3) and (4)(d). That error warrants review and relief as "plain error." [2] But the court declined to review defendant's unpreserved challenge to the order requiring him to pay $610 in CAA fees.

State v. Rennells, 253 Or App 580, 291 P3d 777 (2012), *rev den*, 353 Or 410 (2013). Defendant was charged with domestic assault. At trial, he made several motions for judgment of acquittal, arguing that the evidence did not prove venue in Clackamas County with respect to one count of assault and did not prove that the victim suffered "substantial pain" with respect to the other count of assault. The trial court denied the motions, and the jury found defendant guilty. *Held*: One assault conviction reversed; otherwise affirmed. Defendant failed to preserve his challenge to the sufficiency of the evidence establishing venue with respect to one count of assault. Although he made an argument about venue at trial, he did not dispute (and, in fact, he agreed with) the prosecutor's statement that venue had been established for that particular incident.

State v. Barboe, 253 Or App 367, 290 P3d 833 (2012), *rev den*, 353 Or 714 (2013). Defendant was involved in the fraudulent use of a stolen credit card. The card was stolen by Mercer, who used the card to pay at a restaurant where defendant was a waiter, giving him a $75 tip on a $32.65 bill. After the victim reported his card stolen, police went to the restaurant where defendant worked. Defendant lied to police about knowing Mercer and denied knowing that the card was stolen. Over a year later, when police again questioned defendant about this, he still denied knowing it was stolen, but he admitted knowing the people who used the card (one of whom was a family member). Defendant was charged with second-degree theft and fraudulent use of a credit card. The case was tried to the court. In announcing its verdict, the trial court acquitted defendant on the theft charge but specifically found him guilty on the fraudulent-use charge because he kept the tip and failed to assist the police after he learned that the card was stolen. On appeal, defendant argued for the first time that the court improperly found him guilty based upon an "aid-and-abet after-the-fact" theory of liability, which is not a crime in Oregon. The state conceded the error, but argued that the error was not plain, or, alternatively, that the court should not exercise its discretion to consider the error. *Held*: Reversed and remanded. [1] The court exercised its discretion to consider the error "first and foremost" because of "the gravity of the error ... As we recently explained in *State v. Reynolds*, 250 Or App 516 (2012), a defendant 'has a strong interest in having a criminal record that accurately reflects the nature and extent of his or her conduct," and "the state has no competing interest in seeing the law applied incorrectly to sustain a conviction. … Accordingly, we affirmatively exercise our discretion to correct the trial court's plain error in convicting defendant of something that is not a crime." [2] Contrary to its normal practice in sufficiency-of-the-evidence cases, the court remanded for a new trial because "factual issues pertinent to a material element of the crime remain unresolved"—*i.e.*, "the trial court's verdict indicates that it did not make findings of fact pertaining to whether defendant aided and abetted before or during the commission of the crime[.] … [B]ecause a factual question as to defendant's knowledge *at the time of the fraudulent transaction* (a material

element of the crime of fraudulent use of a credit card, and the evidence pertaining to that question is sufficient to withstand a motion for judgment of acquittal, we reverse defendant's conviction and remand for a new trial on the charge of fraudulent use of a credit card."

State v. Pickle, 253 Or App 235, 288 P3d 1039 (2012), *rev den*, 353 Or 428 (2013). An officer responding to a minor accident in a bar parking lot found one car with its bumper interlocked with the fender of defendant's car. After completing a DUII investigation and determining neither driver was intoxicated, the officer offered to help the men disentangle their cars so they would not cause further damage. As defendant entered his car, the officer smelled the overwhelming odor of marijuana that he believed clearly indicated that more than one ounce of marijuana was present, but he could not determine which car the odor came from. When the cars were separated, the officer contacted the closest car and did not observe any indication of marijuana; he then contacted defendant, who was standing next to the open door of his car, and determined the marijuana odor came from that car. When asked, defendant admitted having marijuana in his possession, and he reached into the car and pulled two buds from the ashtray. Believing more marijuana was present, the officer asked permission to look in the front area of the car, which defendant gave. The officer discovered a small tin box with a tiny amount of marijuana inside it but still believed the odor indicated the presence of a larger quantity of drugs. He noticed a number of large boxes in the back of the vehicle and asked for consent to search them to make sure they did not contain "pounds of marijuana." Without expressly consenting, defendant went to the rear of his car, opened the hatchback, and offered to hold it open while the officer searched because the door latch was broken. Defendant eventually admitted that he had 60 pounds of marijuana in the car, and the officer discovered nearly that exact amount. Defendant moved to suppress arguing that he never gave consent to search and claimed he merely had acquiesced to the officer's indication that he would search the car without a warrant. The trial court denied the motion, finding that defendant had voluntarily consented to the search and that the search was valid under the automobile exception. *Held*: Affirmed. [1] The trial court correctly denied defendant's motion to suppress based on defendant's consent. [2] Defendant's only argument at the hearing was that he did not give any consent; he did not preserve a claim that the search exceeded the scope of any consent he gave. The Court of Appeals declined to consider that argument for the first time on appeal, because the record might have developed differently if he had raised that issue below.

State v. Tilden, 252 Or App 581, 288 P3d 567 (2012). Defendant was convicted by jury verdict of 101 counts of encouraging child sexual abuse in the second degree, ORS 163.686 (2005), based on evidence that he had accessed sexually explicit images of children on his home computer; the images were found in the unallocated space on his hard drive. On appeal, he contended for the first time that the state did not submit evidence from which a rational juror could infer that he "possessed" or "controlled" the images, for the reasons found in *State v. Ritchie*, 349 Or 574 (2011), and *State v. Barger*, 349 Or 553 (2011), which were decided after his trial. *Held*: Reversed. The convictions reversed as "plain error." [1] Defendant failed to preserve his claim of error because, at trial, he did not raise the particular argument that he raised on appeal. [2] The court ordinarily will not review a claim as plain error unless an appellant has explicitly asked the court to do so by explaining "why an error satisfies the requisites of plain error and, further, why we should exercise our discretion to correct" it. [3] But even though defendant did not use the term "plain error" in his brief on appeal, he nonetheless satisfied the requisites of ORAP 5.45 (governing plain-error review). [4] The trial court committed plain error by not granting defendant's motion for a judgment of acquittal for the reasons discussed in *Ritchie* and *Barger*, and based on several discretionary factors, the court elected to address it.

State v. C. S., 252 Or App 509, 287 P3d 1238 (2012), *rev den*, 353 Or 445 (2013). A petition was filed in juvenile court alleging that youth, a 13-year-old girl, had committed fourth-degree assault, harassment, and first-degree theft of a gym bag and contents. The next day, April 21, she

appeared with her father, and she waived her right to counsel, and admitted the allegations. On May 10, the juvenile court entered a dispositional order. Youth did not appeal from that order. The court subsequently scheduled a restitution hearing and appointed counsel to assist youth. Before the hearing, youth's counsel filed a motion to withdraw her admission to the theft allegation. The court denied that motion and imposed restitution for the bag and its contents. On appeal, the youth argued that the juvenile court erred when it denied her motion to withdraw her admission, because her waiver of counsel was not knowing and voluntary. She argued that "in order to ensure the adequacy of a waiver of counsel in a situation such as this, an explanation of the right to counsel, followed by assurances by a youth that the youth understands, is insufficient. Rather, … the court must not ask leading questions, and should have a youth repeat back his or her understanding of the right being waived." *Held*: Affirmed. [1] "Any error with respect to the validity of youth's waiver of her right to counsel was not preserved. Although … the written motion [to withdraw] did mention that youth had been unrepresented, and thus *could have* been the basis for making an argument to the trial court that her waiver of counsel was not knowing, voluntary, and intelligent, counsel made no such argument in the motion or at the hearing. Rather, .. counsel's argument, and evidence, pertained to whether youth had intended to admit to theft of the gym bag, or only theft of some of the bag's contents." [2] Youth's claim is not reviewable as "plain error" because the juvenile court's colloquy complied with *State v. Meyrick*, 313 Or 125 (1992), and "the legal point youth is making is for an extension of existing law—a refinement, so to speak, of the *Meyrick* requirements in circumstances where a young adolescent is facing charges." And that point is not "obvious, not reasonably in dispute."

State v. Ledford, 252 Or App 572, 287 P3d 1278 (2012) (*per curiam*), *rev den*, 353 Or 209 (2013). Defendant was convicted of first-degree rape, first-degree sexual abuse, and second-degree sexual abuse by jury verdicts, and he argued for the first time on appeal that the trial court committed "plain error," in light of *State v. Nelson*, 241 Or App 681 (2012), *rev allowed*, 351 Or 678 (2012), by not instructing "the jury that that the state was required to prove that [he] knowingly subjected the victim to forcible compulsion." *Held:* Remanded for resentencing but otherwise affirmed. Defendant's challenge to the "forcible compulsion" instruction is not reviewable because he did not except to it as required by ORCP 59 H.

See also ***State v. Wesley***, 254 Or App 697, 295 P3d 1147 (2013) (unpreserved challenge to "natural and probable consequences" instruction).

State v. Colon, 251 Or App 714, 284 P3d 589 (2012). Defendant was charged with fourth-degree assault for throwing a large cooking spoon at her 17-year-old daughter, striking her in the face. At a bench trial, her defense was that she had not thrown the spoon; rather, it slipped out of her hand while she was gesturing at her daughter. In the defense case in chief, defendant called the complainant's cousin, Torres, who testified that he had known the complainant for her entire life, they "used to hang out a lot," and spent a lot of time at her house. Counsel asked Torres whether he had ever heard complainant say that she hated defendant, to which Torres answered that he had heard her say that "plenty of times" and that his cousin was a "drama queen. That's what she does." The state objected and moved to strike those answers as non-responsive; the trial court sustained the objection and struck the answers. Defendant then asked Torres whether the complainant was "prone to over-exaggeration"; the state objected, and the trial court sustained the objection, explaining that defendant failed to lay the necessary "foundation for character," which requires counsel to ask "very specific questions." Defendant appealed, arguing that the trial court erred by not allowing Torres to testify. *Held*: Reversed and remanded. Defendant preserved her argument that the trial court applied the wrong standard for foundation by telling the court "that she believed she had laid the necessary foundation. … Under those circumstances, both the state and the court were aware of defendant's position and the trial court had a chance to consider the issue. Therefore, defendant's argument was properly preserved."

State v. Ritchie, 251 Or App 587, 284 P3d 1174 (2012), *rev den*, 353 Or 533 (2013). The

defendant was charged with, among other things, unlawful use of a vehicle. At trial, the state offered a photograph showing the defendant sitting in the vehicle that he was charged with stealing. The admissibility of the exhibit was discussed somewhat extensively at trial, mostly in the context of whether late disclosure of the photograph was a discovery violation. When the state finally offered the photograph into evidence, defendant objected on the ground of "foundation." The court overruled the objection, and defendant was convicted. On appeal, defendant argued that the state failed to sufficiently authenticate the photograph as required by OEC 901. *Held*: Affirmed. Defendant failed to preserve his claim of error. "His objections below made no reference to the operative rule, OEC 901, which provides the basis for his argument on appeal, nor did he reference the heightened standard of proof that he now contends applied before the photograph could be authenticated, nor did he argue that the photograph did not depict an actual event." Nor did he object when the state explained its proposed method of authentication. His generalized "foundation" objection did not alert the trial court or the state to the argument he later raised on appeal. Moreover, had he raised the argument below, "the state would have been alerted to a possible need to modify its method of authentication so as to establish the photograph's conditional relevance."

^ ***State v. Vanornum***, 250 Or App 693, 282 P3d 908 (2012), *rev allowed*, 353 Or 203 (2013). After a brawl with police, defendant was charged with disorderly conduct and resisting arrest. The trial court gave UCrJI 1227, the uniform instruction on self-defense to a resisting-arrest charge, which states that (1) an officer making an arrest is entitled to use the amount of force he or she reasonably deems necessary, and may use reasonable force to overcome physical opposition to an arrest; but (2) if an officer uses unreasonable physical force to make an arrest of a person offering no unlawful resistance, the person may use force in self-defense from what the person reasonably believes to be the use or imminent use of unlawful physical force by the officer. Defendant agreed to giving that instruction but he requested a special jury instruction stating that unreasonable physical force by an officer making an arrest exists if the defendant reasonably believed that the officer's use of force was disproportionate in the circumstances. His counsel argued that "the basis of the instruction … is to identify a particular fact in the case that maybe needs to have its legal authority more expanded for the jury" and that the "jury would benefit if they were told in more detail rather than general nature about what the law is on that aspect of this case." The trial court declined to give that instruction. The jury found defendant guilty. After defendant's conviction, the Supreme Court in *State v. Oliphant*, 347 Or 175 (2009), disapproved UCrJI 1227 in part. On appeal, defendant relied on *Oliphant* and assigned error both to the trial court's giving of that instruction and its rejection of his requested instruction. *Held*: Affirmed. [1] "Although the state does not contend that defendant failed to preserve his first assignment of error, challenging the failure to give his requested instruction, we nevertheless are enjoined, as a prudential matter, to determine independently whether defendant adequately raised and preserved his present contention before the trial court." [2] Defendant's claim that the trial court erred by not giving his requested instruction was not adequately preserved under ORCP 59 H because defense counsel's "generalized remarks" about the proposed instruction did not "identify the asserted error to the trial court" and "state with particularity" the argument he made on appeal—namely, that omission of the instruction allowed the jury improperly to consider the reasonableness of the officer's force from the officer's perspective rather than defendant's. That was particularly true because the emphasis in the requested instruction on viewing the reasonableness of the officer's force from *defendant's* perspective conflicted with the statement in UCrJI 1227 that the reasonableness of the officer's force is viewed from the *officer's* perspective, and defendant had approved of that instruction being given. [3] The Court of Appeals rejected defendant's claim that, in light of *Oliphant*, the trial court committed plain error by giving UCrJI 1227: "Because defendant raised no exception to the jury instruction provided by the trial court, as required by ORCP 59 H, [his claim of] error is not reviewable."

Appeals: scope of review

State v. Haynes, 352 Or 321, 284 P3d 473 (2012). The state appealed two pretrial rulings on evidentiary issues in this cold-case murder case. Defendant, a male prostitute, is charged with murdering the victim, who was likely a john, in 1994. The victim's body was found in the victim's apartment, having bled to death after being stabbed repeatedly; circumstances suggested an attempted robbery. Male clothing was found near the scene. **Prior acts evidence**. Defendant was later arrested for DUII in Vancouver, after carjacking an elderly victim and attempting to rob him. When stopped, defendant was wearing women's clothing and had stuffed the clothing with found items (foliage and papers from the victim's car). The Vancouver charges ultimately were dropped, but Portland Police Bureau detectives later discovered that those events had occurred in the aftermath of the murder. Defendant was charged with intentional murder, manslaughter, and felony murder (on the theory that the murder was committed in the course and furtherance of a robbery) in 2011, and the state moved to admit evidence of the Vancouver arrest and the circumstances that led to that arrest. The state proffered several theories of admissibility, including arguments that the evidence, in conjunction with numerous other robberies committed by defendant, made it more likely that defendant had committed the homicide in the course of a robbery. The state also argued, albeit only orally at the motion hearing, that, even apart from any other robbery, defendant's "course of conduct" after the homicide was relevant to prove his "flight" from the scene. The circuit court rejected that theory without explanation other than that it was not "relevant." **Evidence of defendant's 2011 interview with detectives.** In 2011, before he was charged, defendant was interviewed by detectives; the interview was recorded by video. Throughout the 20-minute interview, defendant repeatedly claimed that he remembered nothing about what he was doing in 1994. But, at the end of the interview, when asked about the Vancouver DUII arrest, he explained that incident in detail. For that reason, the state sought to offer the entirety of the recorded interview; defendant objected, arguing that his denials were irrelevant. The trial court issued an order that expressly stated that certain admissions by defendant in the interview were relevant. The court also stated that the state would need to produce a redacted version of the recording. The state appealed, assigning error to both the exclusion of the prior-acts evidence and the court's order relating to the interview (which the state had interpreted to exclude every part of the recording other than those expressly found by the trial court to be relevant). *Held:* Orders affirmed; case remanded for further proceedings. [1] The state did not preserve its argument that the evidence of the Vancouver incident was admissible because his conduct after the homicide (his flight from Portland to Vancouver) demonstrated both his proximity to the murder scene and consciousness of guilt; the prosecutor's use of the terms "flight" and "course of conduct" were insufficient. [2] Because the trial court did not expressly exclude the portions of the recorded interview that it had not described as "relevant," the state's appellate challenge to that order was premature.

State v. C. S., 252 Or App 509, 287 P3d 1238 (2012), *rev den*, 353 Or 445 (2013). A petition was filed in juvenile court alleging that youth, a 13-year-old girl, had committed fourth-degree assault, harassment, and first-degree theft of a gym bag and contents. The next day, April 21, she appeared with her father, and she waived her right to counsel, and admitted the allegations. On May 10, the juvenile court entered a dispositional order. Youth did not appeal from that order. The court subsequently scheduled a restitution hearing and appointed counsel to assist youth. Before the hearing, youth's counsel filed a motion to withdraw her admission to the theft allegation. The court denied that motion and imposed restitution for the bag and its contents. *Held*: Affirmed. Youth's challenge to dispositional order is not reviewable because, "not having appealed from the jurisdictional judgment, she may not now challenge it in the course of appealing a subsequent judgment."

^ ***State of Oregon and City of Portland v. Christian***, 249 Or App 1, 274 P3d 262, *rev allowed*, 352 Or 564 (2012). Defendant was charged with, *inter alia*, violating Portland City Code §

14A.60.010(1), which provides, subject to numerous exceptions: "It is unlawful for any person to knowingly possess or carry a firearm, in or upon a public place, including while in a vehicle in a public place, recklessly having failed to remove all the ammunition from the firearm." Defendant demurred to charge, contending that the ordinance on its face violates Art. I, § 27, and the Second Amendment. The trial court overruled the demurrer, and defendant was convicted. *Held*: Affirmed. Because defendant made a facial challenge to the constitutionality of the ordinance by way of demurrer: "First, the only relevant facts in this case are that defendant was charged with, and tried for, violating the ordinance, and those facts are relevant only to establish that he has standing to challenge it; the circumstances surrounding his arrest play no part in our analysis. Second, although generally a facial challenge to a law will fail if the law can constitutionally be applied in any imaginable situation, in a facial challenge under Art. I, § 27, … [if] we determine that legislation is significantly overbroad—that, in some significant number of circumstances, it punishes constitutionally protected activity—we must declare the legislation to be unconstitutional."

Appeals: affirmance on alternative grounds, "right for the wrong reason"

State v. Pitt, 352 Or 566, 293 P3d 1002 (2012). Defendant was charged with sexual offenses involving a child. Prior to his trial, he filed a motion *in limine* to exclude evidence that would show that he previously had committed similar sexual assaults against the victim and another child in Lane County. The state contended that that evidence was relevant under OEC 404(3) both to show his intent when he touched the victim and to prove his identity as the person who had abused the victim (because each victim had seen him abuse the other victim). Defendant asserted that his intent was not at issue because he denied committing the alleged acts and did not plan on arguing that he touched the child accidently but without a sexual intent. The trial court concluded that the evidence was relevant to show that defendant intentionally committed the charged acts and to prove the identity of the perpetrator of the charged acts. The other-crimes evidence was admitted at trial without objection, and defendant was convicted. The Court of Appeals affirmed, ruling that the evidence was relevant because it tended to bolster the victim's identification of him as the perpetrator of the crimes. 236 Or App 657 (2010). *Held:* Reversed and remanded. [1] The trial court erred when it denied defendant's motion to exclude the other-crimes evidence. The evidence was not relevant to prove defendant's identity under the traditional "identity" exception. [2] At the time the trial court denied defendant's motion *in limine*, it was not yet relevant to prove that he committed the charged acts *intentionally* because the record did not yet establish as a fact that the charged acts had occurred. The defendant's "not guilty" plea did not put his intent at issue, and without a stipulation or other evidence that the charged acts had occurred, or without an instruction to the jurors that they could not consider the other-crimes evidence until it determined that he committed the charged acts, the uncharged misconduct evidence could not be admitted unconditionally, because the evidence tended to prove only that he acted in conformity with his character to commit such acts. [3] The Supreme Court declined to consider the state's argument that the other-crimes evidence relating to the victim was admissible under *State v. McKay*, 309 Or 305 (1990), to show defendant's "sexual predisposition" toward her, noting that the prosecutor had not offered that as a theory of admission, the trial court did not admit the evidence on that basis, and the trial court did not instruct the jury on that theory.

State v. Burgess, 352 Or 499, 287 P3d 1093 (2012). At a New Years' Eve party, defendant, his codefendant, and the victim all became intoxicated on alcohol and methamphetamine, and the defendants savagely beat, kicked, and then stomped on the victim. As defendant stood nearby, his codefendant, who was wearing steel-toed boots, repeatedly kicked the victim in the face as he lay unconscious on muddy ground. After the codefendant was hauled away by bystanders, defendant "stomped" on the victim's chest a couple of times and then rolled him over face down and "pile-drived" the victim's face into ground several times. As the victim was taken away for medical treatment, the defendants "high-fived." The victim suffered serious injury to his eye socket and jaw but the doctors could not attribute the specific injuries to which assaults. In general language,

defendants were charged with first-degree assault under ORS 163.185(1)(a) (serious physical injury by dangerous weapon). At trial, the state's theory was that defendant's actions aided and abetted codefendant's previous kicking assault with his boots, "compounding" the victim's injuries. Defendant moved for a judgment of acquittal, but the trial court (Judge Gardner) denied the motion. The jury found him guilty. On appeal, defendant contended that the evidence was insufficient to prove that he aided and abetted this codefendant's assault with the boots. The state argued that even if that was true, the evidence was sufficient to prove that he committed first-degree assault as a principal. The Court of Appeals agreed with defendant, ruled that it could not affirm on the alternative theory, and remanded to consider whether to enter a conviction instead for second- or fourth-degree assault. *State v. Burgess*, 240 Or App 641 (2011). *Held*: Affirmed. [1] The charge of first-degree assault "was sufficient to permit the state to proceed against the defendant at trial either as a principal, an accomplice, or both," and so "the state could have pursued both theories of criminal liability at trial." [2] But "the state informed the trial court and defendant it was pursuing only one theory—accomplice liability" and so "there was no reason for defendant to challenge or rebut any factual contentions as to whether the 'muddy ground' (as opposed to codefendant's steel-toed work boots) met the statutory definition of a dangerous weapon, or whether any of defendant's actions independently caused serious physical injury under the pertinent statutory definition." Consequently, "under the circumstances of this case, it would be fundamentally unfair to defendant to sustain his conviction on a separate factual and legal theory that has been proffered by the state for the first time on appeal." [3] Even though the instructions given were sufficiently broad to allow the jury to find defendant guilty as a principal, the court cannot affirm based on a "right for the wrong reason" theory, because "it is highly likely that defendant would have developed the record differently if he had had actual notice that the state was pursuing principal liability against him." [4] The Supreme Court declined to consider the state's argument that the case should be remanded for retrial on the charge of first-degree assault, because the state did not make that argument in the Court of Appeals. [5] Remanded for a determination whether defendant can be prosecuted for lesser offenses of second- and fourth-degree assault based on the incident.

State v. Pirtle, 255 Or App 195, 296 P3d 625 (2013). Two officers responded to a domestic-disturbance call at an apartment complex involving defendant (a felon) and "possibly involving" a handgun. Officer Labrousse spoke to defendant and his mother outside the apartment building while Officer Myers spoke to the victim inside the building. Parked in front of the building was pickup truck that belonged to defendant's mother; it was loaded with personal belongings. The victim reported that defendant kept a handgun in a backpack and that he had possessed the gun inside the apartment earlier that day; she consented to Officer Myers's request to search the apartment, but the search failed to turn up the gun. While that was happening, the Officer Labrousse arrested defendant and placed him in a patrol car; as he did, he noticed the pickup being driven a short distance and then parked. Officer Myers saw the pickup moving while he was inside the apartment, but he testified that he was unsure at that time whether he knew that defendant's personal belongings were in the truck. Officer Myers then went outside and asked defendant's mother to consent to the search of the truck. She consented but then rescinded her consent before the officer found any evidence. Believing that he had probable cause to continue searching despite her withdrawal of consent (based on the automobile exception), Officer Myers continued searching and found defendant's pistol in the pickup. Defendant was charged with felon in possession of a firearm, and he moved to suppress the pistol, contending that the officers' search of the pickup was unlawful. The circuit court denied the motion, holding that sufficient evidence of mobility was established by the truck's movement "in the course of the stop." *Held*: Reversed. [1] Because "the state did not meet its burden as to the temporal requirement of the automobile exception," the search was not lawful under that exception. [2] The Court of Appeals declined to consider the state's alternative ground for affirmance based on the exigent-circumstances exception because that argument was not sufficiently developed for its consideration, and the record likely would have developed differently had it been fully addressed below.

State v. Marshall, 254 Or App 419, 295 P3d 128 (2013). Defendant ran an RV park, where he dealt in drugs and stolen goods on the side. An informant told the police about defendant's illegal activities, and officers obtained a warrant for his house and "shop." When they arrived to serve the warrant, they discovered a trailer. While serving the warrant, the officers asked for defendant's consent to search the trailer. Defendant claimed some renters had left it behind, and he admitted that it was probably full of stolen property. He consented, but said that he didn't want to be held responsible for what was in the trailer, and insisted that the officer write down on the consent form that "Mr. Marshall is not responsible for the property stored inside the RV Trailer! MSW [Trooper Wilson's initials]." The rest of the form said, in different ways, that the consent given was voluntary. A search of the trailer turned up stolen goods, and defendant was charged with theft (among other crimes). He moved to suppress, claiming that his consent was involuntary because he thought the officer had given him immunity from prosecution by including the "not responsible" language. The trial court denied the motion, and found that defendant's consent was voluntary. Defendant was found guilty. *Held*: Reversed and remanded. [1] Considering the totality of the circumstances, defendant's consent was not voluntary. [2] The state did not develop a record sufficient to substantiate the search on an inevitable-discovery theory.

State v. Jepson, 254 Or App 290, 292 P3d 660 (2012). A police detective and a DHS worker went to a house shared by defendant and his girlfriend—both felons—to investigate a report that the girlfriend had shot defendant's young son with a BB gun. They interviewed both defendant and his girlfriend on the front porch. The girlfriend admitted that she had a BB gun, but denied shooting defendant's son. The detective asked whether they had any other guns in the house, and the girlfriend admitted to having a shotgun and a handgun. She knew that, as felons, they were not supposed to possess firearms, but she said that she thought she was allowed to use them in her mobile slaughtering service. Defendant said that he thought he was allowed to possess guns because eight years had passed since his felony conviction. The detective explained she was not sure about the law and that she would return if there was a problem. She returned an hour later, with another officer, and told defendant that she had done some research and discovered that he could not lawfully possess guns. Defendant called his girlfriend to come outside, and the detective gave them both *Miranda* warnings. They indicated that they were willing to cooperate, and reiterated that they thought they could lawfully possess the guns. The detective then stated, "We're going to have to take the firearms," and asked girlfriend where they were located inside the house. The girlfriend gave detailed directions of where they were, and the detective went into the house to seize them. Neither officer asked for permission to retrieve the guns, and neither defendant nor girlfriend voiced any objection to the detective's entry. Defendant was charged with two counts of felon in possession of a firearm (FIP), and he moved to suppress the guns, claiming that the contact was a stop, that he did not consent to seizure of the guns, and that any implicit consent he gave was the involuntary product of coercive circumstances. The trial court denied the motion, finding that the contact was a mere conversation and not a stop, that defendant was not unlawfully questioned, and that he voluntarily consented to a search because he did not object to the detective's entry. Defendant entered a conditional guilty plea to one of the two FIP charges, reserving the right to appeal the court's ruling on his motion to suppress. On appeal, defendant argued that the search did not fit within any exception to the warrant requirement. *Held*: Reversed and remanded. [1] Defendant and his girlfriend did not voluntarily consent to entry into the home or seizure of the guns. [2] The court did not address the state's argument, made for the first time on appeal, that defendant could not assert a constitutional challenge because he had disclaimed any possessory or privacy interest in the guns during the motion hearing; because the issue of waiver "is a heavily fact-intensive inquiry," the record would have developed differently had the state relied on that theory below.

State v. Ordner, 252 Or App 444, 287 P3d 1256 (2012), *rev den*, 353 Or 280 (2013). Defendant was charged with DUII after an officer stopped defendant's car after seeing him fail to

signal a turn for 100 feet and turn too wide; the patrol car's video recorded these events. Defendant moved to suppress, arguing that the stop was unlawful because the officer's suspicion that he committed traffic infractions was not objectively reasonable. After observing the video and listening to the officer's testimony about his observations, the trial court found that the officer's subjective belief that defendant had made an improper wide turn to be objectively reasonable and identified, *sua sponte*, ORS 811.370 (failure to maintain lane) and ORS 811.310 (crossing the centerline) as the infractions for which the officer had probable cause to believe defendant violated. (Defendant's conduct did not violate those statutes, however, but did violate other traffic statutes relating to maintaining a lane of travel.) After the court denied his motion, defendant entered a conditional guilty plea. In its respondent's brief on appeal, the state identified two statutes that defendant *did* violate: ORS 811.295 (failure to drive on the right) and ORS 811.305 (driving left of the center of the roadway at an intersection). *Held*: Affirmed. The trial court correctly denied defendant's motion to suppress, although the court was "right for the wrong reason." [1] "An officer's subjective belief that a traffic infraction occurred is objectively reasonable if, and only if, the facts as the officer perceived them actually satisfy the elements of a traffic infraction. *State v. Tiffin*, 202 Or App 199, 204 (2005). [2] Although the trial court mistakenly held that the officer reasonably believed that defendant had committed the traffic infractions in question (because a person commits those infractions only on a four-lane road with clearly marked lanes for traffic), "that is not the end of the matter. Although the state has the burden of identifying specific conduct that constitutes the infraction that the officer has probable cause to believe was committed, a misidentification of the statute that applies to the conduct is not dispositive." [3] At trial, it was the trial court—not the state—that cited the incorrect statutory provisions; "both parties understood that the dispositive issue was whether, as a matter of fact, the officer correctly had discerned that defendant had not stayed within his lane in making his turn onto the side street. Defendant never argued that, if the officer's observation was correct, no traffic infraction had occurred." [4] Therefore, the Court of Appeals rejected defendant's argument that it could not consider whether the conduct violated the provisions that the state identified for the first time on appeal, because the record would not have developed differently had the correct statute been cited. [5] The video recording showed that it was "objectively reasonable for the officer to believe that the defendant had committed the offense of failure to drive on the right under ORS 811.295." Accordingly, "the ensuing traffic stop was lawful.

Appeals: errors that may be harmless or waived

State v. Sanchez-Alfonso, 352 Or 790, 293 P3d 1011 (2012). An 18-month-old boy, C, sustained serious head injuries, including a fractured skull, while in defendant's care. The emergency-room physician, suspecting abuse, referred C to CARES for evaluation. At CARES, Dr. Skinner examined and treated C, and reviewed his medical records and police reports. She drafted a report, which concluded that defendant "clearly caused [C's] injuries which caused his hospitalization" and that C "was physically abused by" defendant. This medical diagnosis is based on C's "physical exam … accompanied by review of statements made by" defendant. In her report, Dr. Skinner explained that defendant had given at least three versions of the events leading up to the injuries, and that his stories did not explain C's multiple head injuries. Defendant was charged with assault and criminal mistreatment. At trial, defendant admitted that he had caused C's forehead injury—a lump on his forehead—but claimed it was accidental, and did not create a "substantial risk of death." He denied causing C's skull fracture, blaming C's aunt for causing that injury. Defendant objected to the admissibility of Dr. Skinner's testimony and report on the ground that they violated OEC 702 and OEC 403. The trial court admitted Dr. Skinner's testimony and report, and the jury found defendant guilty. The Court of Appeals affirmed, finding that the trial court erred in allowing Dr. Skinner to testify that defendant caused C's injuries, but that the error was harmless. Before the Supreme Court the state conceded that a portion of the diagnosis did not satisfy the requirements of OEC 702, but argued that the error was harmless. *Held*: Reversed and remanded. [1] Dr. Skinner's diagnosis did not satisfy the scientific-validity requirement of OEC 702, because Dr. Skinner "did not

establish that she was qualified to identify the perpetrator of inflicted injury." [2] The error was not harmless. The court was not persuaded by the state's argument that the jury would have recognized that Dr. Skinner's identification of defendant as the perpetrator of the abuse was simply "a reflection of the facts known to her at the time that she had made her report. … Although it is possible that the jurors could have discounted her conclusion as based on insufficient information, it is just as likely—if not more likely—that they credited Skinner's expertise." Moreover, the state offered Dr. Skinner's report into evidence; by doing so, and by citing the report in closing argument, "the state encouraged the jury to read the report as indicating Skinner's present views." The error was not harmless because "we cannot conclude that there was little likelihood that the admission of Skinner's diagnosis did not affect *all* of defendant's convictions."

State v. Pitt, 352 Or 566, 293 P3d 1002 (2012). Defendant was charged with first-degree sexual abuse and first-degree unlawful sexual penetration involving a child. Prior to his trial, he filed a motion *in limine* to exclude evidence that would show that he previously had committed similar sexual assaults against the victim and another child in Lane County. The state contended that that evidence was relevant under OEC 404(3) both to show his intent when he touched the victim and to prove his identity as the person who had abused the victim (because each victim had seen him abuse the other victim). Defendant asserted that his intent was not at issue because he denied committing the alleged acts and did not plan on arguing that he touched the child accidently but without a sexual intent. The trial court concluded that the evidence was relevant to show that defendant intentionally committed the charged acts and to prove the identity of the perpetrator of the charged acts. The other-crimes evidence was admitted at trial without objection, and defendant was convicted. The Court of Appeals affirmed, ruling that the evidence was relevant because it tended to bolster the victim's identification of him as the perpetrator of the crimes. 236 Or App 657 (2010). *Held:* Reversed and remanded. [1] The trial court erred when it denied defendant's motion to exclude the other-crimes evidence. The evidence was not relevant to prove defendant's identity under the traditional "identity" exception. [2] The error was prejudicial: "The court's evidentiary ruling permitted the jury to consider the uncharged misconduct evidence *before* it decided whether defendant had committed the charged acts. That created a risk that the jury would use the uncharged misconduct evidence for an impermissible propensity purpose—*i.e.*, to decide that, because defendant had committed the uncharged acts, his character was such that he again would act in the same manner and commit the charged acts."

State v. Klontz, 257 Or App __, __ P3d __ (July 31, 2013). Defendant was charged with first-degree rape by forcible compulsion based on a date rape. He admitted the sexual intercourse but claimed the victim consented. At a bench trial, the state introduced, over defendant's objection, evidence of five prior similar sexual offenses he had committed against other women. The trial court rendered a "speaking verdict" that found him guilty. The Court of Appeals affirmed, holding that the prior-crimes evidence was properly admitted to prove the victim's lack of consent, but the Supreme Court reversed and remanded for reconsideration in light of *State v. Leistiko*, 240 Or 338 (2011). *Held*: Affirmed. Even if the other-crimes evidence was erroneously admitted, the error was harmless because the trial court, in its verdict, discussed the evidence of forcible compulsion and consent at length and did not mention evidence of the prior assaults, and explicitly relied on the victim's credibility in finding that she did not consent.

State v. Whitmore, 257 Or App __, __ P3d __ (July 24, 2013). Defendant was stopped at 3:20 a.m., the officer arrested him for DUII, and he submitted to a breath test at 4:15 a.m., which showed a BAC of 0.08%. Prior to trial, defendant filed a motion *in limine* to exclude any evidence "of retrograde extrapolation" without a proper foundation, contending that such an opinion would not be scientifically valid. The trial court denied the motion At trial, the state called Bray, who for 14 years has been a forensic scientist for the Oregon State Police Forensic Division. She testified at length about the general rate of dissipation of blood-alcohol from person's system over the course of

time, about the Widmark formula, and about the numerous variables that may affect the rate of dissipation. The prosecutor then asked Bray a hypothetical question based on the facts of defendant's case—using his assertion that he had drunk only three beers between 9 p.m. and 2 a.m. and that he had a blood-alcohol content of 0.08 percent at 4 a.m.—and she opined that that hypothetical person would have had to have consumed "between seven and ten and a half drinks" during that time in order to still have a blood-alcohol content of 0.08 percent at 4 a.m. The jury found defendant guilty. On appeal, defendant claimed that the trial court erred when it denied his motion *in limine*. *Held*: Reversed and remanded. [1] Bray's testimony required a *Brown/O'Key* foundation: "Because Bray is an expert with a background in forensic science who claims that her knowledge of blood alcohol chemistry is based on studies and the literature in the field, when she testified, she effectively announced to the jury that the basis of her testimony was scientific. The trial court thus had a duty to ensure that her methods possessed the requisite indices of scientific validity. The trial court erred in not requiring the state to show that her methods were scientifically valid under the standards established in *Brown* and *O'Key*." [2] The error was not harmless even though "the evidence in this case is sufficient, even without the expert testimony, to allow the jury to find defendant guilty."

State v. Lovaina-Burmudez, 257 Or App 1, __ P3d __ (2013). Police investigating a string of armed robberies in east Portland developed defendant as a suspect in the robbery of a taco truck on August 18. 2009. On August 24, the police received a report of an armed robbery at the Red Apple Bar & Grill, and the suspect matched defendant's description. About a mile from the scene, an officer recognized defendant riding as a passenger in a van. The officers stopped the van but defendant fled on foot. Officers converged on the area and defendant shot in the process of apprehending him. Defendant was taken by ambulance to OHSU and, when it arrived, an officer seized his shoes and clothes, including $980 in cash inside his pants. The officer did so "to see what valuables are there" and to inventory them, and he then transported the clothes and shoes to the police department's forensic evidence division, where the items were photographed and secured as "evidence." Defendant was charged with robbery, FIP, and UUV based on the taco-cart and Red Apple incidents. Six months later, while the clothes and shoes were still in possession of the police, police obtained a search warrant to seize and search of the clothes and shoes. Defendant moved to suppress the shoes and clothes as evidence, but the trial court denied the motion; the court concluded that the clothes and shoes were lawfully seized incident to defendant's arrest for the taco-truck robbery, and that the cash was discovered pursuant to a valid inventory; the court did not address the state's alternative inevitable-discovery argument based on the subsequent warrant. After a trial at which the state presented evidence of defendant's shoes and the cash in his pocket, he was convicted on the charges. *Held*: Some convictions reversed and remanded; otherwise affirmed. [1] The shoes and clothes were not lawfully seized incident to an arrest for the taco-truck robbery. [2] The police exceeded the scope of their authority under the inventory policy by then photographing the items and holding them "as evidence." [3] The state failed to prove that the clothes and shoes would have been "available … for seizure" six months later had it not unlawfully retained the items "as evidence." The state thus failed to show that the items inevitably would have been discovered pursuant to the warrant. [4] The evidence that should have been suppressed related only to the Red Apple robbery, and there was independent evidence establishing defendant's guilt on charges relating to the taco-truck robbery, and "any error with respect to the disputed evidence related to the Red Apple robbery bore no relationship to the jury's determination of its verdicts on the counts pertaining to the taco truck robbery."

State v. Brown, 256 Or App 774, 302 P3d 1214 (2013). Defendant, a high-school coach, was charged with two counts of second-degree sexual abuse and four counts of third-degree sexual abuse based on his abuse of two teenaged athletes, M and E, who he sexually abused during massages. At trial, he objected to medical diagnoses that M had been sexually abused and that E was "highly concerning for sexual abuse," but the trial court admitted that evidence and defendant was found guilty. After trial, the Supreme Court decided *State v. Southard*, 347 Or 127 (2009), which held that

such a sexual-abuse diagnosis is inadmissible under OEC 403, at least in the absence of physical evidence of abuse. The state conceded on appeal that the trial court erred in admitting the diagnoses under *Southard*, but argued that the error was harmless in light of the fact that medical staff recovered defendant's DNA from a swab of M's labia and that a jury would not have been likely to have been affected by the inadmissible diagnosis. *Held*: Reversed and remanded. The error was not harmless because defendant took the stand and offered an explanation for his conduct, which was that he allegedly only performed "sports massages" on the victims near their vaginal areas, and that that contact may have resulted in the detection of his DNA on Victim M.

State v. Jones, 255 Or App 761, 298 P3d 652 (2013). Defendant was charged with a number of crimes relating to his sexual abuse of two young children. At a bench trial, the older child, J.F., testified that he sexually abused her and also that he attempted to engage her in certain urine-related activities. The state also presented evidence that defendant previously had engaged in similar activity with three other children. Defendant challenged the admissibility of that evidence, asserting that it was not admissible under *State v. Johns*, 301 Or 535 (1986), and was unduly prejudicial under OEC 403. The trial court overruled the objection and ultimately acquitted defendant of all charges except for three charges relating to his abuse of J.F. In explaining its verdict, the court observed that it "believed" J. F. and that it reached its verdict "based on her testimony." The court specifically stated that the testimony of the other victims "didn't have a big impact" in terms of the verdict and whether it believed J. F. *Held*: Affirmed. Even if the evidence was erroneously admitted, any error was harmless, because the trial court expressly stated that it believed J.F.'s testimony and that it based its verdict on her testimony.

State v. Preuitt, 255 Or App 215, 296 P3d 648 (2013). Defendant was charged with several sexual crimes arising from his sexual abuse of his two step-granddaughters. At trial, the state presented testimony from Richards, a contract therapist at Kids First, who had provided therapy for K, one of the victims, and had diagnosed her with PTSD as a result of the abuse. Richards described her therapy sessions with K during which K claimed that defendant sexually abused her and described the abuse. In relating that information, Richards testified that she had no "concerns" and saw no "red flags" indicating that K's claim was a "story that she had adopted from somewhere else," and that there was nothing about K that "made her seem particularly suggestible." The trial court sustained defendant's objection to some of Richards's testimony, but defendant did not move to strike. The jury found defendant guilty. *Held*: Reversed and remanded. [1] Under *State v. Lupoli*, 348 Or 346, 357 (2010), Richards's testimony constituted impermissible vouching. [2] The admission of Richards's comments was not harmless and requires reversal of the convictions based on crimes against K. Although defendant later attempted to challenge her conclusions, and in doing so, necessarily put the same information before the factfinder, did not render the admission of her original testimony harmless. "Defendant was simply attempting to discredit or undermine [Richards's] testimony on cross-examination." Her testimony "was not merely cumulative of other properly admitted evidence." Further, "in a case without physical evidence of abuse, where the credibility of the complainant was of paramount importance," the court could not "conclude that the admission of improper vouching evidence was harmless beyond a reasonable doubt."

^ ***State v. Zolotoff***, 253 Or App 593, 291 P3d 781 (2012), *rev allowed*, 353 Or 428 (2013). Defendant was an inmate in a single-occupancy cell at the Marion County jail. Jail deputies found in his cell a broken-off spoon that was partially sharpened. He was charged with "knowingly" possessing a weapon, ORS 166.275. Defendant requested an instruction for attempted possession of a weapon by an inmate, but the trial court denied the request on the ground that an instruction on an attempt offense can be given only when a defendant is charged with committing the offense intentionally. The jury found defendant guilty. *Held:* Reversed and remanded. The trial court erred by refusing to give the instruction. [1] The trial court erred when it denied defendant's requested instruction: defendant was entitled to the instruction "because the instruction correctly stated the

law" and there was evidence from which the jury could infer that the spoon was not yet a weapon because he "had not completed sharpening it and was merely in the process of making a weapon." [2] The error was not harmless, even though the jury found defendant guilty of the charged offense and the jury would not have been allowed to consider an attempt crime under the "acquittal first" requirement of ORS 136.460(2).

State v. Marshall, 254 Or App 419, 295 P3d 128 (2013). Defendant ran an RV park, where he dealt in drugs and stolen goods on the side. An informant told the police about defendant's illegal activities, and officers obtained a warrant for his house and "shop." When they arrived to serve the warrant, they discovered a trailer. While serving the warrant, the officers asked for defendant's consent to search the trailer. Defendant claimed some renters had left it behind, and he admitted that it was probably full of stolen property. He consented, but said that he didn't want to be held responsible for what was in the trailer, and insisted that the officer write down on the consent form that "Mr. Marshall is not responsible for the property stored inside the RV Trailer! MSW [Trooper Wilson's initials]." The rest of the form said, in different ways, that the consent given was voluntary. A search of the trailer turned up stolen goods, and defendant was charged with theft (among other crimes). He moved to suppress, claiming that his consent was involuntary because he thought the officer had given him immunity from prosecution by including the "not responsible" language. The trial court denied the motion, and found that defendant's consent was voluntary. Defendant was found guilty. *Held*: Reversed and remanded. [1] Considering the totality of the circumstances, defendant's consent was not voluntary. [2] The error was not harmless: "in light of defendant's theory at trial—*viz.*, that he did not know that any of the property in his bus had been stolen—and his admitted suspicion that the property in the RV had been stolen, we cannot conclude that there is 'little likelihood' that the admission of the property found in the RV affected the verdict [with respect to defendant's theft conviction]."

State v. Hudson, 253 Or App 327, 290 P3d 868 (2012), *rev den*, 353 Or 562 (2013). Police officers investigating a double homicide responded to victims' residence. Concerned that the person inside was destroying evidence, the police hailed him with a loudspeaker and ordered him out of the house. Once defendant came outside, the police noticed blood stains on his pants. They cuffed him, asked him his name, and told him that he was not under arrest, but that the police needed to speak with him. Defendant identified himself as "Frank" and said that he had two roommates, neither of which was home at the time. Because it was raining, one of the officers asked defendant if he would sit in the patrol car while he waited for detectives to speak to him; he said that he did not mind doing so, and was placed in the patrol car while still handcuffed. About half an hour later, detectives arrived to talk to defendant. Because it was still raining heavily, the detectives asked defendant to get out of the car, then took him to their van, removed his handcuffs, and told him they wanted to speak with him; he agreed to talk to them. The detectives told him that they were investigating his housemates' disappearance and asked him for consent to search the house. Defendant signed the consent form, after which he asked if he needed an attorney. One of the detectives told him that was "up to [him]," then read him *Miranda* rights, which he acknowledged that he understood. After talking to defendant for about an hour, police asked him if he would go to the community center to give a recorded statement, because the loud rain made it impossible to record the statements in the van. He agreed. In the bright light at the center, police saw large bloodstains on defendant's knees and a bandage on his arm that he tried to cover. Soon thereafter, defendant said that he wanted an attorney, at which point the officers ceased their questioning and took him into custody. The police entered the house based on defendant's consent, suspending the search after seeing blood in the house and waiting for a warrant. Defendant was charged with aggravated murder. Before trial, defendant moved to suppress physical and testimonial evidence, arguing that he was unlawfully seized when he was "loud hailed" out of the house, or alternatively, when he was placed in the patrol car in handcuffs; that he was entitled to *Miranda* warnings at each of those points; and that he was denied his right to counsel when police questioned him after he asked if he needed an attorney. The trial

court rejected those arguments and denied the motion to suppress. Defendant was convicted of aggravated murder. *Held*: Affirmed. [1]The officers seized defendant when, using a loudspeaker, they repeatedly ordered him to come out of the house with his hands up. The seizure was lawful; the circumstances gave rise to reasonable suspicion "that defendant was involved in a crime." [2] The detectives "properly responded to defendant's inquiry regarding an attorney, and their subsequent questioning did not violate his right to counsel." [3] The officers' request for consent to search the house was not "interrogation" that required *Miranda* warnings, nor were the other questions that the officers asked when defendant came out of the house. [4] Alternatively, any error in admitting defendant's statements in response to those questions was harmless because the statements "were not particularly incriminating and, in view of the evidence presented at trial, were unimportant."

State v. Bradley, 253 Or App 277, 290 P3d 827 (2012). Defendant was charged with committing 15 sex offenses against two child victims. The state notified defense counsel 27 days before trial that it intended to introduce one of the victims' out-of-court statements under OEC 803(18a)(b), and that the statements were contained in reports that the state had already provided to the defense in discovery; the state did not identify the particular statements that it intended to introduce. Before trial, defendant moved to exclude those statements, arguing that the state's notice was inadequate to satisfy the requirements of OEC 803(18a)(b) because the prosecutor did not specify which of the child's statements she intended to introduce. The trial court denied the motion, and a jury found him guilty of committing sex offenses against the children. *Held*: Reversed and remanded. [1] The trial court erred in admitting the statements under OEC 803(18a)(b). Here, "the state's notice … did not identify the particular statements that the state intended to offer or how they would be offered. The notice requirement is not satisfied merely by providing copies of reports" and referencing those reports. [2] "The sole sanction for violations, as provided by the rule, is exclusion of the offered statements." [3] The error was not harmless with respect to the charges involving the child whose statements were admitted because the erroneously admitted statements "injected into the record the only evidence that defendant committed [one of the charged offenses], and it bolstered [the child victim's] credibility concerning the other charged offenses [involving that child]."

State v. Richardson, 253 Or App 75, 288 P3d 995 (2012), *rev den*, 353 Or 714 (2013). The victim was an elderly woman in a nursing home suffering from advanced brain cancer. Defendant and Penn, her great-nephew, had her execute a power of attorney and a quit-claim deed to her home in favor of Penn. Afterwards, she had made statements to family members, including "Please don't let them take my house," and "My nephew took my house and car from me." Defendant was charged of first-degree aggravated theft, ORS 164.057, and obtaining execution of a document by deception, ORS 165.102. The victim died before trial, and defendant moved to exclude her statements to family members. Defendant also objected to the admission of an audio recording in which the victim's attorney asked her, "Did you want [Penn] to [put the home in his name]?" to which she responded, "No." Finally, defendant objected to witnesses testifying that the victim had told them that she had been robbed or that her home had been taken from her. The trial court admitted the statements under OEC 803(3), which provides that a statement is not hearsay if it is "of the declarant's then existing state of mind, emotion, sensation or physical condition, such as intent, plan, motive, design, mental feeling, pain or bodily health, but not including a statement of memory or belief to prove the fact remembered or believed." Defendant was found guilty. *Held:* Reversed. [1] The trial court should have excluded the victim's statements as inadmissible hearsay. [2] The error was not harmless; the erroneously admitted evidence "went to the heart of the state's case and is qualitatively different from other evidence that supported it."

State v. Wood, 253 Or App 97, 289 P3d 348 (2012). Defendant molested a ten-year-old girl. Two years later, on the encouragement of a friend, the victim disclosed the abuse to her mother, who reported the abuse to the police. The victim was evaluated by CARES. She also engaged in a "pretext" call to defendant, wherein he admitted having inappropriate feelings toward her, and the

night defendant allegedly touched her inappropriately. Prior to trial, the state filed a served a notice per OEC 803(18a)(b) of intent to rely on statements made by the victim to her mother, named CARES staff members, and a named detective, "as set forth in reports previously made available." At a bench trial, defense counsel objected to admission of the statements, claiming that the state's notice lacked sufficient "particulars" to satisfy OEC 803(18a)(b). The trial court overruled the objection, and found him guilty on one count of first-degree sexual abuse. *Held*: Reversed and remanded. [1] The victim's statements should have been excluded because the state's notice was insufficient under OEC 803(18a)(b). [2] The error was not harmless. That defendant may not have been harmed by the deficient *notice* is not the relevant inquiry; instead, the court's "task is to determine whether the *trial court's* error—admission of the statements—was harmless." "In the absence of overwhelming evidence of guilt, we have held that where, as here, erroneously admitted hearsay evidence significantly reinforces the declarant's testimony at trial, the admission of those statements constitutes error requiring reversal of the defendant's conviction."

State v. Kaylor, 252 Or App 688, 289 P3d 290 (2012), *rev den*, 353 Or 428 (2013). Defendant was a CNA (certified nursing assistant) at a nursing home where the victim, who suffered from dementia, resided. When the victim was resisting defendant's efforts to clean him, another CNA, Rivera, came over to help. The two women rolled the victim onto his side, with defendant standing near his head and Rivera near his lower body. When the victim, who had been "hollering" loudly, suddenly became quiet, Rivera looked up and saw that defendant had clamped her hand over the victim's mouth and was applying pressure. The victim's face was bright red, his eyes were open wide, and he looked "terrified," as if he could not breathe. Defendant kept her hand over the victim's mouth for ten seconds, at which point defendant told Rivera that the victim had bitten her hand and left to tend to her injury. Rivera sought advice from another co-worker, Mayes, and reported the incident to her supervisor later that day. The next afternoon, defendant left a threatening voicemail messages for Mayes to tell Rivera. The state charged defendant with first-degree criminal mistreatment, strangulation, and two counts of witness tampering. At trial, the state presented evidence that defendant had made threats of harm to the victim previously, as well as to another patient. The jury found defendant guilty of all charges. *Held*: Convictions for criminal mistreatment and witness tampering reversed; conviction for strangulation reversed and remanded. [1] Defendant's previous threats against the victim and another patient were inadmissible under OEC 404(3). [2] The error in allowing the evidence was not harmless, because "the central issue" in the case was "a credibility contest between Rivera and defendant," with defendant contending that she did not put her hand over the victim's mouth. "Under those circumstances, evidence showing that defendant had previously threatened the victim and another resident with physical harm was prejudicial."

State v. Colon, 251 Or App 714, 284 P3d 589 (2012). Defendant was charged with fourth-degree assault for throwing a large cooking spoon at her 17-year-old daughter, striking her in the face. At a bench trial, her defense was that she had not thrown the spoon; rather, it slipped out of her hand while she was gesturing at her daughter. In the defense case-in-chief, defendant called the complainant's cousin, Torres, who testified that he had known the complainant for her entire life, they "used to hang out a lot," and spent a lot of time at her house. Counsel asked Torres whether he had ever heard complainant say that she hated defendant, to which Torres answered that he had heard her say that "plenty of times" and that his cousin was a "drama queen. That's what she does." The state objected and moved to strike those answers as non-responsive; the trial court sustained the objection and struck the answers. Defendant then asked Torres whether the complainant was "prone to over-exaggeration"; the state objected, and the trial court sustained the objection, explaining that defendant failed to lay the necessary "foundation for character," which requires counsel to ask "very specific questions." Defendant appealed, arguing that the trial court erred by not allowing Torres to testify. *Held*: Reversed and remanded. [1] Torres's opinion concerning the complainant's tendency to exaggerate was admissible evidence of the complainant's character for truthfulness pursuant to OEC 608(1), and defendant laid all of the foundation for that testimony that the rule requires—"a showing

of adequate contacts between Torres and the complainant for Torres to form a current personal opinion of the complainant's character for truthfulness." [2] The error was not harmless, because the trial court's decision "came down to a determination of credibility," and the trial court found the complainant's testimony "believable and that her motive to lie was negligible."

State v. Perez-Chi, 251 Or App 661, 284 P3d 1195 (2012). Defendant was convicted of burglary, robbery, and felony murder based on his participation in a burglary/robbery at a friend's residence, during which his co-defendant shot and killed his friend. The Court of Appeals reversed and remanded because the trial court had given the "natural and probable consequences" instruction. 241 Or App 344 (2011). After the Supreme Court decided *State v. Lopez-Minjarez*, 350 Or 576 (2011), it remanded this case for reconsideration. On remand, the Court of Appeals reconsidered whether that instruction was harmless for his convictions for burglary and felony murder. *Held*: Reversed and remanded. [1] The erroneous instruction was harmless with respect to his burglary conviction, the first chronological crime of conviction. [2] "We will reverse a conviction if an incorrect jury instruction created an erroneous impression of the law that, if the jury had believed defendant's version of the facts, would have affected the outcome of the case. Thus, to assess whether giving the erroneous instruction was harmless with respect to the felony-murder convictions, we must determine whether the jury's guilty verdicts on those charges could have been based on the theory of criminal responsibility contained in the instruction." [3] The erroneous instruction was not harmless as to the robbery and felony-murder charges. Based on defendant's testimony, the jury could have found that the burglary (charged as unlawful entry with intent to commit theft) was complete before the co-defendant shot and killed the victim. Thus, the jury may have convicted defendant of felony murder based on the unlawful "natural and probable consequences" instruction.

State v. Dalby, 251 Or App 674, 284 P3d 585 (2012), *rev den*, 353 Or 209 (2013). Defendant was charged with PCS resisting arrest arising out of an altercation with police officers in downtown Portland. At trial, an officer testified on direct examination: "I *Mirandized* [him], and he refused to talk to me." Defendant did not object. Later, the prosecutor asked the officer, "that's not the only reason you couldn't ask him questions, right?," to which the officer responded, "Right. He invoked his right to speak with counsel." Defendant moved for a mistrial, the trial court denied it, and the jury acquitted defendant on the resisting-arrest charge but found him guilty on the PCS charge. On appeal, defendant claimed the trial court erred by denying his motion for a mistrial. *Held*: Affirmed. [1] The officer's statements were impermissible comments on "defendant's exercise and invocation of his right to remain silent," as guaranteed by Art. I, §§ 11 and 12. [2] Defendant's choice not to request a cautionary instruction does not preclude appellate review of this claim of error. [3] "Error in admitting evidence that a defendant exercised or invoked his constitutional right to silence or to counsel is prejudicial if the evidence comes in a context whereupon inferences prejudicial to the defendant are likely to be drawn by the jury." In this case, the error was harmless, because the jury *acquitted* defendant of resisting arrest, which was "the charge to which he devoted the bulk of his defense" and "the only evidence that the jury heard regarding defendant's possession of the pipe was uncontradicted (and unobjected to) testimony from a police officer that defendant claimed he picked up the pipe off of the street."

Appeals: remedy

State v. Leistiko, 254 Or App 413, 292 P3d 670 (2012) (*per curiam*). The sentencing court entered a supplemental judgment under HB 3408 (2009) that denied defendant eligibility for additional earned-time credits. Defendant appealed arguing that the court had no authority to enter such a judgment, and the state agreed. *State v. Portis*, 233 Or App 256, *dism'd as moot*, 348 Or 559 (2010). *Held*: Appeal dismissed. "The appropriate remedy … is thus exceedingly narrow: dismiss the appeal and remand the case to the trial court with instructions to vacate the supplemental judgment concerning HB 3508 earned-time credits."

Allen v. Premo, 251 Or App 682, 284 P3d 1199 (2012). In *Allen v. Palmateer*, 219 Or App 221 (2008), the Court of Appeals held that the post-conviction trial court erred when it did not permit petitioner to testify in support of his claims; the court reversed and remanded for a new post-conviction trial. On remand, petitioner moved for leave to file a fourth amended petition. The post-conviction trial court denied that motion on the ground that it was outside the scope of the remand. The court then rejected all of the claims in petitioner's existing petition. *Held*: Reversed and remanded. [1] "Although we generally review a court's denial of a motion to amend only for abuse of discretion, when the denial results from a substantive legal conclusion, we review the correctness of that conclusion for errors of law. In this case, the question is not whether the post-conviction court abused its discretion in denying petitioner's motion to amend; the issue is whether the court erred in concluding that it had no discretion to exercise. That is a legal question, and we review it for legal error." [2] In general, when a case is reversed and remanded, "the 'remanded' part sends the case back to the lower tribunal as if though the original proceeding did not occur." [3] "By remanding for a new trial, the case was returned to its original pretrial posture, and because the new trial would include petitioner's previously excluded testimony, it was foreseeable that petitioner might seek to amend his petition to revise or add new claims related to that testimony. Whether to grant or deny petitioner leave to amend his petition was within the court's authority; thus, the court erred by not exercising its discretion."

^ ***State v. Savastano,*** 246 Or App 566, 266 P3d 176 (2011), (*per curiam*), *rev allowed*, 351 Or 678 (2012). Defendant was convicted, based on conditional pleas of guilty of multiple counts of aggravated first-degree theft. In its original opinion, the Court of Appeals held that she was entitled to relief on her claim—which she had asserted in a pretrial motion to dismiss—that the district attorney's decision to charge her with aggravated first-degree theft by aggregating multiple thefts over the course of a particular month violated Art I, § 20. The remedy granted was "Reversed and remanded." *State v. Savastano*, 243 Or App 584, 590 (2011). The state moved for reconsideration, contending that the court should clarify the opinion so that it does not suggest that trial court on remand must dismiss the charges. *Held*: The remand order "was not intended to dictate [a particular remedy]. That is an issue for the trial court to decide on remand. To forestall any further confusion, however, we now make explicit that the disposition of our earlier opinion is a reversal and remand for further proceedings consistent with this opinion."

Appeals: reconsideration

State v. Leistiko, 352 Or 622, 292 P3d 522 (2012). In its original opinion, *State v. Leistiko*, 352 Or 172 (2012), the court held that the trial court erred by admitting evidence of an uncharged rape against a fourth victim, it reversed defendant's two convictions for first-degree rape and remanded for retrial of those charges, but it affirmed his other convictions. Defendant petitioned for reconsideration, arguing that the court should have reversed his other convictions, too. *Held*: Opinion adhered to as modified. Defendant did not argue on appeal that the erroneous admission of the other-crimes evidence required reversal of any of his convictions other than those for first-degree rape. The court declined to consider his new argument because, as a general rule, "the court will not address arguments raised for the first time on reconsideration."

State v. Cam, 256 Or App 146, 300 P3d 208 (2013). In its original opinion, the Court of Appeals affirmed the vast majority of defendant's convictions. *State v. Cam*, 255 Or App 1 (2013). Among the arguments that the court rejected was an argument that defendant manifested his intent to exclude visitors to his property by posting "private property" signs near a gate, and therefore that police unlawfully entered his property. Defendant petitioned for reconsideration, arguing—for the first time—that one of the "private property" signs also said "no trespassing," and asking the court to revisit its analysis of whether defendant manifested his intent to exclude visitors in light of that

photograph. He also argued that the court should reconsider whether the trial court erred in imposing consecutive sentences for defendant's convictions for theft-by-receiving, because the crimes were related and therefore part of the same criminal episode. *Held*: Reconsideration allowed; former opinion adhered to as modified. "We do not ordinarily entertain arguments raised for the first time on reconsideration. To the extent that defendant is contending that we got the facts of the case wrong, we reject that contention. No witness made mention of the words 'no trespassing' on the private property sign. Counsel never mentioned them until the petition for reconsideration. The trial court made no findings regarding the signage, but it did find that defendant had allowed entry onto his property and had not manifested a clear intent to exclude visitors. Viewing the evidence in a manner consistent with the trial court's ultimate conclusion, …we assume that the trial court either did not see the words 'no trespassing' on the photograph or assigned no special significance to them in the context of the record as a whole." Moreover, the words "no trespassing" on the sign does "not alter our conclusion in our original opinion, 255 Or App at 8, that defendant did not manifest a clear intent to exclude visitors."

ARREST

See also "Search & Seizure," and "Stop & Frisk," *below*.

ARSON & RECKLESS BURNING

State v. Nyhuis, 251 Or App 768, 284 P3d 1229 (2012). While lodged at the Buckley House, a local detox center, defendant set fire to an unknown amount of toilet paper, a paper drinking cup, and a few cracker wrappers, which set off the alarm and required evacuation of the facility. Defendant was charged with reckless burning, and he was convicted on stipulated facts. *Held*: Reversed. [1] Under ORS 164.335(1), "reckless burning occurs when a person recklessly damages, by fire or explosive, something that, at the time and place of the damaging act, has a market value or, if no market value can reasonably be obtained, has a replacement cost—but if and only if someone other than the person has a legal or equitable interest in that item that the person has no right to defeat or impair." [2] "The state does not establish, nor could it, that there is a market for used cracker wrappers. And while there may be a market for *new* paper cups and for *new* rolls of toilet paper, there is nothing in the record to establish that that is what defendant burned, nor is there any evidence from which inferences to that effect may be drawn. … The fact that goods of unascertainable value are worth an 'amount' does not imply that they have value. We conclude that 'property,' for purposes of the reckless burning statute, encompasses only items that have a market value, and that the state did not present sufficient (or any) evidence to establish that the items that defendant burned met that definition." [4] Even if only ORS 164.305(2) applies to reckless burning, the stipulated facts do not establish that defendant did anything to 'defeat or impair' Buckley House's legal or equitable interest in the items he burned: "No rational factfinder could infer from the stipulated facts that Buckley House, in giving defendant crackers, intended that he consume the crackers but return the wrapper unimpaired. Likewise, nothing in the stipulated facts states or implies that the paper drinking cup and toilet paper (at least in an unspecified quantity) were meant to be returned unimpaired, rather than used and discarded. Thus, even if the state proved that defendant burned 'property,' the state failed to prove that defendant burned property 'of another.'"

ASSAULT, MENACING, HARASSMENT, AND RELATED OFFENSES

See also "Criminal Mistreatment," "Evidence," and "Sentencing: merger," *below*.

State v. Burgess, 352 Or 499, 287 P3d 1093 (2012). At a New Years' Eve party, defendant, his codefendant, and the victim all became intoxicated on alcohol and methamphetamine, and the defendants savagely beat, kicked, and then stomped on the victim. As defendant stood nearby, his

codefendant, who was wearing steel-toed boots, repeatedly kicked the victim in the face as he lay unconscious on muddy ground. After the codefendant was hauled away by bystanders, defendant "stomped" on the victim's chest a couple of times and then rolled him over face down and "pile-drived" the victim's face into ground several times. As the victim was taken away for medical treatment, the defendants "high-fived." The victim suffered serious injury to his eye socket and jaw but the doctors could not attribute the specific injuries to which assaults. In general language, defendants were charged with first-degree assault under ORS 163.185(1)(a) (serious physical injury by dangerous weapon). At trial, the state's theory was that defendant's actions aided and abetted codefendant's previous kicking assault with his boots, "compounding" the victim's injuries. Defendant moved for a judgment of acquittal, but the trial court (Judge Gardner) denied the motion. The jury found him guilty. On appeal, defendant contended that the evidence was insufficient to prove that he aided and abetted this codefendant's assault with the boots. The state argued that even if that was true, the evidence was sufficient to prove that he committed first-degree assault as a principal. The Court of Appeals agreed with defendant, ruled that it could not affirm on the alternative theory, and remanded to consider whether to enter a conviction instead for second- or fourth-degree assault. *State v. Burgess*, 240 Or App 641 (2011). *Held*: Affirmed. [1] The charge of first-degree assault "was sufficient to permit the state to proceed against the defendant at trial either as a principal, an accomplice, or both," and so "the state could have pursued both theories of criminal liability at trial." [2] But "the state informed the trial court and defendant it was pursuing only one theory—accomplice liability" and so "there was no reason for defendant to challenge or rebut any factual contentions as to whether the 'muddy ground' (as opposed to codefendant's steel-toed work boots) met the statutory definition of a dangerous weapon, or whether any of defendant's actions independently caused serious physical injury under the pertinent statutory definition." Consequently, "under the circumstances of this case, it would be fundamentally unfair to defendant to sustain his conviction on a separate factual and legal theory that has been proffered by the state for the first time on appeal." [3] Even though the instructions given were sufficiently broad to allow the jury to find defendant guilty as a principal, the court cannot affirm based on a "right for the wrong reason" theory, because "it is highly likely that defendant would have developed the record differently if he had had actual notice that the state was pursuing principal liability against him." [4] The Supreme Court declined to consider the state's argument that the case should be remanded for retrial on the charge of first-degree assault, because the state did not make that argument in the Court of Appeals.
[5] Remanded for a determination whether defendant can be prosecuted for lesser offenses of second- and fourth-degree assault based on the incident.

State v. Aitken, 255 Or App 17, 296 P3d 587 (2013). Defendant was charged with, among other things, multiple counts of assault for a knife attack on two victims (Walker and Torres) in an apartment. A jury found defendant guilty on one count of first-degree assault and three counts of second-degree assault against Walker, and two counts of second-degree assault against Torres. The trial court merged several of the assault counts, but refused to merge two counts in which Walker was the victim, finding that defendant had a "substantial opportunity to stop" and "renounce [his] criminal intent" between the assaults underlying those counts. The trial court imposed 144 months sentences on two of the assault counts. *Held:* Remanded for resentencing; otherwise affirmed. The court correctly refused to merge the assault counts, but plainly erred by imposing a sentence that exceeded the statutory maximum. [1] In determining whether to merge counts committed against the same victim in a single criminal episode under ORS 161.067(3), the issue is whether there was a "sufficient pause in defendant's criminal conduct to permit the two offenses to be separately punishable," which means that "one offense ended before the other began." The trial court found that there was such a pause in defendant's attack on Walker, a finding that bound the Court of Appeals. [2] The statutory maximum sentence for assault is 120 months; therefore, the trial court plainly erred by imposing 144 month sentences on two of defendant's assault counts, and the Court of Appeals exercised its discretion to review the error.

State v. Sturgeon, 253 Or App 789, 291 P3d 808 (2012) (*per curiam*). Defendant was convicted of assault in the fourth degree "constituting a crime of domestic violence," ORS 132.586, for assaulting the adult son of his live-in girlfriend, and the court ordered defendant to repay $610 in fees for his court-appointed attorney. For the first time on appeal, he contended that the evidence did not prove the "domestic violence" allegation and that there was insufficient evidence to show that he had the ability to pay CAA fees. *Held*: Reversed and remanded to delete the "domestic violence" finding. [1] The evidence did not establish that defendant and the victim were "cohabitating" or were "family or household members" within the scope of ORS 135.230(3) and (4)(d). [2] The error warrants review and relief as "plain error."

State v. Rennells, 253 Or App 580, 291 P3d 777 (2012), *rev den*, 353 Or 410 (2013). Officers responded to defendant's apartment after "an anonymous 911 call reporting screams coming from that apartment." When the officers arrived, the apartment was quiet. No one responded to their persistent knocking even though they could hear and see someone inside. The officers entered with a pass key and found defendant and the victim in the bedroom. Defendant made inculpatory statements to the officers. At trial, defendant made several motions for judgment of acquittal, arguing that the evidence did not prove venue in Clackamas County with respect to one count of assault and did not prove that the victim suffered "substantial pain" with respect to the other count of assault. The trial court denied the motions, and the jury found defendant guilty. *Held*: One assault conviction reversed; otherwise affirmed. The evidence was not sufficient to prove that the victim suffered "substantial pain," within the meaning of ORS 161.015(7), as a result of a "kicking" incident. At trial, the victim evaded a question about whether the kicking caused her pain. "Although the evidence—a bruise lasting several days—may be sufficient to [allow the jurors to] infer that the victim suffered *some* pain as a consequence of the kicking incident, it is not sufficient to infer that she suffered *substantial* pain."

State v. Glazier, 253 Or App 109, 288 P3d 1007 (2012), *rev den*, 353 Or 280 (2013). Defendant assaulted the victim by dragging her out of bed by her ankle, causing her to hit her head and hip on the floor, dragging her out of the room, repeatedly striking her head against a hardwood floor, and kicking her in the torso. As a result, the victim suffered head pain, a knot on her scalp, a sore neck and shoulders such that she could not turn her head for several weeks, and bruising; her injuries made it difficult for her to navigate stairs and pick up small objects. Defendant was charged with second-degree assault and two counts of fourth-degree assault. At trial, defendant moved for a judgment of acquittal, contending that the state failed to prove "physical injury" and use of a dangerous weapon. The trial court denied that motion. The jury found him guilty. He argued that his guilty verdicts on the three assault counts should merge into a single conviction for second-degree assault because his actions were part of a single criminal episode and were not separated by sufficient pauses. The court disagreed and entered separate convictions. *Held*: Reversed and remanded with instructions to merge the guilty verdicts into a single conviction for second-degree assault and for resentencing; otherwise affirmed. [1] The evidence was sufficient to prove that the victim sustained "physical injury" by proving that she suffered "impairment of physical condition." "The victim testified that the pain arising from her injuries made it more difficult for her to engage in normal activities such as walking up and down stairs and lifting small objects. That evidence was sufficient to support the inference that the posited activities caused impairment for purposes of proving physical injury on the fourth-degree assault charges." [2] The state presented sufficient evidence to prove that the hardwood floor was a "dangerous weapon." "The test for determining whether an instrumentality was used as a dangerous weapon is not what injury resulted, but what injury could have resulted under the circumstances. … Here, viewed in the light most favorable to the state, the evidence was sufficient to permit a trier of fact to determine that the floor was readily capable of causing serious physical injury to the victim in the circumstance where defendant repeatedly struck her head against it. [3] The guilty verdicts should have merged into a single conviction. Defendant's actions were not "separately punishable" assaults under ORS 161.067(3) because "there was no evidence of a temporal

break such that a trier of fact could find that one assault had ended before another began. Defendant's conduct was continuous and uninterrupted; there was no evidence that he paused his aggression from the time he pulled the victim off the bed to final charged act of kicking her in the torso."

State v. Jackson, 252 Or App 74, 284 P3d 1266 (2012). Defendant was convicted of second-degree assault after a drunken-biking-road-rage incident, for "knowingly" causing physical injury with a knife to a person who attempted to intervene in a fistfight that defendant was losing. He was so drunk that he barely remembered anything; his girlfriend had to fill him in on the fight later. He told police that he didn't recall stabbing anyone, and speculated that he might have had his knife in his hand and "poked" someone when he tried to throw a defensive punch. At trial, he argued that he either (1) acted reasonably in reacting to a perceived attack, or (2) because of the injuries he had sustained in the fight, he was not coherent at the time of the stabbing and thus did not "knowingly" use the knife. He asked the court to instruct the jury on the lesser-included offense of fourth-degree assault. The trial court denied that instruction, perhaps reasoning that defendant could not have committed fourth-degree assault without also committing second-degree assault. *Held*: Conviction for second-degree assault reversed and remanded; otherwise affirmed. [1] "A defendant is entitled to an instruction on a lesser-included offense if there is a disputed issue of fact enabling the jury to find that all the elements of the greater offense have been proven, but that all the elements of one or more of the lesser offenses have been proven." [2] Here, "defendant's testimony was … sufficient, if believed, to permit the jury to find that, if he stabbed the victim, he did not do so knowingly. … Although the jury was not required to believe that testimony, the jury could have believed a 'composite' of the state's and defendant's theories of the case: that is, that, because of his head injuries, defendant had not known that he was striking the victim with the knife during the second altercation."

^ ***State v. Pipkin***, 245 Or App 73, 261 P3d 60 (2011), *rev allowed*, 351 Or 586 (2012). Defendant broke into the home of his ex-girlfriend in the middle of the night and assaulted her and another person who was spending the night there, and he was charged with first-degree burglary, fourth-degree assault, and menacing. At trial, he moved for judgment of acquittal on the assault charge, arguing that the victim had not suffered "physical injury," but the trial court denied that motion. Defendant then asked the trial court to give a *Boots* instruction that 10 or more of the jurors had to agree on whether he committed the burglary by entering the victim's residence with the requisite intent or by remaining in the her residence with the requisite intent, and the court denied that request. *Held*: Affirmed. Evidence that the victim was still in pain an hour after the attack from injuries to her eye, shoulder, elbow, and back established that she suffered "substantial pain" and thus suffered a "physical injury."

^ ***State v. Phillips***, 242 Or App 253, 255 P3d 587 (2011), *rev allowed*, 351 Or 586 (2012). Defendant was charged with third-degree assault under ORS 163.165(1)(e) ("while being aided by another person actually present") after he and two others assaulted two brothers. At trial, there was conflicting evidence whether defendant directly assaulted the younger brother, or whether he had merely aided the assault by keeping the older brother at bay. Defendant asked the trial court to give a "*Boots* instruction" that 10 or more of the jurors had to agree on whether defendant committed third-degree assault as a principal or as an accomplice, the court refused to give that instruction, and the jury convicted him of that third-degree assault. *Held*: Affirmed. The trial court correctly refused to give the requested "*Boots* instruction" because when the state presents alternative grounds to establish that a defendant committed a single crime of third-degree assault—*i.e.*, either by actually inflicting the physical injury himself or by aiding and abetting another in doing so—the jury does not need to agree on the specific ground for liability.

BURGLARY & CRIMINAL TRESPASS

See also "Constitutional Issues: free-speech claims," *below*.

State v. May, 257 Or App 375, __ P3d __ (2013). The owner of a storage facility arrived there in the morning and found the lock at the front gate had been cut with bolt cutters, that the locks on several units were cut off, and that at least one unit had been opened and ransacked. The owner of that unit confirmed that a large amount of his property had been taken, which suggested that more than one person was involved. About 1 p.m. that same day, an officer in a nearby town searched a backpack in the trunk of defendant's car and found some of the victim's stolen items. That evening, a sheriff's deputy searched defendant's residence pursuant to a warrant in an unrelated case and found more stolen property. Defendant admitted that the property came from the burglary at the storage facility but he denied participating in the burglary; he claimed that he had agreed with a friend that he would store the stolen property if the friend committed the burglary. He offered an alibi that he later admitted was false. Defendant was charged with multiple counts of burglary, criminal mischief, and theft. The case was tried to the court, and defendant argued that the evidence was not sufficient to prove him guilty of anything but theft by receiving. The trial court found him guilty. *Held*: Affirmed. The trial court properly found defendant guilty. [1] Although defendant denied participating in the burglary, the trial court "was not required to accept as true defendant's exculpatory statements." [2] Under the circumstances, including defendant's possession of stolen property only hours after the burglary, his admission that he knew about the burglary ahead of time, his false alibi, and that it appeared more than one person was involved, "the evidence was legally sufficient to permit the court to infer that defendant personally burglarized and damaged that facility."

State v. G. L. D., 253 Or App 416, 290 P3d 852 (2012). Youth and a couple of other teenagers broke into a high school, stole 20 computers, and set the school on fire. After a hearing, the juvenile court determined that youth had committed acts that constitute first-degree arson, aggravated first-degree theft, two counts of second-degree burglary, and first-degree criminal mischief. *Held*: Affirmed. The juvenile court correctly did not merge the two burglary adjudications because the evidence allowed the court to find that youth made two separate entries—first to take the computers, then 15 minutes later to the school to set the fire—which provided him a sufficient opportunity to renounce his criminal intent, for purposes of ORS 161.067(3).

Note: Because the Court of Appeals affirmed the juvenile court's ruling that the burglary adjudications do not merge under ORS 161.067(3), it did not address the state's argument that ORS 161.067 does not apply to delinquency proceedings.

^ ***State v. Pipkin***, 245 Or App 73, 261 P3d 60 (2011), *rev allowed*, 351 Or 586 (2012). Defendant broke into the home of his ex-girlfriend in the middle of the night and assaulted her and another person who was spending the night there, and he was charged with first-degree burglary, fourth-degree assault, and menacing. At trial, he moved for judgment of acquittal on the assault charge, arguing that the victim had not suffered "physical injury," but the trial court denied that motion. Defendant then asked the trial court to give a *Boots* instruction that 10 or more of the jurors had to agree on whether he committed the burglary by entering the victim's residence with the requisite intent or by remaining in the her residence with the requisite intent, and the court denied that request. *Held*: Affirmed. The trial court correctly refused to give the requested *Boots* instruction because "entering unlawfully and remaining unlawfully are two alternative methods of meeting the 'enters or remains unlawfully' element" of a single crime—first-degree burglary."

CIVIL CLAIMS FOR DAMAGES

MacNab v. State of Oregon, 253 Or App 511, 291 P3d 758 (2012). Plaintiff, a sex offender, brought a civil action against the state, claiming that a judge falsely imprisoned him by declining to

stay his sentence pending appeal in a criminal case (for failing to register as a sex offender). The state successfully moved to dismiss because the claim was outside the two-year statute of limitations. The trial court granted the motion and dismissed the case. On appeal, plaintiff argued that his action was timely because he could not have discovered that his imprisonment was unlawful until the Court of Appeals reversed his conviction. *Held*: Affirmed. The circuit court correctly dismissed plaintiff's claim. [1] The two-year statute of limitations applicable to Oregon Tort Claims Act claims does not begin to run until a plaintiff "knows or reasonably should know of the facts giving rise to his claim"—"that an injury occurred, the injury harmed one or more of [his] legally protected interests, and the defendant is the responsible party." [2] For a false-imprisonment claim, then, "the period of limitations … under the OTCA begins to run when the plaintiff knows or reasonably should know that a confinement is intentional and unlawful." [3] Whatever the merits of the claim, "plaintiff knew all of the facts necessary to prove liability for the tort of false imprisonment under his theory of the case … when he was imprisoned after the filing of his appeal… The entire period of confinement occurred more than six years before the filing of the complaint—well outside the two-year statute of limitations."

^ ***Westfall v. Oregon Department of Corrections,*** 247 Or App 384, 271 P3d 116 (2011), *rev allowed*, 352 Or 564 (2012). Plaintiff was convicted of various felony offenses in Jackson County in January 2000, and the court imposed a series of consecutive sentences. Plaintiff escaped from a work crew, and he was convicted of escape in Marion County in July 2001, and the court imposed a consecutive prison sentence. Petitioner then was convicted in Douglas County of various felony offenses in July 2002, and the court imposed more consecutive sentences. Finally, plaintiff was convicted of various felony offenses in Douglas County in September 2002, and the court imposed more consecutive sentences. In 2005, plaintiff obtained post-conviction relief on his Marion County escape conviction, and that sentence was vacated. As a result, DOC employees applied an established policy to readjust all of his various consecutive sentences based on the "consecutive to all previously imposed sentences" clause in the Josephine County judgment, and calculated a new release date. After his release, plaintiff filed a civil action for negligence and false imprisonment contending that his sentences should have been readjusted in a manner that would have resulted in his release 13 months previously. The state moved for summary judgment on the ground that the restructuring of plaintiff's sentences were actions for which, under ORS 30.265(3)(c), the state is immune from tort liability. The trial court granted the motion. *Held*: Reversed and remanded for trial. [1] ORS 30.265(3)(c) "insulates public bodies from tort liability for acts or decisions that constitute a choice among alternative public policies by persons to whom responsibility for such policies has been delegated, yet the immunity does not come to bear on the merely routine decisions that a public employee makes in the course of everyday governmental activities." [2] "Although, as the state argues, the adoption of the DOC policy may reflect a choice among competing policy objectives by individuals within the agency to whom the responsibility to make such a choice has been delegated, the DOC employees implementing that policy were *not* delegated similar responsibility; the policy choice had been made for them through the instructions in the DOC policy that required them to make certain decisions when confronted with particular language in a judgment. Put differently, even if the employees' sentence-restructuring decisions in this case were made in perfect conformity with the DOC sentencing policy, those decisions were not the product of policy choices by the employees."

CONFESSIONS & ADMISSIONS

See also "Right to Counsel," *below*.

Confessions: *Miranda*, right to counsel

Salinas v. Texas, 570 US __, 133 S Ct 2174 (2013). During their investigation of a double murder, police spoke to defendant, who had been a guest at the victims' home the night before the

murder. Defendant voluntarily gave police his shotgun for ballistics testing, and agreed to accompany the police to the police station for questioning. During questioning, defendant was not under arrest and was not read *Miranda* warnings. He answered the officer's questions until the officer asked whether his shotgun would match the shells recovered at the murder scene. Defendant did not respond; instead, he tensed up, looked at the floor, and bit his bottom lip. After a few moments of silence, the officer asked additional questions, which defendant answered. Eventually, defendant was charged with murder. At trial, at which defendant did not testify, prosecutors used his reaction to the question about the shotgun as evidence of his guilt. The jury found him guilty of murder. On appeal, he argued that the prosecutor's reference to his silence as evidence of guilt violated the Fifth Amendment. The Texas courts of appeal affirmed the conviction, holding that defendant's pre-arrest silence was not "compelled" for purposes of the Fifth Amendment. *Held*: Reversed and remanded (3-2-4 decision). The three-judge plurality (Justices Alito, Kennedy, and Roberts) did not reach the question on which the Court granted certiorari because defendant "did not invoke the privilege during his interview." [1] "A witness who desires the protection of the privilege [against self-incrimination] must claim it at the time he relies on it. … That requirement ensures that the Government is put on notice when a witness intends to rely on the privilege so that it may either argue that the testimony sought could not be self-incriminating, … or cure any potential self-incrimination through a grant of immunity." [2] "We have previously recognized two exceptions to the requirement that witnesses invoke the privilege, but neither applies here." The first is that "a criminal defendant need not take the stand and assert the privilege at his own trial. … Because defendant had no comparable unqualified right during his interview with police, his silence falls outside [that] exception." [3] The second exception to the requirement that a defendant invoke the privilege applies "where governmental coercion makes his forfeiture of the privilege involuntary," as is true during a custodial interrogation. The second exception applies whenever "some form of official compulsion denies him a free choice to admit, to deny, or to refuse to answer. … [Defendant] cannot benefit from that principle because it is undisputed that his interview with police was voluntary. … The critical question is whether, under the circumstances of this case, [defendant] was deprived of the ability to invoke the Fifth Amendment. He was not. We have before us no allegation that [defendant's] failure to assert the privilege was involuntary, and it would have been a simple matter for him to say that he was not answering the officer's question on Fifth Amendment grounds. Because he failed to do so, the prosecution's use of his noncustodial silence did not violate the Fifth Amendment."

Justices Thomas and Scalia concurred in the judgment. In his concurring opinion, Justice Thomas explained that there was "a simpler way to resolve this case. In my view, [defendant's] claim would fail even if he had invoked the privilege because the prosecutor's comments regarding his precustodial silence did not compel him to give self-incriminating testimony." Justices Thomas and Scalia would overrule *Griffin v. California*, 380 US 609 (1965), in which the Court held that the Fifth Amendment prohibits a judge or prosecutor from commenting on a defendant's failure to testify," because—as Justice Thomas explained in a previous case—it "lacks foundation in the Constitution's text, history or logic." And they certainly would not extend it to the context of police interviews.

Justice Breyer dissented, joined by Justices Ginsburg, Sotomayor, and Kagan. The dissent would have held that defendant *did* sufficiently invoke his Fifth Amendment privilege by refusing to answer the question given the circumstances of the questioning: defendant knew he was a suspect, the interview was at the police station, defendant was not represented by counsel, and the question that defendant refused to answer (about the shotgun) was obviously intended "to ferret out whether [defendant] was guilty of murder. … These circumstances give rise to a reasonable inference that [defendant's] silence derived from an exercise of his Fifth Amendment rights." The relevant question, in Justice Breyer's view, is: "Can one fairly infer from an individual's silence and surrounding circumstances an exercise of the Fifth Amendment's privilege? … And the answer to that question in the circumstances of today's case is clearly: yes." Accordingly, the dissent would have held that the prosecutor was prohibited from commenting on defendant's silence.

State v. Avila-Nava, 257 Or App 364, __ P3d __ (2013). Defendant was arrested by a Hillsboro police officer as a suspect in a robbery, the officer advised defendant of his *Miranda* rights in Spanish, and defendant stated that he understood those rights. At the station, two detectives interviewed defendant. One detective readvised him of his *Miranda* rights (again in Spanish), and defendant responded, "Do I have to answer your questions?" The detective told him that he could choose not to answer questions. Defendant then asked, "Why did mister call the police?" The detective thought that he should ensure that defendant understood his *Miranda* rights before speaking further with defendant, so he began to walk through them line-by-line. When the detective got to "Anything you say may be used against you in a court of law," defendant stated that he did not understand that warning. The detective repeated, "Anything you say can be used against you," and defendant replied, "I won't answer any questions." Although that statement could be interpreted as a statement that defendant wished to remain silent, the detective explained at the hearing on defendant's motion to suppress that he interpreted that as defendant still trying to understand the meaning of the warning. The detective asked, "Are you saying you don't want to talk to me at all? You just want me to go away?", and defendant responded, "No, I can't talk to you if I don't understand what this right means because you're telling me I have the right to remain silent. I don't understand what this means." Because defendant seemed to be "hung up" on that warning, and asked if the detective meant that defendant was "lying," the detective moved on to the other warnings with the plan of returning to the topic afterward. Defendant then indicated that he understood that he had the right to counsel during questioning, but that he still did not understand that "anything you say can be used against you." After asking about defendant's education level (sixth grade) and whether he could read Spanish, the detective allowed him to read the written *Miranda* card. Defendant read the "you have the right to remain silent" warning, and then asked the detective: "You can just ask questions then?" The detective responded, "If you tell me that you wish to remain silent, I can't question you." Defendant replied, "Now I understand." The detective told defendant that defendant could choose to answer or not answer specific questions, and then confirmed that defendant understood the Miranda warnings and that he wished to speak with the detective. Defendant then gave statements about his involvement in the robbery. Defendant was charged with burglary, robbery, kidnapping and other offenses, and he moved to suppress his admissions. The trial court made findings about the tone of the conversation and the nature of defendant's "I won't answer any questions" comment and ultimately denied defendant's motion. Consistent with the detective's testimony, the court found that defendant's statement was posed "as a quandary"—*i.e.*, that he was trying to decide whether to answer questions and was struggling to understand the preceding warning. The court also noted that the detective's further efforts to explain the rights, and defendant's ultimate statement that he "now" understood those rights, were consistent with the detective's understanding that his "I won't answer any questions" statement was intended to be a question about what defendant should do, not an invocation of a right not to answer further questions. Defendant was found guilty on the charges. *Held*: Reversed and remanded. The trial court erred when it denied defendant's motion to suppress. [1] Whether a statement is an unequivocal invocation of the right to silence is determined based on how a reasonable officer in the circumstances would have interpreted the statement. An officer can ask questions designed to clarify the suspect's intent only if the statement is equivocal. (And, in fact, if the invocation is equivocal, the officer must ask clarifying questions before any further interrogation). [2] A reasonable officer would interpret defendant's words according to their ordinary meaning. Here, the officer interpreted his words contrary to their facial meaning, and that was unreasonable. The officer's later clarification with defendant could not be used "retroactively" to render his words equivocal. [3] Even if, in the face of an unequivocal invocation, an officer is permitted to complete the *Miranda* warnings and ensure that defendant understands his rights, the officer in this case went further than that. Instead, without any intervening voluntary re-initiation on defendant's part, the detective asked him clarifying questions about his invocation. Such follow-up is expressly precluded in the event of an unequivocal invocation, and defendant's inculpatory statements were the product of the constitutional violation.

State v. Plew, 255 Or App 581, 298 P3d 45 (2013). Defendant was charged with a residential burglary of a house on Benham Lane, and was appointed counsel. While he was in jail on that charge, the investigating officer obtained information from a second suspect (and eventual co-defendant) that defendant had also committed a residential burglary eight days earlier, of a house on Holly Lane. The officer went to the jail to interview defendant about the uncharged Holly Lane burglary; he did not invite defendant's attorney in the Benham Lane burglary to the interview. The officer read defendant *Miranda* warnings, told defendant that he was not there to talk about the Benham Lane case, and asked him questions about the Holly Lane burglary. During questioning, the officer used photographs of defendant's apartment—which had been taken as part of the Benham Lane case—to question defendant about specific items of property visible in the photo. Defendant admitted that he had been involved in the Holly Lane burglary and identified property in the photograph that he had stolen during that burglary. The officer asked him if there was "anything else that we need to know about," and defendant replied "No. That's the only two places, I swear to you. You can even give me a lie detector and it will come up positive that's the only two houses." Defendant was charged with the Holly Lane burglary. Before trial, he moved to suppress his statements. He argued that, because he had requested counsel in the Benham Lane case, the officer was required under Art I, § 11 to notify defendant's attorney before questioning him on a factually related criminal episode. The trial court denied the motion, concluding that the two burglaries were not factually related and, therefore, no right to counsel had attached on the Holly Lane burglary. Defendant was convicted of both burglaries after a stipulated-facts trial. He appealed the trial court's denial of the motion to suppress. *Held*: Reversed and remanded. The trial court should have granted defendant's motion to suppress. [1] "[W]e agree with defendant that the two burglaries were sufficiently factually related so that defendant was entitled, under Article I, section 11, to the benefit of his attorney's advice regarding the investigation of the Holly Lane burglary. The burglaries were allegedly committed by the same two suspects, … within close temporal proximity, and at houses located in the same neighborhood." Moreover, the same detective was investigating both cases, and "used photographs taken during his investigation of the Benham Lane case to question defendant regarding defendant's possession of stolen property connected to the Holly Lane case. Importantly, those photographs … constituted overlapping evidence of defendant's involvement in both crimes." And defendant thought the two matters were related, and made an admission that was relevant to both cases. [2] The court was unconvinced by the state's attempt to distinguish this case from *State v. Potter*, 245 Or App 1 (2011), *rev den* (2012).

State v. Hudson, 253 Or App 327, 290 P3d 868 (2012), *rev den*, 353 Or 562 (2013). Police officers investigating a double homicide responded to victims' residence. Concerned that the person inside was destroying evidence, the police hailed him with a loudspeaker and ordered him out of the house. Once defendant came outside, the police noticed blood stains on his pants. They cuffed him, asked him his name, and told him that he was not under arrest, but that the police needed to speak with him. Defendant identified himself as "Frank" and said that he had two roommates, neither of which was home at the time. Because it was raining, one of the officers asked defendant if he would sit in the patrol car while he waited for detectives to speak to him; he said that he did not mind doing so, and was placed in the patrol car while still handcuffed. About half an hour later, detectives arrived to talk to defendant. Because it was still raining heavily, the detectives asked defendant to get out of the car, then took him to their van, removed his handcuffs, and told him they wanted to speak with him; he agreed to talk to them. The detectives told him that they were investigating his housemates' disappearance and asked him for consent to search the house. Defendant signed the consent form, after which he asked if he needed an attorney. One of the detectives told him that was "up to [him]," then read him *Miranda* rights, which he acknowledged that he understood. After talking to defendant for about an hour, police asked him if he would go to the community center to give a recorded statement, because the loud rain made it impossible to record the statements in the van. He agreed. In the bright light at the center, police saw large bloodstains on defendant's knees and a bandage on his arm that he tried to cover. Soon thereafter, defendant said that he wanted an

attorney, at which point the officers ceased their questioning and took him into custody. The police entered the house based on defendant's consent, suspending the search after seeing blood in the house and waiting for a warrant. Defendant was charged with aggravated murder. Before trial, defendant moved to suppress physical and testimonial evidence, arguing that he was unlawfully seized when he was "loud hailed" out of the house, or alternatively, when he was placed in the patrol car in handcuffs; that he was entitled to *Miranda* warnings at each of those points; and that he was denied his right to counsel when police questioned him after he asked if he needed an attorney. The trial court rejected those arguments and denied the motion to suppress. Defendant was convicted of aggravated murder. *Held*: Affirmed. [1]The officers seized defendant when, using a loudspeaker, they repeatedly ordered him to come out of the house with his hands up. The seizure was lawful; the circumstances gave rise to reasonable suspicion "that defendant was involved in a crime." [2] The detectives "properly responded to defendant's inquiry regarding an attorney, and their subsequent questioning did not violate his right to counsel." [3] The officers' request for consent to search the house was not "interrogation" that required *Miranda* warnings, nor were the other questions that the officers asked when defendant came out of the house. [4] Alternatively, any error in admitting defendant's statements in response to those questions was harmless because the statements "were not particularly incriminating and, in view of the evidence presented at trial, were unimportant."

Confessions: corroboration

State v. Hernandez, 256 Or App 363, 300 P3d 261 (2013). Defendant was charged with numerous felony sexual offenses that he committed against a five-year-old victim, "caregiver" of his live-in girlfriend. She disclosed that he had put his penis in her mouth and had rubbed and licked her nipples; she also stated that he had given her "owies where the pee comes out." Defendant eventually confessed to having the victim "grind" her anal and vaginal area on his groin. At trial, he moved for a judgment of acquittal, arguing that although there was some corroborative evidence as to the sodomy counts, the state had failed to adduce any evidence to corroborate his confession, as required by ORS 136.425(1) (2007), as to the charge of sexual abuse by touching the victim's vaginal or anal area—he contended that the victim's "owies" did not establish that he touched her vaginal area for purposes of sexual gratification. The trial court denied the motion, and defendant was found guilty. *Held*: Affirmed. The trial court correctly denied defendant's motion for judgment of acquittal. [1] For purposes of the corroboration requirement, the *corpus delicti* of first-degree sexual abuse, ORS 163.427, "is that the victim was subjected to sexual contact." [2] Viewed in the context of the other evidence in the record—including the victim's statements that he took off her clothes, rubbed and licked her nipples, told her she looked pretty, and put his penis in the her mouth—a jury could infer that the "owies" she described referred to sexual contact. "To be sure, a jury could conclude that the evidence was insufficient to convict defendant of sexual abuse of S. Nevertheless, in order for that issue to go to the jury, the state was only required to submit enough evidence from which a rational trier of fact could draw an inference that *tends* to show that the charged crimes occurred. The state's evidence met that standard."

CONSPIRACY

U.S. v. Smith, 568 US __, 133 S Ct 714 (2013). Defendant was charged with participating in a criminal conspiracy involving narcotics distribution. He asserted that he had been incarcerated and thus had withdrawn from the conspiracy more than five years previously—beyond the statute of limitations for the offense. The trial court instructed the jury that the government had to prove that the conspiracy existed, that defendant was part of that conspiracy, and that the conspiracy continued to within the previous five years—*i.e.*, within the statute of limitations. In response to a question from the jurors, the court also instructed them, over defendant's objection, that defendant had the burden to prove, by a preponderance of the evidence, that he had withdrawn from the conspiracy and that his withdrawal was more than five years previously. The jury found defendant guilty, and DC

Circuit affirmed. *Held*: Affirmed. The trial court correctly instructed the jury. [1] "Upon joining a criminal conspiracy, a defendant's membership in the ongoing unlawful scheme continues until he withdraws. A defendant who withdraws outside the relevant statute-of-limitations period has a complete defense to prosecution." [2] "Allocating to a defendant the burden of proving withdrawal does not violate the Due Process Clause. While the Government must prove beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant is charged, proof of the nonexistence of all affirmative defenses has never been constitutionally required. The State is foreclosed from shifting the burden of proof to the defendant only when an affirmative defense *does* negate an element of the crime. Where instead it excuses conduct that would otherwise be punishable, but does not controvert any of the elements of the offense itself, the Government has no constitutional duty to overcome the defense beyond a reasonable doubt." [3] "Withdrawal does not negate an element of the conspiracy crimes charged here. … Far from contradicting an element of the offense, withdrawal presupposes that the defendant committed the offense. Withdrawal achieves more modest ends than exoneration. Since conspiracy is a continuing offense, a defendant who has joined a conspiracy continues to violate the law through every moment of the conspiracy's existence, and he becomes responsible for the acts of his co-conspirators in pursuit of their common plot. Withdrawal terminates the defendant's liability for post-withdrawal acts of his co-conspirators, but he remains guilty of conspiracy." [4] "A statute-of-limitations defense does not call the criminality of the defendant's conduct into question, but rather reflects a policy judgment by the legislature that the lapse of time may render criminal acts ill suited for prosecution. Thus, although union of withdrawal with a statute-of-limitations defense can free the defendant of criminal liability, it does not place upon the prosecution a constitutional responsibility to prove that he did not withdraw. As with other affirmative defenses, the burden is on him." [5] Although the statute did not expressly so state, withdrawal was an affirmative defense: "Because Congress did not address … the burden of proof for withdrawal, we presume that Congress intended to preserve the common-law rule. That Congress left the traditional burden of proof undisturbed is both practical and fair. "Where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party is best situated to bear the burden of proof. On the matter of withdrawal, the informational asymmetry heavily favors the defendant. Passive nonparticipation in the continuing scheme is not enough to sever the meeting of minds that constitutes the conspiracy. To avert a continuing criminality there must be affirmative action to disavow or defeat the purpose of the conspiracy. The defendant knows what steps, if any, he took to dissociate from his confederates. He can testify to his act of withdrawal or direct the court to other evidence substantiating his claim. It would be nearly impossible for the Government to prove the negative that an act of withdrawal never happened. Witnesses with the primary power to refute a withdrawal defense will often be beyond the Government's reach: The defendant's co-conspirators are likely to invoke their right against self-incrimination rather than explain their unlawful association with him."

Note: Under Oregon law, "renunciation" is an "affirmative defense" to a conspiracy charge, and it requires a showing that the defendant "thwarted commission of the crime which was the object of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of the criminal purpose of the actor." ORS 161.460(1). But ORS 161.465 also describes circumstances under which an existing conspiracy may be "abandoned" either by the conspirators as a group or by one participant unilaterally, and it does not specifically state whether "abandonment" is a defense or an affirmative defense. ORS 161.460(3) provides: "If an individual abandons the agreement, the conspiracy is terminated as to the individual only if and when the individual advises those with whom the individual conspired of the abandonment or the individual informs the law enforcement authorities of the existence of the conspiracy and of the participation of the individual therein." It is not clear whether and how the Court's decision in this case may apply to a prosecution for conspiracy in this state, but the Court's analysis establishes that it would be constitutionally permissible to construe the "abandonment" described in subsection (3) as an affirmative defense that the defendant has the burden to prove.

CONSTITUTIONAL LAW

See also "Evidence: confrontation," "Former Jeopardy," "Search & Seizure," "Sentencing: constitutional issues," and "Stop & Frisk," *below*.

Constitutional Law: free-speech claims

See also "Civil Claims for Damages," above; "Stalking," below.

^ ***State v. Babson***, 249 Or App 278, 279 P3d 222, *rev allowed*, 353 Or 103 (2012). Defendants were charged with second-degree criminal trespass for conducting an around-the-clock anti-war protest vigil on the steps of the state Capitol, in violation of a Legislative Administration Committee (LAC) rule that prohibits overnight use of the Capitol steps. Defendants challenged their convictions, arguing that the rule on its face, and as applied to them, violated their state and federal constitutional rights to free speech and assembly. The trial court rejected those challenges and, based on the Debate Clause in Art. IV, § 9, the court also quashed their subpoenas to question legislators serving on the committee who, defendants alleged, had unlawfully ordered the rule to be enforced against them only because of the content of their protest. *Held*: Reversed and remanded. [1] "The overnight rule does not expressly or obviously regulate speech or communication; rather, it addresses conduct that, in some situations (such as the one at issue here—an overnight protest) may involve expression, but in other situations (for example, a late night capitol steps skateboarder or passed-out drunk) do not. Such enactments … cannot be subjected to a facial challenge—that is, a challenge asserting that the enactors of the rule violated the constitution *when they enacted it*, regardless of how the enactment is enforced." [2] Determining whether the enforcement of a speech-neutral statute violates an individual's rights under Art. I, § 8, turns on "whether the state's enforcement of the overnight rule against defendants was directed toward defendants' expression or toward some speech-neutral objective." The trial court properly found "found as fact that the LAC not only enacted the rule in pursuit of public-safety objectives, but that the rule was enforced against defendants for those purposes as well." [3] The court declined to address defendants' challenge based on the First Amendment: "Until we can determine whether the state's law, including its constitutional law, has deprived defendants of the rights they seek to vindicate under the United States Constitution, any opinion we might render based on the First and Fourteenth Amendments would be premature."

Constitutional Law: equal protection / equal privileges

McBurney v. Young, 569 US __, 133 S Ct 1709 (2013). The Virginia Freedom of Information Act (FOIA) provides that "all public records shall be open to inspection and copying by any citizens of the Commonwealth," but it grants no such right to non-Virginians. Petitioners, who are citizens of other States, unsuccessfully sought information under the Act. They then filed suit in federal court under 42 USC § 1983, seeking declaratory and injunctive relief for violations of the Privileges and Immunities Clause and the dormant Commerce Clause. The district court granted Virginia's motion for summary judgment, and the Fourth Circuit affirmed. Before the Supreme Court, petitioners argued that Virginia's citizens-only FOIA provision violated four different "fundamental" privileges or immunities: the opportunity to pursue a common calling, the ability to own and transfer property, access to the Virginia courts, and access to public information. They also argued that Virginia's citizens-only FOIA provision violates the dormant Commerce Clause. *Held*: Affirmed. The district court correctly granted the state's motion for summary judgment. [1] "The challenged provision of the state FOIA does not violate the Privileges and Immunities Clause simply because it has the incidental effect of preventing citizens of other States from making a profit by trading on information contained in state records. While the Clause forbids a State from intentionally giving its own citizens a competitive advantage in business or employment, the Clause does not require that a State tailor its every action to avoid any incidental effect on out-of-state tradesmen."

[2] "Requiring noncitizens to conduct a few minutes of Internet research in lieu of using a relatively cumbersome state FOIA process cannot be said to impose any significant burden on noncitizens' ability to own or transfer property in Virginia." [3] "Virginia's citizens-only FOIA provision does not impermissibly burden noncitizens' ability to access the Commonwealth's courts." [4] "We reject petitioners' sweeping claim that the challenged provision of the Virginia FOIA violates the Privileges and Immunities Clause because it denies them the right to access public information on equal terms with citizens of the Commonwealth. We cannot agree that the Privileges and Immunities Clause covers this broad right." [5] "Virginia's FOIA law neither 'regulates' nor 'burdens' interstate commerce; rather, it merely provides a service to local citizens that would not otherwise be available at all. The common thread among those cases in which the Court has found a dormant Commerce Clause violation is that the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation. Here, by contrast, Virginia neither prohibits access to an interstate market nor imposes burdensome regulation on that market. Rather, it merely creates and provides to its own citizens copies—which would not otherwise exist—of state records. … Because it does not pose the question of the constitutionality of a state law that interferes with an interstate market through prohibition or burdensome regulations, this case is not governed by the dormant Commerce Clause. Even shoehorned into our dormant Commerce Clause framework, however, [petitioner's] claim would fail. Insofar as there is a market for public documents in Virginia, it is a market for a product that the Commonwealth has created and of which the Commonwealth is the sole manufacturer. We have held that a State does not violate the dormant Commerce Clause when, having created a market through a state program, it limits benefits generated by that state program to those who fund the state treasury and whom the State was created to serve."

^ ***State v. Savastano***, 243 Or App 584, 260 P3d 584, *on recon*, 246 Or App 566, 266 P3d 176 (2011) (*per curiam*), *rev allowed*, 351 Or 678 (2012). Defendant embezzled hundreds of thousands of dollars from her employer in numerous individual theft transactions over a 16-month period. The district attorney applied ORS 164.115(5) to aggregate individual theft transactions that occurred within a six-month period, and defendant was charged with 10 counts of aggravated first-degree theft, and six counts of first-degree theft. Each count was based on aggregated thefts she had committed within each month. Before trial, defendant challenged the manner of aggregation, arguing that the prosecution did not have a consistent, coherent, systematic policy regarding aggregation and, accordingly, the aggregation violated Art I, § 20. The prosecutor responded that although the district attorney did not have a policy, he had aggregated the thefts to provide "a clear organizational outline for the jury." The trial court denied the defendant's motion and, following a conditional guilty plea, defendant appealed. *Held*: Reversed and remanded. [1] A prosecutor's decision regarding how to aggregate theft transactions implicates Art I, § 20, because, depending on what how the prosecutor chose to aggregate, defendant could be burdened with the need to defend against various numbers of charges, and could face penalties of varying seriousness. [2] Although defendant did not establish that the charging decision was unsystematic, the state conceded that it did not have a consistent policy. The trial court therefore should have granted defendant's motion to dismiss.

Note: The Oregon Supreme Court granted the state's petition for review, and the issues before the court on review are: (1) Does Art. I, § 20, apply to a prosecutor's charging decision such as whether to charge a crime, what crime to charge, and how to structure a charge? (2) If Art. I, § 20, applies to such a charging decision, may a defendant carry her burden of proving unequal treatment merely by establishing that the district attorney's office did not adhere to a "coherent, systematic" policy that governed the matter?

Constitutional Law: proportionality

See "Sentencing: constitutional issues" and "Sentencing: forfeiture," *below*.

Constitutional Law: open courts

State v. MacBale, 353 Or __, __ P3d __ (July 25, 2013). Defendant is charged with committing numerous sexual offenses against the victim. Prior to trial, he filed a motion pursuant to OEC 412 to determine the admissibility at trial of some evidence he proffered that the victim previously had falsely accused two other men of rape in order "to prove that she is motivated by a desire to inflict pain on men with whom she has had consensual sex, that she is motivated by her pursuit of money to make false accusations of rape, and that she knows how to manufacture medical or scientific evidence to support a false rape charge." In accordance with OEC 412(4)(b), the trial court scheduled an *in camera* hearing. Relying on various "open courts" constitutional provisions, defendant demanded that the hearing be held in open court. The trial court denied that request. Defendant then filed a petition for writ of mandamus to compel the trial court to hold the hearing in open court, and the Supreme Court issued an alternative writ. *Held*: Petition dismissed. The trial court properly excluded the public from the hearing. [1] Under OEC 412(4)(b), the directive "that the hearing be held outside the presence of the public is mandatory." [2] Both Art. I, § 10, and Art. I, § 11, "are original provisions of the Oregon Constitution. To determine the meaning of an original provision, this court considers its wording, the historical circumstances that led to its creation, and the case law surrounding it. The goal of that inquiry is to understand the wording of the constitutional provision in the light of the way that the wording would have been understood and used by those who created the provision and to apply faithfully the principles embodied in the Oregon Constitution to modern circumstances as those circumstances arise." [3] "The plain words of [the 'open courts' clause in Art. I, § 10] do not confer any personal right on a litigant or on a member of the media or public. Rather, in prohibiting secret courts and requiring that justice be administered openly, that part of [Art. I, § 10] prescribes how government must ensure fairness in the administration of justice." [4] "While it is true that an OEC 412 hearing is secret in the sense that the public is excluded, it does not follow that closing an OEC 412 hearing to the public necessarily results in concealing the administration of justice from public view, in violation of the open courts provision. The defendant and his lawyers are permitted to attend the hearing, there is a record of the hearing, and the trial itself, in general, is open to the public." [5] Although Art. I, § 10, 'is written in broad terms, it does not apply to all aspects of court proceedings. Second, [Art. I, § 10,] generally prohibits a judicial proceeding from being 'secret' (closed to the public) if, in that judicial proceeding, 'justice' is 'administered.' Justice is administered when a court determines legal rights based on the presentation of evidence and argument. Put differently, the focus of the open courts provision is on 'adjudications.' Third, … when justice is being administered, the public's interest in the open administration of justice generally may not be subject to an open ended 'balancing' against the secrecy interest of a particular witness in the case. Fourth, notwithstanding strong textual and case-law support for the principle of open-court proceedings, judges have always enjoyed broad latitude to control their courtrooms, including taking such actions as may be necessary to protect vulnerable participants in judicial proceedings, including victims, from harassment or embarrassment. Given that latitude, the right of access that [Art. I, § 10,], secures, although broad, is not absolute." [6] "The hearing required by OEC 412 is narrowly tailored to screen for a discrete type of evidence that the legislature deems to be presumptively irrelevant to a prosecution for certain sex crimes. As discussed, the legislature has determined that evidence of the past sexual behavior of a victim or witness is *per se* inadmissible, unless it falls within one or more of three exceptions to the ban that the legislature has established. It also created a procedure—not open to the public—to determine whether the otherwise-excluded evidence falls within one of those three narrow categories. If the court determines that it does and that the probative value of the evidence outweighs the danger of unfair prejudice, then the evidence is relevant and admissible. OEC 412(4)(c). All evidence that comes within the category that the legislature has determined should be admitted is admissible at the ensuing public trial. … Closure of the hearing, therefore, operates to deprive the public of exposure only to private, *irrelevant* facts about a witness's sexual history that the legislature has determined should be excluded. Openness in that circumstance would not advance any particular public interest and, given

the sensitive and personal nature of the matters raised at an OEC 412 hearing, openness could potentially further victimize an already vulnerable witness or complainant andmake the complete administration of justice referred to in [Art. I, § 10], more difficult, if not impossible." [7] "A hearing to determine the admissibility of evidence under OEC 412 does not constitute an administration of justice for purposes of [Art. I, § 10], and that the legislature may provide that such a hearing be closed to the public." [8] "The statutory requirement that OEC 412 hearings to determine the admissibility of evidence of a victim or witness's past sexual behavior be conducted outside the presence of the public does not violate [Art. I, § 11, because it], pertains to the trial itself and does not require a pretrial hearing under OEC 412 to be open to the public." [9] "The United States Supreme Court has established over the last few decades that the First Amendment encompasses a public right to observe the workings of at least some parts of the administration of justice, particularly criminal trials. However, the rights accorded by that provision protect not the accused, but the press and other members of the public: They may be asserted only by an identified excluded individual. It is undisputed that defendant will be permitted to attend the hearing under OEC 412. He is not personally deprived of any constitutional right to attend, and he has not shown that he is entitled to assert any constitutional rights of third parties to attend the hearing. Defendant does not have standing to assert a First Amendment right to access to the OEC 412 hearing." [10] "Although the text of the Sixth Amendment refers to the accused's right to a 'public trial,' the United States Supreme Court has held that the right to a public trial extends beyond the trial itself and encompasses some pretrial proceedings. … [T]he right to a public trial extends to those pretrial proceedings that are an integral part of the trial and involve the values that the right to a public trial serves. … We have no trouble concluding that those values are not implicated by OEC 412's requirement that hearings to determine the relevance of certain evidence be conducted *in camera*."

Constitutional Law: *ex post facto* claims

See also "Sentencing: constitutional issues—*ex post facto*," *below*.

State v. Carroll, 253 Or App 265, 290 P3d 864 (2012), *rev den*, 353 Or 428 (2013). Defendant was arrested for DUII in December 2009. At that time, a person was eligible for DUII diversion if he had not had any previous DUII diversions or convictions within the preceding 10 years. Effective January 1, 2010, however, the statute was amended to increase the "look back" period for determining diversion eligibility to 15 years. Defendant had two previous DUII convictions from 12 years before his arrest for DUII. He filed a petition to enter diversion in February 2010 and the trial court, relying on the legislative amendment, applied the current version of the statute and denied the petition because of defendant's prior DUII convictions. The trial court also rejected defendant's *ex post facto* challenges to the amendment. The trial court convicted defendant after a stipulated-facts trial. *Held*: Affirmed. The trial court correctly denied defendant's diversion petition and rejected defendant's *ex post facto* objection. [1] "We reject without extended discussion defendant's contention that, by eliminating his eligibility for diversion, the amendment of ORS 813.215(1)(b) deprived him of a 'defense' to the offense of DUII. Diversion is not a defense." [2] The remaining issue is "whether the amended law imposes a form of punishment—either a detriment, restraint, or deprivation primarily intended as a deterrent—that was not annexed to the crime at the time defendant committed the offense." [3] In general, "the purpose of the Oregon Vehicle Code is primarily remedial, not punitive." [4] The legislative history of the amendment at issue in this case reveals that, "despite incidental deterrent effects, the primary purpose of the amendment ... was a concern for public safety, rather than punishment or deterrence. We have no difficulty concluding that the primary purpose of the amendment … was not punitive." [5] Nor was the practical effect of the amendment punitive: "A person's eligibility for diversion is not punishment for the offense; it provides an alternative to prosecution, conviction, and punishment." [6] Lastly, "the extension of the 'look-back' period for eligibility for DUII diversion does not impose such a significant detriment, restraint, or deprivation on defendant so as to constitute a form of increased punishment."

Constitutional Law: due-process claims

Metrish, Warden v. Lancaster, 569 US __, 133 S Ct 1781 (2013). Petitioner Burt Lancaster, a former police officer with a history of mental-health issues, killed his girlfriend and was charged in state court with murder. At his first trial in 1994, he asserted a diminished-capacity defense that had been recognized by the Michigan Court of Appeals and were included in the uniform jury instructions. That defense allowed the defendant who did not to assert an insanity defense to present evidence of mental illness in order to negate the specific intent alleged in the charged offense. The jury rejected his defense and found him guilty of first-degree murder. His conviction was later reversed and the case was remanded for retrial. In the meantime, the Michigan Supreme Court in 2001 overruled the decisions of the court of appeals and definitively ruled for the first time in *State v. Carpenter* that the statutory scheme did not allow such a diminished-capacity defense. At his retrial in 2005, the petitioner attempted to raise again the diminished-capacity defense contending that the Due Process Clause precluded retroactive application of *Carpenter*. The trial court rejected that argument, the jury found him guilty of first-degree murder, and the state appellate courts affirmed his conviction. Petitioner then filed a § 2254 petition in federal court in which he contended that the state court violated his rights under the Due Process Clause, as construed in *Bouie v. City of Columbia*, 378 US 347 (1964), by retroactively applying *Carpenter* to his case and thus precluding him from asserting a diminished-capacity defense. The district court denied his claim, but the Sixth Circuit reversed, concluding that the state court had unreasonably applied well-established federal law. *Held*: Reversed and remanded. The Sixth Circuit erred by granting petitioner relief. [1] In *Bouie*, the Court held that because the South Carolina Supreme Court's construction of a state trespass statute "was clearly at variance with the statutory language" and "had not the slightest support in prior South Carolina decisions," the state court erred by retroactively applying that new construction to the defendant's trial, which was based on conduct that occurred before that decision. "Due process does not countenance an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." [2] The state court's decision to apply *Carpenter* retroactively in petitioner's case "does not warrant disapprobation as 'an unreasonable application of … clearly established Federal law.' 28 USC § 2254(d)(1). This case is a far cry from *Bouie*, where … the South Carolina Supreme Court had unexpectedly expanded narrow and precise statutory language that, as written, did not reach the petitioners' conduct. In *Carpenter*, by contrast, the Michigan Supreme Court rejected a diminished-capacity defense that the court reasonably found to have no home in a comprehensive, on-point statute enacted by the Michigan Legislature. … Rather than broadening a statute that was narrow on its face, *Carpenter* disapproved lower court precedent recognizing a defense Michigan's high court found, on close inspection, to lack statutory grounding. The situation we confronted in *Bouie* bears scant resemblance to this case, and our resolution of that controversy hardly makes disallowance of Lancaster's diminished-capacity defense an unreasonable reading of this Court's law." [3] "This Court has never found a due process violation … where a state supreme court, squarely addressing a particular issue for the first time, rejected a consistent line of lower-court decisions based on the supreme court's reasonable interpretation of the language of a controlling statute. Fair-minded jurists could conclude that a state supreme-court decision of that order is not unexpected and indefensible by reference to existing law."

Note: Petitioner did not contend that some provision of the federal constitution required the state to recognize a diminished-capacity defense—his only argument was that the *retroactive* application of ruling in *Carpenter* that eliminated that defense under state law violated the Due Process Clause.

Constitutional Law: executive clemency

Haugen v. Kitzhaber, 353 Or 715, __ P3d __ (2013). Plaintiff Haugen was convicted of aggravated murder and was sentenced to death, and the Supreme Court affirmed the judgment on direct review. *State v. Haugen*, 349 Or 174 (2010). He then waived any further challenges to the

judgment and death sentence, and a death warrant was issued scheduling his execution. Before the execution date, Governor Kitzhaber exercised his authority under Art. V, § 14, by granting Haugen "a temporary reprieve … for the duration of my service as Governor." The reprieve by its terms was not conditional and did not impose any burden on Haugen. Haugen sent the Governor a letter purporting to reject that reprieve but the execution was cancelled. Haugen then filed a declaratory-judgment action contending that the reprieve was invalid for a number of reason, but primarily because he had rejected it. The circuit court agreed with Haugen, ruling that he "has the right to reject Governor Kitzhaber's reprieve, and … absent an acceptance a reprieve is ineffective." The Governor appealed, and the Court of Appeals shunted the appeal to the Supreme Court pursuant to ORS 19.405. *Held*: Reversed and remanded. The trial court erred when it declared reprieve to be invalid. [1] "We conclude that we may reach the merits of the parties' arguments regarding what constitutes a reprieve," because Haugen "does not ask the court to limit the Governor's discretion in invoking the clemency power and instead asks the court only to interpret the meaning of 'reprieve'" in Art. V, § 14. "One of this court's fundamental functions is interpreting provisions of the Oregon Constitution." [2] In construing original constitutional provisions, "this court examines the text of the constitutional provision, the historical circumstances surrounding its adoption, and the case law, with the goal of identifying the historical principles embodied in the constitutional text and then applying those principles faithfully to modern circumstances." [3] "To determine if a well-established understanding of executive clemency power existed at the time that the Oregon Constitution was adopted, we must look beyond the constitutional convention. Because the federal clemency power was adopted about 70 years before the Oregon clemency power, and had been exercised by presidents in the years before Oregon adopted Article V, section 14, we examine the federal clemency power and its historical origins." [4] Even if petitioner is correct that a reprieve must have an expiration date, the reprieve at issue "would satisfy that requirement. Although Haugen is correct that the expiration of the Governor's service could occur at different points in time —such as through death, resignation, or expiration of his term of office—he does not dispute that Kitzhaber's service as Governor will end, at which point Haugen's sentence will be reinstated." [5] The reprieve does not "suspend" the laws in violation of Art. I, § 22: "We agree with the Governor that the reprieve suspends Haugen's sentence, rather than the laws. The constitutional provisions that Haugen cites do not establish that a reprieve must have a stated expiration date or cannot be aimed at the laws, as long as its effect is to temporarily suspend the execution of a sentence, as is the case here." [6] "Nothing in the text of the Oregon Constitution provides the recipient of a grant of clemency with a right to nullify it by rejecting it. … We conclude that the Governor's reprieve of Haugen's death sentence is valid and effective, regardless of Haugen's acceptance of that reprieve." [7] Haugen's argument that a reprieve "may be granted only for the reasons that reprieves historically were granted is without support. Although there may have been certain common reasons for granting a reprieve in the past, nothing in the text, history, or case law indicates that a reprieve may be granted *only* for those historical reasons." [8] Haugen's argument that the reprieve violates the Eighth Amendment because indefinite delay in his execution is "additional punishment" that lacks any penological justification has no merit, because the U.S. Supreme Court has not held "that the uncertainty accompanying that time on death row constitutes cruel and unusual punishment [and] Haugen cites no case that suggests that a reprieve or other act of clemency qualifies as cruel and unusual punishment."

Constitutional Law: other issues

See also "Jury Trial," "Sentencing: constitutional issues," *below*.

United States v. Kebodeaux, 570 US __, 133 S Ct 2496 (2013). In 1999, defendant was convicted in a special court-martial of a sexual offense involving a minor, and the court imposed a sentence of 3 months imprisonment and a bad-conduct discharge. In 2004, defendant registered with Texas authorities in accordance with Wetterling Act of 1994. In 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA), 42 USC § 16901 *et seq*., which evidently

superseded or supplemented that Wetterling Act and requires those convicted of sexual offenses to register with state authorities. In 2007, defendant moved within Texas without notifying authorities. As a result, he was charged with and convicted of violating SORNA. The Fifth Circuit, in an *en banc* decision, reversed, holding that the federal government lacked authority under the Necessary and Proper Clause in Art. I, § 8, to require defendant to register because he had "fully served" his sentence and had been "unconditionally let free" before SORNA was enacted. *Held*: Reversed, judgment affirmed. [1] "As of the time of [defendant's] offense, conviction and release from federal custody, these Wetterling Act provisions applied to [him] and imposed upon him registration requirements very similar to those that SORNA later imposed. Contrary to what the Court of Appeals may have believed, the fact that the federal law's requirements in part involved compliance with state-law requirements made them no less requirements of federal law." [2] The Wetterling Act, "as applied to military sex offenders" such as defendant, falls within the scope of the Necessary and Proper Clause. "The Clause allows Congress to adopt any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished and consistent with the letter and spirit of the Constitution. … It could specify that the sex offense of which [defendant] was convicted was a military crime under that Code. It could punish that crime through imprisonment and by placing conditions upon [his] release. And it could make the civil registration requirement at issue here a consequence of [his] offense and conviction. This civil requirement, while not a specific condition of [his] release, was in place at the time [he] committed his offense, and was a consequence of his violation of federal law. And Congress's decision to impose such a civil requirement that would apply upon the release of an offender like [defendant] is eminently reasonable." [3] "The upshot is that here Congress did not apply SORNA to an individual who had, prior to SORNA's enactment, been 'unconditionally released,' *i.e.*, a person who was not in any special relationship with the federal government, but rather to an individual already subject to federal registration requirements that were themselves a valid exercise of federal power under the Military Regulation and Necessary and Proper Clauses. SORNA, enacted after [defendant's] release, somewhat modified the applicable registration requirements. In general, SORNA provided more detailed definitions of sex offenses, described in greater detail the nature of the information registrants must provide, and imposed somewhat different limits upon the length of time that registration must continue and the frequency with which offenders must update their registration. But the statute, like the Wetterling Act, used Spending Clause grants to encourage States to adopt its uniform definitions and requirements. It did not insist that the States do so." Consequently, "the SORNA changes as applied to [defendant] fall within the scope Congress's authority under the Military Regulation and Necessary and Proper Clauses."

State v. Hemenway, 353 Or 498, 302 P3d 413 (2013). In *State v. Hemenway*, 353 Or 129, the Oregon Supreme Court modified the "exploitation" analysis in *State v. Hall*, 339 Or 7 (2005), and held that defendant's voluntary consent to three different searches made those searches lawful, even though the first two consents were given while defendant was unlawfully seized. After the decision issued, defense counsel alerted the court that defendant had died after oral argument but before the Supreme Court had issued its decision. They moved to vacate the decision based on *Yancy v. Shatzer*, 337 Or 345 (2004), and ORAP 8.05(2)(c)(ii), contending that the case was moot before the Supreme Court decided it. The state opposed the motion, contending that the court should exercise its discretion under the vacatur rule not to vacate its decision because the opinion "clarified prior decisions" and the "result will be confusion in the lower courts" if the opinion is vacated. *Held*: Opinion and judgment vacated. The Supreme Court vacated its decision, the Court of Appeals decision reversing defendant's conviction, and the underlying judgment of conviction. [1] Because the case became moot before the court issued its decision, the court lacked "judicial power" under Art. VII (Am), § 1, to decide the case. [2] Equitable considerations supported vacatur. First, because there are a number of other cases pending in the Supreme Court that present the same issue, "we will have ample opportunity" to decide the issue again in another published opinion. Second, defendant did not cause the mootness by his own "voluntary action," and it does not appear that his counsel was aware of his death "and failed to inform the court." Finally, the principle that a "criminal judgment

should be vacated if a criminal defendant dies while pursuing a direct appeal that might result in a reversal of the conviction," militates "in favor of vacatur."

State v. Rogers, 352 Or 510, 288 P3d 544 (2012). Ballot Measure 6 (1986)—which enacted Art. I, § 40—was not enacted in violation of the "separate vote" requirement in Art. XVII, § 1, as interpreted in *Armatta v. Kitzhaber*, 327 Or 250 (1998). [1] The repeal in 1964 of Art. I, § 37, which was enacted in 1920 and reinstituted capital punishment, did not thereby automatically revive Art. I, § 36, which was enacted in 1914 and had abolished capital punishment. ORS 174.090. [2] The "notwithstanding" clause in Art. I, § 40, precludes application of Art. I, §§ 15 and 16, to invalidate the death penalty as a sanction for aggravated murder, but it does not preclude any other challenges under those sections to a death sentence. [3] Measure 6 effected only four substantive changes to the constitution, but those changes are "closely related" for purposes of the "separate vote" requirement.

^ ***State v. Babson***, 249 Or App 278, 279 P3d 222, *rev allowed*, 253 Or 103 (2012). Defendants were charged with second-degree criminal trespass for conducting an around-the-clock anti-war protest vigil on the steps of the state Capitol, in violation of a Legislative Administration Committee (LAC) rule that prohibits overnight use of the Capitol steps. Defendants challenged their convictions, arguing that the rule on its face, and as applied to them, violated their state and federal constitutional rights to free speech and assembly. The trial court rejected those challenges and, based on the Debate Clause in Art. IV, § 9, the court also quashed their subpoenas to question legislators serving on the committee who, defendants alleged, had unlawfully ordered the rule to be enforced against them only because of the content of their protest. *Held*: Reversed and remanded. [1] The LAC had authority to exist and to promulgate the rules at issue. The rules were authorized by the "all powers necessary" clause in Art. IV, § 17, do not violate separation-of-power principles, and "did not violate any of the structural or procedural provisions of the Oregon Constitution." [2] "The framers did not intend to adopt a strict, literal interpretation of the Debate Clause, but, at the same time, they intended it to apply only to statements by legislators uttered during a legislative session. Moreover, the clause applied only to statements made in the exercise of their legislative functions or duties even when … the statements were on the same subject as proposed legislation." But "the purpose of constitutional interpretation is not to freeze the meaning of the state constitution in the mid-nineteenth century. Rather it is to identify, in light of the meaning understood by the framers, relevant underlying principles that may inform our application of the constitutional text to modern circumstances." [3] "Defendants were entitled to question the legislators, but only about any instructions or other communications that they might have given to or had with the LAC administrator or others regarding *enforcement* (as opposed to *enactment*) of the overnight rule. Such instructions or communications fail the requirement that protected speech be an exercise of the legislative function." "The speech about which defendants here sought to inquire occurred well *after* the process of enacting the overnight rule. Once the rule was enacted, the legislative function ended, and with it the immunity conferred by the Debate Clause ended as well. The acts, if they occurred, were not essential to legislating. The court therefore erred in quashing defendants' subpoenas. Because that act prevented defendants from questioning the legislators about facts at the core of the as-applied challenge to the overnight rule, the error was prejudicial." [4] Defendants' challenge to their convictions based on the "peaceably assemble" clause in Art. I, § 26, is subject to the same analysis as under Art. I, § 8, and hence "can succeed only if defendants can establish that no evidence supports the trial court's finding that the rule was enforced for public safety reasons and not for reasons having to do with assembly rights. Thus, the court's error in quashing defendants' subpoenas must be remedied before we can determine whether the arrest violated" Art. I, § 26.

Constitutional Law: construing constitutional provisions

State v. MacBale, 353 Or __, __ P3d __ (July 25, 2013). Defendant is charged with committing numerous sexual offenses against the victim. Prior to trial, he filed a motion pursuant to

OEC 412 to determine the admissibility at trial of some evidence he proffered that the victim previously had falsely accused two other men of rape in order "to prove that she is motivated by a desire to inflict pain on men with whom she has had consensual sex, that she is motivated by her pursuit of money to make false accusations of rape, and that she knows how to manufacture medical or scientific evidence to support a false rape charge." In accordance with OEC 412(4)(b), the trial court scheduled an *in camera* hearing. Relying on various "open courts" constitutional provisions, defendant demanded that the hearing be held in open court. The trial court denied that request. Defendant then filed a petition for writ of mandamus to compel the trial court to hold the hearing in open court, and the Supreme Court issued an alternative writ. *Held*: Petition dismissed. Both Art. I, § 10, and Art. I, § 11, "are original provisions of the Oregon Constitution. To determine the meaning of an original provision, this court considers its wording, the historical circumstances that led to its creation, and the case law surrounding it. The goal of that inquiry is to understand the wording of the constitutional provision in the light of the way that the wording would have been understood and used by those who created the provision and to apply faithfully the principles embodied in the Oregon Constitution to modern circumstances as those circumstances arise."

State v. Copeland, 353 Or __, __ P3d __ (July 25, 2013). Defendant's wife obtained a restraining order that prohibited him from coming within 150 feet of her home or place of business. The next day, a deputy filed a certified proof of service, pursuant to ORS 107.718(8)(d) and 107.720(1)(a), attesting that he had personally served defendant with the order. Several weeks later, defendant was found within 150 feet of his wife's place of business, and he was arrested and charged with punitive contempt. At the hearing, the state offered the deputy's certificate of service, defendant objected on the ground that admission of the certificate would violate his right of confrontation under Art. I, § 11, and the Sixth Amendment. The trial court overruled his objection, and he eventually was found in contempt. Defendant appealed, challenging admission of the certificate of service, and the Court of Appeals affirmed, 247 Or App 362 (2011). *Held*: Affirmed "When construing a provision of the original Oregon Constitution, we engage in a three-part analysis. We examine the text in its context, the historical circumstances of the adoption of the provision, and the case law that has construed it. Our goal is to ascertain the meaning most likely understood by those who adopted the provision. The purpose of that analysis is not to freeze the meaning of the state constitution in the mid-nineteenth century. Rather it is to identify, in light of the meaning understood by the framers, relevant underlying principles that may inform our application of the constitutional text to modern circumstances."

Haugen v. Kitzhaber, 353 Or 715, __ P3d __ (2013). Plaintiff Haugen was convicted of aggravated murder and was sentenced to death, and the Supreme Court affirmed the judgment on direct review. *State v. Haugen*, 349 Or 174 (2010). He then waived any further challenges to the judgment and death sentence, and a death warrant was issued scheduling his execution. Before the execution date, Governor Kitzhaber exercised his authority under Art. V, § 14, by granting Haugen "a temporary reprieve … for the duration of my service as Governor." The reprieve by its terms was not conditional and did not impose any burden on Haugen. Haugen sent the Governor a letter purporting to reject that reprieve but the execution was cancelled. Haugen then filed a declaratory-judgment action contending that the reprieve was invalid for a number of reason, but primarily because he had rejected it. The circuit court agreed with Haugen, ruling that he "has the right to reject Governor Kitzhaber's reprieve, and … absent an acceptance a reprieve is ineffective." The Governor appealed, and the Court of Appeals shunted the appeal to the Supreme Court pursuant to ORS 19.405. *Held*: Reversed and remanded. [1] In construing original constitutional provisions, "this court examines the text of the constitutional provision, the historical circumstances surrounding its adoption, and the case law, with the goal of identifying the historical principles embodied in the constitutional text and then applying those principles faithfully to modern circumstances." [2] "To determine if a well-established understanding of executive clemency power existed at the time that the Oregon Constitution was adopted, we must look beyond the constitutional convention. Because the federal

clemency power was adopted about 70 years before the Oregon clemency power, and had been exercised by presidents in the years before Oregon adopted Article V, section 14, we examine the federal clemency power and its historical origins."

CONTEMPT OF COURT / VIOLATION OF COURT ORDERS

State v. Copeland, 353 Or __, __ P3d __ (July 25, 2013). Defendant's wife obtained a restraining order that prohibited him from coming within 150 feet of her home or place of business. The next day, a deputy filed a certified proof of service, pursuant to ORS 107.718(8)(d) and 107.720(1)(a), attesting that he had personally served defendant with the order. Several weeks later, defendant was found within 150 feet of his wife's place of business, and he was arrested and charged with punitive contempt. At the hearing, the state offered the deputy's certificate of service, defendant objected on the ground that admission of the certificate would violate his right of confrontation under Art. I, § 11, and the Sixth Amendment. The trial court overruled his objection, and he eventually was found in contempt. Defendant appealed, challenging admission of the certificate of service, and the Court of Appeals affirmed, 247 Or App 362 (2011). *Held*: Affirmed [1] The certificate was an official record that was admissible hearsay under OEC 803(8). [2] "Given that historical context, we conclude that the framers of the Oregon Constitution likely were influenced to adopt the Article I, section 11, confrontation requirement (a) to prevent the government from using *ex parte* examinations of suspects and witnesses; and (b) to limit and condition the use of prior testimony in lieu of live witness testimony at trial." [3] At the time Art. I, § 11, "was adopted, the framers of the Oregon Constitution would have understood that the admission of qualifying official records prepared pursuant to an administrative duty generally would not violate the confrontation right of a person accused of a crime. … Records made by a public officer in the performance of an official administrative duty are primary evidence of the facts stated in them. Although official records may contain hearsay declarations, such declarations are not 'witness' statements that offend a defendant's confrontation right if they are confined to matters that the officer is bound by administrative duty to report and do not include investigative or gratuitous facts or opinions." [4] In this case, the deputy issued the certificate pursuant to his official duties, "and it did not contain any investigative or gratuitous facts or opinions. Accordingly, the certificate did not contain the statement of a witness so as to trigger defendant's confrontation right under Article I, section 11, and it was not necessary to establish that the declarant was unavailable as a condition of its admission." [5] The certificate was not "testimonial" evidence under the Sixth Amendment, because the primary purpose the certificate was created was to serve the administrative functions of the court system. "Because the Court has not held, nor otherwise indicated, that a document primarily created for an administrative purpose could be rendered testimonial merely by the possibility that it might be used in a later criminal prosecution, we likewise refrain from doing so in this case."

Note: The court cautioned: "We do not hold that every document that falls within the official-records hearsay exception, OEC 803(8), necessarily is admissible in the face of a confrontation objection. Instead, we hold only that the official record in this case did not contain a witness statement that implicated defendant's confrontation right because the declaration within it was confined to an administrative matter that the deputy sheriff was bound by an official duty to report, and the record did not include investigative or gratuitous facts or opinions."

State v. Larrance, 256 Or App 850, 302 P3d 481 (2013) (*per curiam*). Defendant was found in contempt of court for violating a restraining order, and the court erroneously entered a judgment that recited that defendant was "convicted" of contempt. *Held*: "Reversed and remanded with directions to enter judgment finding defendant in contempt of court."

State v. Gostevskyh, 256 Or App 472, 300 P3d 306 (2013) (*per curiam*). The trial court committed plain error by "entering a misdemeanor conviction for contempt based on defendant's violation of his pretrial release agreement, because contempt is not a crime."

State v. Jung, 255 Or App 507, 296 P3d 1287 (2013) (*per curiam*). Defendant was found in contempt of court for having violated a restraining order, and the trial court entered a judgment stating that defendant was "convicted" of violating the order. *Held*: Reversed and remanded. "The judgment erroneously states that he was 'convicted' of contempt, and we reverse and remand for the trial court to enter a judgment that instead makes clear that defendant was found in contempt of court."

State v. Quade, 252 Or App 577, 287 P3d 1278 (2012) (*per curiam*). For several years, defendant failed to pay $17,000 in restitution and related costs, failed to appear in court, and disobeyed court orders. He pleaded guilty to four counts of contempt of court based on that misconduct. The court entered misdemeanor convictions and imposed unitary assessments and misdemeanor surcharges on each conviction. *Held*: Reversed and remanded. The sentencing court committed "plain error," because contempt of court is not a criminal conviction, and the court lacked the authority to impose assessments and surcharges associated with criminal convictions.

CONTINUANCE

State v. Fredinburg, 257 Or App 473, __ P3d __ (2013). Defendant was charged with DUII and retained private counsel. Two days before trial, defendant asked for a continuance, which the court denied. Then, on the morning of trial, counsel moved to withdraw, citing a breakdown in the attorney-client relationship, and for a continuance for new counsel to get up to speed. The trial court denied both requests, telling counsel that he did not think counsel was telling the truth, and was simply "subterfuge" to obtain the continuance that the court had previously denied. During trial, defendant asked to represent himself for the remainder of the proceeding. The trial court again denied his request. On appeal, he argued that the trial court abused its discretion in denying his motions. *Held:* Affirmed. The trial court did not abuse its discretion in denying defendant's motions for substitute counsel and a continuance. [1] "A continuance request that is made after a case is called for trial and a pretrial evidentiary hearing has occurred is not requested in a 'timely manner'… It was not an abuse of discretion for the court to deny the motions as untimely." [2] As for defendant's motion to represent himself, even assuming that the request was unequivocal, intelligent, and understanding, "it was within the discretion of the trial court to deny the midtrial request if the court concluded that the timing of the change or other consequences of the self-representation would be disruptive of the orderly conduct of the trial in a way that would be unreasonable under the circumstances." [3] In this case, "the court's concerns that defendant's self-representation would be unreasonably disruptive of the orderly conduct of the trial were supported by the record."

State v. Dawson, 252 Or App 85, 284 P3d 1272 (2012). Defendant was found guilty of DUII and reckless driving, and he requested a two-day delay before sentencing. The trial court denied that request, ruling that there was no authority that required it, and immediately proceeded to sentencing. On appeal, the state conceded that ORS 137.020(2) entitled defendant to the requested delay, but argued that the error was harmless because he did not challenge the sentence imposed or argue that he was prejudiced by the trial court's refusal to grant his request for the delay. *Held*: Remanded for resentencing; otherwise affirmed. [1] "A trial court has a duty to pass sentence in accordance with the pertinent sentencing statutes, ORS 137.010(1), and a sentence's validity is determined solely by how well it comports with those statutes." But "the court's failure to comply with the sentencing statutes does not require reversal and remand for resentencing unless the error 'prejudiced the defendant in respect to a substantial right.' *See* ORS 131.035." [2] To determine whether the trial court's failure to allow a sentencing delay, the court examined "the record in light of the nature and purposes of the statutory right." Although the record does not indicate that the trial court would have imposed a different sentence if defendant had more time to prepare for sentencing, there is "another, more subtle, purpose" behind the two-day waiting period: "to create a measure of distance between

the sentencing proceeding and the momentum to pronounce final judgment that often exists in the wake of a criminal trial." [3] "That concern is manifest in this case. The trial judge here acknowledged that the case had an emotional impact on him, and the lack of waiting period denied defendant the substantial right of having a "deliberate and carefully considered pronouncement of judgment."

CRIMINAL MISCHIEF

See also "Instructions," *below*.

CRIMINAL MISTREATMENT / Child Endangerment

See also "Assault, Menacing, Harassment, and Related Offenses," *above*.

State v. Wright, 253 Or App 401, 290 P3d 824 (2012). While babysitting, defendant spanked a 16-month-old child several times, leaving black and purple bruises extending from the top of his diaper to the bottom of his left buttock. When his mother picked him up, the child looked tired and "his eyes were all red." The next day, she took the child to the doctor, who described the bruising as "superficial ecchymosis." At that time, the child was very active, did not appear to be impaired, and did not exhibit any pain. Defendant was charged with first-degree criminal mistreatment under ORS 163.205(1)(b)(A) ("causes physical injury"). At trial, defendant moved for a judgment of acquittal contending that the evidence did not establish "physical injury" under ORS 161.015(7) (defining "physical injury" as "impairment of physical condition or substantial pain"). The trial court denied the motion with respect to the "impairment" theory but ruled that the evidence was insufficient to go to the jury on the "substantial pain" theory. The jury found defendant guilty. *Held*: Reversed. "Absent a diminishment in the ability to use a body part or disruption of the ordinary function of an organ, there is no impairment of physical condition." There was insufficient evidence to prove that defendant impaired the child's physical condition because he was "full of energy" and running around the house the day after the incident, he "did not exhibit any evidence of pain," and there was no evidence that the bruising impaired the function of his skin or other organ.

Note: The state argued on appeal that a rational trier of fact could infer that the child suffered "substantial pain" from the spanking—*i.e.*, the bruising was evidence that defendant spanked the child hard enough that he bruised even though he was wearing a diaper, that he cried after the spanking, and that when his mother picked him up from defendant's home, the child was very tired and had red eyes. But the court declined to consider that argument because the trial court allowed only the "impaired physical condition" theory to go to the jury.

State v. Kinsley, 253 Or App 251, 289 P3d 367 (2012) (*per curiam*). Defendant was found guilty on charges of delivery of methamphetamine within 1,000 feet of a school, delivery of methamphetamine, first-degree child neglect, and endangering the welfare of a minor, and the court (Judge John Wilson) entered separate convictions. Defendant argued on appeal that the two DCS convictions should have been merged into a single conviction and that the convictions child neglect and endangering the welfare of a minor also should have merged into a single conviction. *Held*: Remanded for resentencing. Under *State v. Reiland*, 153 Or App 601 (1998), and based on the manner in which the offenses were charged, the convictions for endangering the welfare of a minor and first-degree child neglect merge.

State v. Kaylor, 252 Or App 688, 289 P3d 290 (2012), *rev den*, 353 Or 428 (2013). Defendant was a CNA (certified nursing assistant) at a nursing home where the victim, who suffered from dementia, resided. When the victim was resisting defendant's efforts to clean him, another CNA, Rivera, came over to help. The two women rolled the victim onto his side, with defendant standing

near his head and Rivera near his lower body. When the victim, who had been "hollering" loudly, suddenly became quiet, Rivera looked up and saw that defendant had clamped her hand over the victim's mouth and was applying pressure. The victim's face was bright red, his eyes were open wide, and he looked "terrified," as if he could not breathe. Defendant kept her hand over the victim's mouth for ten seconds, at which point defendant told Rivera that the victim had bitten her hand and left to tend to her injury. The jury found defendant guilty of all charges. *Held*: Convictions for criminal mistreatment and witness tampering reversed; conviction for strangulation reversed and remanded. With respect to criminal mistreatment, "the legislature did not intend ORS 163.205(1) to criminalize affirmative conduct against a dependent person. Rather, as the court held in [*State v. Baker-Krofft*, 348 Or 655 (2010)], the legislature intended to prohibit 'keeping back from the dependent person those physical services and attention that are necessary to provide for the dependent person's bodily needs.'" The court rejected the state's argument that, while defendant held her hand over the victim's mouth, she withheld attention necessary for the victim's bodily needs. "Just as ORS 163.205(1)(a) does not apply to affirmative conduct, it does not apply to defendant's failure to stop engaging in that affirmative conduct."

DEATH PENALTY

See also "*Habeas Corpus*: federal-court proceedings," *below*.

Death Penalty: federal cases

Ryan, Director, Arizona DOC v. Gonzales, 568 US __, 133 S Ct 696 (2013). In the *Gonzales* case, the petitioner was convicted of murder, robbery, and burglary in Arizona, the court imposed a death sentence, and the judgment was affirmed. Gonzales then filed a § 2254 petition for *habeas corpus* relief in federal court. His appointed counsel moved for a stay, alleging that he had become incompetent, but the district court denied the motion, ruling that even if he is incompetent the claims could be fairly litigated without his participation. On review in mandamus, the Ninth Circuit issued a stay, ruling that Gonzales is entitled to a determination of competency under 18 USC § 3599. Meanwhile, in the *Carter* case, the petitioner was convicted of aggravated murder, robbery, and rape in Ohio, he was sentenced to death, and the judgment was affirmed. Carter then filed a § 2254 petition in federal court. His appointed counsel moved for a stay on the ground that he was incompetent. The district court found him to be incompetent, found that his counsel needed his assistance to prosecute the proceeding, and dismissed the petition without prejudice and prospectively tolled the statute of limitations. The Sixth Circuit affirmed, basing its decision on 18 USC § 4241. In each case, the state petitioned the Court for review, and the Court allowed both petitions. *Held*: Reversed and remanded. The courts erred by staying the proceedings based on allegations that the petitioners are incompetent. [1] The petitioner's statutory right to counsel in a *habeas corpus* proceeding does not necessarily imply that he has a right to stay the proceedings if he is not competent: "Notwithstanding the connection between the right to competence at trial and the right to counsel at trial, we have never said that the right to competence *derives from* the right to counsel. We will not assume or infer that Congress intended to depart from our precedents and locate a right to competence in federal habeas proceedings within the right to counsel. We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent." [2] "We are not persuaded by the Ninth Circuit's assertion that a habeas petitioner's mental incompetency could 'eviscerate the statutory right to counsel' in federal habeas proceedings. Given the backward-looking, record-based nature of most federal habeas proceedings, counsel can generally provide effective representation to a habeas petitioner regardless of the petitioner's competence. Indeed, where a claim is 'adjudicated on the merits in State court proceedings,' 28 USC § 2254(d), counsel should, in most circumstances, be able to identify whether the 'adjudication . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,' § 2254(d)(1), without any evidence outside the record." [3] Neither § 3599 nor

§ 4241 provides a basis to stay a *habeas corpus* proceeding on the ground that the petitioner is not competent. [4] Although a district court may have inherent authority to stay a *habeas corpus* proceeding, in neither case did the record show that the petitioner's assistance was necessary for fair adjudication of the claims. The Court note that in the *Carter* case his "claims were adjudicated on the merits in state postconviction proceedings and, thus, were subject to review under § 2254(d)," which means that "any extra-record evidence that Carter might have concerning these claims would therefore be inadmissible. Consequently, these claims do not warrant a stay."

Notes: [a] The Court helpfully observed: "AEDPA's acknowledged purpose is to reduce delays in the execution of state and federal criminal sentences. Staying a federal habeas petition frustrates AEDPA's objective of encouraging finality by allowing a petitioner to delay the resolution of the federal proceedings. … The same principle obtains in the context of competency-based stays. At some point, the State must be allowed to defend its judgment of conviction. If a district court concludes that the petitioner's claim could substantially benefit from the petitioner's assistance, the district court should take into account the likelihood that the petitioner will regain competence in the foreseeable future. Where there is no reasonable hope of competence, a stay is inappropriate and merely frustrates the State's attempts to defend its presumptively valid judgment." [b] The Court cautioned: "Our opinion today does not implicate the prohibition against carrying out a death sentence upon a prisoner who is insane." *See Panetti v. Quarterman*, 551 US 930 (2007); *Ford v. Wainwright*, 477 US 399 (1986). [c] Applications to stay collateral proceedings based on allegations that the petitioner is incompetent has become the latest ploy in capital litigation. In Oregon, we have had counsel for several death-row inmates attempt to stay their post-conviction or federal *habeas corpus* proceedings on that ground. This opinion should put an end to those attempts.

Death Penalty: state cases

Haugen v. Kitzhaber, 353 Or 715, __ P3d __ (2013). Plaintiff Haugen was convicted of aggravated murder and was sentenced to death, and the Supreme Court affirmed the judgment on direct review. *State v. Haugen*, 349 Or 174 (2010). He then waived any further challenges to the judgment and death sentence, and a death warrant was issued scheduling his execution. Before the execution date, Governor Kitzhaber exercised his authority under Art. V, § 14, by granting Haugen "a temporary reprieve … for the duration of my service as Governor." The reprieve by its terms was not conditional and did not impose any burden on Haugen. Haugen sent the Governor a letter purporting to reject that reprieve but the execution was cancelled. Haugen then filed a declaratory-judgment action contending that the reprieve was invalid for a number of reason, but primarily because he had rejected it. The circuit court agreed with Haugen, ruling that he "has the right to reject Governor Kitzhaber's reprieve, and … absent an acceptance a reprieve is ineffective." The Governor appealed, and the Court of Appeals shunted the appeal to the Supreme Court pursuant to ORS 19.405. *Held*: Reversed and remanded. The trial court erred when it declared reprieve to be invalid. [1] Even if petitioner is correct that a reprieve must have an expiration date, the reprieve at issue "would satisfy that requirement. Although Haugen is correct that the expiration of the Governor's service could occur at different points in time —such as through death, resignation, or expiration of his term of office—he does not dispute that Kitzhaber's service as Governor will end, at which point Haugen's sentence will be reinstated." [2] The reprieve does not "suspend" the laws in violation of Art. I, § 22: "We agree with the Governor that the reprieve suspends Haugen's sentence, rather than the laws. The constitutional provisions that Haugen cites do not establish that a reprieve must have a stated expiration date or cannot be aimed at the laws, as long as its effect is to temporarily suspend the execution of a sentence, as is the case here." [3] "Nothing in the text of the Oregon Constitution provides the recipient of a grant of clemency with a right to nullify it by rejecting it. … We conclude that the Governor's reprieve of Haugen's death sentence is valid and effective, regardless of Haugen's acceptance of that reprieve." [4] Haugen's argument that a reprieve "may be granted only for the reasons that reprieves historically were granted is without support. Although there may have been certain common reasons for granting a reprieve in the past, nothing in the text, history, or case law

indicates that a reprieve may be granted *only* for those historical reasons." [5] Haugen's argument that the reprieve violates the Eighth Amendment because indefinite delay in his execution is "additional punishment" that lacks any penological justification has no merit, because the U.S. Supreme Court has not held "that the uncertainty accompanying that time on death row constitutes cruel and unusual punishment [and] Haugen cites no case that suggests that a reprieve or other act of clemency qualifies as cruel and unusual punishment."

State v. Rogers, 352 Or 510, 288 P3d 544 (2012). Defendant is a serial killer who kidnapped, tortured, and murdered several women in the mid-1980s. In this case, he was tried and convicted for murdering six women, and he was sentenced to death. In *State v. Rogers*, 313 Or 356 (1992), the court affirmed his convictions, set aside his death sentence, and remanded for a new penalty-phase trial. On retrial, he was again sentenced to death. In *State v. Rogers*, 330 Or 282 (2000), the court again set aside his death sentence and remanded for a new penalty-phase trial. On retrial, the trial court rejected all of defendant's pretrial motions, and the jury sentenced him to death again. *Held*: Reversed and remanded for a new penalty-phase trial. The trial court correctly denied various of defendant's pretrial motions but a remand for a retrial is required by the court's improper use of "anonymous jury."

Challenge to Art. I, § 40. Ballot Measure 6 (1986)—which enacted Art. I, § 40—was not enacted in violation of the "separate vote" requirement in Art. XVII, § 1, as interpreted in *Armatta v. Kitzhaber*, 327 Or 250 (1998). [1] The repeal in 1964 of Art. I, § 37, which was enacted in 1920 and reinstituted capital punishment, did not thereby automatically revive Art. I, § 36, which was enacted in 1914 and had abolished capital punishment. ORS 174.090. [2] The "notwithstanding" clause in Art. I, § 40, precludes application of Art. I, §§ 15 and 16, to invalidate the death penalty as a sanction for aggravated murder, but it does not preclude any other challenges under those sections to a death sentence. [3] Measure 6 effected only four substantive changes to the constitution, but those changes are "closely related" for purposes of the "separate vote" requirement.

Challenge to "third question." The trial court correctly did not instruct jurors on "third question" in ORS 163.150(1)(b)(C). [4] Defendant's claim that the trial court erred by not giving the jurors the "third question" is not preserved: "At no point in the proceedings did defendant ever ask that the court instruct the jury on the third question or attempt to offer evidence relating to the provocation." [5] The third question is not unconstitutionally vague. [6] Defendant's various challenges to how the third question might be applied in other cases present only hypothetical or abstract questions that the court cannot decide.

Challenge to "anonymous jury." The trial court erred by empaneling an "anonymous jury." [6] Art. I, § 11, as interpreted in *State v. Sundberg*, 349 Or 608 (2011), precludes empaneling an "anonymous jury" unless the court find "that the circumstances of the particular trial provide sufficient grounds to believe that the jurors need the protection of anonymity." [7] Even though the jurors in this case filled out detailed questionnaires that included personal identification information and the court did not impose any restrictions on in-court *voir dire*, the jury selected was "anonymous" within the meaning *Sundberg* because the trial court: (a) instructed the prospective jurors that they could choose not to include their identifying information on the questionnaires; (b) directed the parties not to disclose the jurors' information to anyone else, including defendant; and, (c) advised the jurors that their information would not be disclosed to anyone other than the lawyers, from which the jurors might have inferred that their information was being shielded from defendant. Consequently, "the procedure that the trial court followed … gave rise to the same risks that the court identified in *Sundberg*." Because the court did not make the findings required by *Sundberg* to empanel an "anonymous jury," the court erred. [8] The error is not harmless because the jurors may have inferred that defendant is currently dangerous from the court's comment that their information was being kept from him, which would have unfairly prejudiced him on the "future dangerousness" question, and defendant's ability to personally participate in *voir dire* was unfairly hampered by him not having the information.

Challenge to admission of evidence of homosexual experience. [9] The trial court erred

when it allowed the state's psychiatrist to testify about a homosexual experience that defendant had in his youth. As a general rule, evidence of a defendant's nonviolent, consensual homosexual conduct is not admissible to prove that he would be a "continuing threat" to society. "The state did not present evidence that sexually obsessive and violent persons in general easily transfer their deviant urges and behaviors from one sex to another."

Note: Defendant raised 33 claims of error on appeal in a 500-page appellant's brief that took him five years to file. Because the court remanded for a new penalty-phase trial, the court did not address many of those claims. But in footnote 2 the court rejected without discussion about a dozen of defendant's claims of error.

Lotches v. Premo, 257 Or App 513, __ P3d __ (2013). Petitioner, a member of the Klamath tribe, was convicted of aggravated murder in Multnomah County and sentenced to death. The Supreme Court affirmed the judgment on direct review, *State v. Lotches*, 331 Or 455 (2000), and petitioner filed a petition for post-conviction relief raising number claims that his trial counsel failed to provide constitutionally adequate assistance. The post-conviction court rejected all of his claims for relief. On appeal, he argued that his trial counsel were inadequate (1) for not putting on a defense of "cultural trauma" based on historic abuse of the tribes by the white population and the government, (2) for failing to adequately investigate his mental health history, and (3) that the record did not show that counsel had advised him of the right to testify (which had been alleged below as a claim that counsel had interfered with that right). *Held*: Affirmed. [1] Trial counsel acted reasonably by not proffering either of the proposed defenses; their investigation was "legally and factually appropriate" to the case. Petitioner presented no evidence to link his cultural background to his actions during the crimes, and the record establishes that counsel thoroughly investigated his mental health history. Petitioner presented no evidence to show that counsel could have buttressed the mental defense they presented by referring to petitioner's cultural background. [2] Trial counsel did not interfere with petitioner's right to testify. And, as to the "metamorphosed" version of the claim argued on appeal, the record shows that petitioner knew that he had the right to testify and chose not to do so.

Hale v. Belleque, 255 Or App 653, 298 P3d 596 (2013). In late 1995, when he was 19 years old, petitioner and Susbauer committed a string of crimes, including residential burglaries, in Eugene. In the evening of December 20, petitioner and Susbauer came across petitioner's former girlfriend, her boyfriend, and another boy (all of whom were about 15) and gave them a ride. They took the three up a remote logging road, sexually assaulted the girl, and then murdered them all, execution style. Petitioner and Susbauer were charged with numerous counts of aggravated murder and sexual offenses, as well as with counts of burglary based on previous crimes. The jury found petitioner guilty on the charges and imposed a death sentence. Susbauer pleaded guilty and was sentenced to life imprisonment. The Oregon Supreme Court affirmed petitioner's conviction and death sentence. *State v. Hale*, 335 Or 612 (2003), *cert den* (2004). Petitioner then filed a petition for post-conviction relief in which he alleged numerous claims. After a trial, the post-conviction court rejected all of his claims. *Held*: Affirmed in part and reversed in part. The post-conviction court properly denied all of petitioner's claims based on the convictions for aggravated murder and death sentence, but erred when it denied his claims based on the burglary convictions. [1] Based on the factual findings made by the post-conviction court, it properly denied petitioner's claims that his trial counsel failed to provide constitutionally adequate assistance, because he failed to prove that his counsel erred, that their tactical decisions were inadequate, or that he suffered any prejudice. Those claims include that his counsel failed: (a) to adequately investigate whether he suffered from low intelligence or mental illness; (b) to adequately advise him regarding his decision not to testify; (c) to challenge the indictment on the ground that the state had knowingly presented perjured testimony; (d) to challenge certain testimony of state's witnesses; (e) to assert a "claim preclusion" objection to the state's evidence relating to a robbery that he had been acquitted of; and (f) to seek removal of a juror who had contact with victims' families. [2] The post-conviction court correctly denied petitioner's claim that the trial court erred by ordering him to wear physical restraints during trial: the claim is barred by

Palmer v. State of Oregon, 318 Or 352 (1994), and ORS 138.550; the restraints he wore during trial were not visible and he did not testify, and so he suffered no prejudice; and the record "supports the criminal trial court's decision to require the physical restraints," and so his counsel reasonably chose not to object. [3] The post-conviction court correctly denied petitioner's claim that his trial counsel, Lance, failed to call potential witness Reed: Even if Lance "was inadequate in failing to present the testimony of Reed or to make an offer of proof, petitioner's evidence does not show prejudice. The hearsay evidence, offered through Lance's deposition, of the content of Reed's potential testimony was insufficient to satisfy petitioner's burden to show how she would have testified if called as a witness. Further, the inferences that necessarily must be drawn from Lance's affirmative response to the deposition question are that (a) that Reed would have been available to testify at petitioner's trial and (b) she would have testified in a way that had a tendency or a reasonable probability of affecting the outcome of the case. In the absence of an affidavit by Reed describing her testimony, those inferences are speculative at best, and the post-conviction court was not obligated to make them. We conclude for that reason that the post-conviction court did not err in concluding that petitioner had not established prejudice and in rejecting the claim." [4] The Court of Appeals refused to consider a claim that petitioner's trial counsel provided inadequate assistance by not objecting to a part of the prosecutor's closing argument because that claim "was not asserted in the petition and therefore will not be considered here." *See Bowen v. Johnson*, 166 Or App 89, 92, *rev den* (2000). [5] Petitioner's claim based on the instruction given on "proof beyond a reasonable doubt" was erroneous because it included the "moral certainty" clause has no merit in light of *State v. Williams*, 313 Or 19, 36-38 (1992). [6] But the post-conviction court erred when it denied petitioner's claims based on the instructions given on the burglary charges. Because those charges alleged that he entered the victims' residences with an intent to commit theft and criminal mischief, his counsel failed to provide constitutionally adequate assistance because they did not request a *Boots*-style concurrence instruction "that the same ten jurors must agree regarding which of the two underlying crimes … petitioner intended to commit while in the dwellings." *See State v. Frey*, 248 Or App 1, 9 (2012). Petitioner suffered prejudice even though the jury separately found him guilty on charges of theft and criminal mischief. But that error does not warrant setting aside the convictions for aggravated murder or the death sentence. [7] The post-conviction court correctly denied petitioner's claim that his trial counsel failed to provide constitutionally adequate assistance by not objecting to the "natural and probable consequences" instruction that the Supreme Court later disapproved in *State v. Lopez-Minjarez*, 350 Or App 576 (2011). "As the post-conviction court found, the 'natural and probable consequences' instruction was correct when given in 1998. Until … *Lopez-Minjarez*, the 'natural and probable consequences' instruction was a standard instruction included in the uniform criminal jury instructions and had been described … as 'a correct statement of the law.' The failure of trial counsel to object to it was a reasonable exercise of professional skill and judgment. Accordingly, we conclude that trial counsel was not inadequate in failing to object to the 'natural and probable consequences' instruction. We further conclude that, assuming that trial counsel was inadequate in failing to object, in view of the evidence that petitioner was the primary actor, … the uniform criminal jury instruction on aiding and abetting did not have a tendency to affect the result of the prosecution or cause actual prejudice to the defense."

^ ***Montez v. Czerniak***, 237 Or App 276, 239 P3d 1023 (2010), *rev allowed*, 351 Or 321 (2012). Petitioner and a codefendant Aikens sexually assaulted and murdered a young woman. He was convicted of aggravated murder and was sentenced to death in 1988. On direct review, the court affirmed the convictions but vacated the sentence remanded for a new penalty phase. *State v. Montez*, 309 Or 564 (1990). On retrial in 1992, petitioner again was sentenced to death, and the court affirmed that judgment on direct review. *State v. Montez*, 324 Or 343 (1996), *cert den* (1997). He then petitioned for post-conviction relief, and the court denied all of his claims after a trial. On appeal, petitioner raised numerous claims that his trial counsel did not provide constitutionally adequate assistance. *Held*: Affirmed. [1] "The standards for determining the adequacy of [trial] counsel under the state constitution are functionally equivalent to those for determining the

effectiveness of counsel under the federal constitution." [2] The post-conviction court properly denied petitioner's claim that his trial counsel did not adequately ask the trial court to appoint a mitigation specialist: they did make request and made a sufficient record. [3] The post-conviction court properly denied petitioner's claim that his trial counsel did not adequately investigate possible sexual abuse as a child: their investigation was adequate based on the information known to them at the time—"we must evaluate their conduct from their perspective at the time." [4] Where petitioner submitted a supplemental affidavit from a witness in which it appears that the witness contradicts what he said in his first affidavit, which was submitted by the state, and the post-conviction court "made findings that align with what [the witness] said in his initial affidavit, and those findings are supported by the record, … we disregard any discrepancies between the two affidavits" and accept the court's findings. [5] The post-conviction court properly denied petitioner's claim that his trial counsel did not adequately investigate a possible head injury: "counsel investigated the possibility that petitioner suffered brain damage, and they employed experts to determine whether that was the case." [6] The post-conviction court properly denied petitioner's claim that his trial counsel did not adequately "educate" the jury through *voir dire* and arguments regarding the fourth question: "In light of the correct instructions by the trial court that addressed the effect of a 'no' vote … it was reasonable for counsel to devote argument to other matters." "This court will not second-guess a lawyer's tactical decisions unless those decisions reflect an absence or suspension of professional skill and judgment." [7] The post-conviction court properly denied petitioner's claim that his trial counsel should have requested an instruction clarifying the effect of a "no" vote: a court need not give an instruction that states merely the converse of a correct instruction." [8] The post-conviction court properly denied petitioner's claim that his trial counsel should have insisted on an oral poll of the jury in open court: he failed to prove "that, had counsel attempted to do more to persuade the trial court to conduct an oral poll, it would have done so and, if it had, that any of the jurors would have answered any of the questions 'no.'" [9] The post-conviction court properly denied petitioner's claim that his trial counsel should not have disclosed that petitioner previously had been sentenced to death: the record established that it was petitioner's personal choice to make that disclosure and, under the circumstances, it was a reasonable tactical choice. [10] The post-conviction court properly denied petitioner's claim that his trial counsel should not have called other death-row inmates to testify on petitioner's behalf: the record established that it was petitioner's personal choice to make that disclosure and, under the circumstances, it was a reasonable tactical choice. "Even assuming that counsel's choices regarding the use of inmate testimony and whether to object to some of it were not, in hindsight, the best choices, that is not the test. Even effective counsel may make tactical choices that backfire, because, by their nature, trials often involve risk." [11] The post-conviction court properly denied petitioner's claim that his trial counsel should have presented expert testimony from Dr. Cunningham on future dangerousness: counsel cannot be faulted for not presenting such an opinion when the research underlying that opinion was not available at the time of trial, even if it otherwise was reliable. Counsel is not inadequate for not predicting "changes in psychological research." [12] The post-conviction court properly denied petitioner's claim that his trial counsel did not adequately inform him of his right of allocution: [a] the court found that counsel did so inform him, and petitioner failed to prove that his counsel did not inform him; [b] given the state of the law in 1992 governing the right of allocution, … counsel would not have failed to exercise reasonable professional skill and judgment" by not so informing him.

DEFENSES

See also "Instructions," *below*.

Metrish, Warden v. Lancaster, 569 US __, 133 S Ct 1781 (2013). Petitioner Burt Lancaster, a former police officer with a history of mental-health issues, killed his girlfriend and was charged in state court with murder. At his first trial in 1994, he asserted a diminished-capacity defense that had been recognized by the Michigan Court of Appeals and were included in the uniform jury

instructions. That defense allowed the defendant who did not to assert an insanity defense to present evidence of mental illness in order to negate the specific intent alleged in the charged offense. The jury rejected his defense and found him guilty of first-degree murder. His conviction was later reversed and the case was remanded for retrial. In the meantime, the Michigan Supreme Court in 2001 overruled the decisions of the court of appeals and definitively ruled for the first time in *State v. Carpenter* that the statutory scheme did not allow such a diminished-capacity defense. At his retrial in 2005, the petitioner attempted to raise again the diminished-capacity defense contending that the Due Process Clause precluded retroactive application of *Carpenter*. The trial court rejected that argument, the jury found him guilty of first-degree murder, and the state appellate courts affirmed his conviction. Petitioner then filed a § 2254 petition in federal court in which he contended that the state court violated his rights under the Due Process Clause, as construed in *Bouie v. City of Columbia*, 378 US 347 (1964), by retroactively applying *Carpenter* to his case and thus precluding him from asserting a diminished-capacity defense. The district court denied his claim, but the Sixth Circuit reversed, concluding that the state court had unreasonably applied well-established federal law. *Held*: Reversed and remanded. The Sixth Circuit erred by granting petitioner relief. [1] In *Bouie*, the Court held that because the South Carolina Supreme Court's construction of a state trespass statute "was clearly at variance with the statutory language" and "had not the slightest support in prior South Carolina decisions," the state court erred by retroactively applying that new construction to the defendant's trial, which was based on conduct that occurred before that decision. "Due process does not countenance an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." [2] The state court's decision to apply *Carpenter* retroactively in petitioner's case "does not warrant disapprobation as 'an unreasonable application of … clearly established Federal law.' 28 USC § 2254(d)(1). This case is a far cry from *Bouie*, where … the South Carolina Supreme Court had unexpectedly expanded narrow and precise statutory language that, as written, did not reach the petitioners' conduct. In *Carpenter*, by contrast, the Michigan Supreme Court rejected a diminished-capacity defense that the court reasonably found to have no home in a comprehensive, on-point statute enacted by the Michigan Legislature. … Rather than broadening a statute that was narrow on its face, *Carpenter* disapproved lower court precedent recognizing a defense Michigan's high court found, on close inspection, to lack statutory grounding. The situation we confronted in *Bouie* bears scant resemblance to this case, and our resolution of that controversy hardly makes disallowance of Lancaster's diminished-capacity defense an unreasonable reading of this Court's law." [3] "This Court has never found a due process violation … where a state supreme court, squarely addressing a particular issue for the first time, rejected a consistent line of lower-court decisions based on the supreme court's reasonable interpretation of the language of a controlling statute. Fair-minded jurists could conclude that a state supreme-court decision of that order is not unexpected and indefensible by reference to existing law."

Note: Petitioner did not contend that some provision of the federal constitution required the state to recognize a diminished-capacity defense—his only argument was that the *retroactive* application of ruling in *Carpenter* that eliminated that defense under state law violated the Due Process Clause.

U.S v. Smith, 568 US __, 133 S Ct 714 (2013). Defendant was charged with participating in a criminal conspiracy involving narcotics distribution. He asserted that he had been incarcerated and thus had withdrawn from the conspiracy more than five years previously—beyond the statute of limitations for the offense. The trial court instructed the jury that the government had to prove that the conspiracy existed, that defendant was part of that conspiracy, and that the conspiracy continued to within the previous five years—*i.e.*, within the statute of limitations. In response to a question from the jurors, the court also instructed them, over defendant's objection, that defendant had the burden to prove, by a preponderance of the evidence, that he had withdrawn from the conspiracy and that his withdrawal was more than five years previously. The jury found defendant guilty, and DC Circuit affirmed. *Held*: Affirmed. The trial court correctly instructed the jury. [1] "Upon joining a criminal conspiracy, a defendant's membership in the ongoing unlawful scheme continues until he

withdraws. A defendant who withdraws outside the relevant statute-of-limitations period has a complete defense to prosecution." [2] "Allocating to a defendant the burden of proving withdrawal does not violate the Due Process Clause. While the Government must prove beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant is charged, proof of the nonexistence of all affirmative defenses has never been constitutionally required. The State is foreclosed from shifting the burden of proof to the defendant only when an affirmative defense *does* negate an element of the crime. Where instead it excuses conduct that would otherwise be punishable, but does not controvert any of the elements of the offense itself, the Government has no constitutional duty to overcome the defense beyond a reasonable doubt." [3] "Withdrawal does not negate an element of the conspiracy crimes charged here. … Far from contradicting an element of the offense, withdrawal presupposes that the defendant committed the offense. Withdrawal achieves more modest ends than exoneration. Since conspiracy is a continuing offense, a defendant who has joined a conspiracy continues to violate the law through every moment of the conspiracy's existence, and he becomes responsible for the acts of his co-conspirators in pursuit of their common plot. Withdrawal terminates the defendant's liability for post-withdrawal acts of his co-conspirators, but he remains guilty of conspiracy." [4] "A statute-of-limitations defense does not call the criminality of the defendant's conduct into question, but rather reflects a policy judgment by the legislature that the lapse of time may render criminal acts ill suited for prosecution. Thus, although union of withdrawal with a statute-of-limitations defense can free the defendant of criminal liability, it does not place upon the prosecution a constitutional responsibility to prove that he did not withdraw. As with other affirmative defenses, the burden is on him." [5] Although the statute did not expressly so state, withdrawal was an affirmative defense: "Because Congress did not address … the burden of proof for withdrawal, we presume that Congress intended to preserve the common-law rule. That Congress left the traditional burden of proof undisturbed is both practical and fair. "Where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party is best situated to bear the burden of proof. On the matter of withdrawal, the informational asymmetry heavily favors the defendant. Passive nonparticipation in the continuing scheme is not enough to sever the meeting of minds that constitutes the conspiracy. To avert a continuing criminality there must be affirmative action to disavow or defeat the purpose of the conspiracy. The defendant knows what steps, if any, he took to dissociate from his confederates. He can testify to his act of withdrawal or direct the court to other evidence substantiating his claim. It would be nearly impossible for the Government to prove the negative that an act of withdrawal never happened. Witnesses with the primary power to refute a withdrawal defense will often be beyond the Government's reach: The defendant's co-conspirators are likely to invoke their right against self-incrimination rather than explain their unlawful association with him."

Note: Under Oregon law, "renunciation" is an "affirmative defense" to a conspiracy charge, and it requires a showing that the defendant "thwarted commission of the crime which was the object of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of the criminal purpose of the actor." ORS 161.460(1). But ORS 161.465 also describes circumstances under which an existing conspiracy may be "abandoned" either by the conspirators as a group or by one participant unilaterally, and it does not specifically state whether "abandonment" is a defense or an affirmative defense. ORS 161.460(3) provides: "If an individual abandons the agreement, the conspiracy is terminated as to the individual only if and when the individual advises those with whom the individual conspired of the abandonment or the individual informs the law enforcement authorities of the existence of the conspiracy and of the participation of the individual therein." It is not clear whether and how the Court's decision in this case may apply to a prosecution for conspiracy in this state, but the Court's analysis establishes that it would be constitutionally permissible to construe the "abandonment" described in subsection (3) as an affirmative defense that the defendant has the burden to prove.

State v. Beagley, 257 Or App 220, __ P3d __ (2013). Defendants are members of a religious congregation that relies on faith healing. They were charged with criminally negligent homicide,

ORS 163.145, after their 16-year-old son died of a congenital kidney abnormality that would not have been fatal if he had received medical care in the week before he died. Prior to trial, defendants filed demurrers and motions to dismiss based on "religious freedom" claims, which the trial court denied. They were convicted after a trial. *Held*: Affirmed. [1] ORS 163.145 and ORS 163.206(4) "permit a parent to treat a child by prayer or other spiritual means so long as the illness is not life threatening. However, once a reasonable person should know that there is a substantial risk that the child will die without medical care, the parent must provide that care, or allow it to be provided, at the risk of criminal sanctions if the child does die. That rule … [is] not unconstitutionally vague, nor [does] it offend constitutional guarantees of due process or religious freedom." [2] The rule announced in *Meltebeke v. Bureau of Labor and Industries*, 332 Or 132 (1995)—which defendants contend required the state had to prove they acted knowingly, not merely with criminal negligence—does not apply to a prosecution for criminally negligent homicide based on a parent's failure to provide life-saving medical care to a child. *Meltebeke* involved only civil sanctions and the opinion does not suggest that the holding applies to criminal law. Moreover, the court in *Meltebeke* drew a line between religious practices that could be sanctioned only if the person acted with the knowledge that the act would lead to an unlawful result and conduct that was merely religiously *motivated.* The "knowing" standard did not apply to the latter conduct. Here, the conduct being punished, the failure to provide life-saving medical care, "is clearly and unambiguously—and, as a matter of law—conduct that may be motivated by one's religious beliefs," *i.e.*, the latter category in *Meltebeke* for which the higher standard was not required. [3] The trial court correctly instructed the jury: (a) "Oregon law requires a parent to provide necessary and adequate care to a child." (b) "It is not a defense to the charges of criminally negligent homicide that the defendant's care or treatment of their child was based solely upon spiritual means pursuant to [their] the religious beliefs or practices." (c) "A person under the age of 18 years does not have the right to refuse medical care." Those are all correct statements of the law. [4] The trial court properly rejected defendants' proposed jury instructions—which were based on ORS 109.640—that a child over the age of 15 may refuse medical care, because that is not a correct statement of the law in the context of a prosecution for criminally negligent homicide. [5] The trial did not err by denying defendants' requested for this instruction: "Oregon law permits a parent to treat a child by prayer or other spiritual means so long as the illness is not life-threatening. However, if a reasonable person in the situation should know that there is a substantial and unjustifiable risk that the child will die without medical care, then the parent must provide that care or allow it to be provided." Although the requested instruction was an accurate statement of the law in light of *State v. Hays*, 155 Or App 41 (1998), the trial court's refusal to give that instruction did not require reversal. The overall the jury instructions would not have led the jury to return a guilty verdict under an erroneous impression of the law. To convict in this case, the jury would have had to find that defendants' son *was* suffering from a life-threatening condition *and* that a reasonable person would have been aware of the risk that he would die without medical care, it did not matter what rights defendants had to provide spiritual treatment in a non-life-threatening situation. [6] "Jurors must be correctly informed of what facts they need to find in order to return a guilty verdict. They do not need to know what facts, if found, will *not* suffice. The latter is implicit in the former."

State v. Oneill, 256 Or App 537, __ P3d __ (2013). Police arrested defendant on an outstanding warrant. One of the officers handcuffed defendant and started walking her toward the police car, at which point she started screaming that he was hurting her and trying to rape her. She broke free and ran away, but was caught shortly thereafter. She told the officer—a male—that she was afraid to be searched by a male officer. The officer asked her why she ran, and she said that it was because she had been sexually abused in the past and feared it would happen again. She was charged with third-degree escape for running away from the arresting officer. At trial, defendant offered the testimony of a psychologist that defendant had been diagnosed with PTSD and that PTSD can cause false perceptions to trigger a fight-of-flight response that is not necessarily "a realistic response." Based on that testimony, defendant requested a jury instruction on choice of evils (UCrJI

1103), arguing that her conduct was necessary as an emergency measure to avoid imminent injury by the officers. The trial court refused to give the instruction. The jury found defendant guilty, and defendant appealed. *Held*: Affirmed. The trial court correctly refused to give the instruction. [1] A defendant is entitled to a jury instruction on choice of evils if she "presents any evidence from which a jury could infer that the requirements of ORS 161.200 are met"—*i.e.*, that "(a) a defendant's conduct was necessary to avoid a threatened injury; (b) the threatened injury was imminent; and (c) it was reasonable for the defendant to believe that the threatened injury was greater than the potential injury of his illegal actions." [2] Even if a person's "reasonable belief" that injury was imminent suffices under ORS 161.200, reasonableness "includes an objective component" that does not incorporate "the unique history or mental characteristics of any particular defendant." [3] Here, "defendant presented no evidence that would have allowed a trial court to conclude that, based on the information available to her, she 'reasonably believed' that threatened injury was imminent. …The trial court did not err in refusing to give a choice of evils instruction based on defendant's purely subjective belief that such a threat existed."

State v. Naudain, 254 Or App 1, 292 P3d 623 (2012), *rev den*, 353 Or 787 (2013). In 1998, defendant and five others participated in a home-invasion robbery during which he punched and then shot and killed H, the victim. When he was arrested in 2008, defendant said he had been told H had a gun and that, as he had H at gunpoint, H reached under the bed, he saw something shiny, so he "jumped" and "panicked and freaked out," then fired the shot. He was charged with aggravated murder. At trial, defendant's confession was admitted, and he testified, admitting that he had shot H but claiming he did so only accidentally. He also admitted that he had not felt frightened by the victim and had not seen the victim reach for a gun; he did not claim self-defense. In closing argument, the prosecutor highlighted defendant's confession and argued that he had no legal right to act in self-defense in those circumstances; the prosecutor argued that once defendant learned of that, "his only hope is to offer up to you that it was an accident." Defendant argued to the jury that he had never raised the issue of self-defense and had said merely that he "jumped." Over defendant's objection, the trial court instructed the jury that "an intruder who is committing or attempting to commit a felony … is an initial aggressor" and that "an initial aggressor has no right to act in self-defense unless he first withdraws from the encounter. In the present case, [defendant] has not raised the defense of self-defense." The jury found defendant guilty, and the court imposed a life sentence without the possibility of parole. *Held*: Reversed and remanded. The instruction on self-defense was reversible error. [1] For purposes of ORCP 59 H(1), defendant sufficiently preserved his objection to the instruction. [2] A trial court impermissibly comments on the evidence "when it instructs the jury how specific evidence relates to a particular legal issue." [3] The instruction "told the jury how specific evidence (defendant's status as an initial aggressor) relates to a particular legal issue (defendant's ability to successfully raise self-defense)." Thus, the instruction referred to the evidence and "explained that it precluded defendant from being able to raise self-defense," which was an impermissible comment on the evidence. [4] The instruction was not harmless because, although it instructed that "defendant had not raised self-defense," it also instructed that he "could not raise self-defense—at least not successfully." Because the state had argued that defendant had no right to act in self-defense, the court held, the instruction bolstered the state's argument.

State v. Cespedes-Rodriguez, 253 Or App 698, 294 P3d 493 (2012). Defendant was driving in downtown Portland and hit a pedicab, causing its operator to fall to the ground. Defendant remained in his car and told the victim that he would give her $100 if he could "just leave." She noted that he smelled of alcohol and appeared intoxicated. The victim's friend approached and told defendant to get out of the car, but defendant put the car in reverse and drove away backward. The victim's friend then hit defendant's car several times with a metal object. Defendant fled the scene of the accident and went home. In the days following the accident, he did not contact police or respond to their repeated attempts to contact him. Defendant was charged with with failure to perform the duties of a driver, ORS 811.700(1), and reckless driving based on the manner in which he drove

away. At trial, he asserted a choice-of-evils defense under ORS 161.200 to both charges. After a bench trial, the trial court found defendant guilty on the hit-and-run charge, rejecting his defense to that charge, but acquitted him of reckless driving based on that defense. *Held*: Affirmed. The trial court properly convicted defendant on the hit-and-run charge. [1] To assert a choice-of-evils defense, a defendant must show (a) that his conduct was necessary to avoid a threatened injury, (b) the threatened injury was imminent, and (c) it was reasonable for him to believe that the threatened injury was greater than the potential injury of his illegal actions. After a defendant has made that showing, the state must disprove the defense beyond a reasonable doubt. [2] Here, the evidence that defendant smelled of alcohol and appeared intoxicated, that he offered the victim $100 if he could leave the scene, that he moved his car before the attack, and that he failed to contact the police in the days following the accident disproved the choice-of-evils defense to the hit-and-run charge beyond a reasonable doubt.

Note: The parties argued about whether, even if defendant had a choice-of-evils defense, he was required to stop "as close [to the scene of the accident] as possible," under ORS 811.700(1)(a)(A). Because the Court of Appeals affirmed the trial court's rejection of defendant's choice-of-evils defense, it did not reach that issue.

DEMURRER / MOTION IN ARREST OF JUDGMENT

See also "Accusatory Instruments," *above*.

State v. Gruhlke, 257 Or App 485, __ P3d __ (2013). On April 20, 2002, defendant was issued uniform citations and complaints for DUII and attempting to elude police. Defendant was then charged by way of a district attorney's information on April 22. That information was superseded by an indictment filed on April 30, again charging defendant with felony attempt to elude and misdemeanor DUII for the April 20th incident. After defendant successfully demurred to that indictment, the state filed an "Amended Indictment" in November 2004, which again charged the same April 2002 offenses. Defendant again demurred and moved to dismiss, arguing that the amended indictment started a new case and, with respect to the DUII charge, was filed beyond the two-year statute of limitations. The trial court overruled the demurrer and denied the motion to dismiss. In 2005, defendant entered a conditional guilty plea to the DUII charge, and the state dismissed the felony attempt to elude charge. She then appealed her DUII conviction arising from the 2004 indictment. The Court of Appeals observed that, although the 2004 indictment, on its face, charged crimes that had occurred more than two years before its issuance, it did not allege "any facts that would demonstrate that the state commenced the prosecution" in a timely fashion. *State v. Gruhlke*, 214 Or App 169, 170, 162 P3d 380 (2007). The court then held that the indictment did not satisfy the requirements of ORS 132.540(1)(c), and reversed and remanded. In the meantime, while defendant's appeal in *Gruhlke* was pending, the state filed yet another accusatory instrument in May 2007 titled an "amended information" and that again charged defendant with DUII for the same April 20, 2002, incident. It also included the following additional allegation: "The state further alleges that the prosecution was originally commenced and consistently maintained thereafter prior to the expiration of the original statute of limitations." After the Court of Appeals decided *Gruhlke* and remanded the case to the trial court, defendant sought dismissal of both the 2004 indictment and the 2007 information because they each alleged that defendant had committed the DUII offense more than two years—the limitation period for misdemeanors—before the dates of the accusatory instruments. In response, the state argued that the 2004 indictment was superseded by the 2007 information, which in turn had cured the pleading deficiency that plagued the 2004 indictment. In 2008, the trial court denied defendant's motion to dismiss and entered an amended judgment of conviction, which defendant appealed. The Court of Appeals eventually vacated the judgment upon a joint motion of the parties, because the plea for that conviction was deficient, and remanded the case to the trial court a second time, in March 2010. On remand, defendant had new defense counsel and relitigated the propriety of the 2007 information through another demurrer and motion to dismiss.

The trial court again denied defendant relief. Defendant entered a conditional guilty plea to DUII, and the court entered a judgment of conviction in 2010. *Held:* Reversed and remanded with instructions to enter an order granting defendant's demurrer to the 2007 information. "Applying a 'four corners' analysis of the information under ORS 135.630(5), we agree with defendant that the additional conclusory allegation in the 2007 information is insufficient to establish a timely prosecution of the DUII charge due to the time gap of over five years between the date of the information and the date of the offense and the requirement … that the state plead 'facts' to demonstrate timeliness."

^ ***State of Oregon and City of Portland v. Christian***, 249 Or App 1, 274 P3d 262, *rev allowed*, 352 Or 564 (2012). Defendant was charged with, *inter alia*, violating Portland City Code § 14A.60.010(1), which provides, subject to numerous exceptions: "It is unlawful for any person to knowingly possess or carry a firearm, in or upon a public place, including while in a vehicle in a public place, recklessly having failed to remove all the ammunition from the firearm." Defendant demurred to charge, contending that the ordinance on its face violates Art. I, § 27, and the Second Amendment. The trial court overruled the demurrer, and defendant was convicted. *Held*: Affirmed. [1] Because defendant made a facial challenge to the constitutionality of the ordinance by way of demurrer: "First, the only relevant facts in this case are that defendant was charged with, and tried for, violating the ordinance, and those facts are relevant only to establish that he has standing to challenge it; the circumstances surrounding his arrest play no part in our analysis. Second, although generally a facial challenge to a law will fail if the law can constitutionally be applied in any imaginable situation, in a facial challenge under Article I, section 27, … [if] we determine that legislation is significantly overbroad—that, in some significant number of circumstances, it punishes constitutionally protected activity—we must declare the legislation to be unconstitutional." [2] The Court of Appeals construed § 14A.60.010(1) to mean that it prohibits: "if a person possesses or carries a loaded firearm in a public place; the person knows that he or she is carrying the firearm, that it is loaded, and that he or she is in a public place; the person is conscious that being in a public place with the loaded firearm creates a substantial risk; the substantial risk is unjustified, that is, it is not a risk that would inhere in using the firearm for the kinds of self-defense, defense of others, or defense of premises that are statutorily justified; and the person nonetheless disregarded that risk." [3] As such, the ordinance does not violate Art. I, § 27, as construed in *State v. Hirsch/Friend*, 338 Or 622 (2005). [4] The ordinance also does not violate the Second Amendment, as construed in *District of Columbia v. Heller*, 554 US 570 (2008).

Note: In order to avoid a constitutional problem, the majority opinion construed the ordinance narrowly, in a way that is different from the construction that was offered by the city's own attorney; the majority observed: "this court is obligated to correctly interpret laws even if the parties do not." The dissenting judges took issue with the majority's construction and concluded that the ordinance is unconstitutionally overbroad because "a restriction that prohibits most people from openly carrying a loaded firearm in all places open to the public" violates Art. I, § 27.

DISCOVERY

See "Victims' Rights," *below*.

DRIVING UNDER THE INFLUENCE OF INTOXICANTS

DUII: diversion

State v. Landahl, 254 Or App 46, 292 P3d 646 (2012), *rev den*, 353 Or 787 (2013). Defendant was charged with DUII and pleaded no contest in order to enter into diversion. The diversion agreement provided that the charge would be dismissed if he completed diversion and that, if he failed to complete diversion, a conviction would be entered based on his plea. Later, defendant

moved to terminate diversion and dismiss the charge, asserting that he had completed diversion, and the court granted the motion. Shortly thereafter, the district attorney discovered that defendant had another DUII charge pending and moved to set aside the dismissal. The trial court granted the motion to set aside, terminated diversion, entered a DUII conviction, and imposed a probationary sentence. Defendant appealed and asserted only a claim that the trial court erred when it set aside the dismissal and entered a judgment of conviction; he did not challenge the sentence. *Held*: Appeal dismissed. [1] A defendant who has pleaded guilty or no contest may appeal under ORS 138.050 only when he "makes a colorable showing that the disposition" exceeds the maximum allowable by law or is unconstitutionally cruel and unusual. For purposes of ORS 138.050, "disposition" refers to the types of dispositions listed in ORS 138.053(1). [2] Under that statute, and in light of *State v. Cloutier*, 351 Or 68 (2011), entry of a conviction is not a "disposition." [3] The Court of Appeals does not have jurisdiction over defendant's appeal pursuant to ORS 138.050 because he challenges only the entry of the conviction itself and does not challenge the sentence imposed on his conviction.

State v. Carroll, 253 Or App 265, 290 P3d 864 (2012), *rev den*, 353 Or 428 (2013). Defendant was arrested for DUII in December 2009. At that time, a person was eligible for DUII diversion if he had not had any previous DUII diversions or convictions within the preceding 10 years. Effective January 1, 2010, however, the statute was amended to increase the "look back" period for determining diversion eligibility to 15 years. Defendant had two previous DUII convictions from 12 years before his arrest for DUII. He filed a petition to enter diversion in February 2010 and the trial court, relying on the legislative amendment, applied the current version of the statute and denied the petition because of defendant's prior DUII convictions. The trial court also rejected defendant's *ex post facto* challenges to the amendment. The trial court convicted defendant after a stipulated-facts trial. *Held*: Affirmed. [1] "We reject without extended discussion defendant's contention that, by eliminating his eligibility for diversion, the amendment of ORS 813.215(1)(b) deprived him of a 'defense' to the offense of DUII. Diversion is not a defense." [2] The remaining issue is "whether the amended law imposes a form of punishment—either a detriment, restraint, or deprivation primarily intended as a deterrent—that was not annexed to the crime at the time defendant committed the offense." [3] In general, "the purpose of the Oregon Vehicle Code is primarily remedial, not punitive." [4] The legislative history of the amendment at issue in this case reveals that, "despite incidental deterrent effects, the primary purpose of the amendment ... was a concern for public safety, rather than punishment or deterrence. We have no difficulty concluding that the primary purpose of the amendment … was not punitive." [5] Nor was the practical effect of the amendment punitive: "A person's eligibility for diversion is not punishment for the offense; it provides an alternative to prosecution, conviction, and punishment." [6] Finally, "the extension of the 'look-back' period for eligibility for DUII diversion does not impose such a significant detriment, restraint, or deprivation on defendant so as to constitute a form of increased punishment."

DUII: stops, search and seizure

Missouri v. McNeely, 569 US __, 133 S Ct 1552, 185 L Ed 2d 696 (2013). At 2 a.m., a Missouri police officer lawfully stopped defendant for a traffic infraction and then investigated him for DUII. While at the scene, defendant refused to submit to a breath test on the officer's portable device. The officer arrested him for DUII and started to transport him to the police station, but when the defendant told the officer that he would not submit to a breath test, the officer instead took him to the hospital for a blood draw. The officer gave defendant the standard advice of rights and consequences required under Missouri law, but defendant refused to consent to a blood draw. So, without obtaining a warrant, the officer had hospital staff seize a blood sample over defendant's objection. A test showed that he had a BAC of 0.154 percent. Defendant was charged with a felony-level DUII, and he moved to suppress the blood-alcohol evidence, contending that the draw was a warrantless search that violated the Fourth Amendment. The state did not present evidence that the officer in fact had exigent circumstances; rather, the state argued only that the evanescent nature of

dissipating blood-alcohol content provided sufficient exigency *per se* to justify the warrantless seizure. The trial court granted defendant's motion, the state appealed, and the Missouri Supreme Court affirmed, ruling that the Fourth Amendment "requires more than the mere dissipation of blood-alcohol evidence to support a warrantless blood draw in an alcohol-related case." *Held*: Affirmed (a 4-1-4 decision). The state court correctly granted defendant's motion to suppress. [1] "A warrantless search of the person is reasonable only if it falls within a recognized exception. That principle applies to the type of search at issue in this case, which involved a compelled physical intrusion beneath McNeely's skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation." [2] "In some circumstances law-enforcement officers may conduct a search without a warrant to prevent the imminent destruction of evidence. While these contexts do not necessarily involve equivalent dangers, in each a warrantless search is potentially reasonable because there is compelling need for official action and no time to secure a warrant. To determine whether a law-enforcement officer faced an emergency that justified acting without a warrant, this Court looks to the totality of circumstances. We apply this finely tuned approach to Fourth Amendment reasonableness in this context because the police action at issue lacks the traditional justification that a warrant provides. Absent that established justification, the fact-specific nature of the reasonableness inquiry demands that we evaluate each case of alleged exigency based on its own facts and circumstances." [3] The Court declined to adopt the *per se* rule urged by the state: "Regardless of the exact elimination rate [for blood alcohol], it is sufficient for our purposes to note that because an individual's alcohol level gradually declines soon after he stops drinking, a significant delay in testing will negatively affect the probative value of the results. This fact was essential to our holding in [*Schmerber v. California*, 384 US 757 (1966)], as we recognized that, under the circumstances, further delay in order to secure a warrant after the time spent investigating the scene of the accident and transporting the injured suspect to the hospital to receive treatment would have threatened the destruction of evidence. But it does not follow that we should depart from careful case-by-case assessment of exigency and adopt the categorical rule proposed by the State and its *amici*. In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." "In short, while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber*, it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances."

State v. Fuller, 252 Or App 245, 287 P3d 1147 (2012). Defendant was arrested for DUII and provided a breath sample that showed a .00% BAC. Defendant had admitted to taking an Oxycodone pill, and the officer suspected he was under the influence of controlled substances. The officer read defendant the implied-consent "rights and consequences" statement asked him to provide a urine sample. Defendant complied, and testing confirmed the presence of a variety of controlled substances. Defendant moved to suppress evidence of the urine test, arguing that his consent had been coerced under the rule adopted by the Court of Appeals in *State v. Machuca*, 231 Or App 232 (2009) (*Machuca I*), *rev'd on other grounds*, 347 Or 644 (2010) (*Machuca II*), and that the exigency exception adopted by the Supreme Court in *Machuca II* did not apply. The state argued: *Machuca I* was wrongly decided, and that defendant had voluntarily consented to the test; exigent circumstances obviated the need to obtain a warrant; and the sample was lawfully obtained incident to arrest. The trial court granted defendant's motion to suppress, concluding that his consent was involuntary under *Machuca I*, and that the exigency exception did not apply. With respect to the exigency issue, the trial court reasoned that, although the record established that two drugs, heroin and Ambien, have a short life span and break down rapidly, there was no specific evidence that defendant ingested either of those particular controlled substances. While this case was on appeal, the Court of Appeals decided *State v. McMullen*, 250 Or App 208 (2012) (exigency rule applies when intoxication may be due to ingestion of a controlled substance). *Held*: Reversed and remanded. [1] Based on *Machuca I*, the trial court correctly rejected the state's argument that the urine sample was lawfully seized

pursuant to defendant's voluntary consent. [2] "This case is not materially distinguishable from *McMullen*. … It is immaterial that the officers did not identify specific, rapidly dissipating controlled substances that they expected to find in defendant's urine." It was sufficient that "the officers had probable cause to believe that a controlled substance would be found in defendant's urine and, as in *McMullen*, there was evidence that at least one controlled substance—in this case, heroin—continues to change in urine. Accordingly, we conclude, as we did in *McMullen*, that an exigency existed that justified the warrantless seizure of defendant's urine." [3] "It follows that this is not the 'rare case' where 'a warrant could have been obtained and executed significantly faster than the actual process otherwise used under the circumstances.' *Machuca II*, 347 Or at 657."

State v. Walker, 251 Or App 651, 284 P3d 651 (*per curiam*), *rev den*, 353 Or 127 (2012). Defendant was charged with DUII and reckless driving. He moved to suppress seized during a search of his car, as well as the results of an analysis of his urine. With respect to the urine test results, defendant argued that the warrantless search and seizure of his urine sample violated Art I, § 9, because there was no exigency. The trial court denied his motion, and he was convicted. *Held*: Affirmed. [1] As the court held in *State v. McMullen*, 250 Or App 208 (2012): "If police have probable cause to believe that evidence of a controlled substance will be found in a suspect's urine, the exigency exception justifies a warrantless seizure and search of the suspect's urine in most cases," and did so in this case. [2] The court also rejected without discussion defendant's argument about the search of his car.

^ ***State v. Moore,*** 247 Or App 39, 269 P3d 72 (2011), *rev allowed*, 352 Or 25 (2012). While driving northbound on Highway 101 on a clear, dry afternoon, Trooper Farrar saw defendant, who was driving ahead of him, drift across the center line into on-coming traffic, where he collided with the victim's car, killing the driver. The trooper immediately contacted defendant, who appeared "dazed and his speech was slow." The trooper later contacted defendant at the hospital and observed that he "was very drowsy, his speech was slurred and thick," and appeared to be in considerable pain. After interviewing defendant, the trooper concluded that defendant was under the influence of intoxicants, gave him the advice of rights under the implied-consent law, and asked for his consent for blood and urine samples. Defendant voluntarily consented. Defendant was indicted for DUII and criminally negligent homicide, and he moved to suppress evidence of the blood and urine tests. The state argued that the tests were admissible either under the exigent-circumstances exception and pursuant to his voluntary consent. After a hearing held a week after *State v. Machuca*, 347 Or 644 (2010), was issued, the trial court found that the officer had probable cause but that the state failed to establish exigent circumstances, and it ruled that defendant's consent was not voluntary based on the ruling of the Court of Appeals in *State v. Machuca*, 231 Or 232 (2009). The state appealed, challenging only the latter ruling. *Held*: Affirmed. [1] Although the Supreme Court reversed the decision of the Court of Appeals in *Machuca* on the exigent-circumstances issue, "the court did not call into question, much less abrogate, our analysis concerning the defendant's consent" and "prudential principles … compelling militate in favor of our continued adherence to the core reasoning" in that opinion. [2] "Here, defendant consented after receiving the implied consent warnings. As we reasoned in *Machuca I*, 'a consent to search obtained in that fashion is coerced by the fear of adverse consequences and is ineffective to excuse the requirement to obtain a search warrant.' Thus, the trial court did not err in granting defendant's motion to suppress."

DUII: results of tests of breath, blood, urine, and DRE

State v. Beck, 254 Or App 60, 292 P3d 653 (2012). In the wee hours of the morning, a drug-recognition officer on patrol stopped defendant after he saw him leave the parking lot of a bar, then drive over a median. The officer smelled a light odor of alcohol and noted that defendant displayed several signs of intoxication. Defendant agreed to perform FSTs, during which the officer noted signs that defendant might be under the influence of marijuana as well as alcohol: dilated pupils, eyelid

tremors, and raised taste buds at the back of his tongue. Defendant admitted that he had a few drinks and had smoked marijuana the night before. The officer arrested him for DUII (and DWS) and took him to the station, where he blew a .10 percent BAC. Because that was over the legal limit, the officer did not run the DRE protocol. Defendant was charged under ORS 813.010(1)(c) with driving under the influence of a combination of alcohol and marijuana. Before trial, defendant moved to exclude any reference to his possible marijuana consumption, because the officer did not run the DRE protocol and the evidence was scientific. The trial court denied the motion, and the officer testified at trial that, based on his training and experience, he recognized that defendant's symptoms were consistent with marijuana use, and the effects of marijuana can last up to 24 hours. Defendant moved for judgment of acquittal, arguing that the state failed to prove that he drove under the influence of marijuana. The court denied the motion and found defendant guilty as charged. *Held*: Affirmed. The court rejected defendant's challenge to the marijuana evidence as inadmissible scientific evidence "for two reasons." (a) At least some of the evidence was nonscientific expert opinion evidence that was admissible under OEC 702—specifically, the observations that the officer made while administering FSTs were admissible "because they were neither part of the DRE protocol nor otherwise suggestive of a scientific methodology." *State v. Rambo*, 250 Or App 186 (2012).
(b) Although the officer's testimony about defendant's dilated pupils was "more problematic,…the court we need not determine whether the pupil-dilation evidence was scientific in nature" because the officer did not opine that defendant was under the influence of marijuana, only that he saw indicators that defendant had *possibly* consumed it. "In fact, [the officer] never opined that defendant was currently under the influence of a controlled substance at all." Instead, his investigation focused on "whether defendant's admitted use of marijuana within 24 hours of his arrest had materially contributed to his alcohol intoxication. Because of the narrow purpose for which the marijuana-related evidence was proffered and received, the trial court did not improperly infer that the eye-dilation evidence was part of a scientific protocol that showed that defendant was under the influence of a controlled substance at the time of the offense."

DUII: other evidence

State v. Newman, 353 Or 632, 302 P3d 435 (2013). An officer stopped defendant for driving erratically. Defendant smelled strongly of alcohol, had slurred speech, failed the FSTs, and blew a .015% on the breath test. He was charged with felony DUII. At trial, he wanted to offer evidence that he suffers from somnambulism, a sleepwalking disorder, and that he had no recollection of leaving his apartment the night he was arrested or of driving. He offered testimony from Dr. Ramseyer, a neurologist that "sleep driving" is a "subtype of sleepwalking" that can occur without the person being conscious, and that—in the neurologist's opinion—defendant was "sleep driving" when stopped by police. On the prosecutor's objection that DUII is a strict-liability offense, the trial court excluded the evidence as irrelevant. Defendant was convicted, and the Court of Appeals affirmed his conviction. *Held*: Reversed and remanded. The trial court erred by excluding defendant's proffered evidence of "sleep driving." [1] ORS 161.095(1), which generally requires the state to prove that a criminal defendant committed a "voluntary act," applies not just to crimes defined by the criminal code, but also applies to crimes, including DUII, that are defined by the vehicle code: "ORS 801.020(7) does not prohibit application of ORS 161.095(1) to the offense of DUII [and] we do not view the absence of a voluntary-act requirement within the text of ORS 813.010 as expressing a legislative intent to dispense with the requirement." [2] Under ORS 161.095(1), a defendant is not criminally liable for conduct "if he did not perform a bodily movement consciously." [3] The definition of "consciously," as used in ORS 161.085(2), "associates consciousness with a wakeful state and implies that a person in a state of sleep cannot execute a conscious action." Consequently, "a person engaged in sleepwalking [lacks] the level of consciousness necessary for a volitional act." [4] The court rejected the state's argument that proof of defendant's "voluntary act" of drinking was sufficient to prove the charge: "Although intoxication is an element of the DUII offense, it is not the proscribed conduct; it is a condition necessary to establish the offense. The voluntary act that ORS

161.095(1) requires must be linked not to a condition but to proscribed conduct. That does not mean, however, that the only relevant voluntary act is the act of driving. The … voluntary act may occur prior to the proscribed act as long as it is related to it. That is to say, although a prior voluntary act may suffice, not merely *any* act, however tenuously related, is sufficient." But "a defendant may be held criminally liable for a prior voluntary act if that act, through a course of related and foreseeable events, results in proscribed conduct." **Court's summary:** "We hold that the minimal voluntary act requirement of ORS 161.095(1) applies to the driving element of DUII in this case. Here, the trial court erred in not allowing defendant to adduce evidence that he was not conscious when he drove on the evening in question. The state was entitled to present evidence that defendant's drinking or other volitional act resulted in defendant driving his vehicle that evening. As noted, the state may also show a voluntary act with evidence that defendant had engaged in 'sleep driving' prior to this incident and failed to take adequate precautions to remove access to his car keys."

State v. Whitmore, 257 Or App __, __ P3d __ (July 24, 2013). Defendant was stopped at 3:20 a.m., the officer arrested him for DUII, and he submitted to a breath test at 4:15 a.m., which showed a BAC of 0.08%. Prior to trial, defendant filed a motion *in limine* to exclude any evidence "of retrograde extrapolation" without a proper foundation, contending that such an opinion would not be scientifically valid. The trial court tentatively denied the motion, ruling that such evidence would be admissible "assuming this officer comes in and lays out a foundation that … [would] be sufficient to … qualify her as an expert on this issue." At trial, the state called Bray, who for 14 years has been a forensic scientist for the Oregon State Police Forensic Division. She testified at length about the general rate of dissipation of blood-alcohol from person's system over the course of time, about the Widmark formula, and about the numerous variables that may affect the rate of dissipation. The prosecutor then asked Bray a hypothetical question based on the facts of defendant's case—using his assertion that he had drunk only three beers between 9 p.m. and 2 a.m. and that he had a blood-alcohol content of 0.08 percent at 4 a.m.—and she opined that that hypothetical person would have had to have consumed "between seven and ten and a half drinks" during that time in order to still have a blood-alcohol content of 0.08 percent at 4 a.m. The jury found defendant guilty. On appeal, defendant claimed that the trial court erred when it denied his motion *in limine*. *Held*: Reversed and remanded. Bray's testimony required a *Brown/O'Key* foundation: "Because Bray is an expert with a background in forensic science who claims that her knowledge of blood alcohol chemistry is based on studies and the literature in the field, when she testified, she effectively announced to the jury that the basis of her testimony was scientific. The trial court thus had a duty to ensure that her methods possessed the requisite indices of scientific validity. The trial court erred in not requiring the state to show that her methods were scientifically valid under the standards established in *Brown* and *O'Key*."

State v. Montgomery, 256 Or App 222, __ P3d __ (2013). At 5:30 a.m., a trooper responded to a report of a truck parked off the highway in a remote location. The trooper found the truck a 6:40 a.m. Defendant was asleep inside, along with a couple of empty beer cans. Defendant appeared intoxicated, admitted to drinking beer and taking a Xanax, and explained that he had gotten lost on his way home. After defendant performed poorly on FSTs, the trooper arrested for DUII and DWS. Three hours after the original dispatch, defendant submitted to a breath test which showed a .07 percent BAC. He moved to exclude any expert testimony about retrograde extrapolation of his blood-alcohol. The trial court denied his motion and admitted the evidence, and Jennifer Bray testified concerning the Widmark formula, the average rate of dissipation of alcohol, and retrograde extrapolation. She estimated that defendant's BAC at 5:30 a.m. was between 0.10 and 0.13 percent. Defendant also moved for a judgment of acquittal, but the court denied that motion, and the jury found him guilty. On appeal, defendant claimed that the trial court erred in admitting the evidence of retrograde extrapolation contending that the state had not provided a sufficient *Brown/O'Key* foundation. *Held*: Affirmed. The trial court correctly denied defendant's motions. [1] The Court of Appeals declined to consider defendant's argument regarding the necessary foundation for testimony on retrograde extrapolation because it was unpreserved—the objection that defendant made on appeal

was "qualitatively different" from the argument he had made before the trial court. [2] The state presented sufficient circumstantial evidence for a rational trier of fact to infer that defendant drove while he had a BAC of .08 percent or more.

State v. Davis, 254 Or App 387, 292 P3d 666 (2012), *rev den*, 353 Or 747 (2013). After stopping defendant for observed traffic violations and administering field-sobriety tests, the officer arrested her for DUII and transported her to the police station. When he asked defendant to submit to a breath test, she requested a blood test. The officer explained that she first had to decide whether to consent to a breath test and that, after the test, she would have the option of obtaining a blood test at her own expense. Defendant submitted to a breath test, which showed a 0.16% BAC. Defendant did not renew her request to obtain a blood test, and the officer processed her into jail. Defendant was charged with DUII, and she filed a motion to suppress the results of her breath test, claiming that she had been denied a reasonable opportunity to obtain a blood test under ORS 813.150. The trial court denied her motion, finding that she did not request a blood test after taking the breath test and that the officer did not prevent her from obtaining a blood test. *Held*: Affirmed. [1] "ORS 813.150 does not require an officer to advise an individual that he or she has a right to have an independent breath or blood test. The statute does, however, require that a person who so requests be permitted a reasonable opportunity to obtain such a test. A defendant is denied a 'reasonable opportunity' to obtain an independent blood test when police conduct either prevents or hinders the defendant's attempt to obtain a test." [2] Under ORS 813.410(2)(g) (which provides: "After taking a [breath test], the person will have a reasonable opportunity, upon request, for an additional [blood test] at the person's own expense."), an arrestee's request for an opportunity to obtain independent blood test is valid even if she made it before she submitted to the breath test. [3] Because the statutory right to obtain a blood test is "not equivalent" to the constitutional right to counsel, "the burden is on defendant to show that she was denied the reasonable opportunity to obtain the test." [4] The officer "had no affirmative obligation to take defendant to the hospital absent her request for a test, which she did not raise after he instructed her that she could request the test following the Intoxilyzer. His only obligation was neither to prevent nor hinder her." The Court of Appeals rejected "defendant's implicit argument that the police had an affirmative obligation to either remind defendant of her earlier request or to facilitate it." [5] Because defendant did not request to be taken to a hospital or to see a physician, and the record does not show how long the booking process took, how long defendant remained in jail, or when she was released, the court "cannot conclude from the record that defendant was prevented or hindered from getting a blood test such that she was denied a reasonable opportunity to the test under ORS 813.150."

DUII: instructions

State v. Stubbs, 256 Or App 817, __ P3d __ (2013). An officer stopped defendant for running a stop sign, and observed a number of indicators that he was impaired by medication. After defendant exhibited six clues on the HGN and performed poorly on the other field sobriety tests, he was arrested for DUII. Defendant agreed to provide a urine sample, which was tested at the state crime lab and revealed the presence of the controlled substances methadone, oxycodone (Percodan), and morphine. Defendant was charged with driving under the influence of unspecified "controlled substances." At trial, the criminalist who tested defendant's urine described the different drug categories and their effects, including central nervous depressants, for which he cited Ambien as an example. He also identified Ambien as an example of a schedule IV controlled substance. The criminalist testified that he had detected Ambien in defendant's urine but, because he had been unable to confirm its presence with a confirmatory test, he had not reported it and was not offering testimony that it was actually present. The criminalist also explained that, unlike the narcotics that were found in defendant's urine, central nervous system depressants like Ambien cause HGN. Defendant testified that he had been prescribed the substances that had been found in his urine, but claimed that he had not taken any of them on the morning of the stop. He also volunteered that he had taken Ambien the night before the

stop. During closing argument, the prosecutor pointed out that Ambien would explain the nystagmus that defendant had exhibited, but otherwise focused on the narcotics which defendant had admitted to taking on a daily basis. At the close of the evidence, the trial court instructed the jury that "Methadone, Oxycodone, Percodan and Morphine are controlled substances." After instructions, a juror asked the court, whether "Ambien [is] considered a narcotic in—or a controlled substance in this particular case." In response to the juror's question, the court told the jurors that they had heard all of the evidence and jury instructions in the case, and explained that the court would not comment on the evidence presented to the jury. Defendant objected to the court's response to the question, and contended that the court should instruct the jury that "Ambien was not relevant to the case," because the state had accused the defendant of being under the influence of "the various narcotics that were listed." The trial court determined that the juror's question related to a factual matter for the jury to decide and declined to give the instruction. The jury found defendant guilty. On appeal, defendant contended that the trial court erred by not instructing the jury that Ambien was not a relevant controlled substance. *Held*: Affirmed. [1] Defendant's objection and requested instruction were sufficient to alert the trial court of his position that the state's theory could not change from narcotics to Ambien use, as well as to preserve his arguments that the court's instruction to the jury was misleading and that the evidence relating to Ambien was insufficient to convict him—insofar as those arguments support argument that the court should have given his requested instruction. [2] But defendant's requested for a jury instruction was not the proper procedure to exclude evidence already in the record. Defendant never objected to the Ambien evidence or requested a limiting instruction. "Thus, defendant was in no position to challenge the evidence as irrelevant for the first time through a peremptory instruction." Because the evidence was admitted without objection the jury was entitled to consider it. [3] Defendant's requested instruction that Ambien "is not relevant to the case," was not a correct statement of the law. Both the state and defendant presented evidence of Ambien use, and that evidence was relevant to explain the observed nystagmus and to the issue whether defendant drove while under the influence of a controlled substance.

DUII: sufficiency of evidence

State v. Beck, 254 Or App 60, 292 P3d 653 (2012). In the wee hours of the morning, a drug-recognition officer on patrol stopped defendant after he saw him leave the parking lot of a bar, then drive over a median. The officer smelled a light odor of alcohol and noted that defendant displayed several signs of intoxication. Defendant agreed to perform FSTs, during which the officer noted signs that defendant might be under the influence of marijuana as well as alcohol: dilated pupils, eyelid tremors, and raised taste buds at the back of his tongue. Defendant admitted that he had a few drinks and had smoked marijuana the night before. The officer arrested him for DUII (and DWS) and took him to the station, where he blew a .10 percent BAC. Because that was over the legal limit, the officer did not run the DRE protocol. Defendant was charged under ORS 813.010(1)(c) with driving under the influence of a combination of alcohol and marijuana. Before trial, defendant moved to exclude any reference to his possible marijuana consumption, because the officer did not run the DRE protocol and the evidence was scientific. The trial court denied the motion, and the officer testified at trial that, based on his training and experience, he recognized that defendant's symptoms were consistent with marijuana use, and the effects of marijuana can last up to 24 hours. Defendant moved for judgment of acquittal, arguing that the state failed to prove that he drove under the influence of marijuana. The court denied the motion and found defendant guilty. *Held*: Affirmed. [1] The trial court correctly admitted the marijuana evidence. [2] The state's evidence was sufficient to defeat the MJOA. For a "combination" DUII, where the evidence shoes that a defendant drove while impaired and admitted to recent use of alcohol and a controlled substance, "a trier of fact can find that the defendant was under the combined influence of alcohol and a controlled substance without additional evidence that ingestion of the controlled substance caused the defendant's impairment."

DUII: license revocation or suspension

Bianco v. D.M.V., 257 Or App 446, __ P3d __ (2013). On March 11, 2011, petitioner was arrested for DUII. He refused to submit to a breath test and, as a result, was served with a notice of intent to suspend his driving privileges in 30 days in accordance with ORS 813.410(1). Petitioner requested a hearing, which was scheduled for March 31. On March 26, the hearings office was notified that the arresting officer was unavailable on scheduled date, so the agency cancelled the hearing date, to be reset "as soon as practicable," and rescinded the suspension pending the hearing. The agency rescheduled the hearing for April 8 but then, without explanation, rescheduled it again for April 27. At the hearing on April 27, petitioner moved to dismiss on the ground that the hearing was not held within 30 days, as is generally required by ORS 813.410(4)(e). The ALJ denied the motion and sustained the suspension. Petitioner sought judicial review in the circuit court, and that court agreed and set aside the suspension. The state appealed. *Held*: Reversed and remanded. [1] "The ALJ correctly interpreted [OAR 735-090-0120(1)]] to mean no more than it says: When an officer is unable to appear at a hearing under ORS 813.410, the hearing 'shall be rescheduled as soon as practicable.' The rule does not independently establish a deadline for holding an implied-consent hearing in the event of officer unavailability." [2] The order rescheduling the hearing from April 8 to April 27 was inadequate because it did not recite any "good cause" for that change. "We simply have no way to determine, on this record, why or at whose request the hearing was rescheduled, whether that reason was legally permissible, or even what remedy would be appropriate in the event that the reason was unlawful." [3] The case must be remanded to DMV "so that the ALJ, on behalf of DMV, can consider the issue and, if necessary, take evidence concerning the reason for the second set-over and adequately explain that delay in the order."

State v. Danby, 256 Or App 599, 301 P3d 958 (2013). Defendant was found guilty of DUII based on stipulated facts. At sentencing, the state argued that defendant was subject to a lifetime revocation of his driving privileges under ORS 809.235 based on his infraction DUII convictions in 1976 and 1978 under *former* ORS 487.540, and his misdemeanor DUII conviction in 1998. The sentencing court disregarded the 1978 conviction, which was a bail forfeiture, but, over defendant's objection, ordered a lifetime revocation based on the other convictions. On appeal, defendant argued that under ORS 809.235(1)(b)(A)(i), the trial court could not properly count an infraction DUII conviction as a predicate offense to support the lifetime revocation. The state responded that in light of *State v. Kellar*, 349 Or 626 (2011), and the history of ORS 809.235, defendant's conviction under the previous version of the DUII statute qualifies as a predicate offense for purposes of ORS 809.235. *Held*: Affirmed. The sentencing court correctly imposed a lifetime suspension. [1] In light of the history of the DUII statutes and *Kellar*, a DUII infraction conviction under former ORS 487.540 counts as a predicate offense for permanent revocation of a person's driving privileges. The evolution of ORS 809.235 illustrates that the legislative intent underlying the statute "is to cover an expansive range of conduct." [2] As discussed in *Kellar*, the revised vehicle code provisions were intended "to be a seamless continuation of the provisions that preceded them, and a conviction under *former* ORS 487.540 serves as a predicate conviction for purposes of ORS 809.235." [3] ORS 809.235 contains no express limitation stating that a predicate conviction must be for a misdemeanor. Rather, in 2007 the legislature deleted the term misdemeanor, instead providing that predicate convictions include "any of the following offenses." And the legislature has defined "offense" to include violations. [4] Finally, out of state convictions for infraction DUII are considered the "statutory counterpart" to a conviction under ORS 813.010, and without some apparent basis for giving greater effect to out-of-state DUII convictions than in-state DUII convictions, that context weighs against defendant's position.

Walker v. D.M.V., 254 Or App 543, 295 P3d 167 (2013). Officer Gilderson arrested petitioner for DUII and served him with an intent to suspend. Petitioner requested an administrative hearing. On the morning of the scheduled hearing, Officer Gilderson's supervising sergeant

submitted a form to DMV per ORS 813.440(1)(d) stating that the officer was unable to appear due to "illness." DMV rescheduled the hearing. At the hearing, petitioner asked Officer Gilderson about being sick, and he replied that he had not felt well enough to drive to the hearing because he had just worked 14 hours straight after less than four hours of sleep and was exhausted. Petitioner moved to dismiss on the ground that the original hearing should not have been rescheduled. The DMV denied that motion and suspended petitioner's license. On his appeal, the circuit court reversed on the ground that the first hearing should not have been rescheduled because Officer Gilderson was not actually "ill" within the meaning of ORS 813.440(1)(d). *Held*: Reversed. [1] "There was substantial evidence in the record to support DMV's finding that Gilderson was suffering from extreme exhaustion." [2] Nothing in ORS 813.440(1)(d) "or its legislative history leads us to conclude that the legislature intended illness to be limited to conditions that require medical attention. Rather, in the context in which the word is used in ORS 813.440(1)(d), we conclude that illness is an unhealthy condition of the body or mind that impedes an officer's attendance at a suspension hearing. We further conclude that exhaustion may constitute illness under the statute when, as DMV found here, it causes an officer to believe that he is not well enough to drive to a hearing."

DRUG OFFENSES

State v. Kinslow, 257 Or App 295, __ P3d __ (2013). The police executed a search warrant at defendant's home and found drugs, packaging materials, drug paraphernalia, and drug records. She was charged with various commercial drug offenses (CDO) based on an allegation that she possessed stolen property, ORS 475.900(1)(b). She moved to exclude a crime laboratory report on confrontation grounds. The trial court admitted the evidence over defendant's objection, because she had failed to file a written objection to the report at least 15 days before trial, as required by ORS 475.235. Defendant moved for judgment on the CDO allegation, contending that the state failed to show that her possession of stolen property (the victim's cell phone) was "related to" her drug offenses. The trial court denied the motion, and the jury found defendant guilty. *Held:* [1] The CDO factor listed in ORS 475.900(1)(b) "need not relate to the specific underlying drug offense"; it is only necessary that it occurs or exists "in conjunction with defendant's drugs offenses." *Reaffirming State v. Moore*, 172 Or App 371, 383, *rev den* (2001). Because "the stolen property was possessed by the same individual, defendant, who was also possessing, delivering, and manufacturing methamphetamine, and she possessed that stolen property in a vehicle directly connected to the drug site," a rational jury could "find that the stolen property existed in conjunction with defendant's drug offenses." [2] ORS 475.235, which requires defendants to file a written objection to crime laboratory reports 15 days before trial to preserve an objection, "is precisely the type of notice-and-demand statute of which the Court explicitly approved" in *Melendez-Diaz v. Massachusetts*, 557 US 305 (2009), and hence it did not violate the defendant's Sixth Amendment right to confrontation. [3] ORS 475.235 prescribes a "constitutionally permissible process for determining whether the defendant intends to object" and thus does not violate the Art. I, § 11. *Distinguishing State v. Birchfield*, 342 Or 624 (2007).

State v. Ehrensing, 255 Or App 402, 296 P3d 1279 (2013). Defendant holds an OMMA registry identification card and grew marijuana for several other cardholders. In 2006, law-enforcement officers executed a search warrant at his residence and seized live marijuana plants and packages of dried marijuana. He was charged with unlawful manufacture, delivery, and possession of marijuana, and the state also asserted that the seized items were subject to criminal forfeiture. In September 2006, defendant filed a pretrial motion for the return of marijuana to three cardholders for whom defendant had grown marijuana. He argued that they had a protected "property interest" in the marijuana under ORS 475.304(5) and that they were entitled to return of the marijuana under ORS 475.323(3), and ORS 133.643(3) and (4). The state opposed the motion, arguing at a hearing that the state needed the marijuana for evidentiary purposes. The trial court granted the motion in part and issued a return order, requiring the sheriff to return a portion of the seized marijuana. The state filed a

motion to reconsider, arguing that return and receipt of the marijuana would 'arguably' violate federal law, and the sheriff intervened and also asked the court to reconsider the return order, arguing, in part, that the federal CSA preempted the OMMA return provisions. The court allowed the sheriff to intervene, but denied the motions to reconsider, leaving the return order in effect. The state appealed, and that order was the subject of *State v. Ehrensing*, 232 Or App 511 (2009), in which the Court of Appeals dismissed the appeal as moot. Defendant was not brought to trial during the pendency of that appeal, he moved to dismiss the charges on speedy-trial grounds, and the trial court granted that motion in February 2010. The state did not appeal. Defendant then filed a motion for return of the remainder of the usable seized marijuana. The court granted that motion in part and ordered the sheriff to return a portion of the marijuana. The sheriff appealed. *Held*: Reversed on appeal; affirmed on cross-appeal. The trial court erred in ordering the sheriff to return the marijuana. [1] ORS 475.304(5) does not entitle defendant to return: "ORS 475.304(5) establishes, *as between a cardholder and a person responsible for a grow site*, that the cardholder is the owner of the medical marijuana. The statute plainly provides that the marijuana in production at a grow site must be provided to the registry identification cardholder' by the 'person responsible for a marijuana grow site.' By its terms, ORS 475.304(5) clarifies who owns the marijuana in order to grant the cardholder the right to obtain the marijuana *from the grower on request*. Because that statutory provision bears exclusively on *the relationship between cardholder and grower*, it has limited value in evaluating the obligation of a law enforcement officer to return seized marijuana under ORS 475.323(2)." [2] ORS 475.323(2) also does not entitle defendant to return: "Here, there is no evidence that the district attorney or the district attorney's designee made the requisite determination with respect to defendant (or the other cardholders)." Although the trial court dismissed the charges against defendant on statutory speedy-trial grounds, "that judicial determination does not fulfill the express statutory requisite for the return of seized marijuana under ORS 475.323(2)." Such a dismissal is without prejudice and does not address the merits and, thus, is not tantamount to an acquittal. "Nor did the district attorney in this case determine not to prosecute or to dismiss the charges—and defendant does not so argue." [3] ORS 133.623 also does entitle defendants to return because it "applies only to warrantless seizures," and the marijuana at issue was seized pursuant to a search warrant. [4] Under ORS 133.643, "a movant is entitled to return of seized property … only if he or she 'is lawfully entitled to possess' that property. Although the text of ORS 133.643(4) does not also include the term 'lawfully,' in conjunction with its use of 'entitled,' we have held that, in the totality of the statutory context, 'entitled' in subsection (4) necessarily connotes and requires a showing of *lawful* entitlement to possession." And that requirement of "'lawfully entitled' encompasses both state and federal law." [5] "Finally, construing ORS 133.643 in such a fashion as to authorize—indeed, compel—the return of items whose possession would violate federal law could, as the parties' preemption-related contentions manifest, give rise to 'serious constitutional problems.' ORS 133.643 does not authorize the return of the disputed marijuana, because possession of that marijuana by defendant and the other cardholders would violate federal law. Nor does any other statute authorize that return."

Note: The court's ruling that defendant failed to establish a basis *under state law* for return of the marijuana meant that it did not have to resolve the difficult issue that was presented by the principal arguments that the parties made on appeal—*viz.*, whether the sheriff would commit an unlawful delivery of marijuana in violation of 21 USC § 841(a)(1) if he returned the marijuana to defendant and, if so, whether the federal CSA preempts, under the Supremacy Clause, the OMMA.

State v. Cam, 255 Or App 1, 296 P3d 578, *as modified on reconsideration*, 256 Or App 146 (2013). Defendant was at the center of a massive property-theft ring based in Woodburn. Thieves would bring him stolen goods in exchange for cash or drugs. The jury found defendant guilty of 53 theft and drug-related charges. *Held*: Reversed and remanded for resentencing; otherwise affirmed. [1] Relating to the drug charges, the trial court correctly denied defendant's motion to strike the commercial drug enhancement on possession charges because, as he argued, possession of substantial quantities of one drug (methamphetamine) cannot serve as the basis for a CDO enhancement for possession of *another* drug (marijuana and MDMA). The CDO statute (ORS 475.900) "plainly

allows possession of any of the listed controlled substances in sufficient quantities to serve as enhancements for a possession offense. … The substance charged as a CDO need not be the same substance possessed in the enhancement amount," and "[t]here is no requirement of a nexus between the underlying drug offense and the listed factors." [2] The two counts of CDO possession did not merge even though the counts dealt with the same substances. "In determining whether convictions merge under ORS 161.067(1), the court considers the statutory elements of each offense, not the underlying factual circumstances recited in the indictment," and offense subcategories such as CDO "are not statutory elements of the offense."

State v. Kinsley, 253 Or App 251, 289 P3d 367 (2012) (*per curiam*). Defendant was found guilty on charges of delivery of methamphetamine within 1,000 feet of a school, delivery of methamphetamine, first-degree child neglect, and endangering the welfare of a minor, and the court (Judge John Wilson) entered separate convictions. Defendant argued on appeal that the two DCS convictions should have been merged into a single conviction and that the convictions child neglect and endangering the welfare of a minor also should have merged into a single conviction. *Held*: Remanded for resentencing. Under *State v. Rodriquez-Gomez*, 242 Or App 567 (2011), convictions for delivery of methamphetamine within 1,000 feet of a school and delivery of methamphetamine merge.

ESCAPE

State v. Ashbaugh, 256 Or App 739, 301 P3d 972 (2013). Officers who intended to arrest defendant on a parole-violation detention warrant encountered him at a restaurant. When they asked to talk to him, he ran. The officers chased him, telling him to stop because he was under arrest. When he continued to flee, the officers continued to pursue him—telling him several more times that he was under arrest. He made various threats to the officers during the chase. The officers eventually found him hiding under a tree and approached him from different directions. He then said he would cooperate. Officer Garibay, who had pointed his Taser at defendant, told him to put his hands up and allow the officers to handcuff him. Garibay told him that if he did not comply and allow himself to be handcuffed, he would be shot with the Taser. Defendant told Garibay that if he was shot with the Taser, he would "come after" the officer. Defendant then turned and ran. Garibay shot him with the Taser, and he was finally subdued and arrested. Defendant was charged with resisting arrest and second-degree escape, for unlawfully and knowingly threatening to use physical force to escape from custody, ORS 162.155(1)(a). At trial, defendant moved for a judgment of acquittal, the trial court denied the motion, and defendant was found guilty. *Held*: Affirmed. [1] Defendant was in "custody" at the time he fled from Officer Garibay's warning that he would be shot with the Taser if he did not allow himself to be handcuffed. "Custody" includes "constructive restraint," and imposition of constructive restraint depends on whether the restraint was for the purpose of arrest and whether, in the totality of the circumstances, the officer's purpose to apprehend the person was manifested. Here, the officers manifested an intent to apprehend defendant "both in commanding defendant to allow the officers to handcuff him and in their actions of surrounding him and using the threat of shooting him with a Taser to force defendant to comply." [2] The evidence established that defendant "escaped," in that, although he did not get "did not get very far before being subdued," he was, "however momentarily, no longer within their effective control" and thus had escaped. [3] Defendant used or threatened to use force while escaping from custody. The court rejected defendant's argument that his threat to "come after" Garibay if Garibay shot him with the Taser was conditional, and also was intended not to facilitate an escape, but to prevent himself from being shot with the Taser. The jury could find that defendant's threat to "come after" Garibay was a threat of violence designed to eliminate a restraint that was placed on him to keep him within the officers' control—Garibay's threatened use of the Taser—and thereby enable him to escape from custody. That was a particularly rational inference because defendant attempted to escape after making the statement.

Note: The court noted that although the series of events may have provided a basis to charge

several different escapes, only one escape was charged, and so it could affirm the trial court's ruling on the ground that at least one of the events constituted an escape: "It is possible that, as defendant fled from the officers, the officers constructively restrained him numerous times because the officers repeatedly told defendant that he was under arrest. Nonetheless, he was charged with a single count of escape, and therefore, to affirm, we need only conclude that the evidence was sufficient for a rational trier of fact to have found the facts necessary to convict defendant of a single instance of second-degree escape. Therefore, we focus our analysis on the events following when the officers found defendant hiding under the tree because we conclude that they are determinative."

EVIDENCE

See also "Confessions and Admissions," *above*; "Search and Seizure," *below*.

Evidence: judicial notice (OEC 201)

^ ***State v. Mills***, 248 Or App 648, 274 P3d 230, *rev allowed*, 352 Or 564 (2012). At trial on a DWS offense, a North Plains police officer testified that he stopped defendant on Highway 26 near milepost 56 but did not say that that was within Washington County. Defendant moved for a judgment of acquittal, arguing the state had failed to prove venue, and the trial court denied the motion observing that "everyone knows where Highway 26 is, and that means that everyone knows that it's in Washington County." *Held*: Reversed. [1] Although a jury may infer venue from circumstantial evidence, no such evidence was presented—the state did not introduce any evidence showing where North Plains and mile marker 56 on Highway 26 were in relation to Washington County, nor did it introduce evidence tying anything or anyone involved in the case to Washington County. [2] Taking judicial notice on appeal that the location is within Washington County would not provide a basis to affirm, because: "Our review of the trial court's denial of defendant's motion for a judgment of acquittal requires us to review the trial record to determine whether *it* contained sufficient evidence to support a finding on venue."

Evidence: relevance (OEC 401, 402)

^ ***State v. Supanchick***, 245 Or App 651, 263 P3d 378 (2011), *rev allowed*, 352 Or 107 (2012). Defendant was charged with aggravated murder, first-degree burglary, and attempted coercion for breaking into the residence of his estranged wife in violation of a FAPA restraining order, holding her captive and trying to have her sign documents relinquishing custody of their child, and then killing her. Defendant shot her to death when the police broke into the residence in an attempt to save her. He admitted shooting the victim but contended that he did not intend to kill her. He was a veteran who was present at the Pentagon during the 9/11 attack (but did not see combat), and he presented expert evidence that he had PTSD in support of an EED defense. At trial, the state offered statements from the victim detailing his prior abuse and threats against her; the descriptions were contained in her petition for the RO and in handwritten notes found after the murder. Defendant asserted those statements were inadmissible hearsay under *Crawford*. The trial court overruled his objection and admitted the evidence under the "forfeiture by wrongdoing" exception of OEC 804(3)(g), finding by a preponderance of the evidence that he had killed the victim in order to silence her. The trial court also admitted derogatory statements defendant had made about the victim in emails he had sent her, and it excluded evidence proffered by defendant relating to whether the police used the "Reid technique" in interviewing defendant to elicit his admissions, and whether the officers should have used forcible entry, rather than hostage negotiations, in their efforts to save the victim. *Held*: Affirmed. [1] The trial court correctly allowed the prosecutor to elicit, during cross-examination of defendant's expert, the derogatory statements defendant had made about the victim in emails he had sent her because: (a) those statements were "part of the materials on which [the expert] relied in reaching his conclusions"; (b) defendant's "decision not to discuss the evidence with him on

direct examination did not prevent the state from inquiring about that evidence under OEC 705"; (c) that evidence was relevant "to rebut the expert's conclusion that, on the night of the killing, defendant's actions were a result of PTSD"; and (d) "the trial court did not abuse its discretion in ruling that the testimony at issue was not unfairly prejudicial under OEC 403." [2] The trial court correctly excluded defendant's proffered testimony that would have criticized the manner in which the responding officers entered the residence, because "the issue the jury had to decide was his mental state at the time of the killing" and the proffered testimony "was offered to show that the police might have been able to prevent the killing if they had proceeded differently," but "that issue was not relevant to what the jury was called upon to decide—that is, it did not have any bearing on the defendant's state of mind at the time he killed the victim." [3] The trial court correctly excluded as irrelevant defendant's proffered testimony regarding whether the officers who interrogated defendant after the murder used the Reid interview technique. Although "defendant contends that the evidence was relevant to whether his statements to the police during the interview were voluntary, … the testimony was simply that the officers did not fully follow the 'Reid' interview method, but that much of the interview was 'in line' with the technique. The expert did not go through what the technique consisted of or explain why it might matter. He did not talk about what the 'Reid' technique is designed for or explain that there was something improper about it."

Evidence: probative value vs. prejudice (OEC 403)

State v. Sarich, 352 Or 601, 291 P3d 647 (2012). Defendant's 19-year-old son, Z, is autistic and has developmental disabilities. The victim, who was Z's caregiver, disappeared in January 2007 and his abandoned car was found in a parking lot. Nine months later, his skeletal remains, with a gunshot wound in the skull, were found in a remote forested location at the end of an unpaved spur road. Defendant was involved in fraudulent financial activities in which she had used the victim's name, and so she became a suspect in his murder. She told investigators that the victim did not show up for work the day he disappeared and so she took Z on errands with her the whole day. The police also interviewed Z, and he indicated by statements and by drawings that he knew about the circumstances of the victim's murder, that he had been at the scene, and that he knew where the victim's body had been left. Investigators recorded a video of a trip they took with Z in a vehicle, generally following Z's directions to where the victim's body had been found. Defendant was charged with aggravated murder, and she sought a hearing to determine whether Z was competent to testify at trial. The trial court conducted a hearing, during which Z was able to identify, mostly by "yes" or "no" answers, tangible objects held in front of him. But the trial court's questioning revealed that Z would not be able to answer questions involving intangible actions, past events, persons and objects not present at trial, distances, times, dates, and locations, all of which could and likely would require some degree of comprehension of abstract concepts. The trial court ruled that Z was not competent to testify. The state then filed a motion asking the trial court to hold that the video of Z, and the statements and drawings by Z, were admissible as non-hearsay. The trial court excluded the video, drawings, and statements, holding (in part) that their admission would violate OEC 403 because they were unfairly prejudicial to defendant and would confuse the issues and mislead the jury. *Held*: Affirmed. [1] The record supported the trial court's determination that Z would be incapable of testifying in a way that would be useful at trial. [2] "It has long been the rule in this state that, when a party offers evidence as a whole and the evidence is rejected by the trial court, the appellate court will affirm the trial court's ruling if any part of the evidence is inadmissible. Because the state did not separate its evidentiary offer, or otherwise raise specific arguments regarding the admissibility of each of the different forms of evidence, and does not do so now in this court, if any part of the state's evidence is inadmissible, we will affirm the trial court's decision to exclude all of the evidence." [3] The trial court did not err in excluding the video under OEC 403: "Although the video is probative only to the extent that it exhibits Z's independent knowledge, the video is riddled with suggestive remarks and leading questions by the investigators that could have indicated to Z which way to point and when. In addition, the fact of Z's knowledge is probative of defendant's guilt

only if the factfinder makes a series of assumptions and inferences, and even then results in only circumstantial evidence of guilt. … Although the state does not offer the video for its truth, admission of the video would nevertheless create a substantial risk that the jury would improperly consider that evidence for its truth, resulting in significant unfair prejudice to defendant." [4] "Because we conclude that the trial court did not abuse its discretion in excluding the video tape under OEC 403, and because the state did not offer Z's statements or drawings separately or raise specific arguments regarding the admissibility of those items of evidence, we affirm the trial court's order excluding Z's statements and Z's drawings as well.

State v. Sewell, 257 Or App 462, __ P3d __ (2013). Defendant was convicted of two counts of third-degree sexual abuse, one count of furnishing alcohol to a minor, and one count of contributing to the sexual delinquency of a minor. On appeal, he contended that the trial court erred in admitting the victim's testimony that defendant had refused to use a condom during their sexual encounters. The Court of Appeals reversed, accepting the state's concession that the trial court had failed to analyze the admissibility of the evidence under *State v. Mayfield*, and concluding that the error in admitting the evidence was not harmless. *State v. Sewell*, 222 Or App 423, *adh'd to on recons*, 225 Or App 296 (2009). On remand, the trial court concluded that the evidence was admissible under *Mayfield* and OEC 403. Defendant once again appealed. *Held*: Affirmed. [1] "The trial court did not abuse its discretion in determining that the probative value of the disputed evidence to bolster the victim's credibility was not substantially outweighed by the danger of unfair prejudice." [2] The court's "harmless error discussion in *Sewell I* did not bind the trial court's exercise of discretion under OEC 403 on remand," because that harmless-error analysis is "fundamentally different" than the determination of whether "the trial court's determination under OEC 403 constituted an abuse of discretion."

Evidence: character or other-crimes evidence (OEC 404)

State v. Pitt, 352 Or 566, 293 P3d 1002 (2012). Defendant was charged with first-degree sexual abuse and first-degree unlawful sexual penetration involving a child. Prior to his trial, he filed a motion *in limine* to exclude evidence that would show that he previously had committed similar sexual assaults against the victim and another child in Lane County. The state contended that that evidence was relevant under OEC 404(3) both to show his intent when he touched the victim and to prove his identity as the person who had abused the victim (because each victim had seen him abuse the other victim). Defendant asserted that his intent was not at issue because he denied committing the alleged acts and did not plan on arguing that he touched the child accidently but without a sexual intent. The trial court concluded that the evidence was relevant to show that defendant intentionally committed the charged acts and to prove the identity of the perpetrator of the charged acts. The other-crimes evidence was admitted at trial without objection, and defendant was convicted. The Court of Appeals affirmed. *Held:* Reversed and remanded. [1] Even though defendant did not object during trial to admission of the other-crimes evidence, defendant's motion *in limine* adequately preserved his claim of error. [2] "If a party rests his or her argument on appeal on a trial court's pretrial order declining to exclude certain evidence, we ordinarily will evaluate that argument in light of the record made before the trial court when it issued the order, not the trial record as it may have developed at some later point. We do not rule out the possibility that that conclusion may change due to unique circumstances in another case, such as an agreement of the parties or other developments during trial. But in the usual case, we will evaluate a claim of pretrial error on the basis of the same record that the trial court relied on in making the challenged ruling." [3] The evidence was not relevant to prove defendant's identity under the traditional "identity" exception: "That exception permits the admission of evidence proving that a defendant operated in a novel or distinctive manner that identifies that defendant as the perpetrator. Mere repetition of crimes of a similar class, such as repeated assaults or robberies, without more, is not sufficient. The acts at issue here fail to meet that requirement." The evidence was not relevant to bolster the victim's credibility in identifying defendant as her abuser, but

tended to prove only that he acted in conformity with his character to commit bad acts. [4] At the time the trial court denied defendant's motion *in limine*, it was not yet relevant to prove that he committed the charged acts *intentionally* because the record did not yet establish as a fact that the charged acts had occurred. The defendant's "not guilty" plea did not put his intent at issue, and without a stipulation or other evidence that the charged acts had occurred, or without an instruction to the jurors that they could not consider the other-crimes evidence until it determined that he committed the charged acts, the uncharged misconduct evidence could not be admitted unconditionally, because the evidence tended to prove only that he acted in conformity with his character to commit such acts. [5] The error was prejudicial: "The court's evidentiary ruling permitted the jury to consider the uncharged misconduct evidence *before* it decided whether defendant had committed the charged acts. That created a risk that the jury would use the uncharged misconduct evidence for an impermissible propensity purpose—*i.e.*, to decide that, because defendant had committed the uncharged acts, his character was such that he again would act in the same manner and commit the charged acts."

State v. Lewis, 352 Or 626, 290 P3d 288 (2012). Defendant, a professional truck driver, rear-ended the victim's catering truck, sending it truck into the path of an oncoming logging truck. The resulting collision killed the victim. The collision occurred on Highway 18 in a designated "safety corridor" where there was only one lane of travel in each direction. At the time of the collision, the victim's truck was stopped in his lane with his brake lights and left-turn signal on. Although defendant was sober and driving the speed limit, an eyewitness traveling in the opposite direction saw him looking down and away from the road for several seconds before looking up with surprise immediately before the collision. An accident reconstructionist determined that defendant started braking 382 feet before the collision and that he had not tried to steer away from the collision. The road was wet and defendant's trailer was empty, making it more difficult to quickly stop his truck. Defendant was charged with criminally negligent homicide. Prior to trial, the trial court denied defendant's motion to exclude as irrelevant and prejudicial evidence that, 10-15 minutes before the collision, witnesses saw defendant driving erratically, making an abrupt lane change without signaling, and tailgating a school bus. The trial court found him guilty. The Court of Appeals affirmed without opinion. *Held*: Affirmed. [1] The evidence of defendant's prior bad driving was relevant to the issue of his state of mind at the time of the collision. [2] The trial court did not abuse its discretion when it determined that the probative value of defendant's prior bad driving was not substantially outweighed by the danger of unfair prejudice.

State v. Roquez, 257 Or App__, __P3d__(August 7, 2013). Defendant was charged with first-degree sodomy, ORS 163.405, and second-degree sexual abuse, ORS 163.425. At trial, to prove that victim had not consented to defendant's sexual acts, the state offered evidence that, on a prior occasion, he had engaged in sexual intercourse with another woman without her consent; the state offered the evidence as "other crimes" under OEC 404(3) to prove defendant's intent to commit the charged acts and the victim's lack of consent to defendant's sexual contact. The trial court admitted the evidence. Defendant was found guilty. *Held*: Reversed and remanded. The trial court erroneously admitted the other-crimes evidence. [1] A single instance of prior misconduct is not relevant to prove defendant's intent to engage in forcibly compelled sexual intercourse under *State v. Leistiko*, 352 Or 172, *adh'd to as modified on recons,* 352 Or 622 (2012). [2] Likewise, under *Leistiko, t*he evidence of the prior conduct was not relevant to prove that the victim did not consent in this instance.

State v. Teitsworth, 257 Or App 309, __ P3d __ (2013). In this domestic-violence case, defendant claimed self-defense, asserting that the victim went crazy and bit his finger, so he had to hit her. He was charged with assault in the fourth degree. At trial, court allowed the state, over defendant's objection, to introduce evidence of his previous assaults on the victim. The victim testified that he often initiated physical confrontations with her after he drank alcohol and that he had given her approximately 10 black eyes over the last 3 years. The victim's mother and a friend of the

victim testified to seeing the victim with such injuries. The jury found defendant guilty. On appeal, he argued evidence of the prior assaults was not relevant for any non-propensity purpose and that the evidence was more prejudicial than probative. *Held*: Affirmed. The trial court properly admitted the prior-assaults evidence. [1] "Whether evidence of uncharged misconduct is relevant for a non-character purpose is a question of law; accordingly, we review a trial court's conclusions regarding the relevance of such evidence for errors of law. When doing so, we are bound by the court's findings of historical fact if there is constitutionally sufficient evidence in the record to support them. If the court did not make findings on a particular issue, and there is evidence from which the facts could be decided more than one way, we presume that the court found the facts consistently with its ultimate conclusion." [2] The evidence was not admissible to prove that defendant acted recklessly: "Evidence of uncharged misconduct is admissible only to prove contested issues. Whether defendant was aware that the conduct for which the state prosecuted him—which included punching the victim in the face, throwing her around a bedroom, and kicking her in the face with his hiking boots—gave rise to a substantial and unjustifiable risk of physical injury was not a contested issue. Defendant did not claim that he did not know that such conduct could injure a person. Moreover, the charged conduct, if proven, would, by itself, strongly indicate the required state of mind." [3] But the evidence properly was admitted to prove whether defendant had truly acted in self-defense (*i.e.*, was he the initial aggressor, did he reasonably believe he faced imminent use of unlawful physical force by the victim, and if he was acting in self-defense, did he use an unreasonable amount of force?). "Here, the charged act requires proof of intent; the prior act also required intent; the victim was the same in both acts; and both acts involved defendant striking the victim in the context of a domestic dispute. Therefore, we conclude that the trial court did not err in admitting the evidence of uncharged misconduct to rebut defendant's self-defense claim."

State v. Beagley, 257 Or App 220, __ P3d __ (2013). Defendants are members of a religious congregation that relies on faith healing. They were charged with criminally negligent homicide, ORS 163.145, after their 16-year-old son died of a congenital kidney abnormality that would not have been fatal if he had received medical care in the week before he died. Prior to trial, defendants filed demurrers and motions to dismiss based on "religious freedom" claims, which the trial court denied. They were convicted after a trial. *Held*: Affirmed. The trial court properly admitted evidence of defendants' statements to police following the death of their granddaughter, which occurred three months before their son died: "The fact that defendants had witnessed the death of another child due to lack of medical care makes it more probable, not only that they *did* know that Neil was at risk, but that they *should have known* that Neil was at risk"—"the testimony was not relevant only to a charge of recklessness, and thereby relevant to a charge of negligence; it was directly relevant to the charge of negligence."

State v. Painter, 255 Or App 513, 300 P3d 179 (2013). Defendant was charged with several crimes, including second-degree assault, assaulting a public-safety officer (APSO), and first-degree criminal mischief. The basis for those charges was the state's contention that defendant, while attempting to elude, rammed his car into a police officer's vehicle, injuring the officer. Defendant claimed that he did not know the vehicle was a police vehicle and that, in any event, the officer rammed *his* car, and that the officers were lying about the incident. While he was incarcerated after the offense, defendant made several telephone calls to his mother and sister (recorded by the jail) in which he made angry and hostile statements claiming that the police had lied and unlawfully put him in jail. He also made generalized threats toward police and expressed his hatred of police. Before trial, the trial court ruled, based on OEC 404(3), that the state could present evidence of those statements for the purpose of showing defendant's intent at the time of the crime. The jurors found defendant guilty of second-degree assault, but they acquitted him on the APSO and criminal-mischief charges. Defendant appealed the court's OEC 404(3) ruling. *Held*: Reversed and remanded. [1] The statements were not relevant to defendant's mental state at the time of the crime, because "the only reasonable reading of defendant's threatening statements, individually and collectively, is that they

evince, and were exclusively the product of, defendant's anger as a result of his arrest and subsequent events." And nothing in those statements "was probative of his state of mind as of the time of the collision." [2] The error was not harmless because the evidence of his statements in jail was "qualitatively different" than the evidence the jury heard, the statements were presented as evidence on the central issues of his intent and credibility, and the state relied on them as pivotal evidence in its closing argument.

State v. Stephens, 255 Or App 37, 296 P3d 598 (2013). Defendant was charged with a number of sex offenses after the 17-year-old victim disclosed that defendant had sexually abused him when he was an elementary school student in her fourth, fifth, and sixth grade classes. Defendant objected at trial to the admission the victim's testimony about uncharged incidents of sexual contact with the defendant, but the trial court allowed the evidence. Defendant was convicted. *Held*: Affirmed. [1] Defendant's objection to evidence of other uncharged sexual abuse of the victim was sufficient to preserve a claim that the evidence was not relevant for any non-propensity purpose. [2] But the evidence was relevant for non-propensity purposes. "In cases like this, involving charges of sexual abuse of a child where the reporting was significantly delayed, evidence of sexual contact that is not charged is relevant to explain that delay; the existence of a long-term 'relationship' provides relevant context." Moreover, when the uncharged conduct and the charged crimes involve the same child, evidence of the uncharged conduct is relevant to demonstrate the sexual predisposition this defendant had for this particular victim—that is, to show the sexual inclination of defendant toward the victim.

State v. February, 253 Or App 658, 292 P3d 604 (2012). Defendant was charged with committing several sex offenses against the teenage daughter of his long-time domestic partner. At trial, the state sought to present testimony from the victim's two older sisters (A and S), who testified that defendant also had sexually molested them. Defendant objected, arguing that the evidence was inadmissible character evidence that did not demonstrate that defendant had a "plan" to abuse the victim, and also that the potential for unfair prejudice outweighed any probative value. The trial court overruled the objection and allowed the state to present the sisters' testimony. Defendant was convicted. *Held*: Reversed and remanded. [1] In determining whether prior acts are sufficiently similar to demonstrate a "plan" for purposes of OEC 404(3), "the pertinent question is whether there is "such a concurrence of common features between the prior bad acts evidence … and the charged conduct such that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." [2] Here, the "prior bad acts evidence involving A is sufficiently similar to the charged conduct to be admitted as evidence for the purpose of showing defendant's 'plan,' … the prior bad acts evidence involving S is not sufficiently similar and should not have been admitted." [3] The trial court was not required to engage in OEC 403 balancing, because in criminal cases OEC 404(4) "precludes a trial court from excluding relevant evidence of a defendant's other crimes, wrongs, or acts under OEC 403, except as required by the state or federal constitutions." [4] The error in allowing S's testimony was not harmless.

State v. Kaylor, 252 Or App 688, 289 P3d 290 (2012), *rev den*, 353 Or 428 (2013). Defendant was a CNA (certified nursing assistant) at a nursing home where the victim, who suffered from dementia, resided. When the victim was resisting defendant's efforts to clean him, another CNA, Rivera, came over to help. The two women rolled the victim onto his side, with defendant standing near his head and Rivera near his lower body. When the victim, who had been "hollering" loudly, suddenly became quiet, Rivera looked up and saw that defendant had clamped her hand over the victim's mouth and was applying pressure. The victim's face was bright red, his eyes were open wide, and he looked "terrified," as if he could not breathe. Defendant kept her hand over the victim's mouth for ten seconds, at which point defendant told Rivera that the victim had bitten her hand and left to tend to her injury. Rivera sought advice from another co-worker, Mayes, and reported the incident to her supervisor later that day. The next afternoon, defendant sent a threatening messages

for Mayes to pass on to Rivera. Soon after Rivera left those messages, her supervisor called the police to report the incident. Defendant was charged with first-degree criminal mistreatment, strangulation, and witness tampering. At trial, the state presented evidence that defendant had made threats of harm to the victim previously, as well as to another patient. The jury found defendant guilty of all charges. *Held*: Convictions for criminal mistreatment and witness tampering reversed; conviction for strangulation reversed and remanded. [1] Defendant's previous threats against the victim and another patient were inadmissible under OEC 404(3). "The state's stated rationale for the admission of prior acts evidence is essentially that defendant's commission of abusive acts toward patients in the past made it more likely that defendant 'reacted to the victim's resistance to treatment with physical abuse' or 'physically abused [the victim] in front of a witness,' *i.e.*, committed the crimes in question. That is nothing more than propensity evidence of what defendant did, evidence that is proscribed by OEC 404(3)." [2] The prior acts "were insufficiently similar to the charged conduct to be relevant evidence" of common intent or plan. … The prior acts were not related to the crime of strangulation," because they "did not threaten that crime or foreshadow its commission. … The charged conduct did not threaten harm; it was physically harmful. … Proof that defendant intentionally made past unrelated oral threats to the victim and the female resident does not make it more likely that defendant knew that she was impeding [the victim's normal breathing] … or that defendant committed the charged crime by design." [3] "Moreover, the prior act evidence was relevant to show intent only if intent was disputed. … Here, there is no particular issue of *mens rea*, such as inadvertence, malice, deliberation, or a specific intent, that is in question." [4] The error in allowing the evidence was not harmless.

State v. McIntyre, 252 Or App 16, 284 P3d 1284 (2012). The state charged defendant with promoting prostitution, ORS 167.012, and sought to admit as evidence two rap videos—titled "Turn This Up" and "Pimp'n (All I Know)"—in which defendant appeared and which he helped produce. In both videos, defendant and others describe their involvement in and generally extol the virtues of the prostitution trade. The trial court excluded the videos under OEC 403 because the risk of unfair prejudice outweighed any probative value; the state appealed, arguing that the videos were admissible under OEC 404(3) as "other acts" evidence relevant to prove defendant's intent to promote prostitution, and thus OEC 404(4) precluded the trial court from excluding the videos under OEC 403. *Held*: Affirmed. [1] The admissibility of the videos as evidence of intent under OEC 404(3) is subject to the "cumulative, five-factor test" set out in *State v. Johns*, 301 Or 535 (1986). [2] *State v. Leistiko*, 352 Or 172 (2012), "elucidated two principles that inform our analysis here—the second of which is dispositive in this case: *First*, evidence of other crimes, wrongs, or acts is not admissible to prove a defendant's intent under OEC 404(3) unless either (a) the defendant has conceded the charged act itself or (b) the jury is instructed not to consider the evidence unless it finds that the defendant committed the charged act. *Second* (assuming that either of those conditions is satisfied), when evidence of other crimes, wrongs, or acts is proffered as proof of a defendant's intent, a court ordinarily must apply the cumulative, five-factor test established in *Johns* to determine whether the evidence is relevant." [3] Applying the *Johns* test here, the video evidence failed the third, fourth, and fifth steps: identity of victim (or class of victim), similarity of type of act, and similarity of physical elements. "Accordingly, the state has not established that defendant's prior involvement in the prostitution trade is sufficiently similar to the charged act of promoting prostitution."

Evidence: past sexual conduct (OEC 412)

State v. MacBale, 353 Or __, __ P3d __ (July 25, 2013). Defendant is charged with committing numerous sexual offenses against the victim. Prior to trial, he filed a motion pursuant to OEC 412 to determine the admissibility at trial of some evidence he proffered that the victim previously had falsely accused two other men of rape in order "to prove that she is motivated by a desire to inflict pain on men with whom she has had consensual sex, that she is motivated by her pursuit of money to make false accusations of rape, and that she knows how to manufacture medical

or scientific evidence to support a false rape charge." In accordance with OEC 412(4)(b), the trial court scheduled an *in camera* hearing. Relying on various "open courts" constitutional provisions, defendant demanded that the hearing be held in open court. The trial court denied that request. Defendant then filed a petition for writ of mandamus to compel the trial court to hold the hearing in open court, and the Supreme Court issued an alternative writ. *Held*: Petition dismissed. The trial court properly excluded the public from the hearing. [1] Under OEC 412(4)(b), the directive "that the hearing be held outside the presence of the public is mandatory." [2] "The plain words of [the 'open courts' clause in Art. I, § 10] do not confer any personal right on a litigant or on a member of the media or public. Rather, in prohibiting secret courts and requiring that justice be administered openly, that part of [Art. I, § 10] prescribes how government must ensure fairness in the administration of justice." [3] "While it is true that an OEC 412 hearing is secret in the sense that the public is excluded, it does not follow that closing an OEC 412 hearing to the public necessarily results in concealing the administration of justice from public view, in violation of the open courts provision. The defendant and his lawyers are permitted to attend the hearing, there is a record of the hearing, and the trial itself, in general, is open to the public." [4] Although Art. I, § 10, 'is written in broad terms, it does not apply to all aspects of court proceedings. Second, [Art. I, § 10,] generally prohibits a judicial proceeding from being 'secret' (closed to the public) if, in that judicial proceeding, 'justice' is 'administered.' Justice is administered when a court determines legal rights based on the presentation of evidence and argument. Put differently, the focus of the open courts provision is on 'adjudications.' Third, … when justice is being administered, the public's interest in the open administration of justice generally may not be subject to an open ended 'balancing' against the secrecy interest of a particular witness in the case. Fourth, notwithstanding strong textual and case-law support for the principle of open-court proceedings, judges have always enjoyed broad latitude to control their courtrooms, including taking such actions as may be necessary to protect vulnerable participants in judicial proceedings, including victims, from harassment or embarrassment. Given that latitude, the right of access that [Art. I, § 10], secures, although broad, is not absolute." [5] "The hearing required by OEC 412 is narrowly tailored to screen for a discrete type of evidence that the legislature deems to be presumptively irrelevant to a prosecution for certain sex crimes. As discussed, the legislature has determined that evidence of the past sexual behavior of a victim or witness is *per se* inadmissible, unless it falls within one or more of three exceptions to the ban that the legislature has established. It also created a procedure—not open to the public—to determine whether the otherwise-excluded evidence falls within one of those three narrow categories. If the court determines that it does and that the probative value of the evidence outweighs the danger of unfair prejudice, then the evidence is relevant and admissible. OEC 412(4)(c). All evidence that comes within the category that the legislature has determined should be admitted is admissible at the ensuing public trial. … Closure of the hearing, therefore, operates to deprive the public of exposure only to private, *irrelevant* facts about a witness's sexual history that the legislature has determined should be excluded. Openness in that circumstance would not advance any particular public interest and, given the sensitive and personal nature of the matters raised at an OEC 412 hearing, openness could potentially further victimize an already vulnerable witness or complainant and make the complete administration of justice referred to in [Art. I, § 10], more difficult, if not impossible." [6] "A hearing to determine the admissibility of evidence under OEC 412 does not constitute an administration of justice for purposes of [Art. I, § 10], and that the legislature may provide that such a hearing be closed to the public." [7] "The statutory requirement that OEC 412 hearings to determine the admissibility of evidence of a victim or witness's past sexual behavior be conducted outside the presence of the public does not violate [Art. I, § 11, because it], pertains to the trial itself and does not require a pretrial hearing under OEC 412 to be open to the public." [8] "The United States Supreme Court has established over the last few decades that the First Amendment encompasses a public right to observe the workings of at least some parts of the administration of justice, particularly criminal trials. However, the rights accorded by that provision protect not the accused, but the press and other members of the public: They may be asserted only by an identified excluded individual. It is undisputed that defendant will be permitted to attend the hearing under OEC 412. He is not personally

deprived of any constitutional right to attend, and he has not shown that he is entitled to assert any constitutional rights of third parties to attend the hearing. Defendant does not have standing to assert a First Amendment right to access to the OEC 412 hearing." [9] "Although the text of the Sixth Amendment refers to the accused's right to a 'public trial,' the United States Supreme Court has held that the right to a public trial extends beyond the trial itself and encompasses some pretrial proceedings. … The right to a public trial extends to those pretrial proceedings that are an integral part of the trial and involve the values that the right to a public trial serves. … We have no trouble concluding that those values are not implicated by OEC 412's requirement that hearings to determine the relevance of certain evidence be conducted *in camera*."

Evidence: privilege (OEC 503 to OEC 514)

^ ***Brumwell v. Premo***, S060980 (review on alternative writ of mandamus). Petitioner was convicted of aggravated murder in Marion County and was sentenced to death. After that judgment was affirmed on direct review, he filed a petition for post-conviction relief challenging that judgment based on allegations that his trial counsel provided constitutionally inadequate assistance. He asked the post-conviction court: for a protective order regarding evidence that he and his trial attorneys would provide at their depositions in this proceeding, to preclude the state's use of material subject to the lawyer-client privilege for any purpose other than litigating the post-conviction proceeding, and to bar the state from turning such material over to others, including law-enforcement or prosecutorial agencies involved with the prosecution of his murder case. Petitioner also moved to quash the state's subpoenas directed at two individuals from whom the state sought certain records that pertained to persons who had performed services for petitioner's defense, unless the requested material instead was delivered under seal directly to the post-conviction court (rather than to the state's counsel), which would then review the material *in camera* to determine which material should be disclosed to defendant. The motions directed at the two subpoenas also requested a protective order similar to the one requested in the first motion. The state opposed those requests by arguing that he has no attorney-client privilege in this proceeding under OEC 503(4)(c) and that a protective order is unnecessary. The post-conviction court denied petitioner's motions. The Oregon Supreme Court allowed petitioner's petition and issued an alternative writ of mandamus. According to the court's media release, the issues on review are: "(1) With respect to a petition for post-conviction relief, to what extent does the lawyer-client privilege remain intact, and to what extent is it deemed waived? (2) Does any dissolution or waiver of the privilege exist for all purposes? (3) Can any information that otherwise would have been subject to the lawyer-client privilege be disclosed outside the parameters of a post-conviction proceeding and used in any retrial? (4) Did the post-conviction court err in denying petitioner's motions for a protective order, and his motions to quash the subpoenas unless the requested material first was reviewed *in camera*?"

^ *See also* ***Longo v. Premo***, S061072 (review on alternative writ of mandamus) (same)

State v. Stephens, 255 Or App 37, 296 P3d 598 (2013). Defendant was charged with a number of sex offenses after the 17-year-old victim disclosed that defendant had sexually abused him when he was an elementary school student in her fourth, fifth, and sixth grade classes. The victim reported that on one occasion he and defendant were alone in a locked classroom kissing, with defendant's shirt partially removed. According to the victim, they were interrupted when another teacher, Mahler, knocked on the door. The victim said that defendant ran to a room at the back of the classroom, while he went to open the door. Police contacted Mahler to corroborate the report. Initially, Mahler agreed to meet with police to speak to them, but subsequently she spoke to her attorney, who called the detective and informed him that Mahler would not meet with him. Mahler was subpoenaed to appear at trial. The state did not call her as a witness, but the defense did. Mahler testified that she recalled an incident when she had tried to open the classroom door and it couldn't, but that sometimes the doorknobs stuck. Mahler's version of events differed from the victim's—in

Mahler's version, the victim had opened the door immediately and defendant had not emerged from a back room. When she asked why the door had been locked, they had told her that they had not known that it was. Mahler claimed that the incident seemed accidental and did not raise any "red flag" for her. The prosecutor cross-examined Mahler to show that she was biased due to her personal and employment relationship with defendant. He asked her why she had canceled her meeting with the detective. She answered that she had consulted her lawyer, who told her that she could talk to the detective if she chose to, but that she was not required to give a statement unless she was subpoenaed. The prosecutor continued to question Mahler about why she had refused to talk to the detective. Eventually, defense counsel objected, contending, that the fact that the lawyer gave her legal advice and then contacted the detective "would be … privileged." The trial court overruled that basis for objection, pointing out that Mahler had never asserted any privilege, and had waived any privilege by testifying on the subject. The prosecutor argued in closing that defendant had declined to talk to police because she did not want to provide incriminating evidence against defendant. Defendant was convicted and appealed, contending that the prosecutor's questioning and statements about Mahler's decision to speak with an attorney and not to speak with police were inadmissible under OEC 513(1) as impermissible comments on her exercise of a privilege. *Held*: Affirmed. [1] Defendant's objection that the facts surrounding Mahler's consultation with her own attorney were "privileged" was sufficient to preserve her claim that the testimony violated OEC 513(1). [2] But the objection was not timely: "Even if Mahler's decision to consult her attorney and remain silent with respect to the investigation was privileged, and questioning her about that decision violated OEC 513(1)—a concession that the state does not make and a conclusion that we do not address—defendant's objection to that line of questioning did not occur until well after that information had been elicited without objection." By the time defendant objected, Mahler had waived any privilege she might have had and, in any event, the admission of the evidence to which defendant objected was harmless in light of the previous evidence to which defendant not objected.

State v. Dalby, 251 Or App 674, 284 P3d 585 (2012), *rev den*, 353 Or 209 (2013). Defendant was charged with PCS resisting arrest arising out of an altercation with police officers in downtown Portland. At trial, an officer testified on direct examination: "I *Mirandized* [him], and he refused to talk to me." Defendant did not object. Later, the prosecutor asked the officer, "that's not the only reason you couldn't ask him questions, right?," to which the officer responded, "Right. He invoked his right to speak with counsel." Defendant moved for a mistrial, the trial court denied it, and the jury acquitted defendant on the resisting-arrest charge but found him guilty on the PCS charge. On appeal, defendant claimed the trial court erred by denying his motion for a mistrial. *Held*: Affirmed. [1] The officer's statements were impermissible comments on "defendant's exercise and invocation of his right to remain silent," as guaranteed by Art. I, §§ 11 and 12. [2] "Error in admitting evidence that a defendant exercised or invoked his constitutional right to silence or to counsel is prejudicial if the evidence comes in a context whereupon inferences prejudicial to the defendant are likely to be drawn by the jury." In this case, the error was harmless, because the jury *acquitted* defendant of resisting arrest, which was "the charge to which he devoted the bulk of his defense" and "the only evidence that the jury heard regarding defendant's possession of the pipe was uncontradicted (and unobjected to) testimony from a police officer that defendant claimed he picked up the pipe off of the street."

Evidence: impeachment (OEC 608, 609)

Nevada v. Jackson, 569 US __, 133 S Ct 1990 (2013) (*per curiam*). In a brutal domestic assault, petitioner Jackson forced his way into the apartment of the victim, his former girlfriend, raped and beat her, stole a ring, and then dragged her by her hair out to his car, where bystanders intervened and he ran off. Petitioner told the police it was consensual. He was charged in state court with first-degree rape and related offenses. The victim recanted and went into hiding. The police eventually found her and took her into custody as a material witness. Once in custody, she disavowed the

recantation as the product of threats by petitioner's associates, and she agreed to testify. At trial, petitioner's defense was that the victim fabricated the story, and defense counsel cross-examined her extensively about prior similar reports that she had made to the police that were not corroborated and hence not prosecuted. When defense counsel attempted to introduce police reports of those other incidents or to call the officers involved in those investigations, the trial court sustained the prosecutor's objection. The jury found petitioner guilty, and he was sentenced to life imprisonment. On appeal, he claimed that exclusion of the extrinsic evidence violated his federal constitutional right "to present a complete defense," but the Nevada appellate courts affirmed the judgment. Petitioner then filed a § 2254 petition in federal court reasserting that claim. The district court denied his petition but the Ninth Circuit reversed, relying on *Michigan v. Lucas*, 500 US 145 (1991), to hold "that extrinsic evidence of [the victim's] prior allegations was critical to [petitioner's] defense, that the exclusion of that evidence violated his constitutional right to present a defense, and that the Nevada Supreme Court's decision to the contrary was an unreasonable application of [the Supreme] Court's precedents. Although it acknowledged that the state court had ruled that the evidence was inadmissible as a matter of state law, the Ninth Circuit concluded that the impact of the State's rules of evidence on the defense was disproportionate to the state's interest in exclusion." *Held*: Reversed and remanded. The district court correctly dismissed petitioner's petition. [1] Although "the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense, we have also recognized that state and federal rule-makers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Only rarely have we held that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence." [2] The Nevada rule of evidence at issue "generally precludes the admission of extrinsic evidence of specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crime. The purpose of that rule, the Nevada Supreme Court has explained, is to focus the fact-finder on the most important facts and conserve judicial resources by avoiding mini-trials on collateral issues. The Nevada statute is akin to the widely accepted rule of evidence law that generally precludes the admission of evidence of specific instances of a witness's conduct to prove the witness's character for untruthfulness. [*See* FRE 608(b); OEC 608(2).] The constitutional propriety of this rule cannot be seriously disputed." [3] There is an exception in the Nevada for evidence of previous false accusations of sexual assault, but it requires advance notice to the prosecution, and petitioner did provide that notice. "No decision of this Court clearly establishes that this notice requirement is unconstitutional." [4] "No fair-minded jurist could think that *Lucas* clearly establishes that the enforcement of the Nevada rule in this case is inconsistent with the Constitution." [5] The state court "reasoned that the proffered evidence had little impeachment value because at most it showed simply that the victim's reports could not be corroborated. The admission of extrinsic evidence of specific instances of a witness's conduct to impeach the witness's credibility may confuse the jury, unfairly embarrass the victim, surprise the prosecution, and unduly prolong the trial. No decision of this Court clearly establishes that the exclusion of such evidence for such reasons in a particular case violates the Constitution." [6] Although the Court has held "that various restrictions on a defendant's ability to *cross-examine* witnesses violate the Confrontation Clause, … [it] has never held that the Confrontation Clause entitles a criminal defendant to introduce *extrinsic evidence* for impeachment purposes."

State v. Thomas, 257 Or App __, __ P3d __ (August 7, 2013). Defendant was charged with criminal mischief for breaking car windows. At trial, the state's sole witness, West, claimed that defendant broke he windows, and defendant claimed that it was West who broke the windows. When West took the stand during the jury trial, he admitted to one prior conviction for attempted second-degree robbery. Using an OJIN register printout, defense counsel sought to impeach him with a second felony conviction. After West denied the second conviction, defense counsel sought to enter a certified copy of the OJIN register into evidence under OEC 609(1) to prove his prior convictions. The trial court denied that request, indicating that the OJIN register was not sufficiently reliable. Defendant was found guilty. *Held*: Reversed and remanded. [1] The trial court's implicit conclusion

that the phrase "public record" in OEC 609(1) means only a certified copy of the judgment conflicts with the plain text of the rule. A certified OJIN register is, as a matter of law, a "public record" that "establishes" convictions within the meaning of OEC 609(1). [2] The error was not harmless because there was no physical evidence and this case turned on the credibility of two witnesses—West and the defendant. Thus, the exclusion of evidence that was probative of West's credibility was likely to have affected the result at trial.

State v. Valle, 255 Or App 805, 298 P3d 1237 (2013) (*en banc*). Defendant was charged with first-degree sodomy and second-degree sexual abuse for crimes against his step-daughter, M, who is not a citizen. In a dependency case filed after defendant was arrested on these charges, M's attorney had applied for a U-visa for her on the ground that she was a victim of abuse. At trial, defendant sought to cross-examine M about her application for a U-visa to potentially demonstrate her bias or interest. During colloquy outside the jury's presence, the parties discussed whether defendant could cross-examine M about her application. The prosecutor noted that the U-visa is one "that allows a victim of a crime to remain in the country" and stated that the DA's office had "signed off" on M's application by certifying that M "is in fact the victim of a crime who's participating in a criminal prosecution." Defense counsel explained that this type of visa required the applicant to be a victim of domestic violence or sexual abuse and argued that her application for this visa was relevant to "her motive to fabricate," but he was uncertain about how long the visa lasted. The trial court ruled that defendant could not inquire about the visa because neither he nor defense counsel "knew enough about" the terms of the visa. Defendant then made an offer of proof, where he asked M questions about her application. M gave answers that were vague and possibly inconsistent, but which showed her general understanding that these visas are granted only if she was a victim of sex abuse and "not really like if it's I'm a victim, it's like what happened in the case and if I was abused." She also testified that granting of the visa could allow her to remain in the country for two 4-year periods, whereupon she could gain US residency. Based on M's lack of specific knowledge about the visa terms and requirements, the court again declined to allow questioning about the visa because "none of us seem[s] to understand it quite well enough to allow it in or out … [and] the cause of the visa is speculative." Defendant was found guilty. *Held*: Reversed and remanded. The trial court erred in precluding the cross-examination. [1] Under the low threshold for relevancy under OEC 401, inquiry about M's application for the visa was relevant to impeach her and was required to be admitted even if it had only a mere tendency to show bias or interest: "A party lays a sufficient foundation for the admission of evidence to impeach a witness if the party shows that the evidence could support a reasonable inference that the witness is biased or self-interested. Evidence from which a reasonable jury could infer that a witness has a motive to testify in a certain manner is relevant impeachment evidence. The inference need not be the only one that could be drawn, or even the most probable. At the admissibility stage, the only question is whether a jury could find that the witness has a motive to testify in a certain manner. Whether the witness actually has a motive and, if so, whether the motive has influenced the witness's testimony, are separate and subsequent questions for the jury." [2] Exclusion of this evidence was not harmless because "the jury was not fully informed of matters relevant to an assessment of M's credibility, which was essential to the state's case." [3] Contrary to the dissenting opinion, the trial court did not exclude this evidence under OEC 104(2) for failure to present sufficient evidence of a conditional fact (i.e., "the victim's belief or understanding that her eligibility for a U visa depended on her testimony that she was an abuse victim.") Defendant was not required to present evidence that M believed that receipt of the U-visa depended on her testimony because a jury could reasonably infer that she had a personal interest in testifying that she was a victim of abuse; she "was required to show only that her circumstances were such that a jury could reasonably infer that she might believe that testifying that she had been abused could advance (or at least not undermine) her effort to secure a U visa." [4] Determination of conditional relevancy, as any relevancy determination, is a legal question, not a factual one. The proffered evidence could not be excluded on the ground that M's testimony was ambiguous; any ambiguity of M's testimony "does not preclude the admission of evidence demonstrating that the victim had applied for the visa."

State v. Colon, 251 Or App 714, 284 P3d 589 (2012). Defendant was charged with fourth-degree assault for throwing a large cooking spoon at her 17-year-old daughter, striking her in the face. At a bench trial, her defense was that she had not thrown the spoon; rather, it slipped out of her hand while she was gesturing at her daughter. In the defense case-in-chief, defendant called the complainant's cousin, Torres, who testified that he had known the complainant for her entire life, they "used to hang out a lot," and spent a lot of time at her house. Counsel asked Torres whether he had ever heard complainant say that she hated defendant, to which Torres answered that he had heard her say that "plenty of times" and that his cousin was a "drama queen. That's what she does." The state objected and moved to strike those answers as non-responsive; the trial court sustained the objection and struck the answers. Defendant then asked Torres whether the complainant was "prone to over-exaggeration"; the state objected, and the trial court sustained the objection, explaining that defendant failed to lay the necessary "foundation for character," which requires counsel to ask "very specific questions." Defendant was convicted. *Held*: Reversed and remanded. [1] Torres's opinion concerning the complainant's tendency to exaggerate was admissible evidence of the complainant's character for truthfulness pursuant to OEC 608(1), and defendant laid all of the foundation for that testimony that the rule requires—"a showing of adequate contacts between Torres and the complainant for Torres to form a current personal opinion of the complainant's character for truthfulness." [2] The error was not harmless, because the trial court's decision "came down to a determination of credibility," and the trial court found the complainant's testimony "believable and that her motive to lie was negligible."

Evidence: expert testimony, scientific evidence (OEC 702)

See also "DUII: other evidence," *above*.

State v. Sanchez-Alfonso, 352 Or 790, 293 P3d 1011 (2012). An 18-month-old boy, C, sustained serious head injuries, including a fractured skull, while in defendant's care. The emergency-room physician, suspecting abuse, referred C to CARES for evaluation. At CARES, Dr. Skinner examined and treated C, and reviewed his medical records and police reports. She drafted a report, which concluded that defendant "clearly caused [C's] injuries which caused his hospitalization" and that C "was physically abused by" defendant. This medical diagnosis is based on C's "physical exam … accompanied by review of statements made by" defendant. In her report, Dr. Skinner explained that defendant had given at least three versions of the events leading up to the injuries, and that his stories did not explain C's multiple head injuries. Defendant was charged with assault and criminal mistreatment. At trial, defendant admitted that he had caused C's forehead injury—a lump on his forehead—but claimed it was accidental, and did not create a "substantial risk of death." He denied causing C's skull fracture, blaming C's aunt for causing that injury. Defendant objected to the admissibility of Dr. Skinner's testimony and report on the ground that they violated OEC 702 and OEC 403. The trial court admitted Dr. Skinner's testimony and report, and the jury found defendant guilty. The Court of Appeals affirmed, finding that the trial court erred in allowing Dr. Skinner to testify that defendant caused C's injuries, but that the error was harmless. Before the Supreme Court the state conceded that a portion of the diagnosis did not satisfy the requirements of OEC 702, but argued that the error was harmless. *Held*: Reversed and remanded. [1] "As a preliminary matter, we reject the state's contention that Skinner's conclusion that defendant had been the perpetrator of C's injuries was not part of her medical diagnosis … Skinner's report explicitly identified defendant as the person who had caused C's injuries and characterized her conclusion as a medical diagnosis." And even if it had not been, defendant was entitled to challenge the admissibility of the conclusion: "When an expert reaches a conclusion as to the cause of an injury and purports to use medical or scientific techniques in doing so, a party may challenge the scientific validity of those techniques under OEC 702, whether or not the conclusion is a cognizable 'medical diagnosis.'" [2] The same "mode of analysis" that the court applied in *State v. Southard*, 347 Or 127 (2009), applies in this case. "Although physical evidence was available in this case, Dr. Skinner did

not specifically identify that evidence as a basis for her conclusion that defendant had caused C's injuries. [3] Dr. Skinner's diagnosis did not satisfy the scientific-validity requirement of OEC 702, because Dr. Skinner "did not establish that she was qualified to identify the perpetrator of inflicted injury." "To conclude that scientific evidence is sufficiently reliable to be admissible under OEC 702, it is not enough that there are experts on a subject that the person who testifies is credible, or that evidence takes the form of a medical record. Neither is it enough that 'a lot' of literature exists on the subject or that the expert gathers the information, how that information informs his or her conclusions, and the scientific steps that he or she takes in the process." [4] The error was not harmless.

State v. Whitmore, 257 Or App __, __ P3d __ (July 24, 2013). Defendant was stopped at 3:20 a.m., the officer arrested him for DUII, and he submitted to a breath test at 4:15 a.m., which showed a BAC of 0.08%. Prior to trial, defendant filed a motion *in limine* to exclude any evidence "of retrograde extrapolation" without a proper foundation, contending that such an opinion would not be scientifically valid. The trial court tentatively denied the motion, ruling that such evidence would be admissible "assuming this officer comes in and lays out a foundation that … [would] be sufficient to … qualify her as an expert on this issue." Defense counsel asked for a "continuing objection," and the court said that that was fine. At trial, the state called Bray, who for 14 years has been a forensic scientist for the Oregon State Police Forensic Division. She testified at length—without any objection from defendant—about the general rate of dissipation of blood-alcohol from person's system over the course of time, about the Widmark formula, and about the numerous variables that may affect the rate of dissipation. The prosecutor then asked Bray a hypothetical question based on the facts of defendant's case—using his assertion that he had drunk only three beers between 9 p.m. and 2 a.m. and that he had a blood-alcohol content of 0.08 percent at 4 a.m.—and she opined that that hypothetical person would have had to have consumed "between seven and ten and a half drinks" during that time in order to still have a blood-alcohol content of 0.08 percent at 4 a.m. The jury found defendant guilty. On appeal, defendant claimed that the trial court erred when it denied his motion *in limine*—he did not assign error to Bray's testimony at trial. *Held*: Reversed and remanded. The trial court erred by not conducting a *Brown/O'Key* hearing. [1] Defendant's claim of error is reviewable on appeal even though he did not object at trial to Bray's testimony: "Parties are not required to repeat their objections after the trial court has ruled against them." Moreover, the trial court granted defendant a "continuing objection." [2] Bray's testimony required a *Brown/O'Key* foundation: "Because Bray is an expert with a background in forensic science who claims that her knowledge of blood alcohol chemistry is based on studies and the literature in the field, when she testified, she effectively announced to the jury that the basis of her testimony was scientific. The trial court thus had a duty to ensure that her methods possessed the requisite indices of scientific validity. The trial court erred in not requiring the state to show that her methods were scientifically valid under the standards established in *Brown* and *O'Key*."

State v. Brown, 256 Or App 774, 302 P3d 1214 (2013). Defendant, a high-school coach, was charged with second-degree and third-degree sexual abuse based on his abuse of two teenaged athletes, M and E, who he sexually abused during massages. At trial, he objected to medical diagnoses that M had been sexually abused and that E was "highly concerning for sexual abuse," but the trial court admitted that evidence and defendant was found guilty. After trial, the Supreme Court decided *State v. Southard*, 347 Or 127 (2009), which held that such a sexual-abuse diagnosis is inadmissible under OEC 403, at least in the absence of physical evidence of abuse. The state conceded on appeal that the trial court erred in admitting the diagnoses under *Southard*, but argued that the error was harmless in light of the fact that medical staff recovered defendant's DNA from a swab of M's labia and that a jury would not have been likely to have been affected by the inadmissible diagnosis. *Held*: Reversed and remanded. The error was not harmless because defendant took the stand and offered an explanation for his conduct, which was that he allegedly only performed "sports massages" on the victims near their vaginal areas, and that that contact may have

resulted in the detection of his DNA on Victim M.

Note: Although there was DNA evidence linking defendant to the sexual abuse of one victim, the record showed that the DNA had been analyzed seven months after the sexual-abuse diagnosis. In addition, the diagnosing doctor did not discuss the DNA results in his testimony or provide any explanation as to whether that information would have supported or bolstered his diagnosis or expert testimony concerning his opinion about whether the victim had been sexually abused. Without some testimony linking physical evidence to the medical doctor's diagnosis or opinion, *Southard* may still bar a diagnosis despite the possibility that corroborating physical proof may exist. *See State v. Ovendale*, 253 Or App 620 (2012) (requiring that a medical expert "actually rely on the physical evidence in making a diagnosis of sexual abuse").

State v. Lopez-Cruz, 256 Or App 32, 299 P3d 569 (2013). Defendant was convicted of first-degree sexual abuse several months after the Oregon Supreme Court decided *State v. Southard*, 347 Or 127 (2009). At trial, defendant called an emergency room doctor, who testified that he did not observe physical evidence of abuse. On cross-examination, and with no objection by defendant, the doctor admitted that he diagnosed the victim as suffering "abusive contact of an adult with a patient, no penetration or genital contact." On appeal, defendant argued that the trial court committed plain error under *Southard* by admitting the diagnosis given the absence of physical evidence of abuse. *Held*: Reversed and remanded. The trial court erred in admitting the diagnosis. The Court of Appeals rejected the state's arguments that an "abusive contact" diagnosis is different than a sexual abuse diagnosis and that error, if any, was not obvious or apparent on the record.

State v. Ovendale, 253 Or App 620, 292 P3d 579 (2012), *rev den*, 353 Or 714 (2013). The four-year -old victim reported to his mother that defendant had anally penetrated him. The mother observed fecal matter in the bedroom, where the victim had said the penetration had occurred. The mother later reported her observation to a nurse practitioner at Liberty House. Defendant was charged with first-degree sodomy and first-degree sexual abuse. At trial, the court allowed the nurse practitioner to testify that she had diagnosed the child as sexually abused, because that diagnosis was based, in part, on the fecal matter the mother had observed on the floor. Defendant was convicted, and on appeal challenged the trial court's ruling that the nurse's testimony was admissible. *Held*: Affirmed. [1] *State v. Southard*, 347 Or 127 (2009), does not preclude admission of any diagnosis of sexual abuse; its holding is narrow and it only excludes those diagnoses where there is no "physical evidence of abuse." [2] The necessary physical evidence is not limited to trauma on the victim's body; thus, the fecal matter the mother saw on the floor was "physical evidence of abuse." [3] The nurse practitioner expressly relied on the fecal matter in making her diagnosis. She explained its medical significance, demonstrating that the import of the evidence would not be within the knowledge of the typical juror. [4] The fecal matter had corroborative value because it supported the victim's description of the crime. [5] "We hold … that there is sufficient physical evidence of abuse to avoid *Southard*'s proscription—that is, there is sufficient physical evidence so that the diagnosis of sexual abuse tells the jury something that it is not equally capable of determining—when (1) the significance of that physical evidence is 'the sort of complex factual determination that a lay person cannot make as well as an expert,' (2) the physical evidence is corroborative of the type of abuse actually alleged, and (3) the medical expert actually relies on the physical evidence in making a diagnosis of sexual abuse."

State v. White, 252 Or App 718, 288 P3d 985 (2012). Five years after defendant last sexually abused the victim, she reported numerous instances of abuse over the course of several years. Defendant was charged with multiple sex crimes, criminal mistreatment, strangulation, and unlawful use of a weapon. Before trial, defendant moved to exclude expert testimony on "delayed reporting" of the abuse, arguing that it was not relevant. The trial court granted the motion, ruling that, because defendant did not intend to use the victim's five-year delay in reporting the alleged abuse to impeach her credibility, expert testimony regarding "delayed reporting" was not relevant to any fact at issue in

the case. The state appealed. *Held*: Reversed and remanded. [1] Expert testimony on "delayed reporting" is "relevant to explain why the complainant may have delayed reporting the abuse and to counter a potential inference by the jury that delay is indicative of fabrication." [2] A jury may infer that delay is indicative of fabrication, and the testimony is relevant to counter that inference. [3] "[A] complainant's delay in reporting alleged abuse is an inherent weakness in the state's case and … the state is entitled to address that weakness in its case-in-chief." [4] Relevancy does not depend on whether a defendant intends to use the delay to impeach the victim's credibility.

State v. Nichols, 252 Or App 114, 284 P3d 1246 (2012), *rev den*, 353 Or 428 (2013). Defendant was charged with murdering her elderly next-door neighbor. Among the evidence presented at trial was testimony describing defendant's bizarre behavior days after the murder when first questioned by police. According to the state, that behavior was indicative of her guilt. To rebut that evidence, defendant sought to present evidence from an expert who would explain her mental-health and addiction issues that she contended provided an alternate explanation for her strange behaviors. In an offer of proof, defendant's expert explained that she suffers from bipolar disorder and borderline personality disorder, has a history of kleptomania, and has a history of substance abuse. But defendant's expert did not explain how any of those conditions affect defendant's behavior—or, more specifically, in what way any of those conditions explained her strange behaviors when confronted by police. The trial court concluded that the expert's proposed testimony was not sufficiently "helpful" to the jury and excluded it under OEC 702. Defendant was found guilty. *Held*: Affirmed. [1] "We review the exclusion of expert testimony under OEC 702 for errors of law and, if a correct application of law allows for more than one option, for abuse of discretion." [2] Under OEC 702, expert testimony must be sufficiently "helpful" to the jury. Because the expert's testimony did nothing more than list defendant's various diagnoses and did not demonstrate the link between those conditions and her behavior when she was confronted by the police, the expert testimony was not sufficiently "helpful" and the trial court properly excluded it.

^ ***State v. Supanchick***, 245 Or App 651, 263 P3d 378 (2011), *rev allowed*, 352 Or 107 (2012). Defendant was charged with aggravated murder, first-degree burglary, and attempted coercion for breaking into the residence of his estranged wife in violation of a FAPA restraining order, holding her captive and trying to have her sign documents relinquishing custody of their child, and then killing her. Defendant shot her to death when the police broke into the residence in an attempt to save her. He admitted shooting the victim but contended that he did not intend to kill her. He was a veteran who was present at the Pentagon during the 9/11 attack (but did not see combat), and he presented expert evidence that he had PTSD in support of an EED defense. At trial, the state offered statements from the victim detailing his prior abuse and threats against her; the descriptions were contained in her petition for the RO and in handwritten notes found after the murder. Defendant asserted those statements were inadmissible hearsay under *Crawford*. The trial court overruled his objection and admitted the evidence under the "forfeiture by wrongdoing" exception of OEC 804(3)(g), finding by a preponderance of the evidence that he had killed the victim in order to silence her. The trial court also admitted derogatory statements defendant had made about the victim in emails he had sent her, and it excluded evidence proffered by defendant relating to whether the police used the "Reid technique" in interviewing defendant to elicit his admissions, and whether the officers should have used forcible entry, rather than hostage negotiations, in their efforts to save the victim. *Held*: Affirmed. The trial court correctly allowed the prosecutor to elicit, during cross-examination of defendant's expert, the derogatory statements defendant had made about the victim in emails he had sent her because: (a) those statements were "part of the materials on which [the expert] relied in reaching his conclusions"; (b) defendant's "decision not to discuss the evidence with him on direct examination did not prevent the state from inquiring about that evidence under OEC 705"; (c) that evidence was relevant "to rebut the expert's conclusion that, on the night of the killing, defendant's actions were a result of PTSD"; and (d) "the trial court did not abuse its discretion in ruling that the testimony at issue was not unfairly prejudicial under OEC 403."

Evidence: hearsay (OEC 801)

See also "Evidence: confrontation issues," *below*.

State v. Wood, 253 Or App 97, 289 P3d 348 (2012). Defendant molested a ten-year-old girl. Two years later, on the encouragement of a friend, the victim disclosed the abuse to her mother, who reported the abuse to the police. The victim was evaluated by CARES. She also engaged in a "pretext" call to defendant, wherein he admitted having inappropriate feelings toward her, and the night defendant allegedly touched her inappropriately. Prior to trial, the state filed a served a notice per OEC 803(18a)(b) of intent to rely on statements made by the victim to her mother, named CARES staff members, and a named detective, "as set forth in reports previously made available." At trial, defense counsel objected to admission of the statements, claiming that the state's notice lacked sufficient "particulars" to satisfy OEC 803(18a)(b). The trial court overruled the objection, and found him guilty on one count of first-degree sexual abuse. *Held*: Reversed and remanded. [1]The state's notice was insufficient under OEC 803(18a)(b). [2] The victim's statements were not admissible under OEC 801(4)(a)(B) to rebut a charge of recent fabrication, because she made the statements after her alleged motive to fabricate arose. [3] The error was not harmless.

^ ***State v. Perez***, 247 Or App 353, 271 P3d 154 (2011) (*aff'd without op*), *rev allowed*, 352 Or 107 (2012). Defendant was found guilty of forcible-compulsion rape for having sex at a party with the victim, who was intoxicated but resisted and kept telling him to stop. On appeal, defendant argued that the trial court erred by admitting certain evidence over his objection. The Court of Appeals affirmed without opinion. On review, the issues before the Supreme Court are: (1) May a prosecutor refresh the victim's memory by reading portions of the police report in the form of a question? (2) May a police officer and sexual-assault nurse testify to the details of the victim's complaint of sexual misconduct, or must their testimony be limited only to the fact of the complaint?

Evidence: hearsay—state of mind (OEC 803(3))

State v. Richardson, 253 Or App 75, 288 P3d 995 (2012), *rev den*, 353 Or 714 (2013). The victim was an elderly woman in a nursing home suffering from advanced brain cancer. Defendant and Penn, her great-nephew, had her execute a power of attorney and a quit-claim deed to her home in favor of Penn. Afterwards, she had made statements to family members, including "Please don't let them take my house," and "My nephew took my house and car from me." Defendant was charged of first-degree aggravated theft and obtaining execution of a document by deception. The victim died before trial, and defendant moved to exclude her statements to family members. Defendant also objected to the admission of an audio recording in which the victim's attorney asked her, "Did you want [Penn] to [put the home in his name]?" to which she responded, "No." Finally, defendant objected to witnesses testifying that the victim had told them that she had been robbed or that her home had been taken from her. The trial court admitted the statements under OEC 803(3), which provides that a statement is not hearsay if it is "of the declarant's then existing state of mind, emotion, sensation or physical condition, such as intent, plan, motive, design, mental feeling, pain or bodily health, but not including a statement of memory or belief to prove the fact remembered or believed." Defendant was found guilty. *Held*: Reversed. [1] "The state-of-mind exception to the hearsay rule admits 'statements of existing mental or emotional condition to prove the mental or emotional condition of the declarant *at the time the statements were made*.'" But, "the state did not seek to admit the victim's statements to establish her mental condition at the time that she made the statements but, instead, to establish that she did not intend to convey her home to Penn or that she was not competent at the time that she signed the documents, both of which concerned her mental condition at a time preceding when she made the statements." [2] "Furthermore, OEC 803(3) specifically excludes statements 'of memory or belief to prove the fact remembered or believed.' … [The victim's] statements relate her recollection of her intention in the past and her present

conclusions, based on her reflection on the past, about a past event. We therefore conclude that the victim's statements were not statements of her then existing state of mind, but, instead, were statements of memory and belief," which do not fall under exception to the hearsay rule in OEC 803(3). [3] The error was not harmless: the erroneously admitted evidence "went to the heart of the state's case and is qualitatively different from other evidence that supported it."

Evidence: hearsay—child sexual-abuse reports (OEC 803(18a)(b))

State v. Edblom, 257 Or App 22, __ P3d __ (2013). In 2009, the state tried defendant on multiple counts relating to the sexual abuse of two children. Prior to trial, the state provided defendant with the following written notice:

> "Pursuant to [OEC 803(18a)(b)], notice is hereby given that the State intends to offer hearsay statements of the victim regarding the nature of the criminal acts committed by the defendant upon the victim. Said statements are contained in substance in any law enforcement investigative reports, social service agency reports, school records, and video and audio tapes and other items which have been and will be discovered in this case. The State intends to offer all of the victim statements regarding defendant's criminal acts."

Defendant objected to the admission of hearsay, arguing that the notice was insufficiently particular. In response, the state described the hearsay as including videotaped interviews of the victims, but indicated that it had decided not to offer the tapes. The parties also discussed several statements that the victims had made to a counselor. The trial court overruled defendant's objection. The jury acquitted defendant of all counts involving one of the victims and of some counts involving the other. The jury could not reach verdicts on the remaining counts, and the court declared a mistrial. In 2010, the remaining counts were retried. The state relied on the same notice that it had provided before the first trial. Defendant raised the same objection. In response, the state clarified that it intended to offer the videotaped interview that it had not offered in the first trial. The trial court overruled the objection and the case proceeded to trial. The state presented the videotape and the testimony of several witnesses regarding hearsay statements that the victim had made. The jury convicted defendant on several counts, acquitted him on others, and could not reach verdicts on the remaining counts. *Held*: Reversed. [1] To comply with OEC 803(18a)(b), a notice "must convey that the proponent intends to offer the statements, and the notice must identify the particular statements that the proponent seeks to introduce." Specifically, the notice must identify "the substance of the statement sought to be introduced and identify the witness or the means by which the statement will be introduced." [2] The notice in this case is similar to the notices that were at issue in *State v. Chase*, 240 Or App 541 (2011) and *State v. Bradley*, 253 Or App 277 (2012). Those notices, like the one in this case, "did not identify any particular statements, nor did it specify the witnesses or the means by which the statements would be introduced." [3] Events from the first trial did not serve to augment the state's written notice, because even though the parties discussed some of the hearsay during the first trial the state offered some hearsay at the second trial that it did not offer at the first. Consequently, the state did not provide defendant with adequate notice. [4] Whether the erroneously admitted hearsay prejudiced defendant is determined with regard to the effect of the hearsay's admission, not with regard to the insufficiency of the notice. [5] Judging from the verdicts in the two trials, this "case was a close one." The state's case depended on the victim's credibility and the hearsay statements served to bolster that credibility. Given that, "we cannot conclude that there is little likelihood that their erroneous admission into evidence affected the verdict."

State v. Ferry, 255 Or App 625, 298 P3d 63 (2013). Defendant was charged with several sexual-abuse offenses relating to his daughters. At trial, the prosecutor asked to have each of the victims read aloud a letter she had written to the DA describing the impact the case had on her. For example, one letter stated: "This has been a difficult challenge for me to overcome. I had learn an

important lesson from this. I learn from one of my school official and detective of the Hillsboro Police Department. They both said, 'It not your fault and your some brave little girl.' Another things that my school official said, 'Keep your head up and don't let people put your head down.' I so grateful that I have important people believe my story." Each victim expressed that she wished only for an apology, not jail, and wished to regain her personal dignity. The prosecutor asserted that the evidence was admissible under OEC 803(18a)(b). Defendant objected, claiming the letters contained hearsay within hearsay from the officials, which he also asserted constituted improper vouching. The prosecutor countered that the officials' hearsay statements were not offered for its truth, but only for its effect on the victims, to rebut defendant's claim that relatives put the victims up to this. The trial court overruled defendant's objection and allowed the victims to read the letters. The jury found defendant guilty. On appeal, defendant argued that the letters were inadmissible because "OEC 803(18a)(b) does not cover statements made by anyone other than the victim of abuse." *Held*: Affirmed. Defendant's claim on appeal that the imbedded hearsay in the letters was not admissible under OEC 803(18a)(b) is not reviewable because it was not preserved. He did not challenge the state's "effect on the hearer" theory, but instead moved directly to a different objection.

State v. Bradley, 253 Or App 277, 290 P3d 827 (2012). Defendant was charged with committing sexual offenses against two child victims. The state notified defense counsel 27 days before trial that it intended to introduce one of the victims' out-of-court statements under OEC 803(18a)(b), and that the statements were contained in reports that the state had already provided to the defense in discovery; the state did not identify the particular statements that it intended to introduce. Before trial, defendant moved to exclude those statements, arguing that the state's notice was inadequate to satisfy the requirements of OEC 803(18a)(b) because the prosecutor did not specify which of the child's statements she intended to introduce. The trial court denied the motion, and a jury found him guilty. *Held*: Reversed and remanded for new trial on some counts; otherwise affirmed. [1] OEC 803(18a)(b) permits a party to introduce out-of-court statements by a victim of abuse only if the party notifies the adverse party of its intent to "offer the statement and the particulars of the statement" within 15 days before trial, except for good cause shown." [2] A statement of intent to introduce statements under that provision must "identify the particular statement being proffered. … Merely providing discovery of statements or furnishing a list of witnesses" does not suffice. "Rather, the rule requires at a minimum that the state identify the witness or the means by which the statement [will] be introduced and the substance of the victim's hearsay statements or how they would be offered." [3] Here, "the state's notice … did not identify the particular statements that the state intended to offer or how they would be offered. The notice requirement is not satisfied merely by providing copies of reports" and referencing those reports. [4] "The sole sanction for violations, as provided by the rule, is exclusion of the offered statements." [5] The error was not harmless with respect to the charges involving the child whose statements were admitted because the erroneously admitted statements "injected into the record the only evidence that defendant committed [one of the charged offenses], and it bolstered [the child victim's] credibility concerning the other charged offenses [involving that child]."

State v. Wood, 253 Or App 97, 289 P3d 348 (2012). Defendant molested a ten-year-old girl. Two years later, on the encouragement of a friend, the victim disclosed the abuse to her mother, who reported the abuse to the police. The victim was evaluated by CARES. She also engaged in a "pretext" call to defendant, wherein he admitted having inappropriate feelings toward her, and the night defendant allegedly touched her inappropriately. Prior to trial, the state filed a served a notice per OEC 803(18a)(b) of intent to rely on statements made by the victim to her mother, named CARES staff members, and a named detective, "as set forth in reports previously made available." At a bench trial, defense counsel objected to admission of the statements, claiming that the state's notice lacked sufficient "particulars" to satisfy OEC 803(18a)(b). The trial court overruled the objection, and found him guilty on one count of first-degree sexual abuse. *Held*: Reversed and remanded. [1] The state's notice was insufficient under OEC 803(18a)(b) because although the substance of the

hearsay statements was clear, it was not possible for the court to determine whether that was so because the referenced reports were not before the trial court when it made its ruling and were not part of the record on appeal. Because the extent and number of statements were not apparent in the record, the state failed to establish a basis for its argument that the notice contained sufficient particulars. [2] The victim's statements were not admissible under OEC 801(4)(a)(B) to rebut a charge of recent fabrication, because she made the statements after her alleged motive to fabricate arose. [3] The error was not harmless.

Evidence: hearsay—forfeiture by wrongdoing (OEC 804(3)(f), (g))

^ ***State v. Supanchick***, 245 Or App 651, 263 P3d 378 (2011), *rev allowed*, 352 Or 107 (2012). Defendant was charged with aggravated murder, first-degree burglary, and attempted coercion for breaking into the residence of his estranged wife in violation of a FAPA restraining order, holding her captive and trying to have her sign documents relinquishing custody of their child, and then killing her. Defendant shot her to death when the police broke into the residence in an attempt to save her. He admitted shooting the victim but contended that he did not intend to kill her. He was a veteran who was present at the Pentagon during the 9/11 attack (but did not see combat), and he presented expert evidence that he had PTSD in support of an EED defense. At trial, the state offered statements from the victim detailing his prior abuse and threats against her; the descriptions were contained in her petition for the RO and in handwritten notes found after the murder. Defendant asserted those statements were inadmissible hearsay under *Crawford*. The trial court overruled his objection and admitted the evidence under the "forfeiture by wrongdoing" exception of OEC 804(3)(g), finding by a preponderance of the evidence that he had killed the victim in order to silence her. The trial court also admitted derogatory statements defendant had made about the victim in emails he had sent her, and it excluded evidence proffered by defendant relating to whether the police used the "Reid technique" in interviewing defendant to elicit his admissions, and whether the officers should have used forcible entry, rather than hostage negotiations, in their efforts to save the victim. *Held*: Affirmed. [1] "The text [of OEC 804(3)(g)] contains no requirement that the wrongful conduct be for the sole or primary purpose of causing a witness to be unavailable. Rather, the conduct need only be 'intended' to cause that result." Moreover, *Giles v. California*, 554 US 353 (2008), does not require OEC 804(3)(g) to be construed "to require that the sole or primary purpose of his wrongful act was to make the victim unavailable to cooperate with authorities or to testify in proceedings against defendant. In addition, to the extent that defendant suggests that a defendant must somehow plan in advance his wrongful act with the intent to make the victim unavailable, we reject that contention as well." [2] The court concluded "that there is evidence in the record to support the trial court's finding that one of the purposes behind defendant's wrongful act was to prevent the victim from participating in proceedings against him." [3] "Given the centuries-long history of the doctrine of forfeiture by wrongdoing, we conclude that the exception is 'firmly rooted' and, accordingly, admission of the victim's statements pursuant to the exception does not violate defendant's Art. I, § 11, rights."

Note: Because the Court of Appeals affirmed admission of the victim's statements under OEC 804(3)(*g*), it did not address defendant's contention that the alternative provision in OEC 804(3)(*f*) is unconstitutional in light of *Giles*.

Evidence: cross-examination and redirect

^ ***State v. Everett***, 249 Or App 139, 274 P3d 297, *rev allowed*, 352 Or 377 (2012). Defendant attempted to run over Deputy Moss. Then, while in jail, he attempted to solicit Piatt, who was an enforcer for "the Outsiders" (an outlaw motorcycle gang) to murder Moss. But Piatt informed the police and testified before the grand jury, which indicted defendant for solicitation to commit aggravated murder of Moss, listing Piatt as a witness. Defendant then talked with another inmate who was about to be released, Van Alstine, and asked him to give information to the Outsiders about Piatt's ratting him off, hopefully tell Van Alstine that they would murder Piatt. But Van Alstine also

was an informer, and defendant was charged with solicitation to commit aggravated murder of Piatt, too. At trial, Piatt testified at trial, admitted he had engaged in illegal activities as "enforcer," but he invoked the Fifth and refused to answer a question on cross-examination whether he had ever killed anyone. Defendant moved to strike Piatt's testimony or for a mistrial, but the trial court denied those motions. Defendant was convicted of those charges. *Held*: Affirmed. [1] "Trial courts have broad discretion to control the presentation of evidence, including the discretion to strike the testimony of a witness who refuses to answer questions on cross-examination or to impose a less onerous sanction when appropriate. Our review of the trial court's denial of a mistrial is also for abuse of discretion because the trial court is in the best position to assess and to rectify the potential prejudice to the defendant." [2] "When a witness refuses to answer questions on cross-examination that are *necessary* to test the witness's direct testimony, the trial court has discretion to strike the witness's testimony because it undermines the trier of fact's ability to rely on the witness's direct testimony. Whether the court should strike the witness's testimony depends on whether the question directly relates to the subject matter of the witness's direct examination or relates to a collateral matter." [3] "Given the attenuated relevance of the proposed question and possible answer and defendant's otherwise unfettered ability to cross-examine Piatt, the trial court's exclusion of the question did not require it to strike all of Piatt's testimony."

Evidence: eyewitness identification

State v. Lawson / James, 352 Or 724, 291 P3d 673 (2012). In each of these two cases, the trial court relied on *Classen* to admit, over a defense objection, evidence of an eyewitness identification of the defendant as the perpetrator. In *Lawson*: At about 10 p.m., a man came into the campground at which an older husband and wife were camping and shot them both and stole their truck. The wife was seriously wounded but survived, and her husband died. After initially saying that she could not identify the shooter, the wife eventually identified defendant, who had been in their campsite earlier that day. Defendant moved to exclude the wife's identification of him, and the trial court, applying *Classen*, found that the circumstances of the wife's out-of-court identification of defendant—through throw-downs and line ups—to be unduly suggestive but nonetheless allowed her to testify at trial that defendant "absolutely" was the shooter. Defendant was convicted of aggravated murder, attempted aggravated murder, and first-degree robbery. The Court of Appeals affirmed. In *James*: Two thieves, described by witnesses as "a large Indian" and "a small Indian" wearing particular clothing, stole 40-oz. bottles of beer from a Safeway. When employees attempted to stop them outside the store, the two resisted, and the larger man punched the manager. The next day, an officer saw two men matching the thieves' description, stopped and interviewed them, and convinced them to participate in a show-up identification. They were transported to the Safeway in handcuffs in a patrol car, and the victims positively identified them. Defendant moved to exclude the identification, but the trial court found the out-of-court identification to be unduly suggestive but allowed the victims to testify that defendant was the robber. Defendant was convicted of second-degree robbery and other offenses. The Court of Appeals affirmed. *Held*: Judgment in *Lawson* reversed and remanded; judgment in *James* affirmed. [1] The court discussed the scientific research that has been published since *Classen*, and the rules of evidence that have been adopted since *Classen*, and concluded that "the process outlined in *Classen* does not accomplish its goal of ensuring that only sufficiently reliable identifications are admitted into evidence." The court then explained at length how the process prescribed by *Classen* can both be improved and be made consistent with the current evidence code. The court summarized its holding as follows:

> "To summarize: Under this revised test governing the admission of eyewitness testimony, when a criminal defendant files a pretrial motion to exclude eyewitness identification evidence, the state as the proponent of the eyewitness identification must establish all preliminary facts necessary to establish admissibility of the eyewitness evidence. *See* OEC 104; OEC 307. When an issue raised in a

pretrial challenge to eyewitness identification evidence specifically implicates OEC 602 or OEC 701, those preliminary facts must include, at minimum, proof under OEC 602 that the proffered eyewitness has personal knowledge of the matters to which the witness will testify, and proof under OEC 701 that any identification is both rationally based on the witness's first-hand perceptions and helpful to the trier of fact.

"If the state satisfies its burden that eyewitness evidence is not barred by OEC 402, the burden shifts to the defendant to establish under OEC 403 that, although the eyewitness evidence is otherwise admissible, the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence. If the trial court concludes that the defendant opposing the evidence has succeeded in making that showing, the trial court can either exclude the identification, or fashion an appropriate intermediate remedy short of exclusion to cure the unfair prejudice or other dangers attending the use of that evidence. The decision whether to admit, exclude, or fashion an appropriate intermediate remedy short of exclusion is committed to the sound exercise of the trial court's discretion. *See State v.Cunningham*, 337 Or 528, 536, 99 P3d 271 (2004) (question whether relevant evidence should be excluded under OEC 403 because its probative value is substantially outweighed by the danger of unfair prejudice or other factors is reserved to the trial court's discretion).

"Although we have revised the *Classen* test to incorporate pertinent rules of evidence, we anticipate that the trial courts will continue to admit most eyewitness identifications. That is so because, although possible, it is doubtful that issues concerning one or more of the estimator variables that we have identified will, without more, be enough to support an inference of unreliability sufficient to justify the exclusion of the eyewitness identification. In that regard, we anticipate that when the facts of a case reveal only issues regarding estimator variables—*i.e.*, factors such as characteristics of the witness, the alleged perpetrator, and the environmental conditions of the event that cannot be manipulated—defendants will not seek a pretrial ruling on the admission of the eyewitness identification. Instead, defendants will likely prefer to probe the issues regarding estimator variables through cross-examination, and to educate the factfinder about the potential effects of relevant estimator variables on the accuracy of eyewitness identification by using expert testimony and case-specific jury instructions.

"If the state's administration of one or more of the system variables (either alone or combined with estimator variables) results in suggestive police procedures, that fact can, in turn, give rise to an inference of unreliability that is sufficient to undermine the perceived accuracy and truthfulness of an eyewitness identification—only then may a trial court exclude the eyewitness identification under OEC 403.

"In the end, we intend the test to be a flexible one that will enable the state to hold offenders accountable and, at the same time, protect a criminal defendant's right to a fair trial."

Lawson: [2] Applying the new test to the facts in *Lawson*, the court concluded that the record "raises serious concerns regarding the reliability of the identification evidence proffered" at trial. The court noted that the wife "was under tremendous stress and in poor physical condition when she first observed the man who entered her trailer after she had been shot," her opportunities to see the shooter

were impaired and "she viewed the perpetrator for only a few seconds at most," and her in-court identification of defendant took place over two years after" the crime. The court also noted that the manner in which the wife made the out-of-court identification of defendant was suggestive and hence flawed. The court noted that the changes in the wife's "statements over time are indicative of a memory alter3ed by suggestion and confirming feedback." The court concluded that "the preceding circumstances raise serious questions concerning the reliability of the identification evidence admitted at defendant's trial." [3] On that basis, "we reverse and remand the case to the trial court for a new trial. Due to the novelty and complexity of the procedures we have articulated today, the parties must be permitted on retrial to (1) supplement the record with any additional evidence that may bear on the reliability of the eyewitness identifications at issue here, and (2) present arguments regarding the appropriate application of the new procedures set out in this opinion."

James: [4] Although the show-up procedure the officers used was unduly suggestive, other evidence in the record supported the trial court's finding that "the suggestive show up confrontation did not cause or contribute to the witnesses' identification of" defendant: "The trial court found that the witnesses 'got a very good look' at the perpetrators and described their unique features with particularity. The trial court also found that the witnesses had observed and described the clothing that defendant and his companion were wearing (one item of which was unusual for that location at that time of year) and a specific bottle of beer that was found in defendant's possession along with other items that defendant admitted belonged to him. The witnesses' accuracy in describing those details demonstrated the reliability of their observations." [5] Moreover, "we think that the concerns of unfair prejudice were negligible. The descriptions of defendant and his companion so closely matched the two men apprehended by police, that the witnesses' subsequent identifications of defendant as one of the men that they had seen in the store prejudiced defendant little, if at all."

State v. Collins, 256 Or App 332, 300 P3d 238 (2013). In the evening of March 9, 1999, when it was dark, the victims (adult woman driving and two 12-year-old girls in the back seat) were driving on I-205 in the middle lane when a Nissan pulled alongside in the left lane. The Nissan slowed, circled behind the victims' car, and then came up along the passenger side. The dome light was on in the Nissan, and the victims saw that the driver had exposed himself and was masturbating. They called 911, and they were interviewed that evening by a police officer and provided a description of the driver. The Nissan was traced to defendant, the registered owner, and he also was interviewed that evening. He admitted it was his car and that he was driving on I-205 that day, he denied the accusation, and consented to being photographed, noting "Of course, she'll recognize me. I was there." Two weeks later, the victims were shown a six-picture throw-down, and each identified defendant as the flasher. Defendant was charged with public indecency, ORS 163.465. He failed to appear and left the state, and an 11-year gap then ensued. At a pretrial hearing in 2010, defendant moved to suppress the victims' identifications of him. The state proceeded with the identifications only by the two girls, and the trial court denied the motion, applying the standard in *State v. Classen*, 285 Or 221 (1979). Defendant entered a conditional guilty plea. *Held*: Affirmed. Applying the new *Lawson/James* test, the trial court correctly denied defendant's motion to exclude the victims' identification. [1] Although "the trial court improperly considered the level of certainty with which each victim made her identification, … no reasonable decisionmaker could have found that the victims lacked the personal knowledge necessary to identify the driver." [2] "As the proponent of the evidence under OEC 701, the state was required to prove that it was more likely that the victims' identifications were based on their original perceptions than on the allegedly suggestive photographic lineup. The trial court found that the physical features of the non-suspects approximated those of defendant and, hence, determined that the composition of the lineup was not unduly suggestive. We conclude that any differences between defendant and the non-suspects as to facial hair, apparent skin tone, hair length, and apparent stature were not so distinguishing as to single out defendant. Facial hair was not a salient characteristic included in the victims' initial descriptions of the driver." [3] Other facts support the conclusion that the victims' out-of-court identification were based on their original observations: "the victims' consistent descriptions of the driver, the OSP procedures utilized

to mitigate suggestiveness, and defendant's inculpating statements all indicate the reliability of the victims' observations." [4] Despite the 11-year delay, the trial court properly concluded that the victims' in-court identifications of defendant were admissible. [5] The Court of Appeals declined to review defendant's belated challenge to the admissibility of each victims' "self-appraisal of her certainty" of her identification: "In his motion *in limine* and at the pretrial hearing, defendant sought to exclude the out-of-court identification evidence as a whole, rather than raising specific arguments regarding the admissibility of the different forms of that evidence. When a party objects to evidence as a whole and the trial court rules that the evidence is admissible, the reviewing court will affirm the trial court's ruling when any part of the evidence is admissible."

State v. Hickman, 255 Or App 688, 298 P3d 619 (2013). Defendant was charged with murder for shooting the victim at a house party on New Year's Eve. Shortly before midnight, two young white women were in a car parked outside of the house noticed that a large group of African-American men had gathered in the front yard and that some of the men were in a fight. The women heard gunshots and saw the shooter standing in the street holding a gun. He was 12 to 25 feet away from the women when they saw him fire three more shots into the air. As the women's car started to drive away, the shooter ran up to car and tried unsuccessfully to get in. The police stopped the car a few blocks away and questioned the occupants. The two women were unable to provide detailed descriptions of the shooter; the police never asked the two women to try to identify the shooter. During trial, which occurred 23 months later, the prosecutor asked each witness whether she saw the shooter in the courtroom. Defense counsel objected to both identifications, arguing that the in-court identifications were the result of a suggestive procedure and that they were therefore unreliable, unconstitutional, and unfairly prejudicial. The trial court overruled the objections. The court agreed that the in-court procedure was suggestive, but decided that the resulting identifications were not so unreliable as to be unconstitutional. Both women identified defendant as the murderer. Defendant was found guilty. *Held:* Reversed and remanded for a new trial. [1] Under *State v. Lawson/James*, 352 Or 724 (2012) (decided while this case was on appeal), courts are to determine the admissibility of eyewitness identifications using the applicable provisions of the Oregon Evidence Code. [2] "Initially, the proponent of the evidence has the burden of establishing that the identification is relevant, OEC 401; OEC 402, and, although eyewitness identifications are almost always relevant, the proponent nonetheless has to establish by a preponderance of the evidence that the identification derives from what the witness actually saw, OEC 602, and not from unduly suggestive procedures, OEC 701. ... Once the proponent establishes relevance, the burden shifts to the opponent, who can succeed in having the evidence excluded only by establishing, under OEC 403, that its probative value is substantially outweighed by the danger of unfair prejudice." [3] Here, the in-court procedure was suggestive because it involved "suggestive questioning" and defendant was the only non-lawyer sitting at the defense table. [4] Other factors also detracted from the reliability of the identifications: Both witnesses were under stress when they saw the shooter. They saw him only quickly and at night. The witnesses are white and defendant is African-American—and witnesses are significantly better at identifying members of their own race than those of other races. "Most significantly," the identifications took place two years after the crime and memory decays over time. Immediately after the murder, neither witness was able to provide the police with many details about the shooter. [5] "In light of those concerns, we conclude that a new hearing on the admissibility of the challenged eyewitness identification is required, based on the considerations prescribed in *Lawson/James*" (quoting from *State v. Wesley*, 254 Or App 697, 716 (2013)).

Note: In a footnote, the court added: "We recognize that in-court identifications are a staple of criminal trials, and we do not hold or even imply that they are *per se* unreliable. This case deals with one particular trial and the unusual situation in which, among other things, there was a significant time lapse, an inability to provide particular contemporaneous descriptions or details, and no intermediate, non-suggestive out-of-court identification."

State v. Wesley, 254 Or App 697, 295 P3d 1147 (2013). Defendant was convicted of murder

and attempted murder, among other crimes, for a drug-related drive-by shooting. Defendant was in a car with another man, Smith, at the time of the shooting. Smith shot at one person, Anderson, but missed, instead striking and killing Anderson's girlfriend. Police showed Anderson a photograph of defendant and asked if he could identify him; Anderson said that he did not recognize the person in the photograph. But he eventually testified that he lied, and did indeed recognize defendant as one of the two men in the car at the time of the shooting—he claimed that he did had lied because he intended to seek his own revenge. Smith confessed to the shooting, and entered a plea bargain; he testified that both he and defendant had been armed, and both men had shot at the fleeing Anderson. Defendant moved to exclude Anderson's identification of him, because it resulted from an unduly suggestive procedure. The trial court denied the motion, reasoning that, although the police procedure in showing Anderson defendant's single photograph was indeed suggestive, Anderson did not identify defendant after looking at the photograph. The jury found defendant guilty. *Held*: "The identification in this case is problematic under *Lawson/James* for several reasons," and "a new hearing on the admissibility of the challenged eyewitness identification is required, based on the considerations prescribed in *Lawson/James*."

Evidence: "vouching" evidence, comments on credibility

State v. Preuitt, 255 Or App 215, 296 P3d 648 (2013). Defendant was charged with several sexual crimes arising from his sexual abuse of his two step-granddaughters. At trial, the state presented testimony from Richards, a contract therapist at Kids First, who had provided therapy for K, one of the victims, and had diagnosed her with PTSD as a result of the abuse. Richards described her therapy sessions with K during which K claimed that defendant sexually abused her and described the abuse. In relating that information, Richards testified that she had no "concerns" and saw no "red flags" indicating that K's claim was a "story that she had adopted from somewhere else," and that there was nothing about K that "made her seem particularly suggestible." The trial court sustained defendant's objection to some of Richards's testimony, but defendant did not move to strike. The jury found defendant guilty. *Held*: Reversed and remanded in part; otherwise affirmed. [1] Under *State v. Lupoli*, 348 Or 346, 357 (2010), "Richards's testimony constituted impermissible vouching. In contrast to the types of testimony that the court in *Lupoli* indicated might be admissible in other circumstances, Richards did not merely describe her observations of K's demeanor or physical characteristics, nor did she merely give general information regarding circumstances that indicate that a child is or is not suggestible. In other words, the information was not merely of the type that would assist the jury in reaching *its own* conclusions regarding the truthfulness of K's testimony. Instead, Richards testified regarding *her own conclusions* regarding K's veracity—that there was nothing about K that made her seem suggestible and that there were no 'red flags' indicating that K was adopting her story from another source. Those statements, amounted to testimony from Richards that K was credible." [2] The fact that Richards provided an admissible PTSD diagnosis does not change the outcome. As in *Lupoli*, "a comment on the credibility of a witness does not become admissible merely because it is offered as part of a discussion of a medical diagnosis." [3] The admission of Richards's comments was not harmless and requires reversal of the convictions based on crimes against K.

Evidence: witness competency

State v. Sarich, 352 Or 600, 291 P3d 647 (2012). Defendant's 19-year-old son, Z, is autistic and has developmental disabilities. The victim, who was Z's caregiver, disappeared in January 2007 and his abandoned car was found in a parking lot. Nine months later, his skeletal remains, with a gunshot wound in the skull, were found in a remote forested location at the end of an unpaved spur road. Defendant was involved in fraudulent financial activities in which she had used the victim's name, and so she became a suspect in his murder. She told investigators that the victim did not show up for work the day he disappeared and so she took Z on errands with her the whole day. The police

also interviewed Z, and he indicated by statements and by drawings that he knew about the circumstances of the victim's murder, that he had been at the scene, and that he knew where the victim's body had been left. Investigators recorded a video of a trip they took with Z in a vehicle, generally following Z's directions to where the victim's body had been found. Defendant was charged with aggravated murder, and she sought a hearing to determine whether Z was competent to testify at trial. The trial court conducted a hearing, during which Z was able to identify, mostly by "yes" or "no" answers, tangible objects held in front of him. But the trial court's questioning revealed that Z would not be able to answer questions involving intangible actions, past events, persons and objects not present at trial, distances, times, dates, and locations, all of which could and likely would require some degree of comprehension of abstract concepts. The trial court ruled that Z was not competent to testify. The state then filed a motion asking the trial court to hold that the video of Z, and the statements and drawings by Z, were admissible as non-hearsay. The trial court excluded the video, drawings, and statements, holding (in part) that their admission would violate OEC 403 because they were unfairly prejudicial to defendant and would confuse the issues and mislead the jury. The state then appealed the trial court's orders to the Supreme Court under ORS 138.060(2). *Held*: Affirmed. [1] "Whether a person is competent to be a witness is a preliminary question for the trial court to decide under OEC 104." [2] "We conclude that our review involves a two-step process. First, we determine whether the trial court applied the correct legal standard for determining competency. Second, if the trial court applied the correct standard, we review the record to determine whether the trial court abused its discretion in determining competency." [3] "The proper inquiry is not whether the person is able to perceive and communicate in *any* capacity, but rather whether the person has sufficient ability to perceive, recollect and communicate *so it is worthwhile for the person to testify*. OEC 601 does not require that a person be able to communicate in any particular form, manner, or language, but it does require witnesses to be able to make known their perceptions to others in *some* manner." [4] The accommodations that the state contended were necessary for Z to communicate would effectively prevent the attorneys from obtaining any useful information regarding many of Z's perceptions relevant to the case: "We conclude that the OEC 601 legal standard permitted the trial court some latitude to tailor the competency inquiry to the anticipated circumstances of the trial. On the facts of this case, the trial court did not err in the questions it posed to Z, or in basing its competency determination on Z's inability to respond coherently to the kind of questions that would be relevant to the issues in this case. Although it was apparent … that Z had some ability to perceive, Z's ability to communicate his perceptions to others was severely limited. … Z's inability to respond to those sorts of questions supported the trial court's determination that Z would be incapable of testifying in a way that would be useful at trial."

Evidence: demonstrative evidence

State v. Fivecoats, 251 Or App 761, 284 P3d 1225 (2012). Someone stole a firearm out of the victim's van when he made a delivery at a bar. In a photo throw-down, the victim identified defendant as being near the van when he had gone inside, and a surveillance video showed a man who looked like defendant walking up to the van and stealing the firearm. The man in the video had an odd gait. Defendant was charged with first-degree theft, felon in possession of a firearm, and unlawful entry into a motor vehicle. At trial, the state presented the video, and two officers who knew defendant testified as to his odd gait. Although defendant elected not to testify at trial, he asked to show the jury how he walked, because he claimed it was different from the man in the video. The trial court denied defendant's request, concluding that it would be testimonial in nature. The jury found defendant guilty. *Held*: Reversed and remanded. [1] "Testimonial evidence is evidence that communicates by words or conduct an individual's beliefs, knowledge, or state of mind. In contrast, evidence of physical characteristics such as identity, appearance, and physical conditions are not testimonial. Because walking is physical evidence concerning a person's appearance or physical condition and does not communicate beliefs, knowledge, or state of mind, we conclude that it is not testimonial. Thus, it was error for the trial court to rule that demonstrating his walk would have been

testimonial so as to waive his right against self-incrimination." [2] "It is conceivable that defendant's walk was so distinctive and so distinctively different from the walk on the brief video that a juror could be persuaded that defendant was not that man."

Evidence: offer of proof

State v. Fivecoats, 251 Or App 761, 284 P3d 1225 (2012). Someone stole a firearm out of the victim's van when he made a delivery at a bar. In a photo throw-down, the victim identified defendant as being near the van when he had gone inside, and a surveillance video showed a man who looked like defendant walking up to the van and stealing the firearm. The man in the video had an odd gait. Defendant was charged with first-degree theft, felon in possession of a firearm, and unlawful entry into a motor vehicle. At trial, the state presented the video, and two officers who knew defendant testified as to his odd gait. Although defendant elected not to testify at trial, he asked to show the jury how he walked, because he claimed it was different from the man in the video. The trial court denied defendant's request, concluding that it would be testimonial in nature. The jury found defendant guilty. *Held*: Reversed and remanded. [1] The claim of error is preserved for appeal even though defendant did not make an offer of proof because "the substance of the evidence … was apparent from the context." OEC 103(1)(b). "When defendant made his request [he] intended to demonstrate that his walk, although not a normal gait, was different from the gait of the man in the surveillance video. Whether his walk did or did not resemble the one in the video would be a question for the jury, not a judgment for the court in the exercise of its determination of admissibility." [2] Trial court erred when it precluded defendant from demonstrating to the jurors his gait.

Note: The Supreme Court has imposed a strict requirement that the defendant must make an offer of proof to preserve the claim if the trial court excludes evidence he has proffered; such an offer is necessary both to frame the issue for appeal and to demonstrate prejudice. *See, e.g., State v. Bowen*, 340 Or 487, 501 (2006). In this case, the Court of Appeals excused defendant's failure to make a formal offer and merely assumed that he would have presented evidence similar to the representation and that the excluded evidence, had it been presented, actually would have been exculpatory.

State v. Colon, 251 Or App 714, 284 P3d 589 (2012). Defendant was charged with fourth-degree assault for throwing a large cooking spoon at her 17-year-old daughter, striking her in the face. At a bench trial, her defense was that she had not thrown the spoon; rather, it slipped out of her hand while she was gesturing at her daughter. In the defense case-in-chief, defendant called the complainant's cousin, Torres, who testified that he had known the complainant for her entire life, they "used to hang out a lot," and spent a lot of time at her house. Counsel asked Torres whether he had ever heard complainant say that she hated defendant, to which Torres answered that he had heard her say that "plenty of times" and that his cousin was a "drama queen. That's what she does." The state objected and moved to strike those answers as non-responsive; the trial court sustained the objection and struck the answers. Defendant then asked Torres whether the complainant was "prone to over-exaggeration"; the state objected, and the trial court sustained the objection, explaining that defendant failed to lay the necessary "foundation for character," which requires counsel to ask "very specific questions." Defendant was convicted and appealed, arguing that the trial court erred by not allowing Torres to testify. The state argued that defendant failed to preserve her arguments for appellate review because she failed to make an offer of proof of what Torres would have said, and because she failed to argue that the trial court had applied the wrong standard for foundation. *Held*: Reversed and remanded. [1] Although defendant did not make an offer of proof, "the substance of Torres's testimony regarding the complainant's tendency to 'over-exaggerate' was apparent from the context"—specifically, his statements that the complainant was a "drama queen" who had many times said she hated her mother—and thus sufficiently preserved for appellate review. [2] Defendant preserved her argument that the trial court applied the wrong standard for foundation by telling the court "that she believed she had laid the necessary foundation. … Under those circumstances, both

the state and the court were aware of defendant's position and the trial court had a chance to consider the issue. Therefore, defendant's argument was properly preserved." [3] Torres's opinion concerning the complainant's tendency to exaggerate was admissible evidence. [4] The error was not harmless.

Evidence: confrontation issues

State v. Copeland, 353 Or __, __ P3d __ (July 25, 2013). Defendant's wife obtained a restraining order that prohibited him from coming within 150 feet of her home or place of business. The next day, a deputy filed a certified proof of service, pursuant to ORS 107.718(8)(d) and 107.720(1)(a), attesting that he had personally served defendant with the order. Several weeks later, defendant was found within 150 feet of his wife's place of business, and he was arrested and charged with punitive contempt. At the hearing, the state offered the deputy's certificate of service, defendant objected on the ground that admission of the certificate would violate his right of confrontation under Art. I, § 11, and the Sixth Amendment. The trial court overruled his objection, and he eventually was found in contempt. Defendant appealed, challenging admission of the certificate of service, and the Court of Appeals affirmed, 247 Or App 362 (2011). *Held*: Affirmed The admission of the certificate of service did not violate defendant's confrontation rights. [1] The certificate was an official record that was admissible hearsay under OEC 803(8). [2] "Given that historical context, we conclude that the framers of the Oregon Constitution likely were influenced to adopt the Article I, section 11, confrontation requirement (a) to prevent the government from using *ex parte* examinations of suspects and witnesses; and (b) to limit and condition the use of prior testimony in lieu of live witness testimony at trial." [3] At the time Art. I, § 11, "was adopted, the framers of the Oregon Constitution would have understood that the admission of qualifying official records prepared pursuant to an administrative duty generally would not violate the confrontation right of a person accused of a crime. … Records made by a public officer in the performance of an official administrative duty are primary evidence of the facts stated in them. Although official records may contain hearsay declarations, such declarations are not 'witness' statements that offend a defendant's confrontation right if they are confined to matters that the officer is bound by administrative duty to report and do not include investigative or gratuitous facts or opinions." [4] In this case, the deputy issued the certificate pursuant to his official duties, "and it did not contain any investigative or gratuitous facts or opinions. Accordingly, the certificate did not contain the statement of a witness so as to trigger defendant's confrontation right under Article I, section 11, and it was not necessary to establish that the declarant was unavailable as a condition of its admission." [5] The certificate was not "testimonial" evidence under the Sixth Amendment, because the primary purpose the certificate was created was to serve the administrative functions of the court system. "Because the Court has not held, nor otherwise indicated, that a document primarily created for an administrative purpose could be rendered testimonial merely by the possibility that it might be used in a later criminal prosecution, we likewise refrain from doing so in this case."

Note: The court cautioned: "We do not hold that every document that falls within the official-records hearsay exception, OEC 803(8), necessarily is admissible in the face of a confrontation objection. Instead, we hold only that the official record in this case did not contain a witness statement that implicated defendant's confrontation right because the declaration within it was confined to an administrative matter that the deputy sheriff was bound by an official duty to report, and the record did not include investigative or gratuitous facts or opinions."

State v. Kinslow, 257 Or App 295, __ P3d __ (2013). The police executed a search warrant at defendant's home and found drugs, packaging materials, drug paraphernalia, and drug records. She was charged with various drug offenses, and she moved to exclude a crime laboratory report on confrontation grounds. The trial court admitted the evidence over defendant's objection, because she had failed to file a written objection to the report at least 15 days before trial, as required by ORS 475.235. The jury found defendant guilty. *Held:* [1] ORS 475.235, which requires defendants to file a written objection to crime laboratory reports 15 days before trial to preserve an objection, "is

precisely the type of notice-and-demand statute of which the Court explicitly approved" in *Melendez-Diaz v. Massachusetts*, 557 US 305 (2009), and hence it did not violate the defendant's Sixth Amendment right to confrontation. [2] ORS 475.235 prescribes a "constitutionally permissible process for determining whether the defendant intends to object" and thus does not violate the Art. I, § 11. *Distinguishing State v. Birchfield*, 342 Or 624 (2007).

State v. Pollock, 251 Or App 755, 284 P3d 1222 (2012), *rev den*, 353 Or 280 (2013). While riding in the back seat of the family car, the three-year-old victim told her mother that defendant had her perform oral sex on him "every day" while he was babysitting her. The victim was interviewed at the Kids FIRST Center, where she repeated the accusations, and the interview was recorded on a DVD. Defendant was charged with multiple counts of first-degree sodomy. At trial, the victim (then five years old) testified that she remembered the statements she made on the DVD and that they were true. But the prosecutor did not specifically question her about the abuse. On cross-examination, defense counsel briefly questioned the victim, and she confirmed that she remembered making the statements on the DVD and remembered talking to her mother about the abuse. The victim's mother also testified concerning the victim's original report to her. The victim remained available to testify and the state offered the DVD into evidence. On appeal, defendant argued that the statements the victim made on the DVD and to her mother were testimonial, and that his confrontation rights were violated because he did not have an adequate opportunity to cross-examine the victim about her statements. *Held*: Affirmed. [1] The victim's statements to Kids FIRST, as recorded on the DVD, were testimonial, but she adopted them in her in-court testimony and defendant had an adequate opportunity to question her about them. [2] Defendant's confrontation rights were not violated when the victim's out-of-court statements were admitted because she testified subject to cross-examination: "Although…the state's decision not to question the victim in detail about the statements on the DVD placed on defendant the burden to weigh the advantages and disadvantages of cross-examining the victim specifically about her statements, … the state's tactical decision did not limit defendant's right to confrontation in this case. The choice whether and to what extent to cross-examine a witness always requires a weighing of benefits and risks. But where, as here, the victim has taken the witness stand and is available for cross-examination, the Confrontation Clause is not implicated." [3] The victim's spontaneous statements to her mother were not testimonial: no law-enforcement agent was present, and her statements were only casual remarks to a family member.

^ ***State v. Everett***, 249 Or App 139, 274 P3d 297, *rev allowed*, 352 Or 377 (2012). Defendant attempted to run over Deputy Moss. Then, while in jail, he attempted to solicit Piatt, who was an enforcer for "the Outsiders" (an outlaw motorcycle gang) to murder Moss. But Piatt informed the police and testified before the grand jury, which indicted defendant for solicitation to commit aggravated murder of Moss, listing Piatt as a witness. Defendant then talked with another inmate who was about to be released, Van Alstine, and asked him to give information to the Outsiders about Piatt's ratting him off, hopefully tell Van Alstine that they would murder Piatt. But Van Alstine also was an informer, and defendant was charged with solicitation to commit aggravated murder of Piatt, too. At trial, Piatt testified at trial, admitted he had engaged in illegal activities as "enforcer," but he invoked the Fifth and refused to answer a question on cross-examination whether he had ever killed anyone. Defendant moved to strike Piatt's testimony or for a mistrial, but the trial court denied those motions. Defendant was convicted of those charges. *Held*: Affirmed. [1] "When a witness refuses to answer questions on cross-examination that are *necessary* to test the witness's direct testimony, the trial court has discretion to strike the witness's testimony because it undermines the trier of fact's ability to rely on the witness's direct testimony. Whether the court should strike the witness's testimony depends on whether the question directly relates to the subject matter of the witness's direct examination or relates to a collateral matter." [2] "Given the attenuated relevance of the proposed question and possible answer and defendant's otherwise unfettered ability to cross-examine Piatt, the trial court's exclusion of the question did not require it to strike all of Piatt's testimony."
[3] Defendant was not entitled under *Crawford v. Washington* to have Piatt's testimony stricken

based on his refusal to answer the question: "Piatt's trial testimony was not an out-of-court statement, so *Crawford* does not apply to it [and] Piatt was available for cross-examination and was, in fact, cross-examined about his direct testimony."

EX POST FACTO

See "Sentencing: constitutional issues—*ex post facto*," *below*.

FAILURE TO APPEAR

State v. Mather, 256 Or App 230, 300 P3d 221 (2013). Defendant was charged with PCS, he failed to appear, a warrant was issued, and he later appeared. The judge that he could either be taken into custody by deputy sheriffs or "walk over to pretrial services" at the Lane County Jail. Defendant took the latter option and entered into two release agreements. He then later failed to appear at separate court appearances required by the release agreements, and he was charged with two counts of first-degree failure to appear, ORS 162.205. At trial, the state offered detailed testimony from two release officers at the pretrial-services offices, who explained the pretrial-release process and that the only alternative to pretrial release is to take the defendant "into full physical custody and brought into the jail." Defendant moved for judgments of acquittal relying on *State v. Ford*, 207 Or App 407 (2006). He argued the evidence was insufficient to support findings that he either was released from actual custody of a peace officer or in the constructive custody of a correctional facility. The trial court denied the motion, and defendant was convicted by a jury. *Held*: Affirmed. [1] Because ORS 162.135(2) defines "correctional facility" to mean "any place used for the confinement of persons charged with or convicted of a crime or otherwise confined under a court order," that means "the statute provides a more expansive definition of a 'correctional facility' that, under certain circumstances, encompasses facilities beyond the common conceptions of that term. It includes, for example, a jail, but also, as in this case, *any* place used for the confinement of persons pursuant to a court order." [2] Because defendant was subject to a court order that required him to go to pretrial services in lieu of being arrested and taken to the jail, he was effectively being "confined" at pretrial services pursuant to court order, because he "had no lawful choice but to go there." [3] "It follows that the pretrial services office was a 'correctional facility' for purposes of the statute defining first-degree failure to appear. Accordingly, there is sufficient evidence that defendant was released from a 'correctional facility' when he was released from pretrial services under a release agreement."

FAILURE TO REGISTER AS SEX OFFENDER

See "Sexual Offenses," *below*.

FORMER JEOPARDY

Evans v. Michigan, 568 US __, 133 S Ct 1069 (2013). Defendant was prosecuted in state court for arson for burning down an unoccupied house. At the close of the state's case, he moved for a judgment of acquittal on the ground that the state law required the state to prove affirmatively that it "was not a dwelling house" and that the evidence did not prove that. The trial court agreed and granted an acquittal. The state appealed, and the court of appeals reversed and remanded for a new trial, concluding that that actually was not an element of the offense. The Michigan Supreme Court affirmed, ruling that the Double Jeopardy Clause did not bar retrial: "when a trial court grants a defendant's motion for a directed verdict on the basis of an error of law that did not resolve any factual element of the charged offense, the trial court's ruling does not constitute an acquittal for the purposes of double jeopardy and retrial is therefore not barred." *Held*: Reversed. The Double Jeopardy Clause bars retrial. [1] "The Double Jeopardy Clause bars retrial following a court-decreed

acquittal, even if the acquittal is based upon an egregiously erroneous foundation. A mistaken acquittal is an acquittal nonetheless, and we have long held that a verdict of acquittal could not be reviewed, on error or otherwise, without putting a defendant twice in jeopardy, and thereby violating the Constitution." [2] "Here, it is plain that the trial court evaluated the State's evidence and determined that it was legally insufficient to sustain a conviction. The trial court granted [defendant's] motion under a rule that requires the court to direct a verdict of acquittal on any charged offense as to which the evidence is insufficient to support conviction. And the court's oral ruling leaves no doubt that it made its determination on the basis of the testimony that the State had presented. This ruling was not a dismissal on a procedural ground unrelated to factual guilt or innocence, … but rather a determination that the State had failed to prove its case. Under our precedents, then, [defendant] was acquitted." [3] The acquittal was binding even though it was based on the defendant's motion and trial court's erroneous interpretation of state law: "The trial court's judgment of acquittal resolved the question of [defendant's] guilt or innocence as a matter of the sufficiency of the evidence, not on unrelated procedural grounds. That judgment, however erroneous it was, precludes reprosecution on this charge, and so should have barred the State's appeal as well."

Note: The state and the US Attorney General argued that this result is unfair because it gives a defendant a "windfall" given that the erroneous midtrial ruling is essentially unreviewable. The Court rejected that argument: "Nothing obligates a jurisdiction to afford its trial courts the power to grant a midtrial acquittal, and at least two States disallow the practice. Many jurisdictions, including the federal system, allow or encourage their courts to defer consideration of a motion to acquit until after the jury returns a verdict, which mitigates double jeopardy concerns. And for cases such as this, in which a trial court's interpretation of the relevant criminal statute is likely to prove dispositive, we see no reason why jurisdictions could not provide for mandatory continuances or expedited interlocutory appeals if they wished to prevent misguided acquittals from being entered. But having chosen to vest its courts with the power to grant midtrial acquittals, the State must bear the corresponding risk that some acquittals will be granted in error." In a footnote to that passage, the Court further observed: "If a court grants a motion to acquit after the jury has convicted, there is no double jeopardy barrier to an appeal by the government from the court's acquittal, because reversal would result in reinstatement of the jury verdict of guilt, not a new trial." In Oregon, of course, there is no provision for a post-verdict motion for judgment of acquittal.

^ ***State v. Campbell***, 247 Or App 353, 271 P3d 154 (2011) (*aff'd without op*), *rev allowed*, 351 Or 678 (2012). Defendant was charged PCS, reckless driving, and DUII; each count alleged he committed the crime "on or about December 8, 2003." Pursuant to a plea agreement, he pleaded guilty to the reckless driving (RD) and DUII and was placed on probation; the PCS charge was dismissed. The petition provided that defendant waived his speedy-trial rights and the statute of limitation and agreed that the PCS charge "may be refiled if the defendant's probation on counts 3 and 4 is revoked." Later, the court revoked defendant's probation, and the state then re-indicted defendant on the PCS charge. Defendant moved to dismiss, arguing that the prosecution is barred by the statutory and constitutional former-jeopardy provisions—ORS 131.515 and Art. I, § 12—because he committed the PCS offense as part of the same criminal episode as the DUII and RD offenses and that he had not waived that defense. The trial court denied the motion, ruling that the PCS was not part of the same criminal episode as the DUII and RD offenses. The Court of Appeals affirmed without opinion. On review, the issue before the Supreme Court is whether prosecution of the PCS offense is barred.

GUILTY PLEAS

United States v. Davila, 569 US __, 133 S Ct 2139 (2013). Defendant was charged in federal court by a 34-count indictment with various fraud offenses based on his filing of 120 falsified tax returns and his unlawful receipt of $423,000 as a result. Upset that his court-appointed lawyer advised him that he had no defense and should negotiate a deal, he asked for appointment of a new

lawyer. The magistrate judge met *ex parte* with defendant and his counsel in a recorded conference. While addressing defendant's request for substitute counsel, the magistrate judge explained to him his exposure under the sentencing guidelines and strongly suggested that he follow his counsel's advice. Defendant then filed some pretrial motions, which were litigated and denied. Several months later, he pleaded guilty before a different judge to a single count in return for dismissal of all the others; he affirmed on the record that his plea was knowing and voluntary. Before sentencing, he moved to withdraw his plea, which he claimed he had entered as a "strategic" maneuver to force the government's hand on what he contended were defects in the indictment. The district court denied his motion and imposed a 115-month sentence. On appeal, his counsel filed an *Anders* brief that did not identify any potential error. On "independent review," the Eleventh Circuit pointed out that the magistrate judge may have violated Fed. R. Crim. Proc. 11(c)(1), which precludes a federal judge from participating in plea discussions. After briefing and argument, in which the government acknowledged the violation but argued the error was harmless, the Eleventh Circuit held that a violation of Rule 11(c)(1) required "automatic vacatur" of defendant's plea. *Held*: Reversed and remanded. The Eleventh Circuit erred by ruling that the Rule 11(c)(1) violation automatically requires vacation of the plea. [1] The magistrate judge violated Rule 11(c)(1) by suggesting to defendant that he consider making a plea deal. [2] Under Rules 11(h) and 52(a), a "variance" in the plea process "is harmless error if it does not affect substantial rights." Consequently, "a defendant who seeks reversal of his conviction after a guilty plea on the ground that the district court committed plain error under Rule 11 must show a reasonable probability that, but for the error, he would not have entered the plea." [3] Because "Rule 11(c)(1) was adopted as a prophylactic measure, not one implied by the Due Process Clause or any other constitutional requirement," the magistrate judge's violation of the rule was not a "structural error" that requires vacatur of the plea without any showing of prejudice. [4] Under the circumstances, it does not appear that the error had any effect at all on defendant's decision to plead guilty. But the case is remanded for the Eleventh Circuit to resolve that issue.

Notes: [a] Like Rules 11(h) and 52(a), Oregon law generally provides that variance from the procedure required by law does not require remedial action "unless it has prejudiced the defendant in respect to a substantial right." ORS 131.035; *see also* ORS 138.230. [b] In a state court, of course, a judge may participate in plea discussions within the limitations set forth in ORS 135.432. As a result, this opinion has no direct application to practice in this state. [c] But this opinion is generally helpful because it reiterates the very narrow scope of what is "structural error" under federal law and concludes that an error committed during the plea process is not a structural error: "We have characterized as 'structural' a very limited class of errors that trigger automatic reversal because they undermine the fairness of a criminal proceeding as a whole. Errors of this kind include denial of counsel of choice, denial of self-representation, denial of a public trial, and failure to convey to a jury that guilt must be proved beyond a reasonable doubt. Rule 11(c)(1) error does not belong in that highly exceptional category."

HABEAS CORPUS

See also "Death Penalty: federal cases," *above*; "Post-Conviction Proceedings," *below*.

Habeas Corpus: federal cases

Ryan, Director, Arizona DOC v. Schad, 569 US __, 133 S Ct 2548 (2013) (*per curiam*). In 1985, petitioner was convicted of capital murder in Arizona and was sentenced to death. In 1998, after he had exhausted all of his available post-conviction remedies in state court, he filed a § 2254 petition for *habeas corpus* relief in federal court asserting claims that his trial counsel provided constitutionally inadequate assistance. The district court denied all of his claims. The Ninth Circuit affirmed in part and reversed in part, remanding for a consideration of whether an evidentiary hearing is appropriate. The state petitioned for certiorari, and the Court granted the petition, vacated the

opinion, and remanded for further proceedings in light of *Cullen v. Pinholster*, 131 S Ct 1388 (2011). On remand, the Ninth Circuit affirmed the district court's judgment, and it denied petitioner's petition for rehearing in February 2012. In July 2012, after the Court decided *Martinez v. Ryan*, 566 US 1 (2012), petitioner filed a motion to remand the case to the district court for reconsideration in light of that decision. The Ninth Circuit denied his motion. Petitioner filed a petition for certiorari, but the Court denied that petition in October 2012. Petitioner then went back to the Ninth Circuit and requested a stay pending its resolution of a case that presented a *Martinez* claim. The Ninth Circuit *sua sponte* construed that motion as one to reconsider and, in a split decision, granted reconsideration and remanded the case to the district court to consider his new *Martinez* claim, requiring cancellation of the execution date. Arizona again filed a petition for certiorari. *Held*: Reversed. [1] "States have an interest in the finality of convictions that have survived direct review within the state court system. Elsewhere, we explained that the profound interests in repose attaching to the mandate of a court of appeals dictate that the power to withdraw the mandate can be exercised only in extraordinary circumstances. Deviation from normal mandate procedures is a power of last resort, to be held in reserve against grave, unforeseen contingencies. Even assuming a court of appeals has authority to do so, it abuses its discretion when it refuses to issue the mandate once the Supreme Court has acted on the petition, unless extraordinary circumstances justify that action." [2] The Ninth Circuit abused its discretion when it did not issue the mandate: "As in [*Bell v. Thompson*, 545 US 794 (2005)], the Ninth Circuit here declined to issue the mandate based on an argument it had considered and rejected months earlier. And, by the time of the Ninth Circuit's February 1, 2013, decision not to issue its mandate, it had been over 10 months since we decided *Martinez* and nearly7 months since respondent unsuccessfully asked the Ninth Circuit to reconsider its decision in light of *Martinez*. Further, there is no doubt that the arguments presented in the rejected July 10, 2012, motion were identical to those accepted by the Ninth Circuit the following February." [3] "We presume that the Ninth Circuit carefully considers each motion a capital defendant presents on habeas review. As a result, there is no indication that there were any extraordinary circumstances here that called for the court to revisit an argument *sua sponte* that it already explicitly rejected. … In light of the foregoing, we hold that the Ninth Circuit abused its discretion when it neglected to issue its mandate. … The Ninth Circuit's judgment is reversed, the stay of execution is vacated, and the case is remanded with instructions to issue the mandate immediately and without any further proceedings."

Nevada v. Jackson, 569 US __, 133 S Ct 1990 (2013) (*per curiam*). In a brutal domestic assault, petitioner Jackson forced his way into the apartment of the victim, his former girlfriend, raped and beat her, stole a ring, and then dragged her by her hair out to his car, where bystanders intervened and he ran off. Petitioner told the police it was consensual. He was charged in state court with first-degree rape and related offenses. The victim recanted and went into hiding. The police eventually found her and took her into custody as a material witness. Once in custody, she disavowed the recantation as the product of threats by petitioner's associates, and she agreed to testify. At trial, petitioner's defense was that the victim fabricated the story, and defense counsel cross-examined her extensively about prior similar reports that she had made to the police that were not corroborated and hence not prosecuted. When defense counsel attempted to introduce police reports of those other incidents or to call the officers involved in those investigations, the trial court sustained the prosecutor's objection. The jury found petitioner guilty, and he was sentenced to life imprisonment. On appeal, he claimed that exclusion of the extrinsic evidence violated his federal constitutional right "to present a complete defense," but the Nevada appellate courts affirmed the judgment. Petitioner then filed a § 2254 petition in federal court reasserting that claim. The district court denied his petition but the Ninth Circuit reversed, relying on *Michigan v. Lucas*, 500 US 145 (1991), to hold "that extrinsic evidence of [the victim's] prior allegations was critical to [petitioner's] defense, that the exclusion of that evidence violated his constitutional right to present a defense, and that the Nevada Supreme Court's decision to the contrary was an unreasonable application of [the Supreme] Court's precedents. Although it acknowledged that the state court had ruled that the evidence was inadmissible as a matter of state law, the Ninth Circuit concluded that the impact of the State's rules

of evidence on the defense was disproportionate to the state's interest in exclusion." *Held*: Reversed and remanded (*per curiam*). The district court correctly dismissed petitioner's petition. [1] Under 28 USC § 2254(d)(1), "it is settled that a federal habeas court may overturn a state court's application of federal law only if it is so erroneous that there is no possibility fair-minded jurists could disagree that the state court's decision conflicts with this Court's precedents." [2] Although "the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense, we have also recognized that state and federal rule-makers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Only rarely have we held that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence." [3] The Nevada rule of evidence at issue "generally precludes the admission of extrinsic evidence of specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crime. The purpose of that rule, the Nevada Supreme Court has explained, is to focus the fact-finder on the most important facts and conserve judicial resources by avoiding mini-trials on collateral issues. The Nevada statute is akin to the widely accepted rule of evidence law that generally precludes the admission of evidence of specific instances of a witness's conduct to prove the witness's character for untruthfulness. [*See* FRE 608(b); OEC 608(2).] The constitutional propriety of this rule cannot be seriously disputed." [4] There is an exception in the Nevada for evidence of previous false accusations of sexual assault, but it requires advance notice to the prosecution, and petitioner did provide that notice. "No decision of this Court clearly establishes that this notice requirement is unconstitutional." [5] "No fair-minded jurist could think that *Lucas* clearly establishes that the enforcement of the Nevada rule in this case is inconsistent with the Constitution." [6] The state court "reasoned that the proffered evidence had little impeachment value because at most it showed simply that the victim's reports could not be corroborated. The admission of extrinsic evidence of specific instances of a witness's conduct to impeach the witness's credibility may confuse the jury, unfairly embarrass the victim, surprise the prosecution, and unduly prolong the trial. No decision of this Court clearly establishes that the exclusion of such evidence for such reasons in a particular case violates the Constitution." [7] Although the Court has held "that various restrictions on a defendant's ability to *cross-examine* witnesses violate the Confrontation Clause, … [it] has never held that the Confrontation Clause entitles a criminal defendant to introduce *extrinsic evidence* for impeachment purposes." [8] "The Ninth Circuit elided the distinction between cross--examination and extrinsic evidence by characterizing the cases as recognizing a broad right to present evidence bearing on a witness's credibility. By framing our precedents at such a high level of generality, a lower federal court could transform even the most imaginative extension of existing case law into 'clearly established Federal law, as determined by the Supreme Court.' 28 USC § 2254(d)(1). In thus collapsing the distinction between an *unreasonable* application of federal law and what a lower court believes to be an *incorrect* or *erroneous* application of federal law, the Ninth Circuit's approach would defeat the substantial deference that AEDPA requires."

Metrish, Warden v. Lancaster, 569 US __, 133 S Ct 1781 (2013). Petitioner Burt Lancaster, a former police officer with a history of mental-health issues, killed his girlfriend and was charged in state court with murder. At his first trial in 1994, he asserted a diminished-capacity defense that had been recognized by the Michigan Court of Appeals and were included in the uniform jury instructions. That defense allowed the defendant who did not to assert an insanity defense to present evidence of mental illness in order to negate the specific intent alleged in the charged offense. The jury rejected his defense and found him guilty of first-degree murder. His conviction was later reversed and the case was remanded for retrial. In the meantime, the Michigan Supreme Court in 2001 overruled the decisions of the court of appeals and definitively ruled for the first time in *State v. Carpenter* that the statutory scheme did not allow such a diminished-capacity defense. At his retrial in 2005, the petitioner attempted to raise again the diminished-capacity defense contending that the Due Process Clause precluded retroactive application of *Carpenter*. The trial court rejected that argument, the jury found him guilty of first-degree murder, and the state appellate courts affirmed his conviction. Petitioner then filed a § 2254 petition in federal court in which he contended that the state

court violated his rights under the Due Process Clause, as construed in *Bouie v. City of Columbia*, 378 US 347 (1964), by retroactively applying *Carpenter* to his case and thus precluding him from asserting a diminished-capacity defense. The district court denied his claim, but the Sixth Circuit reversed, concluding that the state court had unreasonably applied well-established federal law. *Held*: Reversed and remanded. The Sixth Circuit erred by granting petitioner relief. [1] To obtain *habeas corpus* relief from a federal court under 28 USC § 2254(d)(1), "a state prisoner must show that the challenged state-court ruling rested on an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." [2] In *Bouie*, the Court held that because the South Carolina Supreme Court's construction of a state trespass statute "was clearly at variance with the statutory language" and "had not the slightest support in prior South Carolina decisions," the state court erred by retroactively applying that new construction to the defendant's trial, which was based on conduct that occurred before that decision. "Due process does not countenance an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." [3] The state court's decision to apply *Carpenter* retroactively in petitioner's case "does not warrant disapprobation as 'an unreasonable application of … clearly established Federal law.' 28 USC § 2254(d)(1). This case is a far cry from *Bouie*, where … the South Carolina Supreme Court had unexpectedly expanded narrow and precise statutory language that, as written, did not reach the petitioners' conduct. In *Carpenter*, by contrast, the Michigan Supreme Court rejected a diminished-capacity defense that the court reasonably found to have no home in a comprehensive, on-point statute enacted by the Michigan Legislature. … Rather than broadening a statute that was narrow on its face, *Carpenter* disapproved lower court precedent recognizing a defense Michigan's high court found, on close inspection, to lack statutory grounding. The situation we confronted in *Bouie* bears scant resemblance to this case, and our resolution of that controversy hardly makes disallowance of Lancaster's diminished-capacity defense an unreasonable reading of this Court's law." [4] "This Court has never found a due process violation … where a state supreme court, squarely addressing a particular issue for the first time, rejected a consistent line of lower-court decisions based on the supreme court's reasonable interpretation of the language of a controlling statute. Fair-minded jurists could conclude that a state supremecourt decision of that order is not unexpected and indefensible by reference to existing law."

Note: Petitioner did not contend that some provision of the federal constitution required the state to recognize a diminished-capacity defense—his only argument was that the *retroactive* application of ruling in *Carpenter* that eliminated that defense under state law violated the Due Process Clause.

McQuiggin, Warden v. Perkins, 569 US __, 133 S Ct 1924 (2013). Petitioner was convicted of murder in state court in 1993, the court imposed a life sentence, and the judgment was affirmed on appeal in 1997. Eleven years later, in 2008, petitioner filed a § 2254 petition in federal court seeking *habeas corpus* relief. Because he filed his petition long after the one-year statute of limitations in 28 USC § 2244(d)(1) had expired, his petition alleged a "gateway" actual-innocence claim under *Schlup v. Delo*, 513 US 298 (1995) based newly discovered evidence that he was actually innocent; his claim was based on three affidavits that, if believed, showed that someone else had committed the murder. The affidavits were executed in 1997, 1999, and 2002. The district court noted that the new evidence was "dubious" and was not sufficient to establish "actual innocence," but it dismissed the petition primarily on the ground that it was time-barred. The court noted even if a new one-year period commenced upon discovery of the new evidence, his petition was not filed until five years after the most recent affidavit, which did not show "the necessary diligence." The Sixth Circuit held that a sufficient claim of actual innocence was a basis to excuse petitioner's default in filing a timely petition and provided a "gateway" for consideration of his procedurally defaulted claims of ineffective assistance of counsel. *Held*: Vacated and remanded (5-4 decision). [1] A petitioner seeking *habeas corpus* relief "is entitled to equitable tolling only if he shows (a) that he has been pursuing his rights diligently, and (b) that some extraordinary circumstance stood in his way and prevented timely filing. [Petitioner] does not qualify for equitable tolling. In possession of all three affidavits by July 2002, he waited nearly six years to seek federal postconviction relief. Such a delay

falls far short of demonstrating the diligence required to entitle a petitioner to equitable tolling." [2] "We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence. *Herrera v. Collins*, 506 US 390, 404-05 (1993). We have recognized, however, that a prisoner otherwise subject to defenses of abusive or successive use of the writ of habeas corpus may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence." [3] Although 28 USC §§ 2244(b)(2)(B) and 2254(e)(2) reflect Congress's "will to *modify* the miscarriage-of-justice exception with respect to second-or-successive petitions and the holding of evidentiary hearings in federal court," they do not show Congress's "intent to preclude courts from applying the exception, unmodified, to the type of petition at issue here—an untimely first federal habeas petition alleging a gateway actual-innocence claim. The more rational inference to draw from Congress's incorporation of a modified version of the miscarriage-of-justice exception in §§ 2244(b)(2)(B) and 2254(e)(2) is simply this: In a case not governed by those provisions, *i.e.*, a first petition for federal habeas relief, the miscarriage-of-justice exception survived AEDPA's passage intact and unrestricted." [4] "While we reject the State's argument that habeas petitioners who assert convincing actual-innocence claims must prove diligence to cross a federal court's threshold, we hold that the Sixth Circuit erred to the extent that it eliminated timing as a factor relevant in evaluating the reliability of a petitioner's proof of innocence. To invoke the miscarriage-of-justice exception to AEDPA's statute of limitations, … a petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence. Unexplained delay in presenting new evidence bears on the determination whether the petitioner has made the requisite showing. … As we stated in *Schlup*, a court may consider how the timing of the submission and the likely credibility of a petitioner's affiants bear on the probable reliability of evidence of actual innocence." [5] A claim of "actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar … or, as in this case, expiration of the statute of limitations. We caution, however, that tenable actual-innocence gateway pleas are rare: A petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt. And in making an assessment of the kind *Schlup* envisioned, the timing of the petition is a factor bearing on the reliability of the evidence purporting to show actual innocence." [6] "On remand, the District Court's appraisal of Perkins' petition as insufficient to meet *Schlup*'s actual innocence standard should be dispositive, absent cause, which we do not currently see, for the Sixth Circuit to upset that evaluation."

Notes: [a] Justice Scalia wrote a spirited dissent in which he insists that § 2244(d)(1) is clear on its face and does not provide any room for an "actual innocence" exception to one-year statute of limitations. He disparages the majority's analysis as "a statutory-construction blooper reel" and concludes: "Because there is no plausible basis for inferring that Congress intended or could have anticipated this exception, its adoption here amounts to a pure judicial override of the statute Congress enacted. It is wrong for us to reshape AEDPA on the very lathe of judge-made habeas jurisprudence it was designed to repair." [b] The majority opinion takes great pains to explain repeatedly how *narrow* the new window is and how *unlikely* it is that anyone will be able to establish, under this new rule, a sufficient basis for excusing a default in filing a timely petition. But the reality is that this decision now opens the door for a state inmate to file a petition years—even decades—after his conviction became final based merely on allegations of "actual innocence," however stale and frivolous, and then we will be obliged to respond to the merits of that allegation. Of course, with the passage of time, witnesses will have died or disappeared and crucial evidence may have been lost or destroyed, based on the false assumption that the case was finally, finally over. The majority opinion seeks to reassure prosecutors by noting: "A showing that delay was part of a deliberate attempt to manipulate the case, say by waiting until a key prosecution witness died or was deported, might raise a different ground for withholding equitable relief." But Justice Scalia was not reassured: "Today's decision piles yet more dead weight onto a postconviction habeas system already creaking at its rusted joints."

Trevino v. Thaler, Director, 569 US __, 133 S Ct 1911 (2013). Petitioner Trevino was convicted of murder in state court and was sentenced to death, and the judgment was affirmed on direct appeal. Petitioner did not assert on appeal a claim of ineffective assistance of counsel (IAC)—*i.e.*, that his trial counsel failed to provide constitutionally ineffective assistance. While his appeal was pending, petitioner filed a petition for post-conviction relief in which, through court-appointed counsel, he asserted a variety of IAC claims, but he did not allege a claim that his counsel failed to investigate and present evidence of mitigating circumstances in the penalty phase. The state court rejected all of his post-conviction claims and affirmed the conviction and death sentence. Petitioner then filed in federal court a § 2254 petition for *habeas corpus* relief, and he asserted for the first time an IAC claim that his trial counsel failed to discover and present mitigating evidence. Because that claim was not exhausted, the federal court stayed the proceedings to allow petitioner to file in state court a successive petition for post-conviction relief. The state court dismissed that petition as procedurally barred. The district court then rejected his claim as procedurally barred after suggesting that it may have had merit. The Fifth Circuit affirmed on the ground that the claim was procedurally barred because he failed to present it in a timely and proper manner in his first state post-conviction proceeding. *Held*: Reversed and remanded (5-4 decision). The Fifth Circuit erred in ruling that petitioner's claim is barred. [1] Under *Martinez v. Ryan*, 566 US 1 (2012), a federal court may "find 'cause,' thereby excusing a defendant's procedural default, where (a) the claim of ineffective assistance of trial counsel was a 'substantial' claim; (b) the 'cause' consisted of there being no counsel or only ineffective counsel during the state collateral-review proceeding; (c) the state collateral-review proceeding was the initial-review proceeding in respect to the [IAC] claim; and (d) state law *requires* that an [IAC] be raised in an initial-review collateral proceeding." [2] Although it may be permissible under Texas law to assert and litigate an IAC claim on direct review, the state's "procedural system—as a matter of its structure, design, and operation—does not offer most defendants a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal." Consequently, the rule in *Martinez* applies in this case.

Notes: [a] *Martinez* involved application of Arizona's direct-appeal and collateral-review procedures, which preclude a defendant from asserting an IAC claim on direct appeal. This case involved application of Texas's system, which theoretically allows a defendant to assert such a claim on direct review but generally makes it impracticable for a defendant to do so. Because Oregon's direct-appeal and post-conviction scheme is like Arizona's, this decision does not adversely affect us beyond what the Court held in *Martinez*. [b] That Court noted that it did not consider the merits of petitioner's IAC claim: "Given this holding, Texas submits that its courts should be permitted, in the first instance, to decide the merits of Trevino's ineffective-assistance-of-trial-counsel claim. We leave that matter to be determined on remand. Likewise, we do not decide here whether Trevino's claim of ineffective assistance of trial counsel is substantial or whether Trevino's initial state habeas attorney was ineffective."

Marshall, Warden v. Rodgers, 569 US __, 133 S Ct 1446, 185 L Ed 2d 540 (2013). Petitioner was charged in California state court with a variety of weapons-related offenses. At arraignment, he executed a valid waiver of his right to counsel. But he changed his mind and retained counsel for his preliminary hearing. He later fired that lawyer and reiterated his waiver of counsel. Before trial, he requested appointment of counsel, and the trial court appointed him counsel. By the time of trial, he changed his mind again, fired his counsel, and elected to proceed to trial *pro se*. The jury found him guilty. He then requested appointment of counsel to assist him file a motion for new trial. His motion did not include reasons in support of his request, and when offered a chance to supplement or explain his motion at a later hearing, he declined to do so. The trial court denied the request for counsel. On appeal, the appellate court ruled that the trial court had discretion to deny his request for appointment of counsel at that point, and that it did not abuse that discretion under the circumstances. Petitioner eventually filed in federal court a *habeas corpus* petition pursuant to 28 USC § 2254 in which he contended that the state courts violated his rights under the Sixth Amendment by refusing his request for appointment of counsel. The district court denied his petition,

but the Ninth Circuit reversed. The court "invoked certain Sixth Amendment precedents from its own earlier cases and from cases in other Circuits. From those precedents, the panel identified two relevant principles that it deemed to have been clearly established by this Court's cases: first, that a defendant's waiver of his right to trial counsel does not bar his later election to receive assistance of counsel at a later critical stage of the prosecution, absent proof by the State that the reappointment request was made in bad faith; and, second, that a new-trial motion is a critical stage. Combining these two propositions, the court held that respondent had a clearly established right to the reappointment of counsel for purposes of his new-trial motion, and that the California courts—which vest the trial judge with discretion to approve or deny such requests based on the totality of the circumstances—violated that right by refusing to order the reappointment of counsel." *Held*: Reversed. The ruling by the California courts that there was no Sixth Amendment violation is not contrary to "clearly established Federal law, as determined by the Supreme Court of the United States" within the meaning of § 2254(d)(1). [1] "The Sixth Amendment safeguards to an accused who faces incarceration the right to counsel at all critical stages of the criminal process. It is just as well settled, however, that a defendant also has the right to proceed *without* counsel when he voluntarily and intelligently elects to do so." [2] "All this case requires—and all the Court of Appeals was empowered to do under § 2254(d)(1)—is to observe that, in light of the tension between the Sixth Amendment's guarantee of the right to counsel at all critical stages of the criminal process and its concurrent promise of a constitutional right to proceed *without* counsel when a criminal defendant voluntarily and intelligently elects to do so, it cannot be said that California's approach is contrary to or an unreasonable application of the general standards established by the Court's assistance-of-counsel cases." [3] Although an appellate panel may, in accordance with its usual law-of-the-circuit procedures, look to circuit precedent to ascertain whether it has already held that the particular point in issue is clearly established by Supreme Court precedent, it may not canvass circuit decisions to determine whether a particular rule of law is so widely accepted among the Federal Circuits that it would, if presented to this Court, be accepted as correct."

Note: The Court assumed, without deciding, that "a post-trial, pre-appeal motion for new trial is a critical stage of the prosecution" for purpose of the right to counsel under the Sixth Amendment.

Johnson, Warden v. Williams, 568 US __, 133 S Ct 1088, *rehearing den*, 133 S Ct 1858 (2013). Petitioner was the wheelwoman in an armed robbery that went awry, and she was charged with felony murder in state court. During the jury's deliberations, the foreman advised the court that one of the jurors was refusing to apply the felony-murder rule because he thought it was too harsh. After an inquiry, and over petitioner's objection, the court excused that juror and substituted the alternate. The reconstituted jury then found petitioner guilty. On appeal, petitioner argued that the excusal of that juror violated both state statute and the Sixth Amendment, although her argument on the latter was perfunctory. The state appellate court affirmed after discussing and rejecting her claim based on the state statute; the court did not expressly address her claim based on the Sixth Amendment. The California Supreme Court summarily denied her petition for review. Petitioner then filed a § 2254 petition in federal court claiming *inter alia* that the excusal of that juror violated the Sixth Amendment. The district court applied the deferential standard required by AEDPA and rejected that claim. On appeal, the Ninth Circuit reversed: it held that the state court had "overlooked or disregarded" her Sixth Amendment claim, reviewed the claim *de novo*, and, applying its own precedent, concluded that the excusal of that juror violated the Sixth Amendment. *Held*: Reversed and remanded. The district court correctly granted deference to the state court's ruling and denied that claim. [1] "AEDPA sharply limits the circumstances in which a federal court may issue a writ of habeas corpus to a state prisoner whose claim was 'adjudicated on the merits in State court proceedings.' 28 USC §2254(d). In [*Harrington v. Richter*, 562 US __ (2011)], we held that § 2254(d) does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits.' Rather, we explained, when a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the

claim on the merits in the absence of any indication or state-law procedural principles to the contrary. Our reasoning in *Richter* points clearly to the answer to the question presented in the case at hand. Although *Richter* itself concerned a state-court order that did not address *any* of the defendant's claims, we see no reason why the *Richter* presumption should not also apply when a state-court opinion addresses some but not all of a defendant's claims. There would be a reason for drawing a distinction between these two situations if opinions issued by state appellate courts always separately addressed every single claim that is mentioned in a defendant's papers. If there were such a uniform practice, then federal habeas courts could assume that any unaddressed federal claim was simply overlooked. No such assumption is warranted, however, because it is not the uniform practice of busy state courts to discuss separately every single claim to which a defendant makes even a passing reference. On the contrary, there are several situations in which state courts frequently take a different course." [2] The Court rejected the state's argument that the presumption should be irrebuttable: "This argument goes too far. To be sure, if the state-law rule subsumes the federal standard—that is, if it is at least as protective as the federal standard—then the federal claim may be regarded as having been adjudicated on the merits. … Thus, while the *Richter* presumption is a strong one that may be rebutted only in unusual circumstances, it is not irrebuttable. *Per se* rules should not be applied . . . in situations where the generalization is incorrect as an empirical matter, and an irrebuttable presumption that state courts never overlook federal claims would occasionally miss the mark." [3] "Applying the presumption of merits adjudication to the facts of this case, we hold that the Ninth Circuit erred by finding that the California Court of Appeal overlooked [petitioner's] Sixth Amendment claim. Several facts make this conclusion inescapable."

Notes: The Ninth Circuit had reasoned that the state courts must have overlooked petitioner's Sixth Amendment claim because their previous decisions on the topic were not consistent with Ninth Circuit precedent on that issue. The Court dismissively rejected that analysis: "But the views of the federal courts of appeals do not bind the California Supreme Court when it decides a federal constitutional question, and disagreeing with the lower federal courts is not the same as ignoring federal law. The Ninth Circuit's apparent assumption that the California Supreme Court could not refuse to follow federal court of appeals precedent without disregarding the Federal Constitution would undo § 2254(d)'s 'contrary to' provision, which requires deference unless a state court fails to follow *Supreme Court* precedent. 28 USC § 2254(d)(1)."

Ryan, Director, Arizona DOC v. Gonzales, 568 US __ , 133 S Ct 696 (2013). In the *Gonzales* case, the petitioner was convicted of murder, robbery, and burglary in Arizona, the court imposed a death sentence, and the judgment was affirmed. Gonzales then filed a § 2254 petition for *habeas corpus* relief in federal court. His appointed counsel moved for a stay, alleging that he had become incompetent, but the district court denied the motion, ruling that even if he is incompetent the claims could be fairly litigated without his participation. On review in mandamus, the Ninth Circuit issued a stay, ruling that Gonzales is entitled to a determination of competency under 18 USC § 3599. Meanwhile, in the *Carter* case, the petitioner was convicted of aggravated murder, robbery, and rape in Ohio, he was sentenced to death, and the judgment was affirmed. Carter then filed a § 2254 petition in federal court. His appointed counsel moved for a stay on the ground that he was incompetent. The district court found him to be incompetent, found that his counsel needed his assistance to prosecute the proceeding, and dismissed the petition without prejudice and prospectively tolled the statute of limitations. The Sixth Circuit affirmed, basing its decision on 18 USC § 4241. In each case, the state petitioned the Court for review, and the Court allowed both petitions. *Held*: Reversed and remanded. The courts erred by staying the proceedings based on allegations that the petitioners are incompetent. [1] The petitioner's statutory right to counsel in a *habeas corpus* proceeding does not necessarily imply that he has a right to stay the proceedings if he is not competent: "Notwithstanding the connection between the right to competence at trial and the right to counsel at trial, we have never said that the right to competence *derives from* the right to counsel. We will not assume or infer that Congress intended to depart from our precedents and locate a right to competence in federal habeas proceedings within the right to counsel. We normally assume that,

when Congress enacts statutes, it is aware of relevant judicial precedent." [2] "We are not persuaded by the Ninth Circuit's assertion that a habeas petitioner's mental incompetency could 'eviscerate the statutory right to counsel' in federal habeas proceedings. Given the backward-looking, record-based nature of most federal habeas proceedings, counsel can generally provide effective representation to a habeas petitioner regardless of the petitioner's competence. Indeed, where a claim is 'adjudicated on the merits in State court proceedings,' 28 USC § 2254(d), counsel should, in most circumstances, be able to identify whether the 'adjudication . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,' § 2254(d)(1), without any evidence outside the record." [3] Neither § 3599 nor § 4241 provides a basis to stay a *habeas corpus* proceeding on the ground that the petitioner is not competent. [4] Although a district court may have inherent authority to stay a *habeas corpus* proceeding, in neither case did the record show that the petitioner's assistance was necessary for fair adjudication of the claims. The Court note that in the *Carter* case his "claims were adjudicated on the merits in state postconviction proceedings and, thus, were subject to review under § 2254(d)," which means that "any extra-record evidence that Carter might have concerning these claims would therefore be inadmissible. Consequently, these claims do not warrant a stay."

Notes: [a] The Court helpfully observed: "AEDPA's acknowledged purpose is to reduce delays in the execution of state and federal criminal sentences. Staying a federal habeas petition frustrates AEDPA's objective of encouraging finality by allowing a petitioner to delay the resolution of the federal proceedings. … The same principle obtains in the context of competency-based stays. At some point, the State must be allowed to defend its judgment of conviction. If a district court concludes that the petitioner's claim could substantially benefit from the petitioner's assistance, the district court should take into account the likelihood that the petitioner will regain competence in the foreseeable future. Where there is no reasonable hope of competence, a stay is inappropriate and merely frustrates the State's attempts to defend its presumptively valid judgment." [b] The Court cautioned: "Our opinion today does not implicate the prohibition against carrying out a death sentence upon a prisoner who is insane." *See Panetti v. Quarterman*, 551 US 930 (2007); *Ford v. Wainwright*, 477 US 399 (1986). [c] Applications to stay collateral proceedings based on allegations that the petitioner is incompetent has become the latest ploy in capital litigation. In Oregon, we have had counsel for several death-row inmates attempt to stay their post-conviction or federal *habeas corpus* proceedings on that ground. This opinion should put an end to those attempts.

Habeas Corpus: state cases

Woodroffe v. Nooth, 257 Or App __, __ P3d __ (July 31, 2013). Plaintiff, an inmate at SRCI, filed a petition for *habeas corpus* relief based on a claim that defendant superintendent was denying him "constitutionally adequate medical treatment for his various physical and psychological conditions, including a fractured coccyx, knee pain, migraine headaches, and attention deficit hyperactivity disorder (ADHD)." The circuit court granted the state's motion to dismiss. *Held*: Affirmed. [1] "A motion to dismiss a writ of *habeas corpus* is the functional equivalent of a motion for summary judgment; thus, in reviewing a judgment dismissing a writ of *habeas corpus*, we will affirm if the record, viewed in the light most favorable to the plaintiff, presents no genuine issue of material fact and the defendant is entitled to prevail as a matter of law. In our assessment of the record, the plaintiff's replication is not the equivalent of an affidavit or other evidence that is sufficient to overcome a motion to dismiss for failure to establish a claim for *habeas corpus* relief." [2] "To state a cognizable claim for *habeas corpus* relief [under Art. I, § 16 and the Eighth Amendment], a prisoner must allege that he has a serious medical need that has not been treated in a timely and proper manner and that prison officials have been deliberately indifferent to [his] serious medical needs. To establish deliberate indifference, a plaintiff must demonstrate something more than an honest difference of medical opinion about correct diagnosis and necessary treatment." [3] Even if plaintiff's coccyx pain is a serious medical condition and in some circumstances, "application of a cost/benefit analysis in withholding or denying certain medical treatment could

constitute deliberate indifference, plaintiff did not provide any evidence that the TLC's denial of his request for a surgical consultation was, in fact, predicated on the cost of treatment, much less some constitutionally impermissible cost-benefit analysis." [4] Given the nature of the remedy plaintiff sought—*viz.*, injunctive relief and not damages—"the proper temporal benchmark for assessing deliberate indifference is *at the time that the habeas claim is adjudicated*. Thus, *past* deliberate indifference is insufficient to support habeas relief; rather, that indifference and derivative conduct must be *continuing* as of the time the petition is adjudicated. … Plaintiff has not contended, nor proffered *prima facie* evidence, that the course of treatment as of the time the court adjudicated the petition was improperly motivated or otherwise constitutionally deficient. Accordingly, the court did not err in its disposition as to those allegations." [5] Even if plaintiff's ADHD is a serious medical condition, plaintiff did not inform any SRCI treatment provider that the substituted and discontinued medication was materially less efficacious with respect to his condition, much less cooperate in any process to remedy any purported deficiency. Consequently, "no reasonable juror could determine that defendant was deliberately indifferent to plaintiff's ADHD."

Rivas v. Persson, 256 Or App 829, __ P3d __ (2013). Plaintiff, who committed aggravated murder in 1987, petitioned for a writ of *habeas corpus*, asserting that the Board of Parole and Post-Prison Supervision failed to fully credit him for time served after his arrest. The trial court denied the petition, ruling that plaintiff had a remedy in post-conviction and, alternatively, that his petition was barred by issue preclusion. While his appeal was pending, the board held an exit interview and, finding that plaintiff suffered from a "present severe emotional disturbance," postponed plaintiff's projected parole release date by two years. Before filing its responsive brief, defendant (the state) moved to dismiss on mootness grounds, arguing that, even if plaintiff were to prevail in *habeas*, the board's postponement of his projected parole release date meant that he was not entitled to immediate release on parole. The appellate commissioner denied the motion, reasoning that "if plaintiff prevails on appeal, his release date will be 604 days sooner than it otherwise would be, so a ruling in plaintiff's favor would have a practical effect on his rights even if his release date is extended for two years." The state reiterated its mootness argument in its brief. *Held*: Appeal dismissed as moot. Even if plaintiff could prove that he was entitled to the additional credit for time served, "he would, as in [*Janowski/Fleming v. Board of Parole*, 349 Or 432 (2010)], be entitled to have the release-consideration process commenced, starting with a hearing in the immediate future to establish a release date. After that hearing, the board would be permitted to conduct an exit interview to determine whether to postpone the release. But both of those events have already occurred. … Consequently, ordering the board to start the process again would have no practical effect on plaintiff's rights. It follows that plaintiff's appeal is moot."

HINDERING PROSECUTION

State v. Hansen, 253 Or App 407, 290 P3d 847 (2012) / ***State v. Withnell***, 253 Or App 476, 290 P3d 908 (2012) (*per curiam*). Police officers thought they saw Culp, who was the subject of an outstanding warrant, duck into a residence. When the officers knocked on the door, defendants came out and insisted that Culp was not inside, despite being warned that they would be charged with hindering prosecution if they were lying. Eventually the officers entered the house and found Culp hiding inside. Defendants were charged with hindering prosecution, ORS 162.325(1)(d), based on allegations that they did "prevent, by means of deception, the discovery or apprehension" of Culp. At trial, defendants moved for a judgment of acquittal arguing that they did not "prevent" Culp's arrest, but the trial court denied their motion. Over defendants' objection, the court instructed the jury on the additional language in subsection (1)(d): "*anyone from performing an act which might aid in* the discovery or apprehension." *Held*: Reversed. [1] The term "prevent" in ORS 162.325(1)(d) means permanently prevents rather than temporarily prevents or delays. The "or obstructs" alternative in the statute, which was not charged in this case, "implies making someone's action more difficult, as opposed to stopping the action completely." Because the legislature used the terms as alternatives,

"prevent" cannot be construed to mean temporarily delays: "courts normally seek to avoid an interpretation of a statute that results in a redundancy." [2] Although that statute ordinary does not require proof of prevention but instead merely proof of preventing of "anyone from performing an act which might aid in the … apprehension of such person," ORS 162.325(1)(d), the state could not rely on that theory because the language was omitted from the indictment. [3] "Whether a variance between the allegation in the charging instrument and the state's evidence at trial warrants reversal depends on whether that variance was either material or prejudicial. As to prejudice, we must determine whether on the facts of the particular case, the defendant had suffered prejudice to his defense by the variance between the allegation and the proof. If the answer to that question is affirmative, the motion for judgment of acquittal should be granted. Whether a variance is *prejudicial* depends on the specific *theories* under which a case is argued. If the defendant would need to develop a different argument to contend with the variance, the defendant would be prejudiced." [4] Defendants were prejudiced by the variance between allegation and proof.

Note: The Court of Appeals did not remand for a new trial as it had in *State v. Burgess*, 240 Or App 641 (2011), *aff'd*, 352 Or 499 (2012), because the state did not ask for that remedy.

HOMICIDE

See also "Death Penalty," *above*.

State v. Lewis, 352 Or 626, 290 P3d 288 (2012). Defendant, a professional truck driver, rear-ended the victim's catering truck, sending it truck into the path of an oncoming logging truck. The resulting collision killed the victim. The collision occurred on Highway 18 in a designated "safety corridor" where there was only one lane of travel in each direction. At the time of the collision, the victim's truck was stopped in his lane with his brake lights and left-turn signal on. Although defendant was sober and driving the speed limit, an eyewitness traveling in the opposite direction saw him looking down and away from the road for several seconds before looking up with surprise immediately before the collision. An accident reconstructionist determined that defendant started braking 382 feet before the collision and that he had not tried to steer away from the collision. The road was wet and defendant's trailer was empty, making it more difficult to quickly stop his truck. Defendant was charged with criminally negligent homicide. Prior to trial, the trial court also denied defendant's motion to exclude as irrelevant and prejudicial evidence that, 10-15 minutes before the collision, witnesses saw defendant driving erratically, making an abrupt lane change without signaling, and tailgating a school bus. After the state's case, defendant moved for a judgment of acquittal, arguing that the state presented insufficient evidence to show that he had acted with criminal negligence. The trial court denied the motion and found him guilty. The Court of Appeals affirmed without opinion. *Held*: Affirmed. The trial court correctly denied defendant's motion pretrial motion to exclude evidence of defendant's prior bad driving and his motion for judgment of acquittal. [1] The evidence of defendant's prior bad driving was relevant to the issue of his state of mind at the time of the collision. [2] The trial court did not abuse its discretion when it determined that the probative value of defendant's prior bad driving was not substantially outweighed by the danger of unfair prejudice. [3] "Contrary to defendant's assertions, ORS 161.085(10) does not require the state to prove that defendant engaged in 'seriously blameworthy' conduct or that defendant's conduct exhibited an 'indifference to consequences.'" Instead, the criminal-negligence statute "requires only that the risk of a particular result from defendant's conduct be 'substantial and unjustifiable' and that the failure to be aware of that risk be a 'gross deviation' from the standard of care a reasonable person would observe. In short, whether conduct exhibits a criminally negligent state of mind will depend, in large part, on the factual context in which the conduct occurs." [4] The evidence was sufficient to prove that "defendant was distracted and inattentive for a protracted time." [6] That inattentiveness "was a particularly aggravated circumstance given defendant's training as a professional commercial driver, the highly dangerous vehicle he was driving, and the dangerous area of road he was on, among other factors." [7] Moreover, the evidence showed that "defendant could

have taken actions to avoid the catering truck even after, due to his own inattentiveness, he noticed it too late in time to stop."

State v. Beagley, 257 Or App 220, __ P3d __ (2013). Defendants are members of a religious congregation that relies on faith healing. They were charged with criminally negligent homicide, ORS 163.145, after their 16-year-old son died of a congenital kidney abnormality that would not have been fatal if he had received medical care in the week before he died. Prior to trial, defendants filed demurrers and motions to dismiss based on "religious freedom" claims, which the trial court denied. They were convicted after a trial. *Held*: Affirmed. The trial court correctly denied defendant's motions and requests for jury instructions. [1] ORS 163.145 and ORS 163.206(4) "permit a parent to treat a child by prayer or other spiritual means so long as the illness is not life threatening. However, once a reasonable person should know that there is a substantial risk that the child will die without medical care, the parent must provide that care, or allow it to be provided, at the risk of criminal sanctions if the child does die. That rule … [is] not unconstitutionally vague, nor [does] it offend constitutional guarantees of due process or religious freedom." [2] The rule announced in *Meltebeke v. Bureau of Labor and Industries*, 332 Or 132 (1995)—which defendants contend required the state had to prove they acted knowingly, not merely with criminal negligence—does not apply to a prosecution for criminally negligent homicide based on a parent's failure to provide life-saving medical care to a child. *Meltebeke* involved only civil sanctions and the opinion does not suggest that the holding applies to criminal law. Moreover, the court in *Meltebeke* drew a line between religious practices that could be sanctioned only if the person acted with the knowledge that the act would lead to an unlawful result and conduct that was merely religiously *motivated.* The "knowing" standard did not apply to the latter conduct. Here, the conduct being punished, the failure to provide life-saving medical care, "is clearly and unambiguously—and, as a matter of law—conduct that may be motivated by one's religious beliefs," *i.e.*, the latter category in *Meltebeke* for which the higher standard was not required. [3] The trial court correctly instructed the jury: (a) "Oregon law requires a parent to provide necessary and adequate care to a child." (b) "It is not a defense to the charges of criminally negligent homicide that the defendant's care or treatment of their child was based solely upon spiritual means pursuant to [their] the religious beliefs or practices." (c) "A person under the age of 18 years does not have the right to refuse medical care." Those are all correct statements of the law. [4] The trial court properly rejected defendants' proposed jury instructions—which were based on ORS 109.640—that a child over the age of 15 may refuse medical care, because that is not a correct statement of the law in the context of a prosecution for criminally negligent homicide. [5] The trial did not err by denying defendants' requested for this instruction: "Oregon law permits a parent to treat a child by prayer or other spiritual means so long as the illness is not life-threatening. However, if a reasonable person in the situation should know that there is a substantial and unjustifiable risk that the child will die without medical care, then the parent must provide that care or allow it to be provided." Although the requested instruction was an accurate statement of the law in light of *State v. Hays*, 155 Or App 41 (1998), the trial court's refusal to give that instruction did not require reversal. The overall the jury instructions would not have led the jury to return a guilty verdict under an erroneous impression of the law. To convict in this case, the jury would have had to find that defendants' son *was* suffering from a life-threatening condition *and* that a reasonable person would have been aware of the risk that he would die without medical care, it did not matter what rights defendants had to provide spiritual treatment in a non-life-threatening situation. [6] "Jurors must be correctly informed of what facts they need to find in order to return a guilty verdict. They do not need to know what facts, if found, will *not* suffice. The latter is implicit in the former." [7] The trial court properly admitted evidence of defendants' statements to police following the death of their granddaughter, which occurred three months before their son died: "The fact that defendants had witnessed the death of another child due to lack of medical care makes it more probable, not only that they *did* know that Neil was at risk, but that they *should have known* that Neil was at risk"—"the testimony was not relevant only to a charge of recklessness, and thereby relevant to a charge of negligence; it was directly relevant to the charge of negligence."

State v. Wesley, 254 Or App 697, 295 P3d 1147 (2013). Defendant was convicted of murder and attempted murder, among other crimes, for a drug-related drive-by shooting. Defendant was in a car with another man, Smith, at the time of the shooting. Smith shot at one person, Anderson, but missed, instead striking and killing Anderson's girlfriend. Police showed Anderson a photograph of defendant and asked if he could identify him; Anderson said that he did not recognize the person in the photograph. But he eventually testified that he lied, and did indeed recognize defendant as one of the two men in the car at the time of the shooting—he claimed that he did had lied because he intended to seek his own revenge. Smith confessed to the shooting, and entered a plea bargain; he testified that both he and defendant had been armed, and both men had shot at the fleeing Anderson. Defendant moved to exclude Anderson's identification of him, because it resulted from an unduly suggestive procedure. The trial court denied the motion, reasoning that, although the police procedure in showing Anderson defendant's single photograph was indeed suggestive, Anderson did not identify defendant after looking at the photograph. At trial, defendant's theory of the case was two-fold: that (1) jurors should not believe either Anderson or Smith as to his presence, and (2) even if he had participated in the shooting, he had no intent to kill the girlfriend, rather than Anderson, which meant he was guilty of only manslaughter for the death of the victim. But the state relied on a transferred intent theory, and the trial court instructed jurors expressly that they could apply the doctrine of transferred intent—that if defendant intended to kill Anderson, he could be found guilty of murder just as if he had intended to kill the victim. The jury found defendant guilty. *Held*: Reversed and remanded. [1] The doctrine of transferred intent remains viable in Oregon murder prosecutions. Although the 1971 Criminal Code did not codify the doctrine, it was an "elementary principle of criminal law" and nothing in the Code or its commentary indicated that the legislature intended to abolish it. [2] "[T]he identification in this case is problematic under *Lawson/James* for several reasons," and "a new hearing on the admissibility of the challenged eyewitness identification is required, based on the considerations prescribed in *Lawson/James*."

State v. Beck, 254 Or App 609, 295 P3d 169 (2013). In 1961, defendant was convicted of negligent homicide under *former* ORS 163.091 (1957). That offense was defined as causing the death of another person by driving a motor vehicle in a grossly negligent manner, and it was punishable as either a misdemeanor or a felony. In 2010, defendant moved under ORS 137.225 to set aside his conviction. The state opposed the motion, contending that the conviction is not eligible to be set either because of the exclusion for traffic offenses, set out at ORS 137.225(6)(a), or because of the specific exclusion for a conviction for criminally negligent homicide under ORS 163.145, set out at ORS 137.225(7). The trial court denied defendant's motion, ruling that the ORS 137.225 does not allow his conviction to be set aside. *Held*: Affirmed. The trial court correctly denied defendant's motion to set aside his conviction. [1] ORS 137.225(7) precludes the setting aside of defendant's conviction. Although ORS 137.225(7) specifically refers just to ORS 163.145 (the current statute defining the offense of criminally negligent homicide) and to Class C felonies (a classification that did not exist when defendant committed his crime), defendant's conviction is one the legislature intended to preclude from being set aside under ORS 137.225(7). The legislative history of ORS 163.145 establishes that the legislature intended the crime of criminally negligent homicide to encompass the previous crime of negligent homicide. Moreover, the legislature has clearly demonstrated its intent to prevent convictions for criminally negligent homicide from being set aside. [2] The reference in ORS 137.225(7) to a conviction under the current statute number, ORS 163.145, does not preclude its application to a conviction under *former* ORS 163.091. *See State v. Kellar*, 349 Or 626 (2011), and *State v. Andre*, 142 Or App 285, *rev den* (1996).

State v. Giles, 254 Or App 345, 293 P3d 1086 (2012). Defendant was convicted of murder based on a murder he committed in August 1999. In 2009, the case was remanded for resentencing. On remand, defendant argued that the court could not impose on his conviction the sentence of "imprisonment of life" required by ORS 163.115(5)(a) because he committed the murder during the

so-called "*McLain* window"—*i.e.*, after the date on which the Court of Appeals had invalidated that term as unconstitutionally disproportionate in *State v. McLain*, 158 Or App 419 (1999) (*viz.*, February 17, 1999), and before the legislature had fixed the statute by enacting ORS 163.115(5)(c) (*viz.*, October 23, 1999). Relying on *State v. Haynes*, 168 Or App 565 (2000), the sentencing court overruled defendant's objection and imposed life imprisonment with a 300-month minimum. *Held*: Reversed and remanded for entry of corrected judgment. [1] "When this court [held in *McLain*] the former version of ORS 163.115(5)(a) was unconstitutional, that statutory provision could no longer be applied. In light of the inapplicability of ORS 163.115(5), we determined … that the proper sentence was that required by other statutes—a 25-year mandatory minimum as provided in ORS 137.700(2)(a)(A) and ORS 163.115(5)(b), followed by post-prison supervision for life in accordance with OAR 213-005-0004. [That decision] identified and was predicated on the only sentence that could lawfully have been imposed as of that time (*i.e.*, before the enactment of the 1999 amendments)." [2] "We conclude that that was the only sentence to which defendant could lawfully have been subjected as of the time he committed the murder, and because the 1999 amendments prescribe a sentence that is patently harsher than that prescribed by *McLain*, the application of the 1999-amended scheme to defendant violates *ex post facto* protections."

Notes: [a] The Court of Appeals held in *Haynes* that the *ex post facto* clauses did not preclude retroactive application of the ORS 163.115(5)(a), as amended in October 1999, to a murder conviction based on a crime that was committed after re-enactment of the "imprisonment for life" sentence in April 1, 1995 and before *McLain* was issued in February 1999. The court in this decision merely distinguished *Haynes* and did not overrule it. As a result, a defendant convicted of murder based on a crime committed after April 1, 1995, must be sentenced to "imprisonment for life" pursuant to ORS 163.115(5) ***unless*** he or she committed the crime during the eight-month "*McLain* window"—February 17 to October 23, 1999.

[b] For a murder conviction based on a crime committed during the *McLain* window, the court still must impose, and the defendant must serve, the 300-month minimum sentence per ORS 163.115(5)(b) and a life-time term of post-prison supervision per OAR 213-005-0004. But without the indeterminate "life sentence," the parole board would not have authority under ORS 163.115(5)(c) to delay or bar the defendant's release once he or she has completed serving the 300-month minimum. In other words, for a murder defendant in that window, he or she is legally entitled to release onto post-prison supervision immediately after completing the 300-month minimum.

INSANITY

Erskine v. P.S.R.B., 257 Or App 71, __ P3d __ (2013). In 2010, petitioner was found guilty except for insanity on a charge of first-degree burglary, was placed within the jurisdiction of the PSRB, and was committed to OSH. In 2011, the hospital applied to the board, pursuant to ORS 161.341(1) to have petitioner conditionally released to DOC. Petitioner opposed the request, but after a hearing the board found that he has a mental disease and still presents a danger but that he "could be adequately controlled and treated in the community if he were conditionally released to the DOC," recommending that he reside in "secure custody" and participates in treatment. Petitioner appealed. *Held*: Reversed and remanded. Under the circumstances of this case, ORS 161.341(1) required the hospital to submit a "verified conditional release plan" to the board before petitioner's conditional-release hearing, and that was not done.

INSTRUCTIONS

See also "Defenses," and "DUII: instructions," *above*, and "Sexual Offenses: instructions," and "Weapons Offenses," *below*.

State v. Beagley, 257 Or App 220, __ P3d __ (2013). Defendants are members of a religious

congregation that relies on faith healing. They were charged with criminally negligent homicide, ORS 163.145, after their 16-year-old son died of a congenital kidney abnormality that would not have been fatal if he had received medical care in the week before he died. Prior to trial, defendants filed demurrers and motions to dismiss based on "religious freedom" claims, which the trial court denied. They were convicted after a trial. *Held*: Affirmed. The trial court correctly denied defendant's motions and requests for jury instructions. [1] The rule announced in *Meltebeke v. Bureau of Labor and Industries*, 332 Or 132 (1995)—which defendants contend required the state had to prove they acted knowingly, not merely with criminal negligence—does not apply to a prosecution for criminally negligent homicide based on a parent's failure to provide life-saving medical care to a child. *Meltebeke* involved only civil sanctions and the opinion does not suggest that the holding applies to criminal law. Moreover, the court in *Meltebeke* drew a line between religious practices that could be sanctioned only if the person acted with the knowledge that the act would lead to an unlawful result and conduct that was merely religiously *motivated.* The "knowing" standard did not apply to the latter conduct. Here, the conduct being punished, the failure to provide life-saving medical care, "is clearly and unambiguously—and, as a matter of law—conduct that may be motivated by one's religious beliefs," *i.e.*, the latter category in *Meltebeke* for which the higher standard was not required. [2] The trial court correctly instructed the jury: (a) "Oregon law requires a parent to provide necessary and adequate care to a child." (b) "It is not a defense to the charges of criminally negligent homicide that the defendant's care or treatment of their child was based solely upon spiritual means pursuant to [their] the religious beliefs or practices." (c) "A person under the age of 18 years does not have the right to refuse medical care." Those are all correct statements of the law. [3] The trial court properly rejected defendants' proposed jury instructions—which were based on ORS 109.640—that a child over the age of 15 may refuse medical care, because that is not a correct statement of the law in the context of a prosecution for criminally negligent homicide. [4] The trial did not err by denying defendants' requested for this instruction: "Oregon law permits a parent to treat a child by prayer or other spiritual means so long as the illness is not life-threatening. However, if a reasonable person in the situation should know that there is a substantial and unjustifiable risk that the child will die without medical care, then the parent must provide that care or allow it to be provided." Although the requested instruction was an accurate statement of the law in light of *State v. Hays*, 155 Or App 41 (1998), the trial court's refusal to give that instruction did not require reversal. The overall the jury instructions would not have led the jury to return a guilty verdict under an erroneous impression of the law. To convict in this case, the jury would have had to find that defendants' son *was* suffering from a life-threatening condition *and* that a reasonable person would have been aware of the risk that he would die without medical care, it did not matter what rights defendants had to provide spiritual treatment in a non-life-threatening situation. [5] "Jurors must be correctly informed of what facts they need to find in order to return a guilty verdict. They do not need to know what facts, if found, will *not* suffice. The latter is implicit in the former."

State v. Cruz-Gonzelez, 256 Or App 811, __ P3d __ (2013). Defendant struck an unattended vehicle with his car, but he continued driving for 472 feet and pulled around a corner before stopping, calling 911, and then returning to the scene. He was charged with failure to perform the duties of a driver when property is damaged in violation of ORS 811.700(1)(b) (H&R), which requires the driver to "immediately stop" and contact the owner or operator of the vehicle or leave a conspicuous note with the vehicle. Defendant asked the court to instruct the jury on "attempt" and the affirmative defense of renunciation, ORS 161.430, arguing that the jury could find that he merely committed a substantial step toward committing H&R but then had renounced his intent when he called 911. The trial court denied his request, and the jury found him guilty. *Held*: Affirmed. [1] Under ORS 136.465, a defendant is entitled to a jury instruction on a lesser offense if it accurately states the law and if the evidence could support the giving of the instruction. [2] An attempt to commit a crime is a lesser-included offense of the greater crime, so the requested instructions here accurately stated the law. [3] "A defendant is not entitled to a jury instruction on a lesser-included offense unless there is evidence from which a jury could *rationally* find guilt of a lesser-included offense and no guilt of the

charged offense." [4] Defendant was not entitled to an instruction on attempted H&R because no rational trier of fact could have found on these facts that he attempted, but did not *complete*, the crime of H&R—the jurors could not *rationally* find from the evidence that he stopped "immediately" and attempted to provide contact information. In this context, "immediately" means "without delay." [5] The trial court also correctly denied defendant's request to instruct the jury on "renunciation" because that "is an affirmative defense to a charge of an attempted crime."

State v. Stubbs, 256 Or App 817, __ P3d __ (2013). An officer stopped defendant for running a stop sign, and observed a number of indicators that he was impaired by medication. After defendant exhibited six clues on the HGN and performed poorly on the other field sobriety tests, he was arrested for DUII. Defendant agreed to provide a urine sample, which was tested at the state crime lab and revealed the presence of the controlled substances methadone, oxycodone (Percodan), and morphine. Defendant was charged with driving under the influence of unspecified "controlled substances." At trial, the criminalist who tested defendant's urine described the different drug categories and their effects, including central nervous depressants, for which he cited Ambien as an example. He also identified Ambien as an example of a schedule IV controlled substance. The criminalist testified that he had detected Ambien in defendant's urine but, because he had been unable to confirm its presence with a confirmatory test, he had not reported it and was not offering testimony that it was actually present. The criminalist also explained that, unlike the narcotics that were found in defendant's urine, central nervous system depressants like Ambien cause HGN. Defendant testified that he had been prescribed the substances that had been found in his urine, but claimed that he had not taken any of them on the morning of the stop. He also volunteered that he had taken Ambien the night before the stop. During closing argument, the prosecutor pointed out that Ambien would explain the nystagmus that defendant had exhibited, but otherwise focused on the narcotics which defendant had admitted to taking on a daily basis. At the close of the evidence, the trial court instructed the jury that "Methadone, Oxycodone, Percodan and Morphine are controlled substances." After instructions, a juror asked the court, whether "Ambien [is] considered a narcotic in—or a controlled substance in this particular case." In response to the juror's question, the court told the jurors that they had heard all of the evidence and jury instructions in the case, and explained that the court would not comment on the evidence presented to the jury. Defendant objected to the court's response to the question, and contended that the court should instruct the jury that "Ambien was not relevant to the case," because the state had accused the defendant of being under the influence of "the various narcotics that were listed." The trial court determined that the juror's question related to a factual matter for the jury to decide and declined to give the instruction. The jury found defendant guilty. On appeal, defendant contended that the trial court erred by not instructing the jury that Ambien was not a relevant controlled substance. *Held*: Affirmed. [1] Defendant's objection and requested instruction were sufficient to alert the trial court of his position that the state's theory could not change from narcotics to Ambien use, as well as to preserve his arguments that the court's instruction to the jury was misleading and that the evidence relating to Ambien was insufficient to convict him—insofar as those arguments support argument that the court should have given his requested instruction. [2] But defendant's requested for a jury instruction was not the proper procedure to exclude evidence already in the record. Defendant never objected to the Ambien evidence or requested a limiting instruction. "Thus, defendant was in no position to challenge the evidence as irrelevant for the first time through a peremptory instruction." Because the evidence was admitted without objection the jury was entitled to consider it. [3] Defendant's requested instruction that Ambien "is not relevant to the case," was not a correct statement of the law. Both the state and defendant presented evidence of Ambien use, and that evidence was relevant to explain the observed nystagmus and to the issue whether defendant drove while under the influence of a controlled substance.

State v. Milnes, 256 Or App 701, 301 P3d 966 (2013). Police responded to a domestic-violence 911 call at the home of defendant's mother, where she directed them to his bedroom. The officers could hear a man and a woman arguing inside. The officers knocked loudly on the bedroom

door for 10 minutes before defendant opened it, came out half-dressed, and shut the door behind her. When asked whether her boyfriend (who police knew was on probation) was in the room, she twice denied that anyone else was in her room; she continued to deny her boyfriend's presence even after the officers told her they had heard his voice. She asked (and police allowed her) to go down the hall to change her clothes in the bathroom; after she returned, she then quickly opened her bedroom door, told the officers that her boyfriend was not there, and said he must have gone out the window. Because an officer had been stationed outside that window, the officers knew her statement was false. The officers looked inside the room, saw the boyfriend hiding behind the bed, and arrested him on a probation-violation detainer. As they took defendant and the boyfriend outside the house, one of the cover officers reported seeing a rifle round in plain view on the bed. Defendant denied having any weapons and immediately began walking quickly back toward the house. Officers stopped her and re-entered the bedroom, where they seized a rifle, which was laying on the floor, and more ammunition rounds they saw in the room. Defendant was charged with felon in possession of a firearm and violating her probation (by failing to comply with special conditions that she remain law-abiding and abstain from use of intoxicants). At trial, defendant admitted that she and her boyfriend had been arguing and that she was drunk (in violation of her probation). But she denied trying to stall police entry into her room to allow her boyfriend to escape and denied seeing a rifle or ammunition in her room, claiming instead that her boyfriend must have brought them there without her knowledge. She admitted that she lied to police at the scene regarding her boyfriend's presence, because she was trying to keep him from being arrested, and that she knew he had not gone out the window but was actually hiding in her room. Based on the discrepancy between defendant's statements at the scene to police and her testimony at trial, the prosecutor requested the uniform "witness false in part" instruction. *See* UCrJI 1026; ORS 10.095(3). The circuit court gave the instruction over defendant's objection, and the jury found her guilty. The court then found her in violation of her probation based on that conviction and on her admitted use of alcohol. *Held*: Reversed. The trial court committed reversible error by giving "witness false in part" instruction. [1] UCrJI 1026 should be given "on all proper occasions" when sufficient evidence allows the jury to conclude "that at least one witness consciously testified falsely" and was not simply mistaken, confused, or had a hazy recollection. [2] The instruction is not limited to instances of inconsistent trial testimony but may be based on an inconsistency between trial testimony and on-scene statements to police: "inconsistencies between a witness's trial testimony and (a) his or her deposition testimony, (b) another witness's trial testimony, or (c) the witness's prior, unsworn statements to investigating officials can support the giving of a witness-false-in-part instruction if the jury could find from those inconsistencies that the witness willfully testified falsely. The mere fact that the testimony of a witness is contradicted, however, is not conclusive as to its falsity." [3] "Because defendant admitted in her trial testimony that she lied to police at the scene, her trial testimony was not false, and the jury had no factual basis to find her trial testimony false; moreover, defendant's trial testimony was not internally inconsistent and was not a basis to find that she "consciously testified falsely." [4] The error in giving this instruction was not harmless because it instructed the jury to discredit defendant's under-oath testimony, which is qualitatively different than her unsworn on-the -scene statements to police, and because the prosecutor during closing argument emphasized and linked the uniform instruction to her in-court testimony.

State v. Cossette, 256 Or App 675, 301 P3d 954 (2013). Defendant was charged with unlawful possession of a controlled substance (hashish), and he requested a special jury instruction that would have informed the jurors that possession of less than an ounce of dried marijuana leaves, stems, and flowers is only a violation, not a crime. In support of the instruction, he argued that a jury could find, based on the evidence, that he had believed that he possessed only dried marijuana leaves, stems, and flowers and, therefore, did not know that he was committing a crime. The trial court denied that request based on *State v. Engen*, 164 Or App 591, 609, *rev den* (1999), which held that the state is "not required to prove a defendant's knowledge of the particular type of controlled substance possessed." The jury found defendant guilty. On appeal, defendant argued that the trial court erred

when it refused to give his requested instruction. *Held*: Affirmed. [1] Although the state noted that "defendant has shifted his argument slightly on appeal," it did not contend that his argument was not preserved. But the appellate court nonetheless has a "duty to determine, *sua sponte*, whether the arguments that an appellant raises on appeal are adequately persevered for our review." [2] "In this case, a preservation problem arises because the theory of the case that defendant presented to the trial court differs significantly from the theory that he advances on appeal. Defendant's argument to the trial court was premised entirely on his theory that the state had to prove that he knew that he possessed hashish, not just dried marijuana." "On appeal, defendant describes a fundamentally different theory of his case. He now argues that he was entitled to the jury instruction because the jurors could have found that he in fact did not possess hashish, but possessed only less than one ounce of dried marijuana." [3] "Had defendant presented that theory to the trial court, the parties could have fleshed out their positions on whether the record would allow the jury to infer that defendant had possessed only dried marijuana, the state might have sought to introduce additional evidence on that point … , and—depending on the outcome of those events—the trial court might have decided to give the instruction."

State v. Clark, 256 Or App 428, 300 P3d 281 (2013). Defendant was convicted of seven misdemeanors, all of which arose from a traffic accident resulting from her driving while intoxicated. Six of the charged offenses required proof of a reckless mental state. The trial court gave the jury a modified version of the state's requested instruction on the duties of a driver, which was patterned after one approved in *State v. Stringer*, 49 Or App 51 (1980), *aff'd*, 291 Or 527 (1981), *rev'd on other grounds on reh'g*, 292 Or 388 (1982). The instruction, which accompanied an instruction defining "recklessly," said: "The driver of a motor vehicle is required by law to drive upon a highway or premises open to the public at a speed no greater than is reasonable and prudent, having due regard for the traffic, surface and width of the road, hazards at intersections and any other conditions existing. A driver has a continuing duty to keep a reasonable lookout and maintain the automobile under reasonable control, and that is such as would be exercised by a reasonable person." Defendant objected to the instruction on the ground that it would create a substantial risk the jury would convict "based on a theory of negligence instead of recklessness." The jury found her guilty. *Held*: Affirmed. [1] Defendant's challenge to the instruction fails under *Stringer*, in which the court rejected a similar challenge to nearly the same instruction. "The instruction could inform the jury's determination of whether defendant acted recklessly. ORS 161.085(9), defining 'recklessly,' provides that '[t]he risk [that the defendant is aware of and consciously disregards] must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.' Thus, like the defendant in *Stringer*, a defendant charged with crimes with the mental state of recklessness has 'a duty to exercise that degree of care that a reasonably prudent person would use under the circumstances.'" [2] Here, "the disputed instruction explained, in general terms, the degree of care that a reasonable driver observes," and thus provided the jury a yardstick by which to measure the extent to which defendant's driving deviated from the reasonable person's driving.

Hale v. Belleque, 255 Or App 653, 298 P3d 596 (2013). In late 1995, when he was 19 years old, petitioner and Susbauer committed a string of crimes, including residential burglaries, in Eugene. In the evening of December 20, petitioner and Susbauer came across petitioner's former girlfriend, her boyfriend, and another boy (all of whom were about 15) and gave them a ride. They took the three up a remote logging road, sexually assaulted the girl, and then murdered them all, execution style. Petitioner and Susbauer were charged with numerous counts of aggravated murder and sexual offenses, as well as with counts of burglary based on previous crimes. The jury found petitioner guilty on the charges and imposed a death sentence. Susbauer pleaded guilty and was sentenced to life imprisonment. The Oregon Supreme Court affirmed petitioner's conviction and death sentence. *State v. Hale*, 335 Or 612 (2003), *cert den* (2004). Petitioner then filed a petition for post-conviction relief in which he alleged numerous claims. After a trial, the post-conviction court rejected all of his

claims. *Held*: Affirmed in part and reversed in part. The post-conviction court properly denied all of petitioner's claims based on the convictions for aggravated murder and death sentence, but erred when it denied his claims based on the burglary convictions. [1] Petitioner's claim based on the instruction given on "proof beyond a reasonable doubt" was erroneous because it included the "moral certainty" clause has no merit in light of *State v. Williams*, 313 Or 19, 36-38 (1992). [2] But the post-conviction court erred when it denied petitioner's claims based on the instructions given on the burglary charges. Because those charges alleged that he entered the victims' residences with an intent to commit theft and criminal mischief, his counsel failed to provide constitutionally adequate assistance because they did not request a *Boots*-style concurrence instruction "that the same ten jurors must agree regarding which of the two underlying crimes … petitioner intended to commit while in the dwellings." *See State v. Frey*, 248 Or App 1, 9 (2012). Petitioner suffered prejudice even though the jury separately found him guilty on charges of theft and criminal mischief. But that error does not warrant setting aside the convictions for aggravated murder or the death sentence. [3] The post-conviction court correctly denied petitioner's claim that his trial counsel failed to provide constitutionally adequate assistance by not objecting to the "natural and probable consequences" instruction that the Supreme Court later disapproved in *State v. Lopez-Minjarez*, 350 Or App 576 (2011). "As the post-conviction court found, the 'natural and probable consequences' instruction was correct when given in 1998. Until … *Lopez-Minjarez*, the 'natural and probable consequences' instruction was a standard instruction included in the uniform criminal jury instructions and had been described … as 'a correct statement of the law.' The failure of trial counsel to object to it was a reasonable exercise of professional skill and judgment. Accordingly, we conclude that trial counsel was not inadequate in failing to object to the 'natural and probable consequences' instruction. We further conclude that, assuming that trial counsel was inadequate in failing to object, in view of the evidence that petitioner was the primary actor, … the uniform criminal jury instruction on aiding and abetting did not have a tendency to affect the result of the prosecution or cause actual prejudice to the defense."

State v. Munoz, 255 Or App 735, 298 P3d 595 (2013) (*per curiam*). In murder prosecution based on accusation that defendant, along with other gang members, stabbed the victim to death, the trial court correctly refused to instruct jury that, to find him guilty of murder, at least 10 jurors had to concur on whether he was criminally liable as the principal or as an accomplice. *See State v. Phillips*, 242 Or App 253, *rev allowed* (2012).

State v. Cluver, 255 Or App 284, 296 P3d 638 (2013). Defendant, an employee at an assisted-care facility, was charged with various sexual offenses that he committed against an elderly lady with dementia. One charge was first-degree sodomy under ORS 163.405(1)(d) based on an allegation that she was incapable of consenting. Defendant primarily denied that he had committed the offense, but he also argued that if it happened, the victim had consented. He requested an instruction on second-degree sexual abuse, ORS 163.425(1)(a), as a lesser-included offense. The trial court denied that request on the ground that the nature of the consent required for the two crimes were not the same. The jury found defendant guilty. *Held*: Reversed. The trial court erred by refusing to instruct on second-degree sexual abuse. [1] Where a defendant is charged with first-degree sodomy on a theory that the victim was incapable of consent under ORS 163.405(1)(d), second-degree sexual abuse is a lesser-included offense. [2] It does not matter that the requested instruction on a lesser-included offense might be inconsistent with the defendant's primary defense; the trial court must give a lesser-included offense instruction if the evidence supports it. [3] The error was not harmless. The Court of Appeals once again rejected the state's argument that because the jury was given an "acquittal first" instruction, ORS 136.460(2), and found defendant guilty of the charged offense, the error is inconsequential because the jury could not have considered the lesser crime anyway.

State v. Wesley, 254 Or App 697, 295 P3d 1147 (2013). Defendant was convicted of murder and attempted murder, among other crimes, for a drug-related drive-by shooting. Defendant was in a

car with another man, Smith, at the time of the shooting. Smith shot at one person, Anderson, but missed, instead striking and killing Anderson's girlfriend. Police showed Anderson a photograph of defendant and asked if he could identify him; Anderson said that he did not recognize the person in the photograph. But he eventually testified that he lied, and did indeed recognize defendant as one of the two men in the car at the time of the shooting – he claimed that he did had lied because he intended to seek his own revenge. Smith confessed to the shooting, and entered a plea bargain; he testified that both he and defendant had been armed, and both men had shot at the fleeing Anderson. At trial, defendant's theory of the case was two-fold: that (1) jurors should not believe either Anderson or Smith as to his presence, and (2) even if he had participated in the shooting, he had no intent to kill the girlfriend, rather than Anderson, which meant he was guilty of only manslaughter for the death of the victim. But the state relied on a transferred intent theory, and the trial court instructed jurors expressly that they could apply the doctrine of transferred intent—that if defendant intended to kill Anderson, he could be found guilty of murder just as if he had intended to kill the victim. The jury found defendant guilty. *Held*: Reversed and remanded. [1] The court did not address defendant's assignment of error relating to the jury instruction, because he did not preserve it as required by ORCP 59 H. [2] The doctrine of transferred intent remains viable in Oregon murder prosecutions. Although the 1971 Criminal Code did not codify the doctrine, it was an "elementary principle of criminal law" and nothing in the Code or its commentary indicated that the legislature intended to abolish it.

State v. Naudain, 254 Or App 1, 292 P3d 623 (2012), *rev den*, 353 Or 787 (2013). In 1998, defendant and five others participated in a home-invasion robbery during which he punched and then shot and killed H, the victim. When he was arrested in 2008, defendant said he had been told H had a gun and that, as he had H at gunpoint, H reached under the bed, he saw something shiny, so he "jumped" and "panicked and freaked out," then fired the shot. He was charged with aggravated murder. At trial, defendant's confession was admitted, and he testified, admitting that he had shot H but claiming he did so only accidentally. He also admitted that he had not felt frightened by the victim and had not seen the victim reach for a gun; he did not claim self-defense. In closing argument, the prosecutor highlighted defendant's confession and argued that he had no legal right to act in self-defense in those circumstances; the prosecutor argued that once defendant learned of that, "his only hope is to offer up to you that it was an accident." Defendant argued to the jury that he had never raised the issue of self-defense and had said merely that he "jumped." Over defendant's objection, the trial court instructed the jury that "an intruder who is committing or attempting to commit a felony … is an initial aggressor" and that "an initial aggressor has no right to act in self-defense unless he first withdraws from the encounter. In the present case, [defendant] has not raised the defense of self-defense." The jury found defendant guilty, and the court imposed a life sentence without the possibility of parole. *Held*: Reversed and remanded. The instruction on self-defense was reversible error. [1] For purposes of ORCP 59 H(1), defendant sufficiently preserved his objection to the instruction. [2] A trial court impermissibly comments on the evidence "when it instructs the jury how specific evidence relates to a particular legal issue." [3] The instruction "told the jury how specific evidence (defendant's status as an initial aggressor) relates to a particular legal issue (defendant's ability to successfully raise self-defense)." Thus, the instruction referred to the evidence and "explained that it precluded defendant from being able to raise self-defense," which was an impermissible comment on the evidence. [4] The instruction was not harmless because, although it instructed that "defendant had not raised self-defense," it also instructed that he "could not raise self-defense—at least not successfully." Because the state had argued that defendant had no right to act in self-defense, the court held, the instruction bolstered the state's argument.

^ ***State v. Zolotoff***, 253 Or App 593, 291 P3d 781 (2012), *rev allowed*, 353 Or 428 (2013). Defendant was an inmate in a single-occupancy cell at the Marion County jail. Jail deputies found in his cell a broken-off spoon that was partially sharpened. He was charged with "knowingly" possessing a weapon, ORS 166.275. Defendant requested an instruction for attempted possession of a

weapon by an inmate, but the trial court denied the request on the ground that an instruction on an attempt offense can be given only when a defendant is charged with committing the offense intentionally. The jury found defendant guilty. *Held:* Reversed and remanded. The trial court erred by refusing to give the instruction. [1] Under ORS 136.465, a defendant may be convicted of an attempt to commit a crime even if the mental-state requirement for the completed crime is other than "intentionally." "There is no incongruity between intentionally taking a substantial step toward possession of a weapon and knowing possession of a weapon by an inmate." [2] The trial court erred when it denied defendant's requested instruction: defendant was entitled to the instruction "because the instruction correctly stated the law" and there was evidence from which the jury could infer that the spoon was not yet a weapon because he "had not completed sharpening it and was merely in the process of making a weapon." [3] The error was not harmless, even though the jury found defendant guilty of the charged offense and the jury would not have been allowed to consider an attempt crime under the "acquittal first" requirement of ORS 136.460(2). When the court does not give a lesser-included offense instruction, the jury does not have a complete statement of the law, which could affect how the jury evaluates the greater offense, even in light of the "acquittal first" instruction.

State v. Sullivan, 253 Or App 103, 288 P3d 1004 (2012). In separate incidents, defendant compelled the victim, a 13-year-old girl, to commit oral sodomy and to submit to anal rape. He was charged with two counts of first-degree sodomy by forcible compulsion. In closing argument, the prosecutor described the first incident as that defendant had pushed the victim's head toward his exposed penis and then had threatened to kill her if she screamed, and the second incident as that "when he flips her over the next time and puts her down on the bed, she still is going under that implied threat." Defendant argued that because the state had presented two different theories of forcible compulsion—actual physical force and the threat of physical force—a *Boots* instruction was required that would require the jurors to agree on one of those two theories. The trial court refused to give the instruction, and the jury found him guilty. *Held*: Affirmed. [1] "The decisive question in reviewing the court's rejection of defendant's requested instruction is whether the jury was allowed to base its verdict on alternative factual occurrences, each of which would be a separate crime, or whether the state merely presented alternative evidence to establish a single element of the offense." [2] "ORS 163.305(2) defines 'forcible compulsion,' as either physical force or a threat. Both are merely different ways of proving the element of forcible compulsion." [3] "Accordingly, we conclude that the state was entitled to present evidence that defendant engaged in forcible compulsion by physical force or by threat, and the trial court did not err in denying defendant's requested jury instruction."

State v. Davis, 252 Or App 667, 288 P3d 980 (2012). Defendant had entered the victims' undeveloped property located downstream from his home in order to lower two culverts running under a gravel road on the property. He used a backhoe to dig channels and to excavate the gravel road in order to dig a deeper channel in which to lower the culverts. In doing so, he uncovered, but did not damage, a city water main running parallel to the gravel road. He had lowered one culvert, but stopped trying to lower the second culvert because of the water main, leaving the property with the water main uncovered. He was charged with second-degree criminal mischief, ORS 164.354. Over his objection, the trial court instructed the jury on "recklessly" using UCrJI no. 1036:

> "A person acts recklessly if the person is aware of and consciously disregards a substantial and unjustifiable risk that a particular result would occur *or that a particular circumstance exists.* … When used in the phrase 'damage property,' recklessly means that a person is aware of and consciously disregards a substantial and unjustifiable risk that a result will occur or that damage will occur … that the result in damage would occur *or that a circumstance exists*, and the risk must be of such nature and degree that disregarding it constitutes a gross deviation from the standard of care that a reasonable person would observe."

The jury found defendant guilty. On appeal, defendant relied on *State v. Crosby* , 342 Or 419 (2007), to argue that the "recklessly" instruction was erroneous because it included the italicized words, which he contended improperly allowed the jury to consider whether he had acted recklessly with regard to either a result (damage) *or* a circumstance. *Held*: Reversed and remanded. [1] "In determining whether the trial court erred in giving a particular instruction, we read the instructions as a whole to determine whether they state the law accurately. An erroneous instruction amounts to reversible error if the instruction probably created an erroneous impression of the law in the minds of the jury which affected the outcome of the case." [2] As used in ORS 164.354 (2007), the term "damages" describes "a *result* and not a circumstance: the statute inquires whether a person 'recklessly damages,' not whether a person is reckless with respect to whether damages exist. Thus, for a person to have committed second-degree criminal mischief, he must have been 'aware of and consciously disregard[ed] a substantial and unjustifiable risk' of causing a result: damage." [3] The instruction given was error because it "invited the jury to convict if it found that defendant, though not aware that he might damage the property, was aware of and disregarded the risk that the water main might run through the spot where he was digging"—particularly given that "the state's theory, in part, was that defendant was reckless with regard to the existence of the water main." Here, as in *Crosby*, "an instruction that recklessness as to whether a 'circumstance exists' is sufficient to support a conviction is improper. Rather, the jury should have been instructed only regarding whether defendant acted recklessly as to the result: damage." [4] The instruction "likely created a misimpression of the law that amounts to reversible error."

Note: The court noted that, for second-degree criminal mischief, "it is possible that 'recklessly' does relate to one circumstance—the circumstance that damage was done to 'property of another,' as defined in ORS 164.354," but the court noted that that element was not an issue in this case.

State v. Jackson, 252 Or App 74, 284 P3d 1266 (2012). Defendant was convicted of second-degree assault after a drunken-biking-road-rage incident, for "knowingly" causing physical injury with a knife to a person who attempted to intervene in a fistfight that defendant was losing. He was so drunk that he barely remembered anything; his girlfriend had to fill him in on the fight later. He told police that he didn't recall stabbing anyone, and speculated that he might have had his knife in his hand and "poked" someone when he tried to throw a defensive punch. At trial, he argued that he either (1) acted reasonably in reacting to a perceived attack, or (2) because of the injuries he had sustained in the fight, he was not coherent at the time of the stabbing and thus did not "knowingly" use the knife. He asked the court to instruct the jury on the lesser-included offense of fourth-degree assault. The trial court denied that instruction, perhaps reasoning that defendant could not have committed fourth-degree assault without also committing second-degree assault. *Held*: Conviction for second-degree assault reversed and remanded; otherwise affirmed. [1] "A defendant is entitled to an instruction on a lesser-included offense if there is a disputed issue of fact enabling the jury to find that all the elements of the greater offense have been proven, but that all the elements of one or more of the lesser offenses have been proven." [2] Here, "defendant's testimony was … sufficient, if believed, to permit the jury to find that, if he stabbed the victim, he did not do so knowingly. … Although the jury was not required to believe that testimony, the jury could have believed a 'composite' of the state's and defendant's theories of the case: that is, that, because of his head injuries, defendant had not known that he was striking the victim with the knife during the second altercation."

State v. Perez-Chi, 251 Or App 661, 284 P3d 1195 (2012). Defendant was convicted of burglary, robbery, and felony murder based on his participation in a burglary/robbery at a friend's residence, during which his co-defendant shot and killed his friend. The Court of Appeals reversed and remanded because the trial court had given the "natural and probable consequences" instruction. 241 Or App 344 (2011). After the Supreme Court decided *State v. Lopez-Minjarez*, 350 Or 576 (2011), it remanded this case for reconsideration. On remand, the Court of Appeals reconsidered

whether that instruction was harmless for his convictions for burglary and felony murder. *Held*: Reversed and remanded. [1] The erroneous instruction was harmless with respect to his burglary conviction, the first chronological crime of conviction. [2] "We will reverse a conviction if an incorrect jury instruction created an erroneous impression of the law that, if the jury had believed defendant's version of the facts, would have affected the outcome of the case. Thus, to assess whether giving the erroneous instruction was harmless with respect to the felony-murder convictions, we must determine whether the jury's guilty verdicts on those charges could have been based on the theory of criminal responsibility contained in the instruction." [3] The erroneous instruction was not harmless as to the robbery and felony-murder charges. Based on defendant's testimony, the jury could have found that the burglary (charged as unlawful entry with intent to commit theft) was complete before the co-defendant shot and killed the victim. Thus, the jury may have convicted defendant of felony murder based on the unlawful "natural and probable consequences" instruction.

^ ***State v. Pipkin***, 245 Or App 73, 261 P3d 60 (2011), *rev allowed*, 351 Or 586 (2012). Defendant broke into the home of his ex-girlfriend in the middle of the night and assaulted her and another person who was spending the night there, and he was charged with first-degree burglary, fourth-degree assault, and menacing. At trial, he moved for judgment of acquittal on the assault charge, arguing that the victim had not suffered "physical injury," but the trial court denied that motion. Defendant then asked the trial court to give a *Boots* instruction that 10 or more of the jurors had to agree on whether he committed the burglary by entering the victim's residence with the requisite intent or by remaining in the her residence with the requisite intent, and the court denied that request. *Held*: Affirmed. The trial court correctly refused to give the requested *Boots* instruction because "entering unlawfully and remaining unlawfully are two alternative methods of meeting the 'enters or remains unlawfully' element" of a single crime—first-degree burglary."

^ ***State v. Phillips***, 242 Or App 253, 255 P3d 587 (2011), *rev allowed*, 351 Or 586 (2012). Defendant failed to preserve his challenge to the court's jury instructions—he did not except after instructions as required by ORCP 59 H but rather moved only for a judgment of acquittal based on his argument.

INTERCEPTION OF COMMUNICATIONS

See also "Search & Seizure: electronic surveillance, wiretaps," *below*.

INTERPRETERS

State v. Erives, 252 Or App 93, 284 P3d 1276 (2012), *rev den*, 353 Or 203 (2013). Defendant, who speaks Spanish and some English, appeared before the court on allegations that he had violated his probation. Neither he nor his counsel requested an interpreter, and the trial court did not appoint an interpreter. During defendant's testimony, the court *sua sponte* brought in an interpreter. The court found him in violation. On appeal, defendant argued for the first time that the trial court plainly erred by not appointing an interpreter for the entirety of the proceedings. *Held*: Affirmed. [1] On this record, defendant was entitled to the services of an interpreter. ORS 47.275(1). [2] Under the circumstances of the case, however, it was not obvious that an interpreter was required: (a) at the outset of the hearing, defendant engaged in a colloquy with the court that suggested that he understood English; (b) defendant was represented by counsel who had previously conferred with defendant and informed the court at the outset of the hearing that defendant was ready to proceed; and (c) neither defendant nor his attorney every requested the appointment of an interpreter.

JURY TRIAL

See also "Sentencing: constitutional issues—right to jury," *below*.

State v. Harrell / Wilson, 353 Or App 247, 297 P3d 461 (2013). *State v. Harrell*: Defendant was charged with assault, attempted assault, and unlawful use of a weapon based on his participation in a fight outside of a bar. The case was tried to a jury, and the jurors asked a question during deliberations that concerned defendant's lawyer about their understanding of the law. Defendant then asked to waive his right to a jury and to have the trial court decide the case instead. The prosecutor objected and, after an extensive discussion, the trial court denied defendant' request. The court appeared to say that it lacked the authority to allow the wavier, but it also gave specific reasons for a discretionary decision to deny it. To avoid a retrial if it had committed error by denying defendant's attempted waiver, the trial court submitted his own verdict, which it sealed. The jury found defendant guilty of some charges and acquitted him of others, and the court then disclosed that it would have acquitted defendant of all charges. Defendant appealed, claiming that the trial court erred by not accepting his jury wavier, and the Court of Appeals affirmed. *State v. Wilson*: Defendant was charged with first-degree manslaughter, second-degree assault, DUII, and DWS. Before trial, he asked to waive jury. After an in-chambers discussion, the trial court denied his request. In a later discussion on the record, defendant's counsel recounted some of the parties' discussion from chambers, stating that the prosecutor had objected because he believed that a jury, not a judge, should decide the "extreme indifference" standard for the manslaughter charge. The prosecutor responded by saying that he did not actually object to the jury waiver, but that he asked the court to exercise its discretion not to accept it. The court explained that his "policy" was not to try not to act as factfinder if a party objected to him doing so. Thus, based on the prosecutor's "request," the court denied defendant's wavier. The jury found defendant's guilty, and he appealed, arguing that the court erred by denying his request to waive jury, and the Court of Appeals affirmed. Before the Supreme Court, defendants argued that the trial court's authority under Art. I, § 11, is only to determine "whether the defendant's waiver request was knowingly, intelligently, and voluntarily made," and the state responded that the trial court has broad discretion to deny a defendant's request to waive jury. *Held*: Both cases reversed and remanded for further proceedings. [1] Art. I, § 11, gives a defendant the right to a jury trial, and also the concomitant right—subject to the court's consent—to waive that right in favor of a bench trial. [2] In *State v. Baker*, 328 Or 355 (1999), the court held that the trial court was the only "entity" that possessed the "discretionary choice to deny a criminal defendant in a noncapital case the right to waive trial by jury." [3] Because the jury-waiver provision was added to Art. I, § 11, by legislative referral, "we apply the interpretive methodology for initiated constitutional provisions and amendments set out in … *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 56 (2000). Under that framework, our task is to discern the intent of the voters. The best evidence of the voters' intent is the text and context of the provision itself and, if the intent is clear, the court does not look further. Nevertheless, caution must be used before ending the analysis at the first level, *viz.*, without considering the history of the constitutional provision at issue." Further: "In interpreting constitutional provisions adopted by ballot measure, we examine several aspects of the provision in question in order to discover the voters' intent: (a) the text of the ballot measure that gave rise to the provision; (b) the text of any related ballot measures submitted to voters during the same election; and (c) related constitutional provisions that were in place when the provision at issue was adopted. We also examine relevant case law interpreting the provision at issue, as well as rules of construction that bear directly on the provision's interpretation in context." [4] After considering the text, context, and history of Art. I, § 11, the court held that trial courts should consider the following factors when deciding whether to consent to a bench trial: Whether having a bench trial will be faster than a jury trial, whether it will be more economical than a bench trial, and whether it will fully protect the rights of the accused. "As a general rule, affirmative answers to those questions logically would lead to the conclusion that a criminal defendant's jury waiver should be granted." [5] Judicial discretion is not absolute, and must be exercised "according to fixed legal principles in order to promote substantial justice." It cannot be arbitrary and capricious. In short, judicial discretion "must be lawfully exercised to reach a decision that falls within a permissible range of correct outcomes." In making its discretionary decision, the court should "consider and give due weight to the preferences of the

district attorney." [6] Although the court found it difficult to anticipate the "variety of circumstances" that might prompt a prosecutor to express a preference for or against a defendant's jury wavier in an individual case, the court anticipated that the preference "will be consistent with promoting judicial economy and seeking justice as the circumstances of an individual case indicate. … And, the prosecutor's 'preference' should be weighed by the trial judge with those goals in mind." [7] The court acknowledged, however, that in addition to the "primary considerations" mentioned above, "we do not foreclose the possibility that other considerations might arise in an individual case." [8] In *Harrell*, because the court found it difficult to determine whether the trial court's refusal to consent to a bench trial was premised on the correct considerations, the "best course is to remand to the trial court to reconsider [Harrell's] jury trial waiver in accordance with this opinion." [9] In *Wilson*, the trial court withheld its consent to a jury waiver based only on the prosecutor's objection, the basis for which was not clear on the record. Thus, the court remanded to the trial court to reconsider the jury waiver.

Note: Justice Linder's concurring opinion (joined by Justice Kistler) agreed generally with the majority's analysis and the disposition in *Wilson*. She also noted that the judge was incorrect in *Harrell* was incorrect insofar as he initially assumed it was too late in the case for the defendant to waive jury: "The constitution does not expressly dictate the timing of the defendant's jury waiver by requiring the waiver to occur at the outset of the trial. The legislature likely could require the waiver to occur at an earlier point. But the legislature has not done so … Consequently, in my view, the trial judge's reason for denying the motion in that initial ruling reflected a legal error." But she would have concluded that the trial court's alternative explanation for denying defendant's request was sufficient: "That alternative ruling provides a sound basis for the trial judge's unwillingness to consent to defendant's requested jury waiver. Defendant's motion to waive jury came after the four days of trial were concluded, and the jury had retired to deliberate. By coming so late, the waiver, if granted, would have cast the judge into a role that the judge had not prepared throughout the trial to perform; it would have wasted the jurors' time and efforts through a four-day trial, as well as the public's resources, in the form of the extra time and effort expended by the prosecutor and the judge and court staff; and it would have risked undermining the integrity of the proceedings and the confidence in the verdict in multiple ways, including the fact that the judge was familiar with a key defense witness."

State v. Rogers, 352 Or 510, 288 P3d 544 (2012). Defendant is a serial killer who kidnapped, tortured, and murdered several women in the mid-1980s. In this case, he was tried and convicted for murdering six women, and he was sentenced to death. In *State v. Rogers*, 313 Or 356 (1992), the court affirmed his convictions, set aside his death sentence, and remanded for a new penalty-phase trial. On retrial, he was again sentenced to death. In *State v. Rogers*, 330 Or 282 (2000), the court again set aside his death sentence and remanded for a new penalty-phase trial. On retrial, the trial court rejected all of defendant's pretrial motions, and the jury sentenced him to death again. *Held*: Reversed and remanded for a new penalty-phase trial. [1] Art. I, § 11, as interpreted in *State v. Sundberg*, 349 Or 608 (2011), precludes empaneling an "anonymous jury" unless the court find "that the circumstances of the particular trial provide sufficient grounds to believe that the jurors need the protection of anonymity." [2] Even though the jurors in this case filled out detailed questionnaires that included personal identification information and the court did not impose any restrictions on in-court *voir dire*, the jury selected was "anonymous" within the meaning *Sundberg* because the trial court: (a) instructed the prospective jurors that they could choose not to include their identifying information on the questionnaires; (b) directed the parties not to disclose the jurors' information to anyone else, including defendant; and, (c) advised the jurors that their information would not be disclosed to anyone other than the lawyers, from which the jurors might have inferred that their information was being shielded from defendant. Consequently, "the procedure that the trial court followed … gave rise to the same risks that the court identified in *Sundberg*." Because the court did not make the findings required by *Sundberg* to empanel an "anonymous jury," the court erred. [3] The error is not harmless because the jurors may have inferred that defendant is currently dangerous

from the court's comment that their information was being kept from him, which would have unfairly prejudiced him on the "future dangerousness" question, and defendant's ability to personally participate in *voir dire* was unfairly hampered by him not having the information.

M.F.K. (Foster) v. Miramontes, 352 Or 401, 287 P3d 1045 (2012). Plaintiff filed a petition under ORS 30.866 in which she requested both a stalking protective order (SPO) against defendant and an award of compensatory damages for lost sick and annual leave, lost wages, and counseling expenses. Defendant demanded a jury trial on the claim for damages; he based that claim on Art. I, § 17, and Art. VII (Am), § 3. The trial court denied that request, and after a trial to the court, it issued a SPO and entered a judgment against defendant for $42,000 in compensatory damages. Defendant appealed, and the Court of Appeals affirmed. *Held*: Reversed and remanded. [1] ORS 30.866 allows a plaintiff to request both issuance of a SPO and compensatory damages, but it does not authorize the trial court to provide the defendant with a jury trial on the damages claim. [2] Under Art. I, § 17, and Art. VII (Am), § 3, "the relevant inquiry is not whether a newly created statutory claim existed at common law, but whether, because of its nature, it falls within the guarantee of the Constitution to a jury trial." [3] "If plaintiff had sought only money damages under ORS 30.866—that is, had she not combined her claim for money damages with a claim for [an SPO]—then her claim would have been at law and the right to jury trial would have attached." On the other hand, "if plaintiff had sought only injunctive relief [in the form of an SPO], her claim would have been equitable in nature, and the constitution would not provide a right to a jury trial. … There is no right to jury trial on equitable claims." [4] "[T]he right to jury trial must depend on the nature of the relief requested and not on whether, historically, a court of equity would have granted the relief had the legal issue been joined with a separate equitable claim. … Instead, we conclude that [Art. I, § 17, and Art. VII (Am), § 3] do not guarantee a right to jury trial for claims or request for relief that, standing alone, are equitable in nature and would have been tried to a court without a jury at common law. By the same token, in the absence of a showing that the nature of a claim or request for relief is such that, for that or some other reason, it would have been tried to a court without a jury, those provisions do guarantee a right to jury trial on claims or requests that are properly categorized as 'civil' or 'at law.'" [5] Because "plaintiff's claim seeking monetary damage for injury inflicted fits within those terms, even if it does not have a precise historical analog," defendant was entitled to a jury trial on that claim. [6] When a mixed petition is before the trial court in which the plaintiff is seeking both equitable relief and compensatory damages and the defendant demands a jury trial on the damages claim, the court should defer ruling on the equitable claim until the jury has rendered a verdict on the damages claim.

State v. Gilbert, 255 Or App 203, 296 P3d 629 (2013). The case was tried to the court on stipulated facts, and the court found him guilty two misdemeanor charges. Although the court file did not contain a written jury waiver, and the transcript did not contain a waiver-of-jury colloquy or otherwise reference a jury waiver, the judgment recited that "defendant executed a written waiver of trial by jury." On appeal, defendant claimed that the court committed plain error by not obtaining a written jury waiver as required by Art I, § 11. *Held*: Reversed. [1] The error is plain—the record is not subject to competing inferences. Despite the recital in the judgment, nothing in this record establishes that the defendant executed a "knowing and voluntary" jury waiver. [2] The error is not harmless and reversal is required, because of the specific requirement in Art I, § 11, that a waiver of jury must be in writing.

^ ***State v. Fuller***, 252 Or App 391, 287 P3d 1263 (2012), *rev allowed*, 353 Or 203 (2013). Defendant was charged with attempted theft in the first degree and theft in the third degree, both misdemeanors, based on a shoplifting incident. The charges were reduced to violations at arraignment pursuant to ORS 161.566(1). As a consequence, defendant was not entitled to court-appointed counsel, a jury trial, or proof beyond a reasonable doubt. ORS 153.076(1), (2). Defendant demanded a jury trial and proof beyond a reasonable doubt; she contended the prosecution and conviction of the charges retained characteristics that made it a criminal prosecution. The trial court

denied those requests, found her guilty by a preponderance of the evidence after a trial to the court, and imposed a $300 fine. (Defendant was represented at trial by retain counsel and on appeal by *pro bono* counsel.) *Held*: Reversed and remanded. [1] Although the legislature may devise a violation system to allow for punishment of people by lesser means than criminal prosecution, the alternative approach must have characteristics sufficiently distinguishable from a criminal prosecution to avoid application of the procedural protections of criminal cases. The factors to be considered include the type of offense, the nature of the prescribed penalty, the collateral consequences associated with conviction, the significance of the conviction to the community, and the pretrial practices associated with an arrest and detention for the offense. *See Brown v. Multnomah County Dist. Ct.*, 280 Or 95, 100-02 (1977). [2] Applying those factors, theft was historically viewed as a criminal offense. In 1999, the legislature modified the "default principle" that initially accords violation treatment, absent prosecutorial election, to a "default principle" of misdemeanor treatment. The maximum fine for violation has been increased to $6,250, *see* ORS 161.566(2)(b), when, by comparison, the maximum fine under ORS 161.635(1) for a class C misdemeanor of theft in the third degree is only $1,250. When a violation commences as a misdemeanor, the offender is also subject to the "trappings" associated with a criminal offense, such as custodial arrest, search incident to arrest, and bail requirements. [3] The offense of attempted first-degree theft has not been sufficiently decriminalized to deny the defendant the right to jury trial and to proof beyond a reasonable doubt.

^ *See also* ***State v. Benoit***, S060858 (review on alternative writ of mandamus). When prosecutor elects under ORS 161.566 to treat misdemeanor offense as a violation, do any of the constitutional and statutory protections afforded to the defendant in criminal prosecutions apply to the violation proceeding?

JUVENILES

See also "Sentencing: constitutional considerations—proportionality," *below*.

^ ***State v. A. J. C.***, 254 Or App 717, 295 P3d 1157, *rev allowed*, 353 Or 747 (2013). V and youth were students at the same school. One evening, youth called V and sent her text messages telling her that he was going to bring a gun to school the next day and shoot her. At school the next day, V told a counselor of youth's threat, and the counselor relayed the threat to the principal, who did not know V but knew youth, who had had "disciplinary issues." The principal called in the police and youth's mother. Meanwhile, he searched youth's locker, then pulled him from class and seized his backpack. During an interview, youth denied making the threat. The principal searched youth's backpack and found a .45-caliber pistol and ammunition. A petition was filed in juvenile court alleging that youth committed various weapons offenses. Youth moved to suppress contending that the principal's search of his backpack was unlawful. The juvenile court denied the motion, and youth was adjudicated delinquent. *Held*: Affirmed. [1] "Warrantless searches of students without probable cause or some other exception to the warrant requirement, such as consent, are permissible when a school official reasonably suspects, based on specific and articulable facts, that the student is in possession of something that poses an immediate threat to the student or others." And the permissible scope of such searches "depends on the nature of the safety threat. *State v. M.A D.*, 348 Or 381 (2010). [2] The principal had reasonable suspicion, based on specific, articulable facts, to believe that youth unlawfully possessed a firearm on school grounds. [3] The principal's decision to search the backpack, rather than return it to youth's parents, was reasonable under the circumstances perceived by the principal: that youth reportedly may have threatened other unidentified students, and that the type of gun youth reportedly had was unknown (and therefore may have been concealed elsewhere inside the school). When faced with the choice of returning the unopened backpack, searching youth, searching elsewhere in the school, or searching the backpack, the principal's choice to search the backpack was reasonable because "it was the most likely to reveal a gun and dissipate the safety threat without further intrusions or delay," and did not violate youth's rights under Art. I, § 9.

State v. D.M.T., 254 Or App 631, 295 P3d 175 (2013) (*per curiam*). Based on his admissions pursuant to a plea agreement, youth was adjudicated on two counts of attempted first-degree sexual abuse. Before final disposition, youth filed a motion to amend the petition and order to allege only attempted *third*-degree sexual abuse. The juvenile court denied the motion, noting that it did not "have authority" to do so. *Held*: Reversed and remanded. "The juvenile court has discretion under the juvenile code to dismiss or amend a petition and to set aside or modify its orders even after a youth has admitted to allegations in the petition and the court has accepted those admissions. … *See* ORS 419C.261(1); ORS 419C.610(1)."

State v. C.E.B., 254 Or App 353, __ P3d __ (2012). In 1997, when he was 11 or 12 years old, youth committed acts against his sister that constituted first-degree sodomy and rape. The state filed a delinquency petition, youth admitted the acts and was adjudicated delinquent, and the juvenile court placed him on probation. The court terminated youth's probation in 2003. In 2010, when he was 24 years old, youth filed a motion pursuant to ORS 419C.261(2), to set aside the order finding him within the jurisdiction of the court. The state opposed the motion. At a hearing held after youth had turned 25 years old, the juvenile court suggested that it would have granted the motion on the merits but denied the motion on the ground that it no longer had authority to consider the motion. *Held*: Reversed and remanded. The juvenile court erred when it ruled that it lacked authority to consider youth's motion to dismiss. [1] ORS 419C.261(2) "authorizes the trial court to dismiss the petition 'in furtherance of justice after considering the circumstances of the youth.' There is no explicit time limitation on the court's authority to dismiss a petition." [2] "In light of the juvenile court's general jurisdiction, ORS 419B.090(1), we conclude that the juvenile court's authority to dismiss a petition under ORS 419C.261(2) is not limited to cases in which the person continues to be within the juvenile court's jurisdiction, but also extends to cases in which the person is no longer within the juvenile court's jurisdiction under ORS 419C.005 by reason of having reached age 25. … Reversed and remanded with instructions for juvenile court to consider merits of youth's motion to dismiss."

State v. G. L. D., 253 Or App 416, 290 P3d 852 (2012). Youth and a couple of other teenagers broke into a high school, stole 20 computers, and set the school on fire. After a hearing, the juvenile court determined that youth had committed acts that constitute first-degree arson, aggravated first-degree theft, two counts of second-degree burglary, and first-degree criminal mischief. The court imposed restitution in the amount of $194,578. *Held*: Affirmed. [1] The juvenile court properly denied youth's motion to dismiss the aggravated-theft allegation based on ORS 164.057(1)(b). The court properly considered the cost of replacing the stolen computers when it determined that their value exceeded $10,000: it did not improperly use the replacement cost in lieu of proof of fair market value; rather, it properly considered replacement value with other evidence to determine the fair market value of the computers and, therefore, based its determination of value not on the replacement cost but on market value. [2] Under *State v. E.V.*, 240 Or App 298 (2010), the juvenile court properly ordered youth to pay restitution to insurance companies. Youth's argument that he was entitled to a jury trial on restitution has no merit in light of *State v. N.R.L.*, 249 Or App 321, *rev allowed* (2012).

Note: The Court of Appeals reiterated that "the appropriate mechanism to challenge the sufficiency of evidence in a juvenile proceeding is a motion to dismiss rather than a motion for judgment of acquittal."

State v. C. S., 252 Or App 509, 287 P3d 1238 (2012), *rev den*, 353 Or 445 (2013). A petition was filed in juvenile court alleging that youth, a 13-year-old girl, had committed fourth-degree assault, harassment, and first-degree theft of a gym bag and contents. The next day, April 21, she appeared with her father, and she waived her right to counsel, and admitted the allegations. On May 10, the juvenile court entered a dispositional order. Youth did not appeal from that order. The court subsequently scheduled a restitution hearing and appointed counsel to assist youth. Before the hearing, youth's counsel filed a motion to withdraw her admission to the theft allegation. The court

denied that motion and imposed restitution for the bag and its contents. On appeal, the youth argued that the juvenile court erred when it denied her motion to withdraw her admission, because her waiver of counsel was not knowing and voluntary. She argued that "in order to ensure the adequacy of a waiver of counsel in a situation such as this, an explanation of the right to counsel, followed by assurances by a youth that the youth understands, is insufficient. Rather, … the court must not ask leading questions, and should have a youth repeat back his or her understanding of the right being waived." *Held*: Affirmed. [1] "Any error with respect to the validity of youth's waiver of her right to counsel was not preserved. Although … the written motion [to withdraw] did mention that youth had been unrepresented, and thus *could have* been the basis for making an argument to the trial court that her waiver of counsel was not knowing, voluntary, and intelligent, counsel made no such argument in the motion or at the hearing. Rather, .. counsel's argument, and evidence, pertained to whether youth had intended to admit to theft of the gym bag, or only theft of some of the bag's contents." [2] Youth's claim is not reviewable as "plain error" because the juvenile court's colloquy complied with *State v. Meyrick*, 313 Or 125 (1992), and "the legal point youth is making is for an extension of existing law—a refinement, so to speak, of the *Meyrick* requirements in circumstances where a young adolescent is facing charges." And that point is not "obvious, not reasonably in dispute." [3] Youth's challenge to dispositional order is not reviewable because, "not having appealed from the jurisdictional judgment, she may not now challenge it in the course of appealing a subsequent judgment."

^ ***State v. N. R. L.***, 249 Or App 321, 277 P3d 564, *rev allowed*, 352 Or 378 (2012). Youth who was found within the jurisdiction of the juvenile court on charges of burglary and criminal mischief, and the juvenile court ordered him to pay restitution to the victims in the amount of $114,071.13. On appeal, youth argued that the court erred when it denied his motion to empanel a jury; he argued that Art. I, § 17, entitled him to a jury trial on the issue of restitution because the amendments to the restitution statute, ORS 419C.450, had changed the statute's purpose from penal to "quasi-civil." *Held*: Affirmed. [1] "A jury trial is guaranteed only in those classes of cases in which the right was customary at the time the constitution was adopted or in cases of like nature. To determine whether cases are of like nature, courts must look at the particular issue in the proceeding rather than the controversy." [2] "Because juvenile delinquency proceedings are *sui generis* and did not exist when Article I, section 17, was adopted in 1857, youths generally are not entitled to a trial by jury in such proceedings." [3] "The juvenile court thus imposes restitution as a sanction, an aspect of the youth's disposition, not as a form of civil recovery for the victim." Moreover, "the restitution available to victims does not fully compensate the victim and the judgment for restitution also serves rehabilitative and deterrent purposes." A youth is not entitled to a jury trial on the amount of restitution because "juvenile court's order of restitution in a juvenile proceeding is penal, not civil, in nature."

KIDNAPPING

State v. Kinslow, 257 Or App 295, __ P3d __ (2013). The victim was at defendant's house using methamphetamine with her when she called Warren to come over and assault the victim. When Warren arrived and directed him to empty his pockets, the victim placed his cell phone and some cash on the bed. Warren then assaulted the victim over the course of a day and a half, refusing to let him leave. During the assault, Warren moved the victim from room to room, including from the living room into the bathroom. Eventually, the victim awoke to find Warren gone and defendant asleep, and so he finally escaped. The following week, the police executed a search warrant at defendant's home and found drugs, packaging materials, drug paraphernalia, and drug records; they also found the victim's cell phone in her car. She was charged with numerous offenses, including first-degree kidnapping (as an accomplice) under ORS 163.225(1)(a) ("one place to another"). Defendant moved for judgment of acquittal on the kidnapping charge, arguing that the evidence was insufficient to show that Warren moved the victim from "one place to another," but the trial court denied the motion.

The jury found defendant guilty. *Held:* Conviction for first-degree kidnapping reversed. In light of *State v. Sierra*, 349 Or 506 (2010), and *State v. Opitz* , 256 Or App 521 (2013), the evidence "failed to prove that the victim was taken 'from one place another' for purposes of" ORS 137.225(1)(a). The question is "whether, viewing the evidence in the light most favorable to the state, as a matter of situation and context, the victim's ending place [was] qualitatively different from the victim's starting place. … Given the situation and context—that is, a day-and-a-half-long assault in defendant's home—there were no qualitative differences between the various rooms of the small house. Whatever functional differences between the living room, kitchen, and bathroom, there was nothing about any one of those rooms that, on these particular facts, increased Warren's or defendant's control over the victim or further isolated the victim."

Note: Defendant was not charged with kidnapping under the "secretly confines" alternative in ORS 163.225(1)(b).

State v. Opitz, 256 Or App 521, 301 P3d 946 (2013). Defendant assaulted his girlfriend repeatedly over several hours inside her one-bedroom apartment, leaving her seriously injured. During the course of the extended assault, he moved her around between different rooms. For example, after beating the victim in the living room, he "pulled her by her hair into the bathroom and threw her headfirst into the shower." There, the victim's "face smashed into a metal bar in the shower, fracturing the orbital bone around her left eye." He then "turned cold water onto the victim to rinse off the blood." Even though she wanted to obtain medical treatment for her "substantial injuries," he forced her to remain in the apartment with him for the next three days. Eventually, her daughter called the police for a "welfare check," and the victim was rescued. Defendant was charged with numerous offenses, including a count of first-degree kidnapping based on an allegation that he took the victim "from one place to another." ORS 163.225(1)(a). The case was tried to the court, and defendant moved for a judgment of acquittal on that kidnapping charge, arguing that the evidence was insufficient to establish that he moved the victim "from one place to another." The trial court denied the motion, and found defendant guilty. *Held*: Conviction for first-degree kidnapping reversed, otherwise affirmed; remanded for resentencing. The trial court should have granted defendant's motion for judgment of acquittal. [1] Defendant sufficiently preserved his argument concerning the asportation element of the kidnapping charge. Although his argument before the trial court "pertained primarily to the intent element of kidnapping," the state's response and the trial court's reasoning rejecting his argument "demonstrate that the parties and the court both understood that defendant's motion challenged the sufficiency of the evidence as to both the act and intent elements." [2] With respect to different room in the same residence, "generic functional distinctions do not establish the requisite 'qualitative difference' vis-à-vis the commission of the crime of kidnapping. The hallmark of 'qualitative difference' is whether the difference between the starting and ending places promotes or effectuates a substantial interference 'with another's personal liberty.' ORS 163.225(1). In the situation and context of this case, the functional differences among the rooms in the victim's apartment had no effect on the extent to which defendant interfered with the victim's personal liberty. In that respect, we also note that the state adduced no evidence that, in moving the victim between rooms of her apartment, defendant intended or accomplished transporting the victim to a place where he could exert greater control over the victim or increase her isolation." [3] The evidence was insufficient to prove asportation. To establish that element of a kidnapping offense, the state must prove that defendant "qualitatively changed the victim's location," and that any movement was not "incidental to the assaults." Under *State v. Sierra*, 349 Or 506, 518 n 9 (2010), defendant's movement of the victim from room to room around her apartment was incidental to the assault and no individual movement—including the movement from the living room to the bathroom where he cleaned her blood—constituted a "qualitative" change in her location.

State v. Gerlach, 255 Or App 614, 300 P3d 193, *rev den*, 353 Or 787 (2013). Defendant drove into and knocked a 10-year-old girl off her bicycle, he then forced her into his car, drove her to a remote area, parked, and sexually assaulted her. He then got back into the driver's seat and drove

off, with the victim still in the car, heading toward a forested, mountainous area, possibly with an intent to murder her and dump her body. Fortunately, the police caught up with him and forced his car off the road, and the victim was rescued. Defendant was charged with two counts of first-degree kidnapping, among other crimes. The state's theory was that his act of forcing the victim into his car and driving to the location of the sexual assault constituted one kidnapping, and his act of driving the victim from that location toward the mountainous area constituted the second kidnapping. Defendant stipulated that he committed all of the acts alleged in the indictment. At sentencing, he argued that the two kidnapping counts should merge. The sentencing court rejected that argument holding that, under ORS 161.067(3), the two counts did not merge because they constituted "repeated violations" of the kidnapping statute and were separated by a "sufficient pause in the defendant's criminal conduct to afford the defendant an opportunity to renounce the criminal intent." *Held*: Reversed and remanded. [1] Defendant's stipulation to the facts alleged in the indictment does not preclude review of his claim: "the scope and application of ORS 161.067 is a question of law that we review for errors of law." [2] "Because kidnapping is the seizure of a person for the purpose of substantially interfering with the person's liberty, it is a continuing crime. It continues for as long as the seizure continues. Therefore, if defendant commits the crime of kidnapping by taking a person from one place to a second place, the defendant does not commit an additional kidnapping by moving the person from a second place to a third place." [3] Because a single deprivation of the victim's personal liberty is a single violation of ORS 163.225, and, consequently, a single violation of ORS 163.235, merger of defendant's kidnapping counts is not prevented by ORS 161.067(3)."

LESSER-INCLUDED OFFENSES

See also "Instructions," above; and "Sentencing: merger," *below*.

State v. Cruz-Gonzelez, 256 Or App 811, __ P3d __ (2013). Defendant struck an unattended vehicle with his car, but he continued driving for 472 feet and pulled around a corner before stopping, calling 911, and then returning to the scene. He was charged with failure to perform the duties of a driver when property is damaged in violation of ORS 811.700(1)(b) (H&R), which requires the driver to "immediately stop" and contact the owner or operator of the vehicle or leave a conspicuous note with the vehicle. Defendant asked the court to instruct the jury on "attempt" and the affirmative defense of renunciation, ORS 161.430, arguing that the jury could find that he merely committed a substantial step toward committing H&R but then had renounced his intent when he called 911. The trial court denied his request, and the jury found him guilty. *Held*: Affirmed. [1] Under ORS 136.465, a defendant is entitled to a jury instruction on a lesser offense if it accurately states the law and if the evidence could support the giving of the instruction. [2] An attempt to commit a crime is a lesser-included offense of the greater crime, so the requested instructions here accurately stated the law. [3] "A defendant is not entitled to a jury instruction on a lesser-included offense unless there is evidence from which a jury could *rationally* find guilt of a lesser-included offense and no guilt of the charged offense." [4] Defendant was not entitled to an instruction on attempted H&R because no rational trier of fact could have found on these facts that he attempted, but did not *complete*, the crime of H&R—the jurors could not *rationally* find from the evidence that he stopped "immediately" and attempted to provide contact information. In this context, "immediately" means "without delay." [5] The trial court also correctly denied defendant's request to instruct the jury on "renunciation" because that "is an affirmative defense to a charge of an attempted crime."

MANDAMUS

State v. Blok, 352 Or 394, 287 P3d 1059 (2012). Relator is the defendant in a pending criminal case in which he is charged with Measure 11 offenses. Pursuant to ORS 135.240(5), which governs pre-trial release in such a case, the trial court allowed relator's release, but imposed several release conditions. One of those conditions prohibited him from contacting the state's witnesses,

including his own family members. Relator filed a petition for writ of mandamus, arguing that the "no contact with state's witnesses" condition was unlawful under the applicable statute and under the Oregon Constitution. Specifically, he argued that the statute and constitution allow only those conditions related to protecting the safety of the victim or the community, and that a "no contact with state's witnesses" condition was not related to either of those concerns. Based on that argument, the Supreme Court issued an alternative writ. At oral argument, relator abandoned that argument. He conceded that a "no contact with state's witnesses" condition may be permissible depending on the circumstances, but argued that the condition was improper in this case because it was not supported by the factual record. *Held*: Writ dismissed. [1] "This court's exercise of its mandamus power is discretionary" under Art. VII (Am), § 2. [2] "Because relator's argument to this court is not the argument that he raised in his mandamus petition, it does not present the legal question posed by our issuance of the alternative writ. Accordingly, we exercise our discretion to dismiss the alternative writ of mandamus that we previously issued."

MENTAL STATES

State v. Newman, 353 Or 632, 302 P3d 435 (2013). An officer stopped defendant for driving erratically. Defendant smelled strongly of alcohol, had slurred speech, failed the FSTs, and blew a .015% on the breath test. He was charged with felony DUII. At trial, he wanted to offer evidence that he suffers from somnambulism, a sleepwalking disorder, and that he had no recollection of leaving his apartment the night he was arrested or of driving. He offered testimony from Dr. Ramseyer, a neurologist that "sleep driving" is a "subtype of sleepwalking" that can occur without the person being conscious, and that—in the neurologist's opinion—defendant was "sleep driving" when stopped by police. On the prosecutor's objection that DUII is a strict-liability offense, the trial court excluded the evidence as irrelevant. Defendant was convicted, and the Court of Appeals affirmed his conviction. *Held*: Reversed and remanded. The trial court erred by excluding defendant's proffered evidence of "sleep driving." [1] ORS 161.095(1), which generally requires the state to prove that a criminal defendant committed a "voluntary act," applies not just to crimes defined by the criminal code, but also applies to crimes, including DUII, that are defined by the vehicle code: "ORS 801.020(7) does not prohibit application of ORS 161.095(1) to the offense of DUII [and] we do not view the absence of a voluntary-act requirement within the text of ORS 813.010 as expressing a legislative intent to dispense with the requirement." [2] Under ORS 161.095(1), a defendant is not criminally liable for conduct "if he did not perform a bodily movement consciously." [3] The definition of "consciously," as used in ORS 161.085(2), "associates consciousness with a wakeful state and implies that a person in a state of sleep cannot execute a conscious action." Consequently, "a person engaged in sleepwalking [lacks] the level of consciousness necessary for a volitional act." [4] The court rejected the state's argument that proof of defendant's "voluntary act" of drinking was sufficient to prove the charge: "Although intoxication is an element of the DUII offense, it is not the proscribed conduct; it is a condition necessary to establish the offense. The voluntary act that ORS 161.095(1) requires must be linked not to a condition but to proscribed conduct. That does not mean, however, that the only relevant voluntary act is the act of driving. The … voluntary act may occur prior to the proscribed act as long as it is related to it. That is to say, although a prior voluntary act may suffice, not merely *any* act, however tenuously related, is sufficient." But "a defendant may be held criminally liable for a prior voluntary act if that act, through a course of related and foreseeable events, results in proscribed conduct." **Court's summary:** "We hold that the minimal voluntary act requirement of ORS 161.095(1) applies to the driving element of DUII in this case. Here, the trial court erred in not allowing defendant to adduce evidence that he was not conscious when he drove on the evening in question. The state was entitled to present evidence that defendant's drinking or other volitional act resulted in defendant driving his vehicle that evening. As noted, the state may also show a voluntary act with evidence that defendant had engaged in 'sleep driving' prior to this incident and failed to take adequate precautions to remove access to his car keys."

MERGER

See "Sentencing: merger," *below*.

MOTION FOR MISTRIAL

State v. Middleton, 256 Or App 173, 300 P3d 228 (2013). Defendant was charged with sex crimes against minors. Before trial, he moved to exclude any mention of his prior criminal history of sex crimes. The trial court granted the motion. In opening statement, the prosecutor told the jury that defendant had admitted he had a "sex problem" and needed help. Defendant moved for a mistrial; the court denied defendant's motion, but struck the prosecutor's statement and gave the jury a curative instruction that the statement was not true and the jury was to disregard it. The prosecutor also corrected himself and apologized to the jury, saying that he had misread a police report. Later in the trial, a witness who admitted to having a prior conviction for a sex offense volunteered that he met defendant "in treatment." Defendant objected, moved to strike, and moved for a mistrial, arguing that the statement, in light of the prosecutor's stricken comment, allowed the jury to infer that defendant was a sex offender and had received sex-offender treatment. The trial court sustained the objection, struck the testimony, but denied the mistrial motion. Defendant moved for mistrial on two more occasions, after witnesses testified that defendant "had acknowledged that he shouldn't be talking to minors," and that, after defendant was arrested, he acknowledged "that he had a problem and he needed to change his ways." The trial court again denied the motions for mistrial. The jury found defendant guilty. *Held*: Affirmed. The trial court did not abuse its discretion in denying a mistrial. [1] "A motion for mistrial is addressed to the sound discretion of the trial court, because the trial court is in the best position to assess and remedy any potential prejudice to the defendant"; accordingly, a court's ruling on a motion for mistrial is reviewed for abuse of discretion. "A mistrial is a drastic remedy to be avoided if possible, consistent with fairness." [2] "Even if the prosecutor's conduct [during the opening statement] was improper—an issue we do not address—a trial court does not abuse its discretion in denying a mistrial unless the effect is to deny the defendant a fair trial." [3] "Generally, a proper jury instruction is sufficient to protect the defendant against any prejudice," although "there are some statements that are so prejudicial that, as a practical matter, the prejudice cannot be remedied by an instruction. … Ultimately, we must decide whether, under the circumstances as a whole, prejudice to defendant denied him the right to a fair trial, as a matter of law." [4] "We agree with defendant that the prosecutor's statement and the testimony had the potential to cause the jury to wonder whether defendant had previously been convicted of sex offenses, but we conclude that none of the statements, separately, was so prejudicial that it could not be cured by an instruction." [5] "The jury is presumed to follow the court's instructions, absent an overwhelming probability that they would be unable to do so. … There is no basis here to negate that presumption." [6] "We have never held that that a mistrial can be based on cumulative prejudice of multiple errors that in and of themselves do not support the granting of a motion for mistrial. Assuming that cumulative prejudice or repeated references to excluded evidence can form a basis for a mistrial, … we conclude that the trial court did not abuse its discretion in rejecting any of defendant's contentions in this case that a mistrial was in order because of the cumulative effects of the various statements. … The trial court's instructions to the jury not to consider the testimony precluded the jury from engaging in that speculation, and we see no reason to doubt that the jury followed the court's instructions." [7] The court did not consider defendant's unpreserved argument that the trial court should have stricken testimony from a witness that defendant "knew he shouldn't be talking to minors" under OEC 403; even if defendant had preserved such an objection, the evidence "could nonetheless not be excluded under OEC 404(4)."

State v. Cam, 255 Or App 1, 296 P3d 578, *as modified on reconsideration*, 256 Or App 146 (2013). Defendant was at the center of a massive property-theft ring based in Woodburn. Thieves would bring him stolen goods in exchange for cash or drugs. The jury found defendant guilty of 53

theft and drug-related charges. *Held*: Reversed and remanded for resentencing; otherwise affirmed. The trial court was not required to grant a mistrial *sua sponte* when the prosecutor referred to conduct unsupported by evidence in the record; although that statement was improper, it was not "so prejudicial that the only legally acceptable alternative was to grant a mistrial *sua sponte*."

PAROLE

Dixon v. Board of Parole, 257 Or App 273, __ P3d __ (2013). In 1987, while on parole for on a robbery conviction, petitioner got into a fight with a bartender in Multnomah County, stabbed him in the heart, and stole money from the till. He pleaded guilty to aggravated murder and the court imposed a life sentence with a 30-year minimum. In 2009, after he had served 20 years, he requested a murder-review hearing under ORS 163.105(2), asking the board to find that he was likely to be rehabilitated within a reasonable period of time and, upon that finding, change the terms of his 30-year confinement. The board considered petitioner's lengthy criminal record and numerous incidents of misconduct while imprisoned and, after a hearing at which he and his wife and family testified, denied his request, finding that he had not met his burden to so prove. On appeal, petitioner contended that he had provided sufficient evidence that he was likely to be rehabilitation and, thus, the board's decision was not supported by substantial evidence; he also argued that the board's order did not contain substantial reasons for its conclusions. *Held*: Affirmed. The board properly denied petitioner's request. [1] "On substantial evidence review, we must determine whether a reasonable person could make the findings that the board made, ORS 183.482(8)(c), and we do not substitute our own view of the evidence for the board's view of the evidence. Under ORS 163.105(2)(a), petitioner has the burden to prove that he was capable of rehabilitation. Thus, we examine the record to determine if there was substantial evidence for a reasonable person to conclude that petitioner did not meet his burden." [2] Petitioner's argument that he presented "unrebuttable" evidence in his favor is wrong standard to review the evidence: substantial evidence exists when the record would permit a reasonable person to make the finding, and the board "has the authority to deny petitioner's requested relief if he fails to meet his burden of proof, regardless of whether some of his evidence is unrebuttable." [3] "OAR 255-032-0020(4) does not preclude the board from considering petitioner's past conduct, including his criminal history, along with other evidence, to infer that he is presently immature or irresponsible." [4] Petitioner adequately preserved his claim that the board's order was not supported by "substantial reason" because he contended in his administrative-review request "that the board's conclusions were not supported by the record." [5] The board's order was contained substantial reasons when it "identified the particular facts and the particular criteria on which it relied" in support of its conclusion that petitioner did not meet his burden.

POST-CONVICTION PROCEEDINGS

See also "*Habeas Corpus*: federal cases," *above*.

Chaidez v. United States, 568 US __, 133 S Ct 1103 (2013). Petitioner is from Mexico but is a lawful permanent resident of the US. She was convicted in federal court of mail fraud after pleading guilty, and the district court sentenced her to four years of probation. That judgment became final in 2004. In 2009, immigration authorities commenced removal proceedings on the ground that her conviction is for an "aggravated felony." She then filed the federal equivalent of a post-conviction petition, contending that her lawyer failed to provide constitutionally adequate assistance because he did not warn her that her convictions could result in removal. While her petition was pending, the Court decided *Padilla v. Kentucky*, holding that criminal defense attorneys must inform non-citizen clients of the risks of deportation arising from guilty pleas. The government argued that *Padilla* did not help petitioner, because it is a "new rule" that does not apply retroactively under *Teague v. Lane*, 489 US 288 (1989). The district court disagreed, applied *Padilla* to petitioner's claim, found that her lawyer provided ineffective assistance, and set aside her conviction. The

Seventh Circuit reversed, holding that *Padilla* does not apply retroactively. *Held*: Affirmed. The ruling in *Padilla* is a "new rule" that does not apply retroactively to convictions that are already final. [1] Under *Teague*, when the Court "announces "a 'new rule,' a person whose conviction is already final may not benefit from the decision in a habeas or similar proceeding. Only when we apply a settled rule may a person avail herself of the decision on collateral review." Under *Teague*, "a case announces a new rule … when it breaks new ground or imposes a new obligation on the government. To put it differently, … a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final. And a holding is not so dictated … unless it would have been apparent to all reasonable jurists." On the other hand, "when all we do is apply a general standard to the kind of factual circumstances it was meant to address, we will rarely state a new rule for *Teague* purposes. Because that is so, garden-variety applications of the test in *Strickland* v. *Washington*, 466 US 668 (1984), for assessing claims of ineffective assistance of counsel do not produce new rules." [2] "*Padilla*'s holding that the failure to advise about a non-criminal consequence could violate the Sixth Amendment would not have been—in fact, was not—apparent to all reasonable jurists prior to our decision. *Padilla* thus announced a 'new rule.'" [3] "Under *Teague*, defendants whose convictions became final prior to *Padilla* therefore cannot benefit from its holding." Consequently, petitioner cannot rely on *Padilla* in support of her ineffective-assistance claim.

Note: The Court noted that petitioner did not contend that even if *Padilla* is a "new rule" it should be applied retroactively to her case: "*Teague* stated two exceptions: 'watershed rules of criminal procedure' and rules placing 'conduct beyond the power of the [government] to proscribe' apply on collateral review, even if novel. 489 US at 311. [Petitioner] does not argue that either of those exceptions is relevant here."

Gable v. State of Oregon, 353 Or 750, __ P3d __ (2013). In January 1989, petitioner murdered Oregon Department of Corrections director Michael Francke, and he was charged with aggravated murder. At that time, Oregon law provided only two sentencing options on a conviction for aggravated murder: death and life with the possibility of parole. Later in 1989, the legislature amended ORS 163.105(1) and ORS 163.150 to give jurors a third option—life without the possibility of parole ("true life")—and it provided that that new option applies to all pending cases. During his trial in 1990 in Marion County, petitioner's trial counsel did not advise him that he could object on *ex post facto* grounds to submission of the true-life option to the jury, and the trial court instructed the jury on all three sentencing options without any objection from petitioner. The jury found petitioner guilty of aggravated murder and imposed a true-life sentence. On appeal, petitioner argued for the first time that imposition of the true-life sentence violated the *ex post facto* clauses, but the Court of Appeals refused to consider that claim because it was unpreserved. *State v. Gable*, 127 Or App 320, 332, *rev den* (1994). Meanwhile, the Oregon Supreme Court held that imposition of a true-life sentence over the defendant's objection on an aggravated-murder conviction based on a murder committed before the amendment violated the state's *ex post facto* clause. *State v. Wille*, 317 Or 487 (1993). Petitioner then sought post-conviction relief asserting (among dozens of claims) that his trial counsel failed to provide constitutionally adequate assistance because he did not advise him that he could choose to object on *ex post facto* grounds to submission of the true-life sentencing option. In 2000, the post-conviction court denied relief on all of his claims. He appealed, and the Court of Appeals reversed and remanded on that claim, ruling that his attorney had provided inadequate assistance on that point and the court needed to decide whether petitioner was prejudiced by that error. *Gable v. State of Oregon*, 203 Or App 710 (2006). On remand, petitioner testified that if his counsel had advised him of the possible *ex post facto* objection he would have chosen to object to the jury considering the true-life option. But the post-conviction court again denied his claim, finding that his testimony on that point was not credible because it did not "make sense," and that, as a result, he did not prove he suffered prejudice. The Court of Appeals affirmed. 243 Or App 389 (2011). *Held*: Affirmed. The post-conviction court correctly rejected petitioner's *Wille-based* claim on its finding that he was not credible. [1] "In establishing a right to post-conviction relief, the burden of

proof of facts alleged in the petition shall be upon the petitioner to establish such facts by a preponderance of the evidence. ORS 138.620(2). That burden of proof applies to facts related to both prongs of the test for inadequacy of counsel. The legal standard that applies to the prejudice prong entails demonstrating that, based on the facts that the petitioner has established by a preponderance of the evidence, the acts or omissions of counsel had a tendency to affect the result of the trial. A petitioner must make a similar showing under the Sixth Amendment. In reviewing the decision of the post-conviction court, we are bound by its findings of fact if they are supported by evidence in the record." [2] The post-conviction court applied the correct burden of proof under *Strickland v. Washington*, 466 US 668 (1984): "In this case, … the post-conviction court set out the correct legal standard in its 2000 findings and conclusions, which actually quoted the reasonable-probability language from *Strickland*. That standard was expressly incorporated into the court's 2006 findings and conclusions. And in this case, … the post-conviction court cited—accurately—the statutory requirement that a post-conviction petitioner establish all facts alleged in the petition by a preponderance of the evidence. Under the circumstances, … there is no reason for us to assume that the court applied the statutory burden of proof in a manner that conflicted with the *Strickland* standard." [3] Under *Moen v. Peterson*, 312 Or 503 (1991), "the controlling question in this post-conviction proceeding, … is whether the receipt of correct advice about a possible *ex post facto* objection would have made a difference to petitioner in this case. The only evidence on that point is petitioner's assertion that he would have insisted on exercising his *ex post facto* rights and have the jury instructed on only two sentencing options. As we have noted, the post-conviction court did not believe petitioner. There is no suggestion that the post-conviction court lacked a basis in the record for making that finding as to petitioner's credibility. To the contrary, throughout the course of the post-conviction proceeding, the court detailed inconsistencies in petitioner's testimony that led it to conclude—repeatedly—that petitioner simply was not credible. That ends the matter."

^ ***Brumwell v. Premo***, S060980 (review on alternative writ of mandamus). Petitioner was convicted of aggravated murder in Marion County and was sentenced to death. After that judgment was affirmed on direct review, he filed a petition for post-conviction relief challenging that judgment based on allegations that his trial counsel provided constitutionally inadequate assistance. He asked the post-conviction court: for a protective order regarding evidence that he and his trial attorneys would provide at their depositions in this proceeding, to preclude the state's use of material subject to the lawyer-client privilege for any purpose other than litigating the post-conviction proceeding, and to bar the state from turning such material over to others, including law-enforcement or prosecutorial agencies involved with the prosecution of his murder case. Petitioner also moved to quash the state's subpoenas directed at two individuals from whom the state sought certain records that pertained to persons who had performed services for petitioner's defense, unless the requested material instead was delivered under seal directly to the post-conviction court (rather than to the state's counsel), which would then review the material *in camera* to determine which material should be disclosed to defendant. The motions directed at the two subpoenas also requested a protective order similar to the one requested in the first motion. The state opposed those requests by arguing that he has no attorney-client privilege in this proceeding under OEC 503(4)(c) and that a protective order is unnecessary. The post-conviction court denied petitioner's motions. The Oregon Supreme Court allowed petitioner's petition and issued an alternative writ of mandamus. According to the court's media release, the issues on review are: "(1) With respect to a petition for post-conviction relief, to what extent does the lawyer-client privilege remain intact, and to what extent is it deemed waived? (2) Does any dissolution or waiver of the privilege exist for all purposes? (3) Can any information that otherwise would have been subject to the lawyer-client privilege be disclosed outside the parameters of a post-conviction proceeding and used in any retrial? (4) Did the post-conviction court err in denying petitioner's motions for a protective order, and his motions to quash the subpoenas unless the requested material first was reviewed *in camera*?"

^ *See also* ***Longo v. Premo***, S061072 (review on alternative writ of mandamus) (same).

Lotches v. Premo, 257 Or App 513, __ P3d __ (2013). Petitioner, a member of the Klamath tribe, was convicted of aggravated murder in Multnomah County and sentenced to death. The Supreme Court affirmed the judgment on direct review, *State v. Lotches*, 331 Or 455 (2000), and petitioner filed a petition for post-conviction relief raising number claims that his trial counsel failed to provide constitutionally adequate assistance. The post-conviction court rejected all of his claims for relief. On appeal, he argued that his trial counsel were inadequate (1) for not putting on a defense of "cultural trauma" based on historic abuse of the tribes by the white population and the government, (2) for failing to adequately investigate his mental health history, and (3) that the record did not show that counsel had advised him of the right to testify (which had been alleged below as a claim that counsel had interfered with that right). *Held*: Affirmed. [1] Trial counsel acted reasonably by not proffering either of the proposed defenses; their investigation was "legally and factually appropriate" to the case. Petitioner presented no evidence to link his cultural background to his actions during the crimes, and the record establishes that counsel thoroughly investigated his mental health history. Petitioner presented no evidence to show that counsel could have buttressed the mental defense they presented by referring to petitioner's cultural background. [2] Trial counsel did not interfere with petitioner's right to testify. As to the "metamorphosed" claim argued on appeal, the record shows that petitioner knew that he had the right to testify and chose not to do so.

Aponte v. State of Oregon, 257 Or App 421, __ P3d __ (2013). In 1995, petitioner bludgeoned a man to death in a Portland motel room. The case remained unsolved for many years until a DNA test connected petitioner to the scene. At that point, he was serving a life sentence in Florida on a murder conviction. When questioned, he admitted to having killed the victim is a dispute over a chess game. In 2006, he was charged with aggravated murder in Oregon. He demanded a speedy trial under the IAD, and the case was set for trial accordingly. Despite attempts by his counsel to talk him into a waiver and continuance to allow time to investigate a possible defense of self-defense, petitioner insisted on a prompt trial, explaining that "he wanted to get the case over with." After a settlement conference and an extended change-of-plea colloquy, petitioner pleaded no contest to the charge and apologized to the victim's family; the trial court imposed a life sentence without the possibility of parole. In 2008, petitioner sought post-conviction relief, contending that his trial counsel failed to adequately investigate potential defenses. The post-conviction court rejected petitioner's claims, finding that he was insistent on refusing to waive his speedy-trial rights under the IAD and wanting to get the case over with. *Held*: Affirmed. "Petitioner does not challenge the post-conviction court's findings that defense trial counsel repeatedly advised petitioner about his options to pursue various defenses, including self-defense. Neither does petitioner challenge the court's finding that he had refused to waive the IAD timelines to allow trial counsel adequate time to investigate the alleged crime, including petitioner's assertion that he had acted in self-defense. Finally, the post-conviction court did not err in determining that petitioner had failed to establish that defense counsel's advice regarding a possible defense of self-defense was incorrect or otherwise did not comport with the exercise of reasonable professional skill and judgment. Accordingly, we affirm."

Ellet v. Coursey, 257 Or App 361, __ P3d __ (2013) (*per curiam*). Petitioner was convicted of second-degree robbery and first degree theft, and he petitioned for post-conviction relief alleging ineffective assistance of counsel. Defendant moved for judgment on the pleadings, arguing that petitioner failed to state a claim for relief because his affidavit and supporting documentation did not demonstrate the *prima facie* validity of any of his claims. The post-conviction court granted defendant's motion, ruling that petitioner's claims lacked sufficient supporting documentation, as required by ORS 138.580. *Held*: Reversed and remanded. Under the standard set forth in *Ogle v. Nooth*, 245 Or App 665 (2013), petitioner's affidavit and supporting documents satisfied the requirement that they must "tend to verify, corroborate, or substantiate the assertions that the petitioner has undertaken to prove."

Walker v. State of Oregon, 256 Or App 697, 302 P3d 469 (2013). The post-conviction court denied petitioner's petition and entered a judgment that contained no findings and simply provided: "The Court considered both state and federal questions. All questions were presented and decided." For the first time on appeal, petitioner contended that judgment failed to comply with ORS 138.640(1), as construed in *Datt v. Hill*, 347 Or 672 (2010). *Held*: Reversed and remanded "for the court to enter a judgment that includes findings complying with ORS 138.640(1)." [1] Petitioner's claim is reviewable as "plain error": "The dictates of preservation do not apply—and, hence, the 'plain error' construct is inapposite—where a party has no practical ability to object to the purported error before entry of judgment. Those principles control here. Until the post-conviction court issued its judgment, petitioner had no reason to know that it would not include findings comporting with ORS 138.640(1)." [2] The judgment on its face fails to comply with ORS 138.640(1).

Hale v. Belleque, 255 Or App 653, 298 P3d 596 (2013). In late 1995, when he was 19 years old, petitioner and Susbauer committed a string of crimes, including residential burglaries, in Eugene. In the evening of December 20, petitioner and Susbauer came across petitioner's former girlfriend, her boyfriend, and another boy (all of whom were about 15) and gave them a ride. They took the three up a remote logging road, sexually assaulted the girl, and then murdered them all, execution style. Petitioner and Susbauer were charged with numerous counts of aggravated murder and sexual offenses, as well as with counts of burglary based on previous crimes. The jury found petitioner guilty on the charges and imposed a death sentence. Susbauer pleaded guilty and was sentenced to life imprisonment. The Oregon Supreme Court affirmed petitioner's conviction and death sentence. *State v. Hale*, 335 Or 612 (2003), *cert den* (2004). Petitioner then filed a petition for post-conviction relief in which he alleged numerous claims. After a trial, the post-conviction court rejected all of his claims. *Held*: Affirmed in part and reversed in part. The post-conviction court properly denied all of petitioner's claims based on the convictions for aggravated murder and death sentence, but erred when it denied his claims based on the burglary convictions. [1] Based on the factual findings made by the post-conviction court, it properly denied petitioner's claims that his trial counsel failed to provide constitutionally adequate assistance, because he failed to prove that his counsel erred, that their tactical decisions were inadequate, or that he suffered any prejudice. Those claims include that his counsel failed: (a) to adequately investigate whether he suffered from low intelligence or mental illness; (b) to adequately advise him regarding his decision not to testify; (c) to challenge the indictment on the ground that the state had knowingly presented perjured testimony; (d) to challenge certain testimony of state's witnesses; (e) to assert a "claim preclusion" objection to the state's evidence relating to a robbery that he had been acquitted of; and (f) to seek removal of a juror who had contact with victims' families. [2] The post-conviction court correctly denied petitioner's claim that the trial court erred by ordering him to wear physical restraints during trial: the claim is barred by *Palmer v. State of Oregon*, 318 Or 352 (1994), and ORS 138.550; the restraints he wore during trial were not visible and he did not testify, and so he suffered no prejudice; and the record "supports the criminal trial court's decision to require the physical restraints," and so his counsel reasonably chose not to object. [3] The post-conviction court correctly denied petitioner's claim that his trial counsel, Lance, failed to call potential witness Reed: Even if Lance "was inadequate in failing to present the testimony of Reed or to make an offer of proof, petitioner's evidence does not show prejudice. The hearsay evidence, offered through Lance's deposition, of the content of Reed's potential testimony was insufficient to satisfy petitioner's burden to show how she would have testified if called as a witness. Further, the inferences that necessarily must be drawn from Lance's affirmative response to the deposition question are that (a) that Reed would have been available to testify at petitioner's trial and (b) she would have testified in a way that had a tendency or a reasonable probability of affecting the outcome of the case. In the absence of an affidavit by Reed describing her testimony, those inferences are speculative at best, and the post-conviction court was not obligated to make them. We conclude for that reason that the post-conviction court did not err in concluding that petitioner had not established prejudice and in rejecting the claim." [4] The Court of Appeals refused to consider a claim that petitioner's trial counsel provided inadequate assistance by not objecting to a part of the

prosecutor's closing argument because that claim "was not asserted in the petition and therefore will not be considered here." *See Bowen v. Johnson*, 166 Or App 89, 92, *rev den* (2000). [5] Petitioner's claim based on the instruction given on "proof beyond a reasonable doubt" was erroneous because it included the "moral certainty" clause has no merit in light of *State v. Williams*, 313 Or 19, 36-38 (1992). [6] But the post-conviction court erred when it denied petitioner's claims based on the instructions given on the burglary charges. Because those charges alleged that he entered the victims' residences with an intent to commit theft and criminal mischief, his counsel failed to provide constitutionally adequate assistance because they did not request a *Boots*-style concurrence instruction "that the same ten jurors must agree regarding which of the two underlying crimes … petitioner intended to commit while in the dwellings." *See State v. Frey*, 248 Or App 1, 9 (2012). Petitioner suffered prejudice even though the jury separately found him guilty on charges of theft and criminal mischief. But that error does not warrant setting aside the convictions for aggravated murder or the death sentence. [7] The post-conviction court correctly denied petitioner's claim that his trial counsel failed to provide constitutionally adequate assistance by not objecting to the "natural and probable consequences" instruction that the Supreme Court later disapproved in *State v. Lopez-Minjarez*, 350 Or App 576 (2011). "As the post-conviction court found, the 'natural and probable consequences' instruction was correct when given in 1998. Until … *Lopez-Minjarez*, the 'natural and probable consequences' instruction was a standard instruction included in the uniform criminal jury instructions and had been described … as 'a correct statement of the law.' The failure of trial counsel to object to it was a reasonable exercise of professional skill and judgment. Accordingly, we conclude that trial counsel was not inadequate in failing to object to the 'natural and probable consequences' instruction. We further conclude that, assuming that trial counsel was inadequate in failing to object, in view of the evidence that petitioner was the primary actor, … the uniform criminal jury instruction on aiding and abetting did not have a tendency to affect the result of the prosecution or cause actual prejudice to the defense."

Saldana-Ramirez v. State of Oregon, 255 Or App 602, 298 P3d 59 (2013). Petitioner, who is not a United States citizen, pleaded guilty in 2008 to one count of felony failure to appear; a charge of felony assault was dismissed. In 2009, he filed a petition for post-conviction relief in which he claimed that his attorney provided constitutionally ineffective assistance because she did not sufficiently advise him regarding the possible adverse immigration consequences of his conviction. In 2010, while his post-conviction case was pending, the Court held in *Padilla v. Kentucky*, 559 US 356 (2010), that a claim of effective assistance of counsel applies to a defense counsel's erroneous or inadequate advice, in conjunction with a plea, regarding possible adverse immigration consequences; the Court held that the defense attorney in that case was constitutionally ineffective for not adequately advising the petitioner about the "clear" consequences of his guilty plea. The post-conviction court found that petitioner's counsel adequately advised him as set forth in *Padilla* and dismissed his petition. Petitioner appealed and reiterated his claim that he is entitled to relief under *Padilla*. While his appeal was pending, the Court decided *Chaidez v. United States*, 568 US __ (2013), in which it held that the rule it adopted in *Padilla* does not apply retroactively in collateral proceedings. *Held*: Affirmed. "Petitioner's conviction became final before *Padilla* issued. Thus, under federal retroactivity principles as elucidated in *Chaidez*, *Padilla* does not apply to petitioner's collateral challenge. Federal retroactivity principles govern whether a new federal rule applies retroactively in an Oregon court. *Miller v. Lampert*, 340 Or 1, 7 (2006)."

Tracy v. Nooth, 255 Or App 435, 299 P3d 565 (2013). In its previous opinion, the Court of Appeals held that the post-conviction court erred in denying petitioner's request for subpoenas in support of his post-conviction case and remanded for further proceedings. 252 Or App 163 (2012). Petitioner moved for reconsideration, asking the court to expand the remand order to allow him to raise on remand "whatever claims below are permitted by ordinary post-conviction procedure, including amending the petition to raise claims that are presented by newly-discovered evidence." *Held*: Reconsideration granted; opinion clarified. [1] Petitioner cannot relitigate on remand those

claims that the post-conviction court already rejected and the Court of Appeals has affirmed that ruling: "Here, we determined that the error affected the judgment as to the claims that we remanded. Petitioner did not show that the error affected the judgment as to any of the other claims. On reconsideration, he does not appear to assert that he should be able to raise those claims on remand, nor does he offer any explanation specific to any of the individual claims regarding why he should be able to raise them on remand. As to those claims, the post-conviction court's judgment is binding." [2] Apart from that, the post-conviction court has broad authority: "Necessarily, the remand returns what remains of petitioner's case to its original pretrial posture. It is possible that, if the post-conviction court issues the subpoenas and the subpoenas result in the discovery of new information, petitioner may move for leave to amend his petition. *See*
ORCP 23 A. Nothing in our disposition limits the trial court's authority to grant or deny such an amendment."

Byers v. Premo, 255 Or App 208, 296 P3d 659, *rev den*, 353 Or 787 (2013). Petitioner was charged with first-degree burglary, second-degree assault, and multiple felony sexual offenses based on an incident in which he broke into the victim's house and repeatedly assaulted her. On the day of trial, petitioner's trial counsel advised him that it was unlikely he would be acquitted of the charges against him if he proceeded to trial. His counsel also told him that one of his options was to agree to a trial on stipulated facts and explained that, by agreeing to do that, he would almost certainly be found guilty of the charged crimes, but the court might impose a shorter sentence than it would if he insisted on a full trial. Counsel further advised petitioner that, in any event, he would likely receive a long prison sentence and explained to him that the court could order him to serve the sentences for each of the charged crimes consecutively. The trial court explained to petitioner that if he agreed to a stipulated-facts trial, the prosecutor would recite the facts and those would be the facts upon which petitioner would agree to try the case. Petitioner confirmed to the court that he understood that. The prosecutor then recited the facts underlying each of the counts, stating that, except for the burglary count, the acts that provided the basis for each count were separate and distinct from the acts that provided the basis for each of the other counts—which would provide a basis for imposition of consecutive sentences under ORS 137.123(2). Petitioner agreed, and the court found him guilty of all counts. Before sentencing, petitioner moved to withdraw his stipulation, but the court denied the motion, concluding that petitioner had knowingly and voluntarily agreed to a stipulated-facts trial. Relying on ORS 137.123(5), the court then sentenced him to consecutive sentences on each of the convictions (except the burglary conviction), for a total sentence of 1,070 months (90 years). Petitioner then filed a petition for post-conviction relief, alleging that his trial counsel provided constitutionally inadequate assistance because, among other things, he failed to inform him that the trial court would be able to sentence him consecutively based on the stipulated facts. He testified that if his counsel had adequately advised him, he would not have agreed to the stipulated-facts trial. The post-conviction court denied relief, finding that petitioner was not credible, that his counsel had adequately advised him of the maximum sentences and that the court could impose consecutive sentences, that his agreement to a stipulated-facts trial was knowing, intelligent, and voluntary. *Held*: Affirmed. The post-conviction court properly rejected petitioner's claims. [1] Even if petitioner's trial counsel may have failed to adequately advise petitioner that he was stipulating to facts on which the sentencing court could rely to impose consecutive sentences under ORS 137.123(2), petitioner failed to prove that he was prejudiced. The sentencing court imposed consecutive sentences based on ORS 137.123(5), rather than subsection (2). [2] Moreover, given the post-conviction court's finding that petitioner was not credible, he failed to prove that if his counsel had properly advised him, he would not have agreed to be tried on the facts to which he stipulated.

Cavitt v. Coursey, 255 Or App 47, 298 P3d 558, *rev den*, 353 Or 533 (2013). Petitioner was convicted on numerous felonies, and did not appeal those convictions. He later filed a petition for post-conviction relief, alleging several claims, including one that alleged that his trial counsel neglected to file an appeal at his request, which he supported by an affidavit in which he averred that

he had asked counsel to file an appeal. The state moved to dismiss per ORCP 21 A(8) for failure to state a claim and on the ground that petitioner did not attach adequate supporting exhibits as required by ORS 138.580. The post-conviction court granted the motion and dismissed the petition. *Held*: Reversed and remanded on second claim; otherwise affirmed. The post-conviction court erred by dismissing the second claim. [1] Because the post-conviction court did not purport to dismiss the petition as "meritless," ORS 138.525(3) does not preclude petitioner's appeal. [2] Petitioner's claim that his trial counsel failed to file a notice of appeal at his request stated a valid claim for relief under *Shipman v. Gladden*, 253 Or 192 (1969), and his supporting affidavit sufficed to comply with ORS 138.580. Thus, the post-conviction court erred in dismissing that claim. [3] But the court correctly dismissed his other claims.

Ross v. Franke, 254 Or App 650, 297 P3d 486, *rev den*, 353 Or 562 (2013). Petitioner was convicted of numerous sex offenses and sought post-conviction relief. He alleged that his counsel was inadequate for failing to investigate and present evidence of one victim's medical history. In particular, petitioner alleged that medical records would have revealed that injuries to the victim's genitals attributed to him were caused much earlier, by a different abuser. Petitioner's post-conviction petition contained a "Notice to Court" stating that petitioner was attaching exhibits in support of his claims, but he did not attach any supporting documents or exhibits. Defendant (the state) moved to dismiss the petition, arguing that petitioner had failed to comply with the "attachment requirement" in ORS 138.580, which provides that the petitioner "shall" attach "[a]ffidavits, records or other documentary evidence" to support the "allegations in the petition." At a hearing on the motion, petitioner's counsel argued that "petitioner need not make his prima facie case at the time he files his formal petition, and that's really what the state is arguing here." Counsel noted that he had sent the state a medical report regarding the victim's earlier abuse but that petitioner was not offering it as an exhibit. The post-conviction court dismissed petitioner's petition, concluding that petitioner had failed to comply the attachment requirement in ORS 138.580 because he did not offer any evidence in support of his claims. Petitioner appealed. *Held*: Affirmed. [1] Because the post-conviction court did not dismiss the petitioner as "meritless" under ORS 138.525, the dismissal judgment is appealable. [2] Under *Ogle v. Nooth* (below), ORS 138.580 does not require a petitioner "to make out a prima facie case in his petition or to have all his evidence in order at the time of filing the petition," but it does require "a petitioner to attach documents that tend to verify, corroborate, or substantiate the assertions that the petitioner has undertaken to prove." [3] In this case, petitioner sent to the state before the hearing a copy of a medical report on the victim's earlier abuse, but "he did not amend his petition to include the report, nor did he enter the report into the record at the hearing." Accordingly, the post-conviction court concluded that "having attached no documents to his petition, petitioner failed to comply with the attachment requirement of ORS 138.580."

^ ***Ogle v. Nooth***, 254 Or App 665, 298 P3d 32, *rev allowed*, 353 Or 747 (2013). Following convictions for various offenses, petitioner sought post-conviction relief under the Post-Conviction Hearing Act (PCHA). He alleged that his counsel was inadequate for not: (1) meeting with a defense witness before trial, (2) investigating the victim's medical records, (3) presenting evidence about those medical records, and (4) cross-examining a doctor about the victim's tooth. Petitioner attached to his petition for relief the indictment, the trial transcripts, and the judgments. Defendant (the state) moved to dismiss the petition, arguing that petitioner had failed to comply with ORS 138.580, which requires that a post-conviction petitioner "shall" attach "affidavits, records or other documentary evidence" to support the "allegations in the petition." Petitioner responded by submitting two of his own affidavits, which provided additional details about the factual and legal bases for his claims. The post-conviction court dismissed the petition, concluding that petitioner did not submit admissible evidence to support each of his claims for relief. Petitioner appealed. *Held*: Reversed and remanded. The post-conviction court erred in dismissing the petition. [1] The judgment of dismissal is appealable because a petition that fails to comply with the "attachment requirement" in ORS 138.580 is not a "meritless petition" under ORS 138.525. [2] "Documentary evidence" means "written

documents that are submitted to the post-conviction court that tend to prove or disprove the existence of an alleged fact." Because elsewhere in the PCHA the legislature used the term "*competent* evidence," the unqualified term "evidence" means that the evidence a petitioner must attach to satisfy ORS 138.580 need not be admissible at a subsequent hearing on the petition. [3] Evidence "supporting the allegations of the petition" means "documentary evidence that verifies, corroborates, or substantiates the assertions that petitioner has undertaken to prove." [4] "Shall be attached to the petition" means that the petitioner must attach evidence to support the allegations. But the petitioner need not attach admissible evidence sufficient to establish a *prima facie* case on each of the claims; such a requirement would be inconsistent with the statute, and at odds with the fact that a petitioner can engage in discovery only after the petition for relief has been filed. [5] Here, the petitioner satisfied ORS 138.580's attachment requirement for each of his claims. [5a] With respect to his claim that counsel should have met with a defense witness, petitioner made that assertion in his affidavit, and explained how he believed that witness would have testified at trial. [5b] With respect to his claims about the medical records, petitioner mentioned the contents of those records in his affidavits. [5c] Finally, with respect to petitioner's claim about cross-examination of the doctor regarding the victim's tooth, petitioner attached the transcript showing that counsel had not cross-examined the doctor on that point.

Holbrook v. Blackletter, 254 Or App 549, 297 P3d 482 (2013). In 1999, petitioner, who was a teacher, was charged with counts of first-degree sexual abuse for touching a child. The first trial ended with a hung jury. Petitioner filed a complaint with the Bar complaining that the prosecutor had made improper public statements. In response, the prosecutor explained that he had mentioned to a couple of jurors that petitioner's ex-wife had accused him of having an inappropriate conduct with a student but he acknowledged that he could not substantiate that. On retrial, petitioner called a witness to testify that, in her opinion, petitioner had an "appropriate" sexual character. The prosecutor attempted to impeach her pursuant to OEC 405(1) by asking whether she knew about the various accusations the ex-wife had made. When the defense counsel objected, the prosecutor said he had "a basis" to ask the questions, and the trial court overruled the objections. The jury found petitioner guilty on one count, and the judgment was affirmed. Later, the Bar prosecuted the prosecutor for cross-examining the witness that way, the trial panel concluded that he had violated DR 7-106(C)(1), but the Supreme Court reversed, concluding the Bar failed to prove that he violated that rule. Petitioner then filed a post-conviction petition in which he alleged that his trial counsel should have prevented the prosecutor from cross-examining the witness in that manner, and he relied on the prosecutor's statements in response to his original complaint and his trial counsel's testimony during the Bar proceeding. The post-conviction court excluded that evidence on the ground that the Supreme Court had reversed the panel's decision. The court then denied petitioner's petition. *Held*: Reversed and remanded. The post-conviction court erred when it excluded the proffered evidence. [1] Because "petitioner alleged below that trial counsel was constitutionally inadequate for failing to adequately prepare and object to the prosecutor's questions during cross-examination, … trial counsel's testimony is relevant to show his knowledge of events and frame of mind prior to the second trial and during the questioning. In that context, it is clearly relevant to whether trial counsel's representation of petitioner was constitutionally inadequate under the circumstances." [2] In reversing the panel's ruling, the Supreme Court "did not decide the underlying *evidentiary issue*—whether the prosecutor had a reasonable basis to believe that the conduct that he referenced during cross-examination had actually occurred." Rather, the court "held only that the Bar had presented insufficient evidence to show that the prosecutor's questioning on cross-examination violated a disciplinary rule." Therefore, the court's decision "has no bearing on whether the questions were inadmissible under the rules of evidence and whether, if so, trial counsel was constitutionally inadequate." [3] The error was prejudicial and requires a remand for a new post-conviction trial.

Ballinger v. Nooth, 254 Or App 402, 295 P3d 115 (2012), *rev den*, 353 Or 747 (2013). Petitioner filed a petition for post-conviction relief in which he challenged his convictions for first-

degree sodomy and sexual abuse based on a claim that his trial counsel provided constitutionally inadequate assistance by not sufficiently investigating his case. Defendant (the state) moved for summary judgment on that claim. Petitioner's post-conviction counsel advised the court that he would not be filing a response, and the court granted the motion and entered a judgment dismissing the petition. Petitioner then filed *pro se* a motion under ORCP 71 B(1)(a) to set aside the judgment based on "mistake, inadvertence, surprise, or excusable neglect." In support of his motion, he filed an affidavit in which he averred that his counsel had not consulted him about filing a response to the state's summary-judgment motion and that, if he had known about the motion, he would have opposed it. But he did not actually proffer a response on the merits to the state's motion. The post-conviction court denied petitioner's ORCP 71 B(1) motion, noting that there was "no legal basis" to grant it. Petitioner appealed from that order. *Held*: Affirmed. The post-conviction court properly denied petitioner's motion to set aside the judgment. [1] "We review the denial of the motion for relief from the judgment for abuse of discretion." [2] In order to obtain relief from the judgment under ORCP 71 B(1), "petitioner was required to address the merits of defendant's summary judgment motion … and to demonstrate that he had a colorable response to the motion." [3] "When responding to a motion for summary judgment, the adverse party has the burden of producing evidence on any issue raised by the motion for summary judgment. ORCP 47 C." [4] "Petitioner submitted a memorandum of law in support of his motion to set aside the judgment and argued that there are issues of material fact concerning whether his trial attorney was ineffective. However, petitioner relied solely on the allegations in his post-conviction-relief petition and did not attach any evidence, *i.e.*, affidavits, declarations, deposition testimony, or exhibits, to demonstrate that his attorney was ineffective, or describe the evidence that he would produce, should the court grant relief from the judgment. Therefore, we cannot say that the post-conviction court abused its discretion in denying petitioner's motion."

Bumgarner v. Nooth, 254 Or App 86, 295 P3d 52 (2012). In 2004, petitioner was convicted of two counts of first-degree rape, two counts of first-degree unlawful sexual penetration, two counts of first-degree sexual abuse, two counts of first-degree kidnapping, and one count of third-degree assault. Trial counsel did not argue that the verdicts should have merged. The judgment was affirmed on appeal. *State v. Bumgarner*, 229 Or App 92 (2009). At the time of trial, there was case law that the convictions on the sex crimes and kidnapping did not merge, but there were also cases suggesting that convictions for the same offense merge when the charges had been based on different statutory subsections. It was not until after the trial in this case that the appellate courts definitely announced that the verdicts should merge. *State v. Parkins*, 346 Or 333 (2009). Petitioner sought post-conviction relief, arguing that his trial counsel was constitutionally inadequate for not requesting merger. The post-conviction court agreed and granted post-conviction relief. The state appealed, arguing that merger law was unsettled at the time of trial, and that a Supreme Court case on point was contrary to a merger argument in petitioner's case, so trial counsel reasonably declined to argue for merger. *Held:* Affirmed. The post-conviction court correctly granted post-conviction relief. [1] Reasonable trial counsel would have discerned, from existing case law holding that different theories of aggravated murder merged, that the structure of the aggravated-murder statute and the statutes involved in this case was similar, and that the convictions at issue in this case should merge. [2] "[U]ncertainty in the law regarding when convictions would merge … did not relieve trial counsel of the obligation to assert that the sentences at issue were subject to merger." Despite any ambiguity in the law, the benefits of raising merger as an issue were so obvious that any reasonable lawyer would have done so. [3] Given the "obvious possible benefits" of arguing that the verdicts should merge, trial counsel's failure to argue for merger constituted inadequate assistance.

Ayer v. Coursey, 253 Or App 726, 292 P3d 595 (2012). T, the victim, lived with her grandmother and petitioner, her step-grandfather, when she was 9 years old. T reported to a teacher that petitioner was sexually abusing her, a medical examination disclosed trauma to her hymen, and petitioner was charged with first-degree rape, sodomy, and sexual abuse. The state filed a pretrial

motion *in limine* to exclude evidence of accusations that others previously had sexually abused T before she went to live with petitioner. Petitioner's trial counsel opposed the motion, arguing that some of the reports were admissible under OEC 412(2)(b)(*A*) and *State v. LeClair*, 83 Or App 121 (1986), as prior false accusations. The trial court granted the state's motion, ruling that the evidence was not admissible under OEC 412 because petitioner did not establish that any of T's previous reports of abuse was "false." At trial, petitioner's trial counsel essentially conceded that T had been sexually abused but argued that petitioner did not abuse her and that he could not have abused her as she claimed. The jury found petitioner guilty, and the convictions were affirmed on appeal. Petitioner then filed a petition for post-conviction relief claiming that his trial counsel did not provide constitutionally adequate assistance in numerous respects, but primarily because his counsel did not argue that the prior-abuse evidence should have been admitted under OEC 412(2)(b)(*B*) to explain the medical evidence; petitioner also claimed that his counsel's closing argument was inadequate "because counsel failed to mention that petitioner was presumed innocent and that the state had the burden of proving the charges beyond a reasonable doubt." The post-conviction court denied the petition, specifically noting that the prior-abuse evidence was "not impeachment and not relevant." *Held*: Reversed and remanded. [1] Petitioner's trial counsel should have argued that some of the prior-abuse evidence was admissible under OEC 412(2)(b)(B): "As a result of reading the reports, and as corroborated by his investigation, counsel believed that T had been abused in the past. He knew that the state would present medical evidence indicating that T had been abused. He planned to defend petitioner on the theory that T had been abused in the past, but petitioner had not abused T. The evidence of past abuse would explain how T was able to make such detailed allegations of sexual abuse against petitioner and why the medical evidence indicated that she had been abused." [2] Although trial counsel's tactical choice at trial to concede that T had been sexually abused was reasonable, his choice not seek admission of the prior-abuse evidence to bolster that defense "was deficient." [3] Because the post-conviction court did consider the issue, "we remand for the post-conviction court to consider, in the first instance, whether trial counsel's deficient performance prejudiced petitioner." [4] The post-conviction court correctly denied petitioner's claim based on his counsel's closing argument: "We consider trial counsel's omission of [a discussion of reasonable doubt] from his closing argument to be very unusual. Nevertheless, we reject petitioner's argument because … the jury was properly instructed on those issues. We presume that a jury follows the instructions given. Consequently, we cannot conclude that any deficiency in counsel's failure to mention those principles prejudiced petitioner." [5] During his closing argument, trial counsel did adequately "marshal the favorable evidence." [6] Trial counsel's decision not to cross-examine T was reasonable: "T was ten years old at the time of trial, and trial counsel testified that he was concerned that the jurors were sensitive to anything that they might perceive as an attack on her. In closing argument, trial counsel raised most of the issues that petitioner identifies[.] … This court will not second-guess a lawyer's tactical decisions unless those decisions reflect an absence or suspension of professional skill and judgment. In light of the difficulty of effectively cross-examining a child victim, trial counsel's strategic choice not to cross-examine T was a reasonable exercise of professional skill and judgment under the circumstances."

Note: The state argued that most, if not all, of the prior-abuse evidence that petitioner argued that should have been admitted under OEC 412(2)(a)(B) was inadmissible hearsay. The Court of Appeals observed: "Even if *most* of the evidence would have been inadmissible, there still may be some evidence in the reports—statements of abuse made directly to investigators—that would be directly admissible." Presumably, that question will be resolved on remand.

Koch v. State of Oregon, 252 Or App 657, 288 P3d 582 (2012). Based on a traffic accident, petitioner was charged with DUII, fourth-degree assault, and second-degree criminal mischief. He applied for diversion on the DUII charge, but the state objected based on ORS 813.215(1)(f)—which precludes diversion if the defendant has a pending charge for vehicular assault—and the court denied his petition. Petitioner's counsel tried without success to compromise the assault charge and then to sever it for a separate trial. He then argued that ORS 813.215(1)(f) is unconstitutional because it

precludes diversion based only on a pending *charge*, but the court rejected that argument. In an attempt to preserve that issue for review on appeal, petitioner's counsel arranged for a stipulated-facts trial at which petitioner was found guilty on all three charges. Petitioner did not appeal. He then filed a petition for post-conviction relief contending that his trial counsel did not provide constitutionally adequate assistance when he induced him to agree to a stipulated-facts trial at which he was convicted on the assault charge. The post-conviction court denied his claim, concluding that counsel adequately advised him. *Held*: Reversed and remanded. Petitioner may be entitled to post-conviction relief on his claim. [1] Trial counsel's advice to petitioner to proceed by a stipulated-facts trial was incorrect, because "even if the trial court had erred in denying diversion for the reason it did, petitioner nevertheless would not have been eligible for diversion because the facts to which he stipulated included uncontroverted evidence that the victim had been injured. Thus, on appeal, this court would have affirmed, because an alternative basis for affirming the court's denial of diversion existed following the stipulated-facts trial." [2] "That incorrect advice constituted deficient performance because counsel failed to adequately assist petitioner in making an informed choice about the stipulated-facts trial." [3] "The appropriate inquiry regarding prejudice in this case is whether petitioner has proved that, but for counsel's advice, he would not have agreed to a stipulated-facts trial." Because the post-conviction court applied the wrong standard, "we remand this case to the post-conviction court for a determination of that issue."

Note: The underlying problem in this case was that once petitioner was found guilty on the assault charge based on the stipulated facts, he no longer could argue on appeal that the trial court erred when it rejected his claim that it was constitutionally impermissible to deny him diversion based merely on the assault *charge*. His trial counsel's choice to a stipulated-facts trial to preserve that issue for appeal clearly was wrong. This is one situation in which it may have been better to have used a conditional guilty plea under ORS 135.335(3).

Derschon v. Belleque, 252 Or App 465, 287 P3d 1189 (2012), *rev den*, 353 Or 208 (2013). Petitioner and Davis committed a home-invasion robbery and was charge with multiple counts of burglary, robbery, kidnapping, and theft. At trial, Davis refused to testify and the state presented, without objection, some self-inculpatory statements he had made that also implicated petitioner. The jury found petitioner guilty. On appeal, the Court of Appeals held that admission of Davis's out-of-court statements violated *Crawford* but affirmed on the ground that the error was harmless in light of the overwhelming evidence of his guilt. *State v. Derschon*, 206 Or App 574, *rev den* (2006). Petitioner then filed a petition for post-conviction relief alleging that his trial counsel was constitutionally inadequate for *inter alia* not to presenting a witness, not objecting to the hearsay statements, and not calling an expert regarding cell-phone records. The post-conviction court denied all of the claims. *Held*: Affirmed. [1] Petitioner's claim that his counsel did not call a particular witness had no merit because the record established that he had subpoenaed her and she did not appear, and "We do not understand petitioner to argue that counsel was required to do more than subpoena the witness." [2] "To prove prejudice, the petitioner must establish that counsel's deficient performance had a tendency to affect the result of the prosecution. In making that determination, the court must consider the totality of the circumstances. In doing so, the question for the court is not simply whether counsel's failure had any negative effect regarding a particular issue. Rather, the question is whether the negative effect, if any, as to that issue in turn tended to affect the result in the proceeding as a whole. As a result, in determining whether a given error had a tendency to affect the result of the prosecution, we consider not only evidence presented in the post-conviction proceeding but also the record of the petitioner's criminal trial." [3] "In light of the quality and quantity of that evidence—including the fact that it came from several groups of unconnected witnesses—we conclude that the erroneous admission of the detectives' testimony that Davis had identified petitioner as the second robber did not have a tendency to affect the result of the trial, and did not create a reasonable probability of a different result." [4] Similarly, although an expert on cell-phone records may have been able to buttress petitioner's alibi defense, the evidence at trial "militated against the success of petitioner's alibi defense" and hence the error did not have a tendency to affect the result.

Bostwick v. Coursey, 252 Or App 332, 287 P3d 1168 (2012). Petitioner was convicted of second-degree assault for hitting a pedestrian with his car. He later sought post-conviction relief, contending that his trial counsel failed to provide adequate assistance for not requesting instructions on the lesser-included offenses of third- and fourth-degree assault pursuant to ORS 136.460(1). The post-conviction court granted relief, concluding that counsel's decision not to request instructions on lesser-included offenses was not reasonable. The state appealed. *Held:* Affirmed. [1] As the court held in *Pereida-Alba v. Coursey*, 252 Or App 66 (2012), reasonably competent defense lawyers must "consider" whether to request instructions on lesser-included offenses. [2] The record supported the post-conviction court's implicit finding that petitioner's counsel "did not consider" whether to request an instruction, and thus, failed to exercise professional skill and judgment. [3] Petitioner suffered prejudice because, without the instruction, the jury did not have a complete statement of the law.

Barteaux v. Mills, 252 Or App 313, 286 P3d 1243 (2012) (*per curiam*). Petitioner was charged with number sexual offenses in Multnomah County, and the state made a plea offer that included a recommendation for a 96-month sentence. Petitioner refused the offer, went to trial, and was convicted, and the court imposed a 180-month sentence. The judgment was affirmed on direct appeal. *State v. Barteaux*, 212 Or 117 (2007). Petitioner then filed a petition for post-conviction in which he alleged that his trial counsel provided constitutionally inadequate assistance during the plea-bargaining stage. The post-conviction court denied the claim, and petitioner appealed. While the appeal was pending, the United States Supreme Court decided *Lafler v. Cooper*, 566 US __, 182 L Ed 2d 398 (2012), and *Missouri v. Frye*, 566 US __, 182 L Ed 2d 379 (2012). The Court of Appeals then reversed and remanded in a *per curiam* decision that simply cited *Lafler* and *Frye*. *Barteaux v. Mills*, 250 Or App 761 (2012). The state filed a petition for reconsideration asking the court to clarify the disposition. *Held*: Reconsideration granted; reversed and remanded. In denying petitioner's petition for post-conviction relief, the post-conviction court proceeded from the premise that, if a petitioner has had a full trial with constitutionally adequate assistance of counsel, the petitioner is not in a position to obtain relief from the resulting convictions based on a claim of inadequate assistance of counsel during plea negotiations. In light of *Lafler* and *Frye*, that premise "has now been confirmed … to have been a false premise." Accordingly, the parties and the post-conviction court on remand should "simply start over [and] consider anew both the deficient-performance question and the prejudice question," employing the standards set out in *Lafler* and *Frye*.

^ ***Pereida-Alba v. Coursey***, 252 Or App 66, 284 P3d 1280 (2012), *rev allowed*, 353 Or 410 (2013). Petitioner was convicted of first-degree robbery with a firearm, and he later petitioned for post-conviction relief, claiming that his counsel was constitutionally inadequate for not requesting an instruction on the lesser-included offense of third-degree robbery. The post-conviction court granted relief, concluding that all reasonable attorneys would have requested that instruction. The state appealed, arguing that reasonable trial counsel could have made a strategic decision not to request that instruction, and that petitioner failed to prove prejudice, given that the jury expressly found that petitioner had used or threatened to use a firearm. *Held:* Affirmed. [1] Reasonably competent defense lawyers are required to consider whether to request an instruction on a lesser-included offense. Although the decision whether to request such an instruction is a "tactical decision for an attorney to make, there can be circumstances in which no reasonably competent attorney would fail to make such a request," and here "there was no evident downside to petitioner from requesting" the instruction. [2] The record was sufficient to support a finding that the attorney "did not consider" whether to request an instruction, and thus, failed to exercise professional skill and judgment. [3] "As a general matter, an attorney's failure to request a jury instruction on a lesser-included offense prejudices the petitioner if the instruction was warranted." *Trotter v. Santos*, 212 Or App 473 (2007). [4] Here, petitioner suffered prejudice because, without the instruction, "the jury did not have a complete statement of the law[.]"

Note: This decision is confusing with respect to the second holding, above, because it

suggests that failing to "consider" whether to request an instruction on a lesser-included offense is, by itself, inadequate assistance. The court did not address the more straightforward legal question presented: whether trial counsel acted unreasonably by not requesting the instruction. In addition, the court's prejudice discussion did not address an argument, made in a subsequent post-conviction appeal, that the "complete statement of the law" inquiry is incorrect in the post-conviction context. Finally, the court did not address the state's argument that *Trotter* was wrongly decided.

Tracy v. Nooth, 252 Or App 163, 285 P3d 745 (2012). Petitioner was convicted of attempted first-degree rape and first-degree sexual abuse based on an incident that occurred in a motel in 2006. He filed a petition for post-conviction relief in which he alleged that his trial attorney conducted an inadequate investigation and that a more thorough investigation would have uncovered admissible, exculpatory evidence. Representing himself in the proceeding, he asked the court to issue him five blank subpoenas *duces tecum* pursuant to ORCP 55 C(2); he asserted needed the subpoenas to collect the evidence from a bar and the motel that he asserted would have shown that his trial attorney's failure to conduct such an investigation was prejudicial to the defense. The post-conviction court denied his request for the subpoenas, ruling that petitioner was not entitled to relitigate the underlying criminal case. The court ultimately denied his petition on the merits. *Held*: Reversed and remanded. [1] ORCP 55 applies in post-conviction proceedings. "ORCP 55 C does not permit a court to deny a request for subpoenas merely because the case involves post-conviction relief." [2] "Even if a post-conviction court has discretion to limit the issuance of subpoenas for the reasons listed in ORCP 36 C—and even if it has discretion to limit the issuance of subpoenas on the basis that the information sought is irrelevant—here, … the post-conviction motions judge's reasons for denying petitioner's request were incorrect. Those reasons are not among those listed in ORCP 36 C. Moreover, to the extent that the post-conviction motions judge concluded that the subpoenas were not relevant to petitioner's post-conviction case, the judge was mistaken." [3] The error was not harmless: Without knowing what evidence the petitioner would discover upon issuing the subpoenas, the court could not say whether and to what extent that evidence would have aided the petitioner's post-conviction case.

Note: ORCP 36 C gives a trial court general discretionary authority to regulate the discovery process in the interests of justice. The Court of Appeals noted that a trial court may have some discretion to deny a request for blank subpoenas under ORCP 55. But the court did not resolve that issue in this case because the post-conviction court's rationale for denying petitioner's request was erroneous and was not based on a discretionary decision.

Henley v. Coursey, 252 Or App 180, 286 P3d 1242 (2012) (*per curiam*). Petitioner alleged in his post-conviction petition that his trial counsel neglected to file an appeal at his request. The post-conviction court denied that claim based on its finding that petitioner did not ask his counsel to file an appeal. *Held*: Reversed and remanded. [1] The post-conviction court's finding is not binding because it "is at odds with the evidence in the record." [2] Defense counsel's failure to file an appeal at petitioner's request to do so constitutes inadequate assistance of counsel.

Allen v. Premo, 251 Or App 682, 284 P3d 1199 (2012). In *Allen v. Palmateer*, 219 Or App 221 (2008), the Court of Appeals held that the post-conviction trial court erred when it did not permit petitioner to testify in support of his claims; the court reversed and remanded for a new post-conviction trial. On remand, petitioner moved for leave to file a fourth amended petition. The post-conviction trial court denied that motion on the ground that it was outside the scope of the remand. The court then rejected all of the claims in petitioner's existing petition. *Held*: Reversed and remanded. [1] "Although we generally review a court's denial of a motion to amend only for abuse of discretion, when the denial results from a substantive legal conclusion, we review the correctness of that conclusion for errors of law. In this case, the question is not whether the post-conviction court abused its discretion in denying petitioner's motion to amend; the issue is whether the court erred in concluding that it had no discretion to exercise. That is a legal question, and we review it for legal error." [2] In general, when a case is reversed and remanded, "the 'remanded' part sends the case

back to the lower tribunal as if though the original proceeding did not occur." [3] "By remanding for a new trial, the case was returned to its original pretrial posture, and because the new trial would include petitioner's previously excluded testimony, it was foreseeable that petitioner might seek to amend his petition to revise or add new claims related to that testimony. Whether to grant or deny petitioner leave to amend his petition was within the court's authority; thus, the court erred by not exercising its discretion."

Pedroso v. Nooth, 251 Or App 688, 284 P3d 1207 (2012), *rev den*, 353 Or 203 (2013). Petitioner, who was convicted of murder, petitioned for post-conviction relief, alleging a number of claims of inadequate assistance of his trial counsel. Pursuant to ORCP 21 A(8), the state moved to dismiss contending that his petition failed to comply with ORS 138.580 by not attaching sufficient evidence to support his claims. The post-conviction court granted the motion and dismissed the petition for failure to state a claim, ruling that, even if petitioner's information was true, it did not show that the alleged inadequacy of counsel had an adverse effect on the trial. *Held*: Appeal dismissed. [1] Under ORS 138.525(3), a petition that does not state a claim is meritless, and a judgment dismissing such a petition is not appealable. [2] "In this case, the court's oral ruling, order, and judgment are … unambiguous: the trial court granted the state's motion to dismiss for failure to state a claim. … And, as the court explained in [*Young v. Hill*, 347 Or 165 (2009)], the consequence is a harsh one: 'the statute is unambiguous: petitions that fail to state a claim are meritless, and a judgment dismissing a petition as meritless is not appealable.'"

^ ***Montez v. Czerniak***, 237 Or App 276, 239 P3d 1023 (2010), *rev allowed*, 351 Or 321 (2012). Petitioner and a codefendant Aikens sexually assaulted and murdered a young woman. He was convicted of aggravated murder and was sentenced to death in 1988. On direct review, the court affirmed the convictions but vacated the sentence remanded for a new penalty phase. *State v. Montez*, 309 Or 564 (1990). On retrial in 1992, petitioner again was sentenced to death, and the court affirmed that judgment on direct review. *State v. Montez*, 324 Or 343 (1996), *cert den* (1997). He then petitioned for post-conviction relief, and the court denied all of his claims after a trial. On appeal, petitioner raised numerous claims that his trial counsel did not provide constitutionally adequate assistance. *Held*: Affirmed. [1] "The standards for determining the adequacy of [trial] counsel under the state constitution are functionally equivalent to those for determining the effectiveness of counsel under the federal constitution." *Id.* at 278 n 1. [2] The post-conviction court properly denied petitioner's claim that his trial counsel did not adequately ask the trial court to appoint a mitigation specialist: they did make request and made a sufficient record. *Id.* at 287. [3] The post-conviction court properly denied petitioner's claim that his trial counsel did not adequately investigate possible sexual abuse as a child: their investigation was adequate based on the information known to them at the time—"we must evaluate their conduct from their perspective at the time." *Id.* at 290. [4] Where petitioner submitted a supplemental affidavit from a witness in which it appears that the witness contradicts what he said in his first affidavit, which was submitted by the state, and the post-conviction court "made findings that align with what [the witness] said in his initial affidavit, and those findings are supported by the record, … we disregard any discrepancies between the two affidavits" and accept the court's findings. *Id.* at 292 n 6. [5] The post-conviction court properly denied petitioner's claim that his trial counsel did not adequately investigate a possible head injury: "counsel investigated the possibility that petitioner suffered brain damage, and they employed experts to determine whether that was the case." *Id.* at 293. [6] The post-conviction court properly denied petitioner's claim that his trial counsel did not adequately "educate" the jury through *voir dire* and arguments regarding the fourth question: "In light of the correct instructions by the trial court that addressed the effect of a 'no' vote … it was reasonable for counsel to devote argument to other matters." "This court will not second-guess a lawyer's tactical decisions unless those decisions reflect an absence or suspension of professional skill and judgment." *Id.* at 296. [7] The post-conviction court properly denied petitioner's claim that his trial counsel should have requested an instruction clarifying the effect of a "no" vote: "a court is not obligated to give an instruction that

states merely the converse of a correct instruction." *Id.* at 297. [8] The post-conviction court properly denied petitioner's claim that his trial counsel should have insisted on an oral poll of the jury in open court: "he failed to demonstrate in the post-conviction court that, had counsel attempted to do more to persuade the trial court to conduct an oral poll, it would have done so and, if it had, that any of the jurors would have answered any of the questions 'no.'" *Id.* at 297-98. [9] The post-conviction court properly denied petitioner's claim that his trial counsel should not have disclosed that petitioner previously had been sentenced to death: the record established that it was petitioner's personal choice to make that disclosure and, under the circumstances, it was a reasonable tactical choice. *Id.* at 304. [10] The post-conviction court properly denied petitioner's claim that his trial counsel should not have called other death-row inmates to testify on petitioner's behalf: the record established that it was petitioner's personal choice to make that disclosure and, under the circumstances, it was a reasonable tactical choice. "Even assuming that counsel's choices regarding the use of inmate testimony and whether to object to some of it were not, in hindsight, the best choices, that is not the test. Even effective counsel may make tactical choices that backfire, because, by their nature, trials often involve risk." *Id.* at 306-07. [11] The post-conviction court properly denied petitioner's claim that his trial counsel should have presented expert testimony from Dr. Cunningham on risk of future dangerousness: counsel cannot be faulted for not presenting such an opinion when the research underlying that opinion was not available at the time of trial, even if it otherwise was reliable. Counsel is not inadequate for not predicting "changes in psychological research." *Id.* at 311 [12] The post-conviction court properly denied petitioner's claim that his trial counsel did not adequately inform him of his right of allocution: [a] the court found that counsel did so inform him, and petitioner failed to prove that his counsel did not inform him; [b] given the state of the law in 1992 governing the right of allocution, … counsel would not have failed to exercise reasonable professional skill and judgment" by not so informing him. *Id.* at 315-16.

PRE-EMPTION

State v. Ehrensing, 255 Or App 402, 296 P3d 1279 (2013). Defendant holds an OMMA registry identification card and grew marijuana for several other cardholders. In 2006, law-enforcement officers executed a search warrant at his residence and seized live marijuana plants and packages of dried marijuana. He was charged with unlawful manufacture, delivery, and possession of marijuana. The case eventually was dismissed speedy-trial grounds, and the trial court granted that motion in February 2010. The state did not appeal. Defendant then filed a motion for return of the remainder of the usable seized marijuana. The court granted that motion in part and ordered the sheriff to return a portion of the marijuana. The sheriff appealed. *Held*: Reversed on appeal. [1] The trial court erred in ordering the sheriff to return the marijuana. ORS 475.304(5), ORS 475.323(2), and ORS 133.623 do entitle defendants to return of the marijuana. [2] Under ORS 133.643, "a movant is entitled to return of seized property … only if he or she 'is lawfully entitled to possess' that property. Although the text of ORS 133.643(4) does not also include the term 'lawfully,' in conjunction with its use of 'entitled,' we have held that, in the totality of the statutory context, 'entitled' in subsection (4) necessarily connotes and requires a showing of *lawful* entitlement to possession." And that requirement of "'lawfully entitled' encompasses both state and federal law." [3] "Finally, construing ORS 133.643 in such a fashion as to authorize—indeed, compel—the return of items whose possession would violate federal law could, as the parties' preemption-related contentions manifest, give rise to 'serious constitutional problems.' ORS 133.643 does not authorize the return of the disputed marijuana, because possession of that marijuana by defendant and the other cardholders would violate federal law. Nor does any other statute authorize that return."

Note: The court's ruling that defendant failed to establish a basis *under state law* for return of the marijuana meant that it did not have to resolve the difficult issue that was presented by the principal arguments that the parties made on appeal—*viz.*, whether the sheriff would commit an unlawful delivery of marijuana in violation of 21 USC § 841(a)(1) if he returned the marijuana to defendant and, if so, whether the federal CSA preempts, under the Supremacy Clause, the OMMA.

State v. Oidor, 254 Or App 12, 292 P3d 629 (2012). Based on evidence that defendant sold music CDs that contained unauthorized reproductions of the original recordings, he was charged with unlawful sound recording, ORS 164.865(1)(b), and unlawful labeling of a sound recording, ORS 164.868. Defendant moved to dismiss the first charge, arguing that federal copyright law preempts that offense, but the trial court denied the motion. At trial, defendant moved for a judgment of acquittal on the second charge, and the trial court also denied that motion. Defendant was found guilty. At sentencing, the trial court imposed restitution of $500 to the Recording Industry Association of America (RIAA). *Held*: Conviction for unlawful sound recording and restitution award reversed; otherwise affirmed. Because federal copyright law, 17 USC § 301(a), expressly preempts ORS 164.865(1)(b), the trial court should have dismissed the unlawful sound-recording count. Section 301(a) of the federal Copyright Act prohibits states from creating rights that are "equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106" of the Act. "Congress intended section 301's preemptive effect to apply to state criminal as well as civil laws." Although ORS 164.865 prohibits offering and advertising sound recordings for sale, and although federal law does not specifically prohibit those acts, ORS 164.865(1)(b) nonetheless "creates a right that is equivalent to the exclusive distribution right that the federal act grants to copyright owners," and federal copyright law thus preempts it.

PROBATION

See "Sentencing: probationary dispositions" and "Sentencing: probation revocation," *below*.

RESISTING ARREST

State v. McClure, 256 Or App 200, 300 P3d 210 (2013). Officers on routine patrol contacted defendant, learned that a warrant was outstanding for his arrest on allegations that he had violated his parole, and arrested him. He resisted being arrested, and he was charged with resisting arrest, ORS 162.315. At trial, he moved for a judgment of acquittal contending that the statute did not apply where, as in this case, a person resists being taken into custody for an alleged parole violation, because the statute cross-references ORS 133.005(1), which defines "arrest" to mean taking someone into custody "for the purpose of charging [him] with an offense." The trial court denied his motion, and the jury found him guilty. *Held*: Affirmed. [1] A parole violation "is not an offense as that term is used in ORS 133.005(1). [2] In 2005, "the legislature added 'parole and probation officer' to ORS 162.315 to bring those officers within the purview of the resisting-arrest statute. Further, it added ORS 133.220(3) to clarify that a parole and probation officer has authority to arrest under a warrant and ORS 133.220(4) to confirm that a parole and probation officer may arrest a parole violator without a warrant for parole violations. In view of that history, it is clear that the legislature intended that taking a person into custody for a parole violation would constitute an arrest for purposes of the resisting arrest statute." [3] Given that ORS 133.005 provides that "unless the context requires otherwise," arrest means placing a person into custody "for the purpose of charging that person with an offense," this situation "presents a circumstance in which, in order to carry out the legislature's intent, we must conclude that an arrest for parole violations is an 'arrest' for purposes of ORS 162.315."

RIGHT TO COUNSEL

See also "Confessions: *Miranda*, right to counsel," *above*.

Right to Counsel: before indictment

State v. Plew, 255 Or App 581, 298 P3d 45 (2013). Defendant was charged with a residential burglary of a house on Benham Lane, and was appointed counsel. While he was in jail on that charge, the investigating officer obtained information from a second suspect (and eventual co-defendant) that defendant had also committed a residential burglary eight days earlier, of a house on Holly Lane. The officer went to the jail to interview defendant about the uncharged Holly Lane burglary; he did not invite defendant's attorney in the Benham Lane burglary to the interview. The officer read defendant *Miranda* warnings, told defendant that he was not there to talk about the Benham Lane case, and asked him questions about the Holly Lane burglary. During questioning, the officer used photographs of defendant's apartment—which had been taken as part of the Benham Lane case—to question defendant about specific items of property visible in the photo. Defendant admitted that he had been involved in the Holly Lane burglary and identified property in the photograph that he had stolen during that burglary. The officer asked him if there was "anything else that we need to know about," and defendant replied "No. That's the only two places, I swear to you. You can even give me a lie detector and it will come up positive that's the only two houses." Defendant was charged with the Holly Lane burglary. Before trial, he moved to suppress his statements. He argued that, because he had requested counsel in the Benham Lane case, the officer was required under Art I, § 11 to notify defendant's attorney before questioning him on a factually related criminal episode. The trial court denied the motion, concluding that the two burglaries were not factually related and, therefore, no right to counsel had attached on the Holly Lane burglary. Defendant was convicted of both burglaries after a stipulated-facts trial. He appealed the trial court's denial of the motion to suppress. *Held*: Reversed and remanded. [1] "[W]e agree with defendant that the two burglaries were sufficiently factually related so that defendant was entitled, under Article I, section 11, to the benefit of his attorney's advice regarding the investigation of the Holly Lane burglary. The burglaries were allegedly committed by the same two suspects, … within close temporal proximity, and at houses located in the same neighborhood." Moreover, the same detective was investigating both cases, and "used photographs taken during his investigation of the Benham Lane case to question defendant regarding defendant's possession of stolen property connected to the Holly Lane case. Importantly, those photographs … constituted overlapping evidence of defendant's involvement in both crimes." And defendant thought the two matters were related, and made an admission that was relevant to both cases. [2] The court was unconvinced by the state's attempt to distinguish this case from *State v. Potter*, 245 Or App 1 (2011), *rev den* (2012).

Right to Counsel: at trial, waiver

Marshall, Warden v. Rodgers, 569 US __, 133 S Ct 1446, 185 L Ed 2d 540 (2013). Petitioner was charged in California state court with a variety of weapons-related offenses. At arraignment, he executed a valid waiver of his right to counsel. But he changed his mind and retained counsel for his preliminary hearing. He later fired that lawyer and reiterated his waiver of counsel. Before trial, he requested appointment of counsel, and the trial court appointed him counsel. By the time of trial, he changed his mind again, fired his counsel, and elected to proceed to trial *pro se*. The jury found him guilty. He then requested appointment of counsel to assist him file a motion for new trial. His motion did not include reasons in support of his request, and when offered a chance to supplement or explain his motion at a later hearing, he declined to do so. The trial court denied the request for counsel. On appeal, the appellate court ruled that the trial court had discretion to deny his request for appointment of counsel at that point, and that it did not abuse that discretion under the circumstances. Petitioner eventually filed in federal court a *habeas corpus* petition pursuant to 28 USC § 2254 in which he contended that the state courts violated his rights under the Sixth Amendment by refusing his request for appointment of counsel. The district court denied his petition, but the Ninth Circuit reversed. The court "invoked certain Sixth Amendment precedents from its own earlier cases and from cases in other Circuits. From those precedents, the panel identified two

relevant principles that it deemed to have been clearly established by this Court's cases: first, that a defendant's waiver of his right to trial counsel does not bar his later election to receive assistance of counsel at a later critical stage of the prosecution, absent proof by the State that the reappointment request was made in bad faith; and, second, that a new-trial motion is a critical stage. Combining these two propositions, the court held that respondent had a clearly established right to the reappointment of counsel for purposes of his new-trial motion, and that the California courts—which vest the trial judge with discretion to approve or deny such requests based on the totality of the circumstances—violated that right by refusing to order the reappointment of counsel." *Held*: Reversed. The ruling by the California courts that there was no Sixth Amendment violation is not contrary to "clearly established Federal law, as determined by the Supreme Court of the United States" within the meaning of § 2254(d)(1). [1] "The Sixth Amendment safeguards to an accused who faces incarceration the right to counsel at all critical stages of the criminal process. It is just as well settled, however, that a defendant also has the right to proceed *without* counsel when he voluntarily and intelligently elects to do so." [2] "All this case requires—and all the Court of Appeals was empowered to do under § 2254(d)(1)—is to observe that, in light of the tension between the Sixth Amendment's guarantee of the right to counsel at all critical stages of the criminal process and its concurrent promise of a constitutional right to proceed *without* counsel when a criminal defendant voluntarily and intelligently elects to do so, it cannot be said that California's approach is contrary to or an unreasonable application of the general standards established by the Court's assistance-of-counsel cases." [3] Although an appellate panel may, in accordance with its usual law-of-the-circuit procedures, look to circuit precedent to ascertain whether it has already held that the particular point in issue is clearly established by Supreme Court precedent, it may not canvass circuit decisions to determine whether a particular rule of law is so widely accepted among the Federal Circuits that it would, if presented to this Court, be accepted as correct."

Note: The Court assumed, without deciding, that "a post-trial, pre-appeal motion for new trial is a critical stage of the prosecution" for purpose of the right to counsel under the Sixth Amendment.

State v. Lubbers, 257 Or App 595, __ P3d __ (2013). Defendant was charged with resisting arrest. He was on his second court-appointed attorney when he asked to represent himself and to have his lawyer appointed as his consultant on "technical matters"; he told the trial court that he was a licensed attorney in another state, and had worked as a legal assistant and investigator. He acknowledged that he had specialized in business contracts rather than criminal defense. The trial court spoke with defendant at length, urging him to retain his attorney, who had experience in criminal procedure and evidence, but he declined. The court allowed defendant to represent himself, with his former counsel acting as a consultant. After a bench trial, the court found him guilty. On appeal, defendant argued that the court violated his constitutional right to counsel by allowing him to represent himself "when the record did not demonstrate that he understood the nature of the charges and the disadvantages of self-representation." *Held*: Affirmed. [1] "Whether a defendant voluntarily and intelligently waived the right to counsel is a legal question that we answer in light of the circumstances particular to each case." [2] A defendant "can validly waive counsel without understanding the contours of all potentially available defenses to [the] charge—as long as the record otherwise establishes that defendant understood his right to counsel, including some of the specific disadvantages of self-representation, when he voluntarily waived that right." [3] Here, the trial court repeatedly explained to defendant the advantage that an experienced local attorney would have in citing and following rules of evidence and procedure, and the record reflected that defendant knew that he faced charges that might be complicated. That, together with defendant's experience in the legal system, strongly indicate that defendant's waiver of counsel was intelligently made. The trial court did not need to ensure that defendant understood the defenses to those particular charges.

State v. Fredinburg, 257 Or App 473, __ P3d __ (2013). Defendant was charged with DUII and retained private counsel. Two days before trial, defendant asked for a continuance, which the

court denied. Then, on the morning of trial, counsel moved to withdraw, citing a breakdown in the attorney-client relationship, and for a continuance for new counsel to get up to speed. The trial court denied both requests, telling counsel that he did not think counsel was telling the truth, and was simply "subterfuge" to obtain the continuance that the court had previously denied. During trial, defendant asked to represent himself for the remainder of the proceeding. The trial court again denied his request. On appeal, he argued that the trial court abused its discretion in denying his motions. *Held:* Affirmed. The trial court did not abuse its discretion in denying defendant's motions for substitute counsel and a continuance. [1] "A continuance request that is made after a case is called for trial and a pretrial evidentiary hearing has occurred is not requested in a 'timely manner'… It was not an abuse of discretion for the court to deny the motions as untimely." [2] As for defendant's motion to represent himself, even assuming that the request was unequivocal, intelligent, and understanding, "it was within the discretion of the trial court to deny the midtrial request if the court concluded that the timing of the change or other consequences of the self-representation would be disruptive of the orderly conduct of the trial in a way that would be unreasonable under the circumstances. … Thus, defendant is incorrect in contending that a trial court lacks any discretion to deny an unequivocal, knowing, and intelligent request for self-representation." [3] In this case, "the court's concerns that defendant's self-representation would be unreasonably disruptive of the orderly conduct of the trial were supported by the record."

State v. Erb, 256 Or App 416, 300 P3d 270 (2013). Defendant was charged with pointing a firearm at another and menacing. Before trial, she fired her retained lawyer and submitted a written waiver of counsel that stated only that she had "been fully informed of" her right to counsel and that she was "aware of the help a lawyer might be to me." At a later hearing, the trial court noted that defendant wished to appear *pro se*, and advised her that she "may be at a disadvantage without a lawyer," and that that decision "was unfortunate," but did not discuss the type of advantages a lawyer could provide. Defendant proceeded to trial *pro se*, and the jury found her guilty. *Held*: Reversed and remanded. The trial court erred when it accepted defendant's waiver of counsel. Although defendant clearly understood that she had a right to counsel, the record failed to establish that she understood what that right entailed and the risks of self-representation. Although defendant was educated (a nurse practitioner), she had no training in the law, and, although she initially was represented by counsel in this case, the mere fact of prior representation by counsel was insufficient to support a conclusion that she was made aware of the risks and benefits of self-representation.

State v. Miller, 254 Or App 514, 295 P3d 158 (2013). A day before trial, defendant told the court that he intended to hire a new attorney, but that the new attorney would not be available for trial the next day. The trial court expressed concern at the age of the case (then, seven months), and told defendant that trial would proceed the next day either with his new attorney, with his appointed attorney, or with him representing himself. On the morning of trial, defendant did not have a new attorney, and his appointed attorney sought to withdraw. The trial court denied that request, explaining that trial counsel was a good attorney and that comments defendant had previously made "shows me how little you know about these matters and that you're better [off] in the hands of an experienced attorney." Defendant asked, "I can't represent myself?" and the trial court answered that he could not, because proceeding with an attorney was in defendant's "best interest." Defendant was found guilty for all counts except one. *Held*: Reversed and remanded. "[T]he trial court understood that defendant sought to invoke his right of self-representation," and erroneously denied that request based solely on its assessment of defendant's "best interest." "Significantly, the court in precluding self-representation, did not refer to, or purport to do so based on, any anticipated disruption of the judicial process."

Right to Counsel: other proceedings

State v. C. S., 252 Or App 509, 287 P3d 1238 (2012), *rev den*, 353 Or 445 (2013). A petition was filed in juvenile court alleging that youth, a 13-year-old girl, had committed fourth-degree assault, harassment, and first-degree theft of a gym bag and contents. The next day, April 21, she appeared with her father, and she waived her right to counsel, and admitted the allegations. On May 10, the juvenile court entered a dispositional order. Youth did not appeal from that order. The court subsequently scheduled a restitution hearing and appointed counsel to assist youth. Before the hearing, youth's counsel filed a motion to withdraw her admission to the theft allegation. The court denied that motion and imposed restitution for the bag and its contents. On appeal, the youth argued that the juvenile court erred when it denied her motion to withdraw her admission, because her waiver of counsel was not knowing and voluntary. She argued that "in order to ensure the adequacy of a waiver of counsel in a situation such as this, an explanation of the right to counsel, followed by assurances by a youth that the youth understands, is insufficient. Rather, … the court must not ask leading questions, and should have a youth repeat back his or her understanding of the right being waived." *Held*: Affirmed. [1] "Any error with respect to the validity of youth's waiver of her right to counsel was not preserved. Although … the written motion [to withdraw] did mention that youth had been unrepresented, and thus *could have* been the basis for making an argument to the trial court that her waiver of counsel was not knowing, voluntary, and intelligent, counsel made no such argument in the motion or at the hearing. Rather, .. counsel's argument, and evidence, pertained to whether youth had intended to admit to theft of the gym bag, or only theft of some of the bag's contents." [2] Youth's claim is not reviewable as "plain error" because the juvenile court's colloquy complied with *State v. Meyrick*, 313 Or 125 (1992), and "the legal point youth is making is for an extension of existing law—a refinement, so to speak, of the *Meyrick* requirements in circumstances where a young adolescent is facing charges." And that point is not "obvious, not reasonably in dispute."

ROBBERY

See also "Sentencing: merger," *below*.

SEARCH & SEIZURE

See also "DUII: stops, search and seizure," *above*, and "Stop & Frisk," *below*.

Search & Seizure: privacy interests / searches

Maryland v. King, 569 US __, 133 S Ct 1958 (2013). Defendant King was arrested in Maryland in 2009 for menacing a group of people with a shotgun; he was charged with first- and second-degree assault. As a routine booking procedure for certain offenses, as prescribed by Maryland law, the jailor took a buccal swab from his mouth, the swab was tested for his DNA profile, and the profile was checked against a state DNA database (CODIS). That profile matched a sample obtained from the victim of an armed burglary and forcible rape that was committed by a masked intruder in 2003 in another town in Maryland. The police obtained a warrant and seized a second buccal sample, which confirmed the earlier test. Defendant was charged in state court with rape based on that incident, and he moved to suppress, contending that the involuntary, warrantless swabbing violated the Fourth Amendment. The trial court denied his motion, the evidence was admitted, and he was found guilty and sentenced to life imprisonment without the possibility of parole. The Maryland Court of Appeals reversed, concluding "that a DNA swab was an unreasonable search in violation of the Fourth Amendment because King's expectation of privacy is greater than the State's purported interest in using King's DNA to identify him." *Held*: Reversed and remanded. The state court erred by suppressing the evidence based on the Fourth Amendment. [1] "It can be

agreed that using a buccal swab on the inner tissues of a person's cheek in order to obtain DNA samples is a search" within the meaning of the Fourth Amendment. Although a buccal swab "can be deemed a search within the body of the arrestee," the fact that the "intrusion is negligible is of central relevance to determining reasonableness." [2] "As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness.' In giving content to the inquiry whether an intrusion is reasonable, the Court has preferred some quantum of individualized suspicion as a prerequisite to a constitutional search or seizure. But the Fourth Amendment imposes no irreducible requirement of such suspicion. In some circumstances, such as when faced with special law-enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable. … The need for a warrant is perhaps least when the search involves no discretion that could properly be limited by the interpolation of a neutral magistrate between the citizen and the law-enforcement officer." [3] "Even if a warrant is not required, a search is not beyond Fourth Amendment scrutiny; for it must be reasonable in its scope and manner of execution. Urgent government interests are not a license for indiscriminate police behavior. To say that no warrant is required is merely to acknowledge that rather than employing a *per se* rule of unreasonableness, we balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable." [4] "The legitimate government interest served by the Maryland DNA Collection Act is one that is well established: the need for law-enforcement officers in a safe and accurate way to process and identify the persons and possessions they must take into custody. It is beyond dispute that probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest. Also uncontested is the "right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested. … Even in that context, the Court has been clear that individual suspicion is not necessary, because the constitutionality of a search incident to an arrest does not depend on whether there is any indication that the person arrested possesses weapons or evidence. The fact of a lawful arrest, standing alone, authorizes a search." [5] The DNA test serves legitimate law-enforcement interests incident to arrest: "First, in every criminal case, it is known and must be known who has been arrested and who is being tried. … The task of identification necessarily entails searching public and police records based on the identifying information provided by the arrestee to see what is already known about him. The DNA collected from arrestees is an irrefutable identification of the person from whom it was taken. … Second, law enforcement officers bear a responsibility for ensuring that the custody of an arrestee does not create inordinate risks for facility staff, for the existing detainee population, and for a new detainee. … Third, the Government has a substantial interest in ensuring that persons accused of crimes are available for trials. … Fourth, an arrestee's past conduct is essential to an assessment of the danger he poses to the public, and this will inform a court's determination whether the individual should be released on bail. … Finally, in the interests of justice, the identification of an arrestee as the perpetrator of some heinous crime may have the salutary effect of freeing a person wrongfully imprisoned for the same offense." [6] "DNA identification of arrestees, of the type approved by the Maryland statute here at issue, is no more than an extension of methods of identification long used in dealing with persons under arrest. In the balance of reasonableness required by the Fourth Amendment, therefore, the Court must give great weight both to the significant government interest at stake in the identification of arrestees and to the unmatched potential of DNA identification to serve that interest. By comparison to this substantial government interest and the unique effectiveness of DNA identification, the intrusion of a cheek swab to obtain a DNA sample is a minimal one. … A brief intrusion of an arrestee's person is subject to the Fourth Amendment, but a swab of this nature does not increase the indignity already attendant to normal incidents of arrest." [7] "In addition the processing of respondent's DNA sample's 13 CODIS loci did not intrude on [defendant's] privacy in a way that would make his DNA identification unconstitutional. First, the CODIS loci come from noncoding parts of the DNA that do not reveal the genetic traits of the arrestee. … And even if non-coding alleles could provide some information, they are not in fact tested for that end. … Finally, the

Act provides statutory protections that guard against further invasion of privacy. … This Court has noted often that a statutory or regulatory duty to avoid unwarranted disclosures generally allays privacy concerns."

Court's summary: "In light of the context of a valid arrest supported by probable cause respondent's expectations of privacy were not offended by the minor intrusion of a brief swab of his cheeks. By contrast, that same context of arrest gives rise to significant state interests in identifying respondent not only so that the proper name can be attached to his charges but also so that the criminal-justice system can make informed decisions concerning pretrial custody. Upon these considerations the Court concludes that DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure. When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment."

Notes: (a) The Maryland statute that requires taking the sample is expressly limited to a person who has been arrested for one of specified offenses, including "a crime of violence." The sample must be obtained only by buccal swab and is not to be processed until the person is arraigned on a criminal charge. The sample must be destroyed either if the person is not eventually convicted of the offense for which he was arrested or if the person is convicted but that conviction is later reversed, set aside, or pardoned. The law precludes use of the sample for any purpose other than identifying the person. (b) The defendant in this case did not dispute the constitutional validity of state statutes that require DNA sampling of a defendant who is *convicted* of a serious offense. He contended only that such a sampling cannot be done based only on an *arrest*. Interestingly, the opinion does not discuss whether this defendant eventually was convicted on the charge for which he was arrested and, if so, why his claim is not now moot as a result. (c) Oregon law requires a DNA sampling—either by blood or buccal test—only upon *conviction* for a felony or certain other specified offenses. ORS 137.076. The Oregon Supreme Court held in *State v. Sanders*, 343 Or 35 (2007), that that requirement does not violate either the Fourth Amendment or Art I, § 9. Under some limited circumstances, a court may order an HIV test based only on an arrest. ORS 135.139.

Florida v. Jardines, 569 US __, 133 S Ct 1409 (2013). The police received an unverified tip that marijuana was being grown in defendant's residence. After the officers conducted minimal surveillance of the residence without observing anything significant, an officer with a drug-sniffing dog went up onto the front porch. The dog alerted at the front porch. Based only on that information, the police obtained a warrant to search the residence. The search uncovered a marijuana-grow operation. Defendant moved to suppress, contending that the officer's entry onto his porch with a dog violated his rights under the Fourth Amendment. The trial court agreed and suppressed the evidence. On appeal, the Florida Supreme Court affirmed. *Held*: Affirmed (5-4 decision). "The government's use of trained police dogs to investigate the home and its immediate surroundings is a 'search' within the meaning of the Fourth Amendment." [1] "When it comes to the Fourth Amendment, the home is first among equals. At the Amendment's very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion. This right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window. We therefore regard the area immediately surrounding and associated with the home—what our cases call the curtilage—as part of the home itself for Fourth Amendment purposes." "The front porch is the classic exemplar of an area adjacent to the home and to with the activity of home life extends." [2] "The knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers of all kinds. This implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave. Complying with the terms of that

traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters. Thus, a police officer not armed with a warrant may approach a home and knock, precisely because that is no more than any private citizen might do." [3] "But introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else. There is no customary invitation to do *that*. An invitation to engage in canine forensic investigation assuredly does not inhere in the very act of hanging a knocker. … The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose. … Here, the background social norms that invite a visitor to the front door do not invite him there to conduct a search." [4] "The *Katz* 'reasonable-expectations' test has been *added to*, not *substituted for*, the traditional property-based understanding of the Fourth Amendment, and so is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas. Thus, we need not decide whether the officers' investigation of [defendant's] home violated his expectation of privacy under *Katz*. … That the officers learned what they learned only by physically intruding on [defendant's] property to gather evidence is enough to establish that a search occurred."

Notes: [a] In her concurring opinion, joined by two others justices, Justice Kagan noted that she would have based the decision on *Kyllo v. United States*, 4533 US 27 (2001), and a violation of defendant's right to *privacy* rather than his property interest: "The Court today treats this case under a property rubric; I write separately to note that I could just as happily have decided it by looking to [defendant's] privacy interests. A decision along those lines would have looked . . . well, much like this one." [b] Justice Alito argued in his dissent that, given customary expectations and the ubiquity of dogs, the officers neither trespassed or invaded defendant's right of privacy.

State v. Cam, 255 Or App 1, 296 P3d 578, *as modified on reconsideration*, 256 Or App 146 (2013). Defendant was at the center of a massive property-theft ring based in Woodburn. Thieves would bring him stolen goods in exchange for cash or drugs. The thefts came to light after a woman who was stopped in a stolen car told police that the car belonged to defendant and that defendant had the title and registration paperwork at his house. To investigate that claim, detectives went to defendant's rural property, driving on a gravel road through an open metal gate posted with two signs that read "Private Property," and one that read "10 mph." When the detectives asked if they could speak with defendant privately, he invited them into his outdoor sauna. The detectives told him why they were there, and asked him if he had any documents relating to the purchase of the car—and, if so, if he was willing to let them see the documents. Defendant said that the documents were in the house and invited the detectives into the house. As they walked through defendant's garage to get to the house, the detectives saw several items they believed were stolen. They asked and received defendant's permission to walk through the rest of the property to search for other stolen items and, when they confirmed that at least one item was stolen, arrested defendant and obtained a warrant to search his property. That search turned up thousands of stolen items and drugs. Before trial, defendant moved to suppress all of the evidence found on his property, arguing that police unlawfully entered his property because the "private property" signs they passed manifested defendant's clear intent to exclude visitors. The trial court denied the motion. The jury found defendant guilty of 53 theft and drug-related charges. *Held*: Reversed and remanded for resentencing; otherwise affirmed. Defendant did not clearly manifest an intent to exclude visitors from his property. "[T]he posting of a sign indicating that property is private does not in and of itself suggest that visitors to the property are excluded. … Considering all of the circumstances in this case, including the open gate and absence of a no-trespassing sign, we conclude that the trial court correctly held that the gate and private property signs did not manifest defendant's clear intent to exclude visitors."

State v. Roper, 254 Or App 197, 294 P3d 517 (2012), *rev den*, 353 Or 714 (2013). Police officers went to defendant's rural residence to investigate a report that he was growing marijuana. They drove through an open gate and up defendant's driveway, and made contact with him outside his home after knocking on his door. In doing so, the officers passed three scattered "No

Trespassing" signs, which they did not actually see. Two of the signs were on fences on the sides of the driveway, with the closer of the two being approximately four feet from the post that held the gate. The third sign was on the gate but was facing backwards—and, hence, the front of that sign was not visible—because the gate was open. The officers made observations outside defendant's home that provided probable cause to believe that he was growing marijuana. He consented to a search of the premises, which yielded evidence of a marijuana-grow operation and of other crimes. Defendant was charged with a slew of crimes, and he moved to suppress the evidence, asserting that the officers were trespassing when they drove up the driveway to contact him at his residence. The trial court granted defendant's motion. The court found that the officers were credible in their testimony that they did not see the "No Trespassing" signs but found that they failed to use due diligence in the matter. The court concluded that the "No Trespassing" signs manifested defendant's intent to exclude visitors from driving up the driveway, and that the officers therefore were trespassing—in violation of Art. I, § 9—when they made the observations outside defendant's home, contacted defendant, and obtained his consent. The state appealed, arguing that defendant did not manifest a clear intent to exclude visitors. *Held*: Affirmed. "The trial court found that a reasonable person would have seen the 'No Trespassing' signs. Although the gate to defendant's property was open, he did have a fence around the property. In light of all the circumstances, we conclude, as a matter of law, that defendant objectively manifested intent to exclude the public, and that the trial court did not err in granting defendant's motion to suppress."

^ ***State v. Unger***, 252 Or App 478, 287 P3d 1196 (2012), *rev allowed*, 353 Or 533 (2013). After receiving reports of drug activity at defendant's house, officers went to the house for a "knock and talk" and to seek consent to search the house. The split-level house had two doors facing the front; officers knocked on both but received no response. Seeing cars parked in the driveway and believing someone was present, an officer went to the back of the house and knocked on a sliding glass door. Defendant answered and, when asked, gave permission for the officers to enter and talk with him. The officers explained the reports they had received and asked if he would show them around the house, which he agreed to do. During the walk-through, officers saw a torn baggie containing white powder and crystals that looked like methamphetamine. Another officer read a consent-to-search form to defendant, who verbally consented to a search but refused to sign any legal document without first consulting his attorney. As the officers began searching pursuant to defendant's verbal consent, defendant phoned his attorney and reported that "his attorney wanted everyone out of the house"; he phoned his attorney a second time, then told the police that *defendant* wanted the officers to leave. One of the officers field-tested the white powder, which was in fact methamphetamine, then the officers arrested defendant. Based on observations made in the house, police obtained a search warrant, which yielded additional drug evidence. Defendant moved to suppress contending that the police unlawfully entered the curtilage of his house to knock on the back door and that all evidence derived from that illegality must be suppressed. The trial court denied his motion, and he was convicted. *Held*: Reversed and remanded. [1] "The officers' entry into defendant's backyard violated his [Art. I, § 9] rights because it was a search and it was not justified by either a warrant or an exception to the warrant requirement … as a general matter, an officer may enter a front yard and knock on a front door, but an officer may not enter a backyard and knock on a back door" because "such an entry is a trespass and constitutes a search." [2] "The officers' entry into and search of defendant's house also violated [Art I, § 9] because, although defendant consented to the entry and search, his consent was invalid because it was the product of unlawful police conduct, specifically, the illegal entry into his backyard.

Search & Seizure: probable cause

Florida v. Harris, 568 US __, 133 S Ct 1050 (2013). Officer Wheetly was on patrol with Aldo, his well-trained drug-sniffing German shepherd, when he stopped defendant's truck for a traffic infraction. One thing led to another, and Aldo alerted on an exterior door handle. Based on that and

defendant's extreme nervousness, the officer searched the truck. Although he did not find any drugs that Aldo was trained to detect, he found 200 pseudoephedrine pills. Defendant 'fessed up that he's a sometime meth cook. Defendant was charged with PCS and was released on bail. Sometime later, Officer Wheetly stopped defendant again for a traffic infraction, Aldo alerted again, and a search of defendant's truck came up empty. Defendant moved to suppress, and after an extensive hearing on Aldo's qualifications, the trial court denied the motion. Defendant was convicted, and he appealed. The Florida Supreme Court reversed, holding that search based on Aldo's sniff violated the Fourth Amendment. The court then adopted a rule that requires an extensive checklist for approving dog-sniff searches, including a detailed, recorded history of the dog's alerts "in the field," specifically including those in which a search failed to confirm the alert. *Held*: Reversed. Aldo's "sniff was up to snuff." [1] "Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence ... have no place in the probable-cause decision. All we have required is the kind of fair probability on which reasonable and prudent people, not legal technicians, act. In evaluating whether the State has met this practical and common-sensical standard, we have consistently looked to the totality of the circumstances. We have rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach. … The Florida Supreme Court flouted this established approach to determining probable cause." [2] "Evidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert. If a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search. The same is true, even in the absence of formal certification, if the dog has recently and successfully completed a training program that evaluated his proficiency in locating drugs." [3] The question—similar to every inquiry into probable cause—is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. A sniff is up to snuff when it meets that test. And here, Aldo's did. The record in this case amply supported the trial court's determination that Aldo's alert gave Wheetley probable cause to search Harris's truck.

Notes: [a] This opinion appears to be consistent with the Oregon Supreme Court's decision on the same topic: *State v. Foster*, 350 Or 161 (2011). [b] The Court disparaged the Florida Supreme Court's emphasis on record-keeping of field experience: "If a dog on patrol fails to alert to a car containing drugs, the mistake usually will go undetected because the officer will not initiate a search. Field data thus may not capture a dog's false negatives. Conversely (and more relevant here), if the dog alerts to a car in which the officer finds no narcotics, the dog may not have made a mistake at all. The dog may have detected substances that were too well hidden or present in quantities too small for the officer to locate. Or the dog may have smelled the residual odor of drugs previously in the vehicle or on the driver's person. Field data thus may markedly overstate a dog's real false positives."

Search & Seizure: search / entry and seizure pursuant to warrant

Bailey v. United States, 568 US __, 133 S Ct 1031 (2013). Based on a tip that "Polo" unlawfully possessed a firearm in his apartment, the police obtained a search warrant for that location. Before officers executed the warrant, detectives conducting surveillance there saw defendant and another man, who both roughly matched Polo's description, leave the apartment and drive away. The detectives followed, and after several blocks they stopped defendant's vehicle believing that was permitted as incident to execution of the warrant. Meanwhile, officers executing the warrant found a gun and narcotics in the apartment. At that point, the detectives searched defendant and found a set of keys, one of which was a key to the apartment. Defendant was charged in federal court with drug and firearm offenses, and he moved to suppress, contending that the stop and search was unlawful. The district court denied the motion, holding that the detectives' conduct was authorized by *Michigan v. Summers*, 452 US 692 (1981). The Second Circuit affirmed. *Held*: Reversed and remanded (a 6-3 decision). The district court should have granted defendant's motion to suppress. [1] "In *Summers*, the Court defined an important category of cases in which detention is allowed without

probable cause to arrest for a crime. It permitted officers executing a search warrant to detain the occupants of the premises while a proper search is conducted. The rule in *Summers* extends farther than some earlier exceptions because it does not require law enforcement to have particular suspicion that an individual is involved in criminal activity or poses a specific danger to the officers. In *Muehler v. Mena*, 544 U S 93 (2005), applying the rule in *Summers*, the Court stated: 'An officer's authority to detain incident to a search is categorical; it does not depend on the quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.' The rule announced in *Summers* allows detention incident to the execution of a search warrant because the character of the additional intrusion caused by detention is slight and because the justifications for detention are substantial." [2] "In *Summers*, the Court recognized three important law enforcement interests that, taken together, justify the detention of an occupant who is on the premises during the execution of a search warrant: officer safety, facilitating the completion of the search, and preventing flight." [3] "In sum, of the three law enforcement interests identified to justify the detention in *Summers*, none applies with the same or similar force to the detention of recent occupants beyond the immediate vicinity of the premises to be searched. Any of the individual interests is also insufficient, on its own, to justify an expansion of the rule in *Summers* to permit the detention of a former occupant, wherever he may be found away from the scene of the search. This would give officers too much discretion. The categorical authority to detain incident to the execution of a search warrant must be limited to the immediate vicinity of the premises to be searched." [4] The seizure and search was unlawful because "petitioner was detained at a point beyond any reasonable understanding of the immediate vicinity of the premises in question."

Notes: [a] The Court that the "immediate vicinity" rule it was adopting may create uncertainty at the margins: "In closer cases courts can consider a number of factors to determine whether an occupant was detained within the immediate vicinity of the premises to be searched, including the lawful limits of the premises, whether the occupant was within the line of sight of his dwelling, the ease of reentry from the occupant's location, and other relevant factors." [b] The Court also noted that other circumstances may provide officers with an independent justification to stop someone who had left the location that was about to be searched: "A suspect's particular actions in leaving the scene, including whether he appears to be armed or fleeing with the evidence sought, and any information the officers acquire from those who are conducting the search, including information that incriminating evidence has been discovered, will bear, of course, on the lawfulness of a later stop or detention. For example, had the search team radioed [to the detectives] about the gun and drugs discovered in [defendant's] apartment as the officers stopped [defendant], this may have provided them with probable cause for an arrest."

State v. Miller, 254 Or App 514, 295 P3d 158 (2013). Police sought a warrant to search defendant's apartment and car for evidence of drug crimes. In the supporting affidavit, an officer averred that defendant had sold drugs to a confidential reliable informant (CRI) through an unwitting informant (UI) on three occasions, at undisclosed locations. The UI told the CRI that it would be "no problem" to buy a dealer amount of meth from defendant within the next couple of days, and that "they could purchase anything they wanted" from defendant. Before one of the buys, police watched defendant's apartment and saw that, upon receiving the call about the sale, defendant drove straight from his apartment to the buy location, and went directly home afterward. The officer further averred that, in his training and experience, people who sell drugs often keep drugs, sales records, proceeds, and packaging materials in "a safe or other type locking container." The warrant issued, and police found evidence of drug crimes in both defendant's car and his apartment. Defendant was found guilty. *Held*: Reversed and remanded. The trial court should grant defendant's motion to suppress evidence discovered in the search of his apartment, but not his car. [1] The statements in the affidavit from the UI concerning defendant's ability to procure more drugs did not contribute to probable cause, because the affidavit contained nothing to indicate the basis of the UI's knowledge; to infer personal knowledge would be impermissibly speculative. Nothing in the affidavit established a nexus between defendant's drug activity and his residence. None of the officer's "general averments" about

people involved in drug distribution keeping items in a "locking container" permitted or supported "a nonspeculative inference" that the container would be in defendant's residence. [2] The affidavit "sufficiently substantiates that defendant drove in [his car] to each of the controlled drug buys"; that information, coupled with the officer's averments about training and experience, makes the nexus to the vehicle "patent."

State v. Huff, 253 Or App 480, 291 P3d 751 (2012). Police sought a search warrant to search defendant's RV and shop for drug evidence. The affidavit in support of the warrant contained information that defendant was on post-prison supervision on a drug-related conviction; that he was associating with another offender who also was on supervision on a drug-related conviction; that 45 months earlier, police had seized a commercial quantity of methamphetamine from defendant's shop; that, on the day of the search, police had found (in a consent search) a user amount of drugs in in defendant's residence and a pipe containing residue; and that defendant's mother had reported that defendant had recently been spending a significant amount of time in his shop, including setting up an office inside. A telephonic warrant issued. The ensuing search turned up evidence of a commercial drug operation in a "shop" on defendant's property, next to his home. Defendant was charged with drug offenses, and he moved to suppress the evidence discovered in the warrant search, arguing that the affidavit in support of the warrant did not provide probable cause. The trial court denied the motion, and defendant was convicted. *Held*: Reversed and remanded. [1] "We have held that the current possession of a small amount of illegal drugs in a person's home does not give rise to probable cause to search the home for additional drugs. … Instead, additional facts beyond current possession must be presented to establish the probability that further evidence of criminal activity will be found at the suspected location." In this case, defendant's possession of a small amount of methamphetamine and a pipe "both suggest personal use of the drug," but "neither of those facts supports an inference that defendant was engaged in the *sale* of methamphetamine from the location, which, in turn, could establish the probability that [police would find] additional quantities of the drug." [2] Although the information about the previous drug seizure in the shop was not "stale," "we conclude that … it is, nonetheless, insufficient to allow the reasonable conclusion that evidence of drug distribution would probably be found on defendant's property." [3] Nothing else in the officer's affidavit could give rise to a finding that it was more likely than not that additional evidence of commercial drug activity, or additional user amounts or paraphernalia, would be found on the property.

Search & Seizure: electronic surveillance, wiretaps

State v. Hale, 252 Or App 187, 288 P3d 1 (2012), *rev den*, 353 Or 533 (2013). Defendant and his codefendant, Klein, were charged with murder, conspiracy to commit murder, and attempted aggravated murder, for murdering Asia Bell and attempting to murder two others in a gang-related shooting at the Bell residence. The shooting occurred in 2002, but the case went cold until Klein's former girlfriend, Hutchens, contacted the prosecutor's office in 2006 and revealed her role as a lookout. Based on information that she supplied, police obtained a series of body-wire orders allowing them to intercept communications between defendant and Hutchens. Search warrants and wiretap orders were subsequently issued as well, based in part on the contents of one of those conversations. Defendant and Klein each sought to suppress evidence obtained by way of those intercept orders, on the ground that the judge who issued the second of the 2006 body-wire orders was not a "neutral and detached magistrate" because the judge had previously worked as a deputy district attorney and had been assigned to the investigation of the Bell shooting in 2002, when it was an unsolved case. He left the district attorney's office in 2005, and did not recall having been to the crime scene when he signed the order in 2006. The trial court denied the motion to suppress. Defendant was convicted. On appeal, defendant challenged the denial of his motion to suppress contents of the second interception, and any derivative evidence. *Held*: Affirmed. [1] For a magistrate to be "neutral and detached," he or she must (1) "be 'severed and disengaged from

activities of law enforcement, and (2) "as a matter of due process, the issuing magistrate not have an interest in the case that would corrupt the integrity of an average judge." [2] In evaluating whether that interest rises to the level of a due-process violation, "the question is whether, under a realistic appraisal of psychological tendencies and human weakness, the average judge in [the issuing judge's position] … is likely to be neutral, or whether there is an unconstitutional potential for bias." [3] Here, the judge was "severed and disengaged from activities of law enforcement," and "there is no evidence that, at the time [he] reviewed the body-wire application, he had anything personally or professionally at stake in the outcome of the prosecution, or had anything more than a passing familiarity with some of the names and motives involved."

Search & Seizure: warrantless searches—automobile exception

State v. Finlay, 257 Or App 581, __ P3d __ (2013). Based on a tip from an informant, a detective arranged two controlled buys in which defendant agreed to sell methamphetamine to the informant. The detective knew that defendant drove a pickup that frequently had a trailer attached. The first controlled buy occurred after defendant agreed to meet the informant at a grocery store. A detective waited at that location and saw defendant arrive in his truck, which was not pulling the trailer; a passenger then got out of the truck, walked directly toward the informant, and handed the informant methamphetamine. Defendant and the passenger then left. The detective testified that, although she believed that she had probable cause to arrest defendant that day, she chose not to do so to continue her investigation. The second controlled buy occurred a week later. Defendant agreed to meet the informant at a restaurant. While waiting in the parking lot, the detective saw defendant's truck enter the parking lot and pull up directly in front of her. That time, defendant's truck was pulling a large, fully enclosed trailer. Defendant got out of his truck, walked inside the restaurant, looked around briefly, and walked back outside, where he was arrested approximately 100 feet from his truck. As defendant walked to the restaurant, two passengers got out of the truck and were arrested. Defendant was searched, but no methamphetamine was found. The detective then believed that she had probable cause to search defendant's truck and trailer for methamphetamine. Approximately 30 to 40 minutes after defendant's arrest, officers did so and found methamphetamine in the trailer. Defendant was charged with delivery of methamphetamine, ORS 475.890, and he moved to suppress, arguing that the warrantless search of the trailer was unlawful under Art. I, § 9; specifically, he argued that the search did not fall within the automobile exception because the truck was not mobile when police "encountered" it in connection with a crime. The trial court found that the detective observed defendant drive into the parking lot and park, but agreed with defendant that police did not "encounter" the truck until they had arrested him—that is, when the truck was parked and unoccupied—and therefore defendant's truck was not mobile when police encountered it. Moreover, defendant argued, the trailer was not part of the truck for purposes of the automobile exception. The court granted defendant's motion to suppress based on defendant's first argument, and the state appealed. *Held*: Reversed and remanded. [1] Defendant's vehicle was mobile when police encountered it in connection with a crime. The detective "encountered defendant's truck when she saw him drive it into the parking lot and park. Further, given the police investigation of the first controlled buy, there is no dispute that that 'encounter' occurred 'in connection with a crime.'" Moreover, "the lack of a roadside stop does not negate the exigency presented by the fact that the truck was mobile when police first encountered it in connection with a crime." [2] The justification for the automobile exception "applies equally in the case of a trailer, or any container, that is *attached* to a vehicle. That is so because, if the vehicle quickly moves out of the locality or jurisdiction, so too will the container attached to it. Moreover, we fail to see a significant distinction between searching containers *inside* a vehicle, which is permitted under the automobile exception, and searching containers attached to the *outside* of the vehicle. Here, it is undisputed that the trailer containing methamphetamine was attached to the defendant's truck." [3] The search of the trailer was supported by probable cause. Police need not have probable cause at the same moment when they encounter the vehicle in connection with a crime.

State v. Tovar, 256 Or App 1, 299 P3d 580 (2013). An officer stopped a car he saw speeding and weaving within its lane, and he noticed the moderate odor of marijuana coming from the car interior. The officer obtained identification from the driver and defendant, the passenger, told them to "stay put," and returned to his patrol vehicle to run a warrants check. When the officer returned to the car, he asked both of them whether there was marijuana in the car, and both said there was not; the driver appeared nervous when responding, and the officer asked for consent to search the vehicle, which she ultimately gave. A cover officer, Murillo, asked defendant to step out of the car to allow them to search. Then, consistent with his own standard practice but without any suspicion specific to defendant, Officer Murillo conducted a pat-down search and felt a small canister in defendant's pocket, but he did not remove it. He asked defendant to wait a short distance away while they searched the car. Before searching the car, the other officer looked into defendant's pocket, which was open enough to show its contents, and saw what he believed to be marijuana inside the clear canister, which he then seized. He then began searching the area where defendant had been sitting and found a backpack, which defendant acknowledged was his. After the officer asked if it contained marijuana, defendant hesitated and said it did not. The backpack was heavy, which prompted the officer to ask defendant if there were pounds of marijuana in it; defendant replied helpfully, "I don't know about pounds," then declined to answer further questions other than to say he was not dealing marijuana. Defendant declined the officer's two requests for consent but, after being told that he believed he could get a warrant, defendant consented to a search, which revealed almost one pound of marijuana inside the backpack. Defendant was charged with unlawful possession of marijuana, and he moved to suppress, contending that the officers unlawfully stopped and searched him and that those illegalities required suppression of both his statements and the marijuana. The trial court held that the pat-down was unlawful and suppressed the small canister of marijuana found in defendant's pocket, but it denied defendant's motion with respect to the remaining evidence, finding that the search of the backpack was not linked to the pat-down search and was lawful under the automobile exception. *Held*: Reversed. The trial court erred in part when it denied defendant's motion to suppress his statements; otherwise affirmed. [1] Officer Murillo "unlawfully seized and searched defendant when Murillo patted him down for weapons without having any specific, articulable safety concerns." Defendant's statements were made during an unlawful seizure and must be suppressed to restore him to the same position he otherwise would have been in without the unlawful seizure. [2] But the marijuana in the backpack was lawfully discovered and seized under the automobile exception, which allows the police to conduct an immediate warrantless search of any area of the vehicle and any container within a vehicle for which they have probable cause to believe contains contraband or evidence of a crime. [3] Unlike in cases where the police articulate their probable cause as relating only to a specific container within a car, the probable cause here extended to the entire vehicle. Therefore, the police did not exceed the scope of an automobile exception search by looking inside the backpack because it was a place where they subjectively believed contraband would be found, and because they could have obtained a warrant to search it.

State v. Pirtle, 255 Or App 195, 296 P3d 625 (2013). Two officers responded to a domestic-disturbance call at an apartment complex involving defendant (a felon) and "possibly involving" a handgun. Officer Labrousse spoke to defendant and his mother outside the apartment building while Officer Myers spoke to the victim inside the building. Parked in front of the building was pickup truck that belonged to defendant's mother; it was loaded with personal belongings. The victim reported that defendant kept a handgun in a backpack and that he had possessed the gun inside the apartment earlier that day; she consented to Officer Myers's request to search the apartment, but the search failed to turn up the gun. While that was happening, the Officer Labrousse arrested defendant and placed him in a patrol car; as he did, he noticed the pickup being driven a short distance and then parked. Officer Myers saw the pickup moving while he was inside the apartment, but he testified that he was unsure at that time whether he knew that defendant's personal belongings were in the truck. Officer Myers then went outside and asked defendant's mother to consent to the search of the truck.

She consented but then rescinded her consent before the officer found any evidence. Believing that he had probable cause to continue searching despite her withdrawal of consent (based on the automobile exception), Officer Myers continued searching and found defendant's pistol in the pickup. Defendant was charged with felon in possession of a firearm, and he moved to suppress the pistol, contending that the officers' search of the pickup was unlawful. The circuit court denied the motion, holding that sufficient evidence of mobility was established by the truck's movement "in the course of the stop." *Held*: Reversed. [1] Under *State v. Kurokawa-Lasciak* , 351 Or 179 (2011), the automobile exception "is absolute and unambiguous": the essential distinction is between merely encountering a vehicle while it is moving and encountering "in connection with a crime" while it is moving. [2] Here, "the record does not disclose that the officers perceived any relationship between the pickup and the crimes that they were investigating until after the pickup had come to its final resting place." Because "the state did not meet its burden as to the temporal requirement of the automobile exception," the search was not lawful under that exception.

State v. Freeman, 253 Or App 472, 290 P3d 908 (2012) (*per curiam*). During a traffic stop, a police officer searched defendant, the car's driver, and discovered methamphetamine in his pants pocket. Defendant was then charged with possession of methamphetamine, and he moved to suppress on the ground that the search of his person was unlawful. The state argued that the search was authorized by the automobile exception. The trial court agreed and denied the motion to suppress. Defendant was found guilty on stipulated facts. On appeal, the state conceded that the search of defendant violated the Fourth Amendment because the automobile exception authorizes a warrantless search of a vehicle but not a search of the vehicle's occupants. *Held*: Reversed and remanded. The challenged evidence should have been suppressed. The automobile exception to the Fourth Amendment authorizes a search only of the vehicle, and not its occupants. *United States v. Di Re*, 332 US 581, 586-87 (1948).

State v. Jones, 253 Or App 246, 289 P3d 360 (2012) (*per curiam*). After being stopped for a traffic violation, defendant stepped out of his vehicle. Although the officer lacked probable cause to arrest defendant, he looked inside his pockets for more evidence of violation-level marijuana possession. The trial court concluded that the search was lawful under the automobile exception and denied defendant's motion to suppress. *Held*: Reversed. The search was not valid under the automobile exception because defendant was outside his vehicle when the search occurred and no other exception applied.

Search & Seizure: warrantless searches—consent

See also "Stop & Frisk: consent," *below*.

State v. Briggs, 257 Or App __, __ P3d __ (July 31, 2013). Officers responded to an anonymous report indicating that a man was intoxicated and driving erratically in the Eagle Crest parking lot. The officer arrived and saw defendant walking away from a vehicle matching the one the informant had described. The officer asked defendant if he would talk to him, and defendant instead turned around and ran into a hotel room and closed the door. A cover officer arrived, and the two officers knocked at the door. A young woman answered, and the officers saw about two dozen people in the room, and that many of them were holding red plastic cups and that the room contained bottles of alcoholic beverages. The officer told the woman who had answered the door, "I need to talk to the person that just ran in here," and then asked whose room it was. The woman explained that she had rented it for a party. She then stepped aside, motioned to the back of the room, and told the officer that defendant was in the back. The officer then went back and found defendant and obtained evidence of DUII. After being charged, defendant moved to suppress, arguing that the officer's entry was an unlawful warrantless search. The state responded that the entry was justified both by the consent of the woman who rented the room and by exigent circumstances. The trial court

denied the motion, and defendant entered a conditional plea of guilty. *Held*: Affirmed. The officers' entry into the room was lawful based on the woman's voluntary consent. [1] "When deciding whether a particular interaction amounts to consent, courts distinguish between voluntary consent and mere passive acquiescence to the search. We will, however, pay close attention to the words used by an officer who requests consent to perform a warrantless search. When those words do not provide the listener with a reasonable opportunity to choose to consent, or when those words leave the listener with the impression that a search is inevitable, absent strong countervailing factors, we have consistently found acquiescence rather than consent." [2] Although the officer's statement to her was a declaration, rather than a request, it was not a statement that would, in "ordinary social intercourse," communicate to the listener that she had no choice about whether the entry would occur. Rather, she had a clear choice: to allow the officer to enter, or to leave the officer outside while she told defendant that the officer wanted to talk to him. Her action of stepping aside and motioning toward defendant showed that she was choosing to let the officer in.

State v. Magana, 257 Or App 251, __ P3d __ (2013). Officers Kenagy, Devlin, Castaneda, and other officers belonging to the Narcotics Task Force were performing a drug-interdiction exercise at a Portland bus stop. Kenagy, wearing plain clothes and carrying a concealed weapon, approached a passenger, Rosales-Perez, as he got off the bus, showed his badge, and asked if he could search Rosales-Perez's bag for narcotics and narcotics paraphernalia. Rosales-Perez consented, and an officer with a drug-detection dog examined the bag. No contraband was detected. When asked for his identification, Rosales-Perez gave Kenagy an identification card that stated he lived at an apartment on Webster Road. Kenagy noted the address and handed the identification back to Rosales-Perez. While Kenagy was talking to Rosales-Perez, Officer Devlin, who was in plain clothes and had a concealed weapon, approached defendant Ramirez-Rivera, who had waved at Rosales-Perez while he was sitting in a pickup truck parked nearby. Devlin explained that he was a narcotics officer and asked whether Ramirez-Rivera knew Rosales-Perez. Officer Castaneda, who was wearing a gun on his belt and a police vest with a badge, acted as a Spanish interpreter. Ramirez-Rivera denied knowing Rosales-Perez, explaining that he had just gone to a nearby mini-mart to make a money-wire transfer. After Ramirez-Rivera produced an identification card that was not a valid Oregon driver's license, he consented to a search of his truck and person, which produced no weapons or contraband. At some point around this time, Castaneda asked Ramirez-Rivera where he lived. He said he didn't remember his address and provided Castaneda with a money-transfer receipt showing the same Webster Road address that was on Rosales-Perez's identification card. Eventually, Ramirez-Rivera admitted that he knew Rosales-Perez. After the officers exchanged information from their separate interviews of Rosales-Perez and Ramirez-Rivera, several of them went to the Webster Road address for a "knock and talk," while the others remained at the scene with Rosales-Perez and Ramirez-Rivera, who had agreed to stay. At the Webster Road address, Officers Kenagy and Castaneda knocked on the apartment door. Defendant Magana cracked open the door and peeked out, saw the officers, who had identified themselves as such, and slammed the door shut. The officers knocked again (after hearing some loud noises from inside the apartment), again identifying themselves as police officers, and this time Magana opened the door and stepped outside. Kenagy asked Magana to put up his hands and patted him down for weapons. Magana did not understand English, and so Castaneda interpreted the conversation. Castaneda asked Magana for consent to search the apartment for narcotics with a drug dog, and Magana very calmly consented. The ensuing search revealed large amounts of heroin and money. Magana was arrested, as was Ramirez-Rivera, who was transported to the Webster Road apartment. After receiving Miranda warnings, defendants both admitted that they lived at the apartment with Rosales-Perez and then made self-incriminating statements. Defendants were charged with drug offenses, they moved to suppress, the trial court denied their motions, ruling that the encounters at the bus stop were "mere conversation" and that Magana voluntarily consented to the search. Defendants entered conditional pleas of guilty to unlawful manufacture and delivery of heroin. *Held*: Reversed and remanded. The trial court should have suppressed the challenged evidence as to both defendants. [1] In light of *State v. Radke*, 242 Or

App 234 (2011), the officers unlawfully stopped Ramirez-Rivera before they found the money-transfer receipt showing the Webster Road address. The stop was unlawful because the officers lacked reasonable suspicion of criminal activity when they initiated it. [2] Because the money-transfer receipt they obtained during the unlawful stop of Ramirez-Rivera led the officers to go to the Webster Road apartment, that tainted Magana's consent to a search and rendered it invalid under *State v. Hall*'s "exploitation" test. "The state failed to meet its burden to prove that the evidence they obtained did not derive from the preceding unlawful stop." [3] Magana's consent to the apartment search was involuntary: a "combination of circumstances" made his interaction with officers Kenagy and Castaneda "implicitly coercive"—"the atmosphere surrounding [Magana's] consent was aggressive and intimidating."

State v. Bertha, 256 Or App 375, 300 P3d 265 (2013). When the officers knocked on the door, a woman named Fuller opened it. The officer saw one of the suspects, Pipgrass, coming out of the kitchen with a plate of food and a large kitchen knife, and the officer drew his weapon and ordered Pipgrass to put down the food and knife and put his hands up. Pipgrass complied and, when the officer motioned for Pipgrass to come to him, Pipgrass did so. The officer called out for the second suspect—defendant—who responded from another room. Fuller slid against the wall and got out of the way, and the officers entered. Inside, they found evidence that inculpated defendant. Defendant moved to suppress, arguing that the officers entered the residence without consent. The trial court concluded that Fuller consented to the officers' entry. *Held*: Reversed and remanded. [1] "Mere acquiescence occurs when an individual is not given a reasonable opportunity to choose to consent." *State v. Jepson*, 254 Or App 290 (2012). [2] Fuller's act of sliding against the wall—out of the line of fire—at best amounted to 'mere acquiescence' to police authority," and did not demonstrate consent to enter because she had no "reasonable opportunity to choose to consent": "Rather, the only choice with which she was presented given the rapid progression of events was whether to remain between a loaded gun and a criminal suspect."

State v. Beaudreau, 255 Or App 175, 296 P3d 623 (2013). An officer lawfully stopped defendant because his car displayed expired registration tags. The officer issued defendant a warning about the tags and then asked him for consent to look inside a sunglasses case that was in the vehicle. Defendant refused to consent, but one of the officers implied that he could cite defendant for additional, undisclosed traffic violations if did not consent. Defendant then consented to the search, and the officers found drugs. Defendant was charged with PCS, and he moved to suppress, contending that his consent was not voluntary. The trial court denied the motion, and defendant was convicted on stipulated facts. *Held*: Reversed and remanded. The state concedes that there is no basis in the record to conclude that the officer had probable cause to issue an additional citation. Consequently, the officer's threat was unlawful and defendant's consent was not valid.

State v. Marshall, 254 Or App 419, 295 P3d 128 (2013). Defendant ran an RV park, where he dealt in drugs and stolen goods on the side. An informant told the police about defendant's illegal activities, and officers obtained a warrant for his house and "shop." When they arrived to serve the warrant, they discovered a trailer. While serving the warrant, the officers asked for defendant's consent to search the trailer. Defendant claimed some renters had left it behind, and he admitted that it was probably full of stolen property. He consented, but said that he didn't want to be held responsible for what was in the trailer, and insisted that the officer write down on the consent form that "Mr. Marshall is not responsible for the property stored inside the RV Trailer! MSW [Trooper Wilson's initials]." The rest of the form said, in different ways, that the consent given was voluntary. A search of the trailer turned up stolen goods, and defendant was charged with theft (among other crimes). He moved to suppress, claiming that his consent was involuntary because he thought the officer had given him immunity from prosecution by including the "not responsible" language. The trial court denied the motion, and found that defendant's consent was voluntary. Defendant was found guilty. *Held*: Reversed and remanded. [1] Considering the totality of the circumstances,

defendant's consent was not voluntary. The lawfulness of a consent search "is innately circumscribed by … the unimpaired autonomous choice of the person giving consent." Here, "given the totality of the circumstances, a reasonable person in defendant's position would have believed that the terms of the written consent form did, in fact, constitute a promise of immunity." And defendant reasonably relied on that promise of immunity in giving his consent. Therefore, the officer's "false inducement subverted defendant's autonomous choice, rendering his purported consent involuntary." [2] The error was not harmless: "in light of defendant's theory at trial—*viz.*, that he did not know that any of the property in his bus had been stolen—and his admitted suspicion that the property in the RV had been stolen, we cannot conclude that there is 'little likelihood' that the admission of the property found in the RV affected the verdict [with respect to defendant's theft conviction]."

State v. Brock, 254 Or App 273, 295 P3d 89 (2012). Defendant was on probation, as was his roommate, Roubidoux. After a probation class that they both attended, defendant's probation officer told them that she intended to conduct a home visit (a condition of defendant's probation); both defendant and Roubidoux said "alright," and neither objected. The probation officer planned the visit because she had reasonable grounds to believe evidence of probation violations would be found at the house (specifically, defendant recently failed four urinalyses, and had been driving without a license; Roubidoux was not complying with required treatment; and a CRI had reported that methamphetamine was being manufactured at their house). The officer planned to request consent to search after she performed the home visit (because home visits permit only a less intrusive, cursory examination of the home's interior). Because she had safety concerns (prior efforts to enter the house had been thwarted and that vicious dogs, weapons, and other felons likely were present there), so she had arranged for four other probation officers and five police officers to meet her at the house before conducting the home visit. Neither defendant nor Roubidoux had valid driver's licenses, so the probation officer drove them home. On the drive, she asked defendant if he had anything at his house that would be a violation of his probation, and defendant admitted that he had some marijuana in his bedroom drawer. When they reached the house, the front door was dead-bolted and neither defendant nor Roubidoux had a key. Roubidoux offered to climb through defendant's bedroom window to get access, which she said she had done previously when she didn't have her key. For safety reasons, the officers declined that offer and instead had one of the police officers climb through the window and open the front door—which took only ten seconds. Once in the house, the probation officer asked defendant to show her the marijuana that he had admitted to having; he led her to his bedroom, but no drugs were in the identified drawer. The probation officer told defendant she had reasonable grounds to request a search of the house, and defendant gave his consent. During the ensuing search, an officer found defendant's girlfriend hiding in the attic, along with some illegal drugs that she said belonged to defendant. That officer re-contacted defendant and asked him for consent to search the rest of the house and garage, which he gave. They found additional criminal evidence was discovered afterward. Defendant moved to suppress. At the hearing, the court found the officer's initial entry through defendant's bedroom window was unlawful because Roubidoux lacked actual authority to consent to the officer's entry into defendant's room; nevertheless, the court denied the motion, finding that defendant voluntarily consented to the search of his house, and that consent was not tainted by the prior illegality. *Held*: Affirmed. [1] Defendant's consent was voluntary under the totality of the circumstances—the probation officer asked for consent, defendant was familiar with the conditions of his probation and had experienced home visits before, the officers did not threaten defendant or make any promises, and the officers displayed no weapons. Defendant's consent to search "was not mere acquiescence to a thinly veiled demand. Nor was the environment so coercive as to preclude defendant from refusing to consent." [2] Defendant's consent was not the product of any exploitation of an underlying illegality. No evidence indicated that, but for the unlawful police entry through the window, defendant otherwise would not have consented to the entry. Unlike cases involving consent to search following an unlawfully extended stop, "[w]e fail to see how admission to the house had any bearing on defendant's consent." Moreover, the record showed that the officers previously intended to request consent to search and would have asked for consent even if they had

not first gone through the window to open the front door, and police did not observe anything inculpatory during the unlawful ten-second entry. Consequently, "defendant did not establish any nexus, even a minimal one, between the unlawful entry and his consent."

State v. Jepson, 254 Or App 290, 292 P3d 660 (2012). A police detective and a DHS worker went to a house shared by defendant and his girlfriend—both felons—to investigate a report that the girlfriend had shot defendant's young son with a BB gun. They interviewed both defendant and his girlfriend on the front porch. The girlfriend admitted that she had a BB gun, but denied shooting defendant's son. The detective asked whether they had any other guns in the house, and the girlfriend admitted to having a shotgun and a handgun. She knew that, as felons, they were not supposed to possess firearms, but she said that she thought she was allowed to use them in her mobile slaughtering service. Defendant said that he thought he was allowed to possess guns because eight years had passed since his felony conviction. The detective explained she was not sure about the law and that she would return if there was a problem. She returned an hour later, with another officer, and told defendant that she had done some research and discovered that he could not lawfully possess guns. Defendant called his girlfriend to come outside, and the detective gave them both *Miranda* warnings. They indicated that they were willing to cooperate, and reiterated that they thought they could lawfully possess the guns. The detective then stated, "We're going to have to take the firearms," and asked girlfriend where they were located inside the house. The girlfriend gave detailed directions of where they were, and the detective went into the house to seize them. Neither officer asked for permission to retrieve the guns, and neither defendant nor girlfriend voiced any objection to the detective's entry. Defendant was charged with two counts of felon in possession of a firearm (FIP), and he moved to suppress the guns, claiming that the contact was a stop, that he did not consent to seizure of the guns, and that any implicit consent he gave was the involuntary product of coercive circumstances. The trial court denied the motion, finding that the contact was a mere conversation and not a stop, that defendant was not unlawfully questioned, and that he voluntarily consented to a search because he did not object to the detective's entry. Defendant entered a conditional guilty plea to one of the two FIP charges. *Held*: Reversed and remanded. [1] The detective's statement that "We're going to have to take the firearms" was not a request for consent, because it "did not invite a response other than acquiescence." Nor was her question about the guns' location a request for consent; it was a statement of intent to seize the guns. As a result, defendant and his girlfriend did not voluntarily consent to entry into the home or seizure of the guns. [2] The court declined to address the state's argument, made for the first time on appeal, that defendant could not assert a constitutional challenge because he had disclaimed any possessory or privacy interest in the guns during the hearing.

State v. Pickle, 253 Or App 235, 288 P3d 1039 (2012), *rev den*, 353 Or 428 (2013). An officer responding to a minor accident in a bar parking lot found one car with its bumper interlocked with the fender of defendant's car. After completing a DUII investigation and determining neither driver was intoxicated, the officer offered to help the men disentangle their cars so they would not cause further damage. As defendant entered his car, the officer smelled the overwhelming odor of marijuana that he believed clearly indicated that more than one ounce of marijuana was present, but he could not determine which car the odor came from. When the cars were separated, the officer contacted the closest car and did not observe any indication of marijuana; he then contacted defendant, who was standing next to the open door of his car, and determined the marijuana odor came from that car. When asked, defendant admitted having marijuana in his possession, and he reached into the car and pulled two buds from the ashtray. Believing more marijuana was present, the officer asked permission to look in the front area of the car, which defendant gave. The officer discovered a small tin box with a tiny amount of marijuana inside it but still believed the odor indicated the presence of a larger quantity of drugs. He noticed a number of large boxes in the back of the vehicle and asked for consent to search them to make sure they did not contain "pounds of marijuana." Without expressly consenting, defendant went to the rear of his car, opened the

hatchback, and offered to hold it open while the officer searched because the door latch was broken. Defendant eventually admitted that he had 60 pounds of marijuana in the car, and the officer discovered nearly that exact amount. Defendant moved to suppress arguing that he never gave consent to search and claimed he merely had acquiesced to the officer's indication that he would search the car without a warrant. The trial court denied the motion, finding that defendant had voluntarily consented to the search. *Held*: Affirmed. [1] Unlike opening the door to a home in response to someone's knocking (which itself does not reasonably imply permission to enter), opening a car door in response to an officer's request for consent "may reasonably be viewed as giving the officer access to the inside of the vehicle—*i.e.*, as manifesting nonverbal consent for the officer to search it." [2] Defendant's only argument at the hearing was that he did not give any consent; he did not preserve a claim that the search exceeded the scope of any consent he gave. The Court of Appeals declined to consider that argument for the first time on appeal, because the record might have developed differently if he had raised that issue below.

^ ***State v. Unger***, 252 Or App 478, 287 P3d 1196 (2012), *rev allowed*, 353 Or 533 (2013). After receiving reports of drug activity at defendant's house, officers went to the house for a "knock and talk" and to seek consent to search the house. The split-level house had two doors facing the front; officers knocked on both but received no response. Seeing cars parked in the driveway and believing someone was present, an officer went to the back of the house and knocked on a sliding glass door. Defendant answered and, when asked, gave permission for the officers to enter and talk with him. The officers explained the reports they had received and asked if he would show them around the house, which he agreed to do. During the walk-through, officers saw a torn baggie containing white powder and crystals that looked like methamphetamine. Another officer read a consent-to-search form to defendant, who verbally consented to a search but refused to sign any legal document without first consulting his attorney. As the officers began searching pursuant to defendant's verbal consent, defendant phoned his attorney and reported that "his attorney wanted everyone out of the house"; he phoned his attorney a second time, then told the police that *defendant* wanted the officers to leave. One of the officers field-tested the white powder, which was in fact methamphetamine, then the officers arrested defendant. Based on observations made in the house, police obtained a search warrant, which yielded additional drug evidence. Defendant moved to suppress contending that the police unlawfully entered the curtilage of his house to knock on the back door and that all evidence derived from that illegality must be suppressed. The trial court denied his motion, and he was convicted. *Held*: Reversed and remanded. [1] The officers' entry into defendant's backyard violated his rights under Art I, § 9. [2] "The officers' entry into and search of defendant's house also violated [Art I, § 9] because, although defendant consented to the entry and search, his consent was invalid because it was the product of unlawful police conduct, specifically, the illegal entry into his backyard. … Consent that is the product of illegal police conduct is invalid, and evidence obtained as a result of such consent is inadmissible." Defendant established the "minimal factual nexus" between the illegal conduct and his consent because the illegality was "ongoing" when police asked defendant for consent. The court rejected the state's argument that "even if the officers' entry into the defendant's backyard violated defendant's [Art I, § 9] rights, the officers did not exploit that violation," because "the Supreme Court rejected the same argument" in *State v. Hall*, 339 Or 7 (2005). and *State v. Ayles*, 348 Or 622 (2010).

^ ***State v. Moore,*** 247 Or App 39, 269 P3d 72 (2011), *rev allowed*, 351 Or 25 (2012). While driving on Highway 101 on a clear, dry day, Trooper Farrar saw defendant, who was driving ahead of him, drift across the center line into on-coming traffic and collide with the victim's car, killing the driver. The trooper contacted defendant, who seemed "dazed and his speech was slow." The trooper later contacted him at the hospital and saw that he "was very drowsy, his speech was slurred and thick," and appeared to be in pain. After talking to defendant, the trooper concluded that defendant was under the influence of intoxicants, gave him the advice of rights under the implied-consent law, and asked for consent for blood and urine samples. Defendant consented. Defendant was indicted for

DUII and criminally negligent homicide, and he moved to suppress evidence of the blood and urine tests. The state argued that the tests were admissible either under the exigent-circumstances exception and pursuant to his voluntary consent. After a hearing held a week after *State v. Machuca*, 347 Or 644 (2010), was issued, the trial court found that the officer had probable cause but that the state failed to establish exigent circumstances, and it ruled that defendant's consent was not voluntary based on the ruling of the Court of Appeals in *State v. Machuca*, 231 Or 232 (2009). The state appealed, challenging only the latter ruling. *Held*: Affirmed. [1] Although the Supreme Court reversed the decision of the Court of Appeals in *Machuca* on the exigent-circumstances issue, "the court did not call into question, much less abrogate, our analysis concerning the defendant's consent" and "prudential principles … compelling militate in favor of our continued adherence to the core reasoning" in that opinion. [2] "Here, defendant consented after receiving the implied consent warnings. As we reasoned in *Machuca I*, 'a consent to search obtained in that fashion is coerced by the fear of adverse consequences and is ineffective to excuse the requirement to obtain a search warrant.'" Thus, the court correctly granted the motion to suppress.

Note: The state did not pursue the exigent-circumstances argument on appeal because the record made at the motion-to-suppress hearing was insufficient to support that argument.

Search & Seizure: warrantless searches—emergency aid

State v. Rennells, 253 Or App 580, 291 P3d 777 (2012), *rev den*, 353 Or 410 (2013). Officers responded to defendant's apartment after "an anonymous 911 call reporting screams coming from that apartment." When the officers arrived, the apartment was quiet. No one responded to their persistent knocking even though they could hear and see someone inside. The officers observed that both defendant and the victim had their cars parked nearby and that defendant was on probation with a no-contact order. Neighbors reported "problems" at that apartment. The officers entered with a pass key and found defendant and the victim in the bedroom. Defendant made inculpatory statements to the officers. Defendant was charged with various offenses, and he moved to suppress, contending that the officers unlawfully entered the apartment. The trial court denied the motion, and he was found guilty. *Held*: One assault conviction reversed; otherwise affirmed. [1] Under the standard announced in *State v. Baker*, 350 Or 641 (2011), "the emergency-aid exception does not require a life-threatening emergency or violence in progress. Entry is permitted if there are articulable facts reasonably indicating that a person is imminently threatened with suffering serious physical injury or harm." [2] The officers were authorized to enter the apartment under that exception, because the evidence supported the officer's reasonable belief that entry into the apartment was necessary to assist a person who has suffered, or is threatened with, serious physical injury.

State v. Lorenzo, 252 Or App 263, 287 P3d 1133 (2012), *rev den*, 353 Or 562 (2013). At 6:51 a.m., a woman reported that her ex-fiancé Kyle was outside her apartment with a noose around his neck, attempting to commit suicide. Officers responded to the apartment complex, detained Kyle, and investigated the situation. They learned that Kyle lived in an apartment in the same complex with defendant and owned a firearm. The officers were concerned because people who attempt suicide "sometimes are suicidal because they have hurt somebody or killed somebody or something else is going on." Officers went to defendant's apartment and knocked loudly asking if he was okay, but he did not respond. They tried calling him on his cell phone, but he did not answer. Because the officer was concerned about defendant, he opened the front door, leaned in, and knocked on the door to defendant's room, which he could reach without actually stepping over the threshold. Defendant finally responded and came out of his room. The officer smelled marijuana smoke, and one thing led to another and defendant consented to a search. He was charged with various drug offenses and felon in possession of a firearm, based on evidence found inside the apartment during the search. Defendant moved to suppress the evidence, arguing that police obtained his consent by exploiting unlawful conduct—opening the apartment door and then reaching inside to knock on his bedroom door. The trial court ruled that the officer's conduct was lawful under the emergency-aid exception,

and it denied defendant's motion. Defendant was convicted on the charges. *Held*: Reversed and remanded. [1] The officer "had received no specific information indicating that Kyle was suicidal because he had hurt someone, that defendant had been injured, or any other facts that would otherwise suggest that defendant was in some kind of danger. Under the totality of the circumstances presented here, we cannot conclude that there were specific and articulable facts to support an objectively reasonable belief that it was necessary to enter defendant's apartment without a warrant to assist a person who had suffered serious physical injury or harm. Accordingly, we agree with defendant that the emergency-aid exception to the warrant requirement does not apply." [2] Because the officers were "able to contact defendant and seek his consent to the search only by effecting a warrantless entry into his apartment," defendant established a minimal factual nexus between the illegality and the consent to search. The state failed to demonstrate that the consent was "independent of the illegality or that the link between the two was so tenuous that suppression should not be required." The officers did not tell defendant, after he emerged from his bedroom, that he was free to refuse their request to enter the apartment, and "it was clear from the circumstances that, by the time defendant opened the bedroom door, [an] officer had previously entered the apartment uninvited."

Search & Seizure: warrantless searches—exigent circumstances

Missouri v. McNeely, 569 US __, 133 S Ct 1552, 185 L Ed 2d 696 (2013). At 2 a.m., a Missouri police officer lawfully stopped defendant for a traffic infraction and then investigated him for DUII. While at the scene, defendant refused to submit to a breath test on the officer's portable device. The officer arrested him for DUII and started to transport him to the police station, but when the defendant told the officer that he would not submit to a breath test, the officer instead took him to the hospital for a blood draw. The officer gave defendant the standard advice of rights and consequences required under Missouri law, but defendant refused to consent to a blood draw. So, without obtaining a warrant, the officer had hospital staff seize a blood sample over defendant's objection. A test showed that he had a BAC of 0.154 percent. Defendant was charged with a felony-level DUII, and he moved to suppress the blood-alcohol evidence, contending that the draw was a warrantless search that violated the Fourth Amendment. The state did not present evidence that the officer in fact had exigent circumstances; rather, the state argued only that the evanescent nature of dissipating blood-alcohol content provided sufficient exigency *per se* to justify the warrantless seizure. The trial court granted defendant's motion, the state appealed, and the Missouri Supreme Court affirmed, ruling that the Fourth Amendment "requires more than the mere dissipation of blood-alcohol evidence to support a warrantless blood draw in an alcohol-related case." *Held*: Affirmed. The state court correctly granted defendant's motion to suppress. [1] "A warrantless search of the person is reasonable only if it falls within a recognized exception. That principle applies to the type of search at issue in this case, which involved a compelled physical intrusion beneath McNeely's skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation." [2] "In some circumstances law-enforcement officers may conduct a search without a warrant to prevent the imminent destruction of evidence. While these contexts do not necessarily involve equivalent dangers, in each a warrantless search is potentially reasonable because there is compelling need for official action and no time to secure a warrant. To determine whether a law-enforcement officer faced an emergency that justified acting without a warrant, this Court looks to the totality of circumstances. We apply this finely tuned approach to Fourth Amendment reasonableness in this context because the police action at issue lacks the traditional justification that a warrant provides. Absent that established justification, the fact-specific nature of the reasonableness inquiry demands that we evaluate each case of alleged exigency based on its own facts and circumstances." [3] The Court declined to adopt the *per se* rule urged by the state: "Regardless of the exact elimination rate [for blood alcohol], it is sufficient for our purposes to note that because an individual's alcohol level gradually declines soon after he stops drinking, a significant delay in testing will negatively affect the probative value of the results. This fact was essential to our holding in [*Schmerber v. California*, 384 US 757 (1966)], as we recognized that, under the circumstances, further delay in order to secure a

warrant after the time spent investigating the scene of the accident and transporting the injured suspect to the hospital to receive treatment would have threatened the destruction of evidence. But it does not follow that we should depart from careful case-by-case assessment of exigency and adopt the categorical rule proposed by the State and its *amici*. In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." "In short, while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber*, it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances."

State v. Hudson, 253 Or App 327, 290 P3d 868 (2012), *rev den*, 353 Or 562 (2013). Defendant rented a room in a boarding house. He murdered both his landlord and a fellow resident, and dumped their mutilated corpses in a remote area 20 feet off of Highway 26 in Washington County. Defendant forgot to remove one of the victims' identification from his pants pocket, so the police were able to identify both victims. The police also recovered a several pieces of bloody clothing found strewn along the shoulder of Highway 26. The ex-wife of one of the victims told police that her ex-husband lived rented a room in a boarding house, and that he did not get along with his fellow resident, "Frank." Given the lack of blood at the recovery site, police felt the murders happened elsewhere, with the most obvious place being the victims' shared residence, so they set up surveillance outside the boarding house. Police saw a person (later identified as defendant) that did not match Frank's description enter the residence and move about inside. Not sure who he was, the police made numerous attempts to call the boarding house but got no response. Concerned that the person inside was destroying evidence, the police hailed him with a loudspeaker and ordered him out of the house. Once defendant came outside, the police noticed blood stains on his pants. They cuffed him, asked him his name, and told him that he was not under arrest, but that the police needed to speak with him. Defendant identified himself as "Frank" and said that he had two roommates, neither of which was home at the time. Because it was raining, one of the officers asked defendant if he would sit in the patrol car while he waited for detectives to speak to him; he said that he did not mind doing so, and was placed in the patrol car while still handcuffed. About half an hour later, detectives arrived to talk to defendant. Because it was still raining heavily, the detectives asked defendant to get out of the car, then took him to their van, removed his handcuffs, and told him they wanted to speak with him; he agreed to talk to them. The detectives told him that they were investigating his housemates' disappearance and asked him for consent to search the house. Defendant signed the consent form. The police entered the house based on defendant's consent, suspending the search after seeing blood in the house and waiting for a warrant. Defendant was charged with aggravated murder. Before trial, defendant moved to suppress, arguing that he was unlawfully seized when he was "loud hailed" out of the house, or alternatively, when he was placed in the patrol car in handcuffs. The trial court denied the motion to suppress, and defendant was convicted of aggravated murder. *Held*: Affirmed. [1] "The officers seized defendant when, using a loudspeaker, they repeatedly ordered him to come out of the house with his hands up," but the seizure was lawful; the circumstances gave rise to reasonable suspicion "that defendant was involved in a crime." [2] Police could have entered the house based on probable cause and exigent circumstances "because there was probable cause to believe that a crime had been committed and that evidence relating to it was inside the house and that a need to prevent destruction of that evidence required officers to act quickly. …Whether they chose to physically enter the house to secure the premises or to accomplish the same goal by simply instructing defendant to come out of the house, officers would have come into contact with defendant," and "their actions were legally permissible." [3] Even if the police arrested defendant when they handcuffed him, the arrest "was supported by probable cause."

Note: Defendant argued that the police did not have exigent circumstances because they waited approximately five hours after seeing him enter the house to hail him with the loudspeaker. Although that may seem a long time, the officers testified in great detail why it took them that long to

construct a nearby command center and take action, including describing the weather, the manpower needed, that homicide detectives were paged from their homes, etc. Given the level of detailed testimony, the Court of Appeals rejected defendant's argument without discussion.

Search & Seizure: warrantless searches—incident to arrest

See also "Search & Seizure: privacy interests," *above*.

State v. Lovaina-Burmudez, 257 Or App 1, __ P3d __ (2013). Police investigating a string of armed robberies in east Portland developed defendant as a suspect in the robbery of a taco truck on August 18. 2009. On August 24, the police received a report of an armed robbery at the Red Apple Bar & Grill, and the suspect matched defendant's description. About a mile from the scene, an officer recognized defendant riding as a passenger in a van. The officers stopped the van but defendant fled on foot. Officers converged on the area and defendant shot in the process of apprehending him. Defendant was taken by ambulance to OHSU and, when it arrived, an officer seized his shoes and clothes, including $980 in cash inside his pants. The officer did so "to see what valuables are there" and to inventory them, and he then transported the clothes and shoes to the police department's forensic evidence division, where the items were photographed and secured as "evidence." Defendant was charged with robbery, FIP, and UUV based on the taco-cart and Red Apple incidents. Six months later, while the clothes and shoes were still in possession of the police, police obtained a search warrant to seize and search of the clothes and shoes. Defendant moved to suppress the shoes and clothes as evidence, but the trial court denied the motion; it concluded that the clothes and shoes were lawfully seized incident to defendant's arrest for the taco-truck robbery, and that the cash was discovered pursuant to a valid inventory; the court did not address the state's alternative inevitable-discovery argument based on the subsequent warrant. After a trial at which the state presented evidence of defendant's shoes and the cash in his pocket, he was convicted on the charges. *Held*: Some convictions reversed and remanded; otherwise affirmed. The shoes and clothes were not lawfully seized incident to an arrest for the taco-truck robbery, because that robbery had occurred six days before police seized the shoes and clothes, and nothing in the record reflected any nexus between the seized items and that robbery.

Search & Seizure: warrantless searches—inevitable discovery

State v. Lovaina-Burmudez, 257 Or App 1, __ P3d __ (2013). Police investigating a string of armed robberies in east Portland developed defendant as a suspect in the robbery of a taco truck on August 18. 2009. On August 24, the police received a report of an armed robbery at the Red Apple Bar & Grill, and the suspect matched defendant's description. About a mile from the scene, an officer recognized defendant riding as a passenger in a van. The officers stopped the van but defendant fled on foot. Officers converged on the area and defendant shot in the process of apprehending him. Defendant was taken by ambulance to OHSU and, when it arrived, an officer seized his shoes and clothes, including $980 in cash inside his pants. The officer did so "to see what valuables are there" and to inventory them, and he then transported the clothes and shoes to the police department's forensic evidence division, where the items were photographed and secured as "evidence." Defendant was charged with robbery, FIP, and UUV based on the taco-cart and Red Apple incidents. Six months later, while the clothes and shoes were still in possession of the police, police obtained a search warrant to seize and search of the clothes and shoes. Defendant moved to suppress the shoes and clothes as evidence, but the trial court denied the motion; it concluded that the clothes and shoes were lawfully seized incident to defendant's arrest for the taco-truck robbery, and that the cash was discovered pursuant to a valid inventory; the court did not address the state's alternative inevitable-discovery argument based on the subsequent warrant. After a trial at which the state presented evidence of defendant's shoes and the cash in his pocket, he was convicted on the charges. *Held*: Some convictions reversed and remanded; otherwise affirmed. [1] The shoes and

clothes were not lawfully seized incident to an arrest for the taco-truck robbery. [2] The police exceeded the scope of their authority under the inventory policy by then photographing the items and holding them "as evidence." [3] When, as in this case, the trial court did not rule an alternative argument, "we will ordinarily remand to the trial court to determine potentially dispositive questions of fact in the first instance. But we do so only if the evidence, with non-speculative derivative inferences, is legally sufficient to permit the trial court to endorse the alternative ground." In this case, however, although the state subsequently obtained a search warrant for the items, the state failed to prove at the motion-to-suppress hearing that the clothes and shoes would have been "available … for seizure" six months later had it not unlawfully retained the items "as evidence." The state thus failed to show that the items inevitably would have been discovered pursuant to the warrant.

State v. Marshall, 254 Or App 419, 295 P3d 128 (2013). Defendant ran an RV park, where he dealt in drugs and stolen goods on the side. An informant told the police about defendant's illegal activities, and officers obtained a warrant for his house and "shop." When they arrived to serve the warrant, they discovered a trailer. While serving the warrant, the officers asked for defendant's consent to search the trailer. Defendant claimed some renters had left it behind, and he admitted that it was probably full of stolen property. He consented, but said that he didn't want to be held responsible for what was in the trailer, and insisted that the officer write down on the consent form that "Mr. Marshall is not responsible for the property stored inside the RV Trailer! MSW [Trooper Wilson's initials]." The rest of the form said, in different ways, that the consent given was voluntary. A search of the trailer turned up stolen goods, and defendant was charged with theft (among other crimes). He moved to suppress, claiming that his consent was involuntary because he thought the officer had given him immunity from prosecution by including the "not responsible" language. The trial court denied the motion, and found that defendant's consent was voluntary. Defendant was found guilty. *Held*: Reversed and remanded. [1] Considering the totality of the circumstances, defendant's consent was not voluntary. [2] The state did not develop a record sufficient to substantiate the search on an inevitable-discovery theory. [3] The error was not harmless.

State v. Hudson, 253 Or App 327, 290 P3d 868 (2012), *rev den*, 353 Or 562 (2013). Defendant rented a room in a boarding house. He murdered both his landlord and a fellow resident, and dumped their mutilated corpses in a remote area 20 feet off of Highway 26 in Washington County. Defendant forgot to remove one of the victims' identification from his pants pocket, so the police were able to identify both victims. The police also recovered a several pieces of bloody clothing found strewn along the shoulder of Highway 26. The ex-wife of one of the victims told police that her ex-husband lived rented a room in a boarding house, and that he did not get along with his fellow resident, "Frank." Given the lack of blood at the recovery site, police felt the murders happened elsewhere, with the most obvious place being the victims' shared residence, so they set up surveillance outside the boarding house. Police saw a person (later identified as defendant) that did not match Frank's description enter the residence and move about inside. Not sure who he was, the police made numerous attempts to call the boarding house but got no response. Concerned that the person inside was destroying evidence, the police hailed him with a loudspeaker and ordered him out of the house. Once defendant came outside, the police noticed blood stains on his pants. They cuffed him, asked him his name, and told him that he was not under arrest, but that the police needed to speak with him. Defendant identified himself as "Frank" and said that he had two roommates, neither of which was home at the time. Because it was raining, one of the officers asked defendant if he would sit in the patrol car while he waited for detectives to speak to him; he said that he did not mind doing so, and was placed in the patrol car while still handcuffed. About half an hour later, detectives arrived to talk to defendant. Because it was still raining heavily, the detectives asked defendant to get out of the car, then took him to their van, removed his handcuffs, and told him they wanted to speak with him; he agreed to talk to them. The detectives told him that they were investigating his housemates' disappearance and asked him for consent to search the house. Defendant signed the consent form. The police entered the house based on defendant's consent, suspending the search after

seeing blood in the house and waiting for a warrant. Defendant was charged with aggravated murder. Before trial, defendant moved to suppress, arguing that he was unlawfully seized when he was "loud hailed" out of the house, or alternatively, when he was placed in the patrol car in handcuffs. The trial court denied the motion to suppress, and defendant was convicted of aggravated murder. *Held*: Affirmed. [1] "The officers seized defendant when, using a loudspeaker, they repeatedly ordered him to come out of the house with his hands up," but the seizure was lawful; the circumstances gave rise to reasonable suspicion "that defendant was involved in a crime." [2] Police could have entered the house based on probable cause and exigent circumstances. [3] Even if the police arrested defendant when they handcuffed him, the arrest "was supported by probable cause." [4] The court also noted that "even if the request for consent to search was impermissible," the evidence in the house would "inevitably have been discovered."

Search & Seizure: warrantless searches—inventory / administrative searches

State v. Lovaina-Burmudez, 257 Or App 1, __ P3d __ (2013). Police investigating a string of armed robberies in east Portland developed defendant as a suspect in the robbery of a taco truck on August 18. 2009. On August 24, the police received a report of an armed robbery at the Red Apple Bar & Grill, and the suspect matched defendant's description. About a mile from the scene, an officer recognized defendant riding as a passenger in a van. The officers stopped the van but defendant fled on foot. Officers converged on the area and defendant shot in the process of apprehending him. Defendant was taken by ambulance to OHSU and, when it arrived, an officer seized his shoes and clothes, including $980 in cash inside his pants. The officer did so "to see what valuables are there" and to inventory them, and he then transported the clothes and shoes to the police department's forensic evidence division, where the items were photographed and secured as "evidence." Defendant was charged with robbery, FIP, and UUV based on the taco-cart and Red Apple incidents. Six months later, while the clothes and shoes were still in possession of the police, police obtained a search warrant to seize and search of the clothes and shoes. Defendant moved to suppress the shoes and clothes as evidence, but the trial court denied the motion; the court concluded that the clothes and shoes were lawfully seized incident to defendant's arrest for the taco-truck robbery, and that the cash was discovered pursuant to a valid inventory; the court did not address the state's alternative inevitable-discovery argument based on the subsequent warrant. After a trial at which the state presented evidence of defendant's shoes and the cash in his pocket, he was convicted on the charges. *Held*: Some convictions reversed and remanded; otherwise affirmed. [1] The shoes and clothes were not lawfully seized incident to an arrest for the taco-truck robbery, because that robbery had occurred six days before police seized the shoes and clothes, and nothing in the record reflected any nexus between the seized items and that robbery. [2] The Portland City Code's inventory policy authorized the officers' initial seizure of the shoes and clothes. Because defendant was in police custody for purposes of the Portland City Code inventory policy when he was transported to the hospital following his arrest, the policy authorized the police to inventory his personal possessions, and to discover the cash in his pocket as they did so. [3] But the police exceeded the scope of their authority under the inventory policy by then photographing the items and holding them "as evidence."

Note: This case and *State v. Johnson*, 335 Or 511, 73 P3d 282 (2003), well illustrate that if a suspect is taken into custody and his clothes are seized pursuant to an inventory policy and the police think it is necessary to retain or process those items for possible evidence, it is imperative to get a warrant *immediately* for that purpose.

State v. Penney, 252 Or App 677, 288 P3d 989 (2012). Defendant was lawfully stopped for a traffic violation and did not produce valid proof of insurance. The Portland Police Bureau's policy gives officers discretion whether to tow and impound vehicles when the driver is uninsured. The officers decided to impound defendant's vehicle because he was driving uninsured and the vehicle

was parked in a manner that made it a traffic hazard. The officers conducted an inventory of the car and discovered cocaine. Defendant was charged with PCS, and he moved to suppress contending: (1) that the PPB policy impermissibly allows officers to exercise discretion in determining whether to tow a vehicle, and (2) that the inventory was unconstitutional as applied because the officers' decision to tow the vehicle was motivated by a desire to search it. The trial court agreed with defendant's first argument but denied his motion on the ground that the decision to tow nonetheless was proper because the vehicle was a traffic hazard. The jury found him guilty. *Held*: Affirmed. [1] Although an inventory search may not involve an exercise of discretion by the officer conducting the inventory, that rule does not extend to the officer's decision whether to impound a vehicle: "an officer's decision to impound a vehicle, unlike an officer's decision whether and in what manner to conduct an inventory, *may* involve the exercise of discretion." [2] "Although an officer may suspect criminal activity when he decides to have a car impounded, his suspicions can play no part in the discretion that he exercises when deciding whether to impound a car." [3] "Whether an officer's decision to impound a vehicle was influenced by a desire to search is a factual determination regarding which we must defer to the trial court." Given that the trial court denied defendant's motion on the ground "that officers towed defendant's car because it presented a traffic hazard, … we reject defendant's contention that the inventory was unconstitutional because, as a factual matter, officers were improperly influenced by a desire to search when they decided to impound his car."

Search & Seizure: warrantless searches—juveniles at school

^ ***State v. A. J. C.***, 254 Or App 717, 295 P3d 1157, *rev allowed*, 353 Or 747 (2013). V and youth were students at the same school. One evening, youth called V and sent her text messages telling her that he was going to bring a gun to school the next day and shoot her. At school the next day, V told a counselor of youth's threat, and the counselor relayed the threat to the principal, who did not know V but knew youth, who had had "disciplinary issues." The principal called in the police and youth's mother. Meanwhile, he searched youth's locker, then pulled him from class and seized his backpack. During an interview, youth denied making the threat. The principal searched youth's backpack and found a .45-caliber pistol and ammunition. A petition was filed in juvenile court alleging that youth committed various weapons offenses. Youth moved to suppress contending that the principal's search of his backpack was unlawful. The juvenile court denied the motion, and youth was adjudicated delinquent. *Held*: Affirmed. [1] "Warrantless searches of students without probable cause or some other exception to the warrant requirement, such as consent, are permissible when a school official reasonably suspects, based on specific and articulable facts, that the student is in possession of something that poses an immediate threat to the student or others." And the permissible scope of such searches "depends on the nature of the safety threat. *State v. M.A.D.*, 348 Or 381 (2010). [2] The principal had reasonable suspicion, based on specific, articulable facts, to believe that youth unlawfully possessed a firearm on school grounds. [3] The principal's decision to search the backpack, rather than return it to youth's parents, was reasonable under the circumstances perceived by the principal: that youth reportedly may have threatened other unidentified students, and that the type of gun youth reportedly had was unknown (and therefore may have been concealed elsewhere inside the school). When faced with the choice of returning the unopened backpack, searching youth, searching elsewhere in the school, or searching the backpack, the principal's choice to search the backpack was reasonable because "it was the most likely to reveal a gun and dissipate the safety threat without further intrusions or delay," and did not violate youth's rights under Art. I, § 9.

Search & Seizure: warrantless searches—officer safety

State v. Tovar, 256 Or App 1, 299 P3d 580 (2013). An officer stopped a car he saw speeding and weaving within its lane, and he noticed the moderate odor of marijuana coming from the car interior. The officer obtained identification from the driver and defendant, the passenger, told them to "stay put," and returned to his patrol vehicle to run a warrants check. When the officer returned to the

car, he asked both of them whether there was marijuana in the car, and both said there was not; the driver appeared nervous when responding, and the officer asked for consent to search the vehicle, which she ultimately gave. A cover officer, Murillo, asked defendant to step out of the car to allow them to search. Then, consistent with his own standard practice but without any suspicion specific to defendant, Officer Murillo conducted a pat-down search and felt a small canister in defendant's pocket, but he did not remove it. He asked defendant to wait a short distance away while they searched the car. Before searching the car, the other officer looked into defendant's pocket, which was open enough to show its contents, and saw what he believed to be marijuana inside the clear canister, which he then seized. He then began searching the area where defendant had been sitting and found a backpack, which defendant acknowledged was his. After the officer asked if it contained marijuana, defendant hesitated and said it did not. The backpack was heavy, which prompted the officer to ask defendant if there were pounds of marijuana in it; defendant replied helpfully, "I don't know about pounds," then declined to answer further questions other than to say he was not dealing marijuana. Defendant declined the officer's two requests for consent but, after being told that he believed he could get a warrant, defendant consented to a search, which revealed almost one pound of marijuana inside the backpack. Defendant was charged with unlawful possession of marijuana, and he moved to suppress, contending that the officers unlawfully stopped and searched him and that those illegalities required suppression of both his statements and the marijuana. The trial court held that the pat-down was unlawful and suppressed the small canister of marijuana found in defendant's pocket, but it denied defendant's motion with respect to the remaining evidence, finding that the search of the backpack was not linked to the pat-down search and was lawful under the automobile exception. *Held*: Reversed. The trial court erred in part when it denied defendant's motion to suppress his statements; otherwise affirmed. [1] Officer Murillo "unlawfully seized and searched defendant when Murillo patted him down for weapons without having any specific, articulable safety concerns." Defendant's statements were made during an unlawful seizure and must be suppressed to restore him to the same position he otherwise would have been in without the unlawful seizure. [2] But the marijuana in the backpack was lawfully discovered and seized under the automobile exception, which allows the police to conduct an immediate warrantless search of any area of the vehicle and any container within a vehicle for which they have probable cause to believe contains contraband or evidence of a crime.

Search & Seizure: exclusionary rule

State v. Hemenway, 353 Or 129, 295 P3d 617, *dism'd as moot*, 353 Or 498 (2013). Defendant was charged with unlawful possession of methamphetamine based on evidence discovered during consent searches of his person, of a tin found in one of his pockets, and of his house. Prior to trial, he moved to suppress, contending that officers had unlawfully seized him before asking for consent to search and that he consent hence was not voluntary. As the state ultimately conceded, officers had unlawfully seized defendant when—while responding to a call from defendant's girlfriend about her "residence's electric power and the whereabouts of [her] son"—they parked their vehicles behind defendant's vehicle (blocking his exit from the driveway), "instructed" defendant to speak with one of the officers, and then (having observed a rifle in defendant's truck) asked defendant if he was a felon and asked for his name and date of birth. The trial court denied his motion, ruling that defendant was not unlawfully "seized" and that he had consented voluntarily to the searches. Defendant entered a conditional guilty plea, and he appealed. On appeal, the state argued that officers did not exploit the seizure to obtain defendant's voluntary consent to the searches. The Court of Appeals disagreed, holding that, for purposes of *State v. Hall*, 339 Or 7, 34-35 (2005), defendant had shown a "minimal factual nexus" between the seizure and his voluntary consent, and that the state failed to show that defendant's voluntary consents were "independent of, or only tenuously related to, the unlawful police conduct." The Court of Appeals concluded that because defendant's consent had occurred "contemporaneously with the [unlawful] stop, with no intervening or mitigating factors," suppression was required. *Held*: The circuit court judgment convicting defendant is affirmed; the

Court of Appeals decision is reversed. [1] The Supreme Court announced that "we modify the exploitation analysis announced in *Hall*." The court dispensed with the requirement in *Hall* that a defendant must show a "minimal factual nexus" between a police illegality and a voluntary consent. More significantly, the court declared that *Hall* "does not account sufficiently for the importance of a defendant's voluntary consent to search," and it rejected the "*per se* rule [implicit in *Hall*] that evidence gained from a requested consent search *always* must be suppressed if that request occurs in close temporal proximity to the illegal stop and the state cannot demonstrate some breach in the causal chain." The court instead held that "when a defendant has established that an illegal stop has occurred and challenges the validity of his or her subsequent consent to a search, the state bears the burden of demonstrating that (a) the consent was voluntary; and (b) the consent, even if voluntary, was not the product of police exploitation of the illegal stop. In deciding whether the voluntary consent was a product of police exploitation of the illegal stop, the court must evaluate whether the police took advantage of the illegal aspects of the earlier police behavior to obtain consent or whether other circumstances were sufficient to purge the taint of the prior illegality on the evidence that the police ultimately obtained. As noted in *Hall*, 339 Or at 44, the state also may prove that the evidence is admissible by showing that the evidence was gained through an independent lawful source or that the evidence inevitably would have been discovered by the police." The court noted that an illegal stop "may fall short of coercing a defendant to consent to a subsequent request to search, but nevertheless may require suppression because the police took advantage of information gained from their illegal conduct to obtain consent." If, for example, an illegal stop by police permits them "to view contraband that otherwise would not have been visible," and if officers ask for consent to search the vehicle "as a result of what they saw," suppression will be required. A "less direct exploitation" of illegal conduct also might require suppression; pertinent factors include not just "the temporal proximity" between the illegal conduct and consent, but "the presence of any intervening or mitigating circumstances … such as *Miranda* warnings or other admonitions," and "the purpose and egregiousness of the illegal police conduct." The court emphasized "that the state is not required to prove that there was no causal link whatsoever between the illegal conduct and consent; rather, the state must prove that the illegal police conduct was a minor or remote cause." If the state "can show that the illegal conduct did not significantly affect the consent, … suppression is not required."

[2] In assessing the facts of this case, the Supreme Court rejected the conclusion reached by the Court of Appeals that suppression was required "because defendant's consent had occurred contemporaneously with the stop, with no intervening or mitigating factors." Although "the temporal proximity factor weighs in defendant's favor," the court noted that the unlawful seizure's purpose was not to "search for evidence" but was to investigate defendant's girlfriend's request for help. With respect to defendant's first consent (to a search of his person for safety reasons), defendant testified that he consented to show that he "wasn't any kind of a threat"; consent thus was not caused by illegal police conduct. "Aside from the close temporal proximity to the stop, there is no evidence that [officers] exploited any aspect of the stop to obtain defendant's first consent," and the consent "was not a product of the illegal stop."

[3] Defendant's second consent—to a search of the tin found in his pocket during the first consent search—also was "not tainted by the prior illegal conduct." "There is no evidence that [officers] took advantage of the fact that [due to the illegal seizure] defendant was unable to terminate the encounter to gain defendant's consent to open the tin," or that they "exploited the stop to gain defendant's consent to open the tin." Instead, officers "simply requested consent to open [the tin]" upon discovering it.

[4] Defendant's third consent—to a search of the house, after officers discovered a methamphetamine pipe and meth residue inside the tin, after they arrested defendant as a result, and after defendant acknowledged that the house might contain more drugs—also was not tainted by the illegal stop. The court noted that officers gave him *Miranda* warnings before obtaining the consent and that, because discovery of the drugs in the tin provided probable cause to arrest him, the arrest preceding the consent itself was lawful.

Note: In her dissent, Justice Walters stated that the Supreme Court's holding has "effectively

overruled" the outcomes both in *Hall* (in which consent given during an illegal stop required suppression, even though—in Justice Walters' words—"there was no evidence that the officers had acted egregiously") and in *State v. Rodgers/Kirkeby*, 347 Or 610 (2010), in which the court held that the "temporal proximity between the illegal detention" and consent required suppression whether or not consent was voluntary. In response, the *Hemenway* majority commented: "Whether the outcome in *Hall* and *Rodgers/Kirkeby* would have been different under the analysis set out here is speculative," and that "whether police 'exploited' their unlawful conduct to obtain consent" is "necessarily dependent on the facts of the particular case and on the record developed in the trial court."

^ ***State v. Backstrand***, 231 Or App 621, 220 P3d 748 (2009), *rev allowed*, 350 Or 130 (2011). An officer saw defendant in an adult bookstore and thought he might be underage. The officer asked defendant's age and explained that he thought the store clerk might be committing a crime by allowing a minor inside the store. When defendant said he was 22, the officer asked if he could see defendant's identification. He looked at defendant's identification, called it in to dispatch to verify it and—before he had the results back—handed the identification back to defendant, said "Have a good day," and left the store. After he left the store, he heard back from dispatch that defendant's identification was valid but suspended. Later, the officer saw defendant drive away from the store, and he stopped and arrested defendant for driving while revoked. Defendant moved to suppress the information obtained as a result of the interaction in the store. The trial court denied the motion, and defendant appealed. *Held*: Defendant could have reasonably believed that he was stopped when the officer called in defendant's identification over his radio. Remanded under *State v. Ashbaugh* to determine whether defendant subjectively believed that he was not free to go at that point. If defendant so believed, the officer's "discovery" that defendant's license was revoked should be suppressed.

Search & Seizure: return of property

State v. Ehrensing, 255 Or App 402, 296 P3d 1279 (2013). Defendant holds an OMMA registry identification card and grew marijuana for several other cardholders. In 2006, law-enforcement officers executed a search warrant at his residence and seized live marijuana plants and packages of dried marijuana. He was charged with unlawful manufacture, delivery, and possession of marijuana, and the state also asserted that the seized items were subject to criminal forfeiture. In September 2006, defendant filed a pretrial motion for the return of marijuana to three cardholders for whom defendant had grown marijuana. He argued that they had a protected "property interest" in the marijuana under ORS 475.304(5) and that they were entitled to return of the marijuana under ORS 475.323(3), and ORS 133.643(3) and (4). The state opposed the motion, arguing at a hearing that the state needed the marijuana for evidentiary purposes. The trial court granted the motion in part and issued a return order, requiring the sheriff to return a portion of the seized marijuana. The state filed a motion to reconsider, arguing that return and receipt of the marijuana would 'arguably' violate federal law, and the sheriff intervened and also asked the court to reconsider the return order, arguing, in part, that the federal CSA preempted the OMMA return provisions. The court allowed the sheriff to intervene, but denied the motions to reconsider, leaving the return order in effect. The state appealed, and that order was the subject of *State v. Ehrensing*, 232 Or App 511 (2009), in which the Court of Appeals dismissed the appeal as moot. Defendant was not brought to trial during the pendency of that appeal, he moved to dismiss the charges on speedy-trial grounds, and the trial court granted that motion in February 2010. The state did not appeal. Defendant then filed a motion for return of the remainder of the usable seized marijuana. The court granted that motion in part and ordered the sheriff to return a portion of the marijuana. The sheriff appealed. *Held*: Reversed on appeal; affirmed on cross-appeal. The trial court erred in ordering the sheriff to return the marijuana. [1] ORS 475.304(5) does not entitle defendant to return: "ORS 475.304(5) establishes, *as between a cardholder and a person responsible for a grow site*, that the cardholder is the owner of the medical

marijuana. The statute plainly provides that the marijuana in production at a grow site must be provided to the registry identification cardholder' by the 'person responsible for a marijuana grow site.' By its terms, ORS 475.304(5) clarifies who owns the marijuana in order to grant the cardholder the right to obtain the marijuana *from the grower on request*. Because that statutory provision bears exclusively on *the relationship between cardholder and grower*, it has limited value in evaluating the obligation of a law enforcement officer to return seized marijuana under ORS 475.323(2)." [2] ORS 475.323(2) also does not entitle defendant to return: "Here, there is no evidence that the district attorney or the district attorney's designee made the requisite determination with respect to defendant (or the other cardholders)." Although the trial court dismissed the charges against defendant on statutory speedy-trial grounds, "that judicial determination does not fulfill the express statutory requisite for the return of seized marijuana under ORS 475.323(2)." Such a dismissal is without prejudice and does not address the merits and, thus, is not tantamount to an acquittal. "Nor did the district attorney in this case determine not to prosecute or to dismiss the charges—and defendant does not so argue." [3] ORS 133.623 also does entitle defendants to return because it "applies only to warrantless seizures," and the marijuana at issue was seized pursuant to a search warrant. [4] Under ORS 133.643, "a movant is entitled to return of seized property … only if he or she 'is lawfully entitled to possess' that property. Although the text of ORS 133.643(4) does not also include the term 'lawfully,' in conjunction with its use of 'entitled,' we have held that, in the totality of the statutory context, 'entitled' in subsection (4) necessarily connotes and requires a showing of *lawful* entitlement to possession." And that requirement of "'lawfully entitled' encompasses both state and federal law." [5] "Finally, construing ORS 133.643 in such a fashion as to authorize—indeed, compel—the return of items whose possession would violate federal law could, as the parties' preemption-related contentions manifest, give rise to 'serious constitutional problems.' ORS 133.643 does not authorize the return of the disputed marijuana, because possession of that marijuana by defendant and the other cardholders would violate federal law. Nor does any other statute authorize that return."

Note: The court's ruling that defendant failed to establish a basis *under state law* for return of the marijuana meant that it did not have to resolve the difficult issue that was presented by the principal arguments that the parties made on appeal—*viz.*, whether the sheriff would commit an unlawful delivery of marijuana in violation of 21 USC § 841(a)(1) if he returned the marijuana to defendant and, if so, whether the federal CSA preempts, under the Supremacy Clause, the OMMA.

SENTENCING

Sentencing: constitutional issues—right to jury, *Apprendi*

Alleyne v. United States, 570 US __ , 133 S Ct 2151 (2013). Defendant and an accomplice, who was armed with a firearm, robbed a store manager who was transporting the day's receipts to the bank. Defendant was charged in federal court with armed robbery under 18 USC § 1951(1) and with carrying or using a firearm in a crime of violence under § 924(c)(1)(A), which further provides that "if the firearm is brandished, [the defendant] shall be sentenced to a term of imprisonment of not less than 7 years." The jury found defendant guilty; it also found that he carried or possessed a firearm during the crime, but it did not specifically find that he had "brandished" it. At sentencing, defendant argued that he was not subject to the seven-year minimum because the jury had not found that he "brandished" the firearm. The district court rejected that argument by relying on *Harris v. United States*, 536 US 545 (2002), in which the Court held that the right-to-jury rule announced in *Apprendi* does not apply to a fact that merely provides the basis for imposition of a mandatory minimum sentence that otherwise is within the maximum sentence allowable by law. The court then found by a preponderance that defendant had "brandished" the firearm, and it imposed the seven-year minimum sentence. On appeal, the Fourth Circuit affirmed based on *Harris*. *Held*: Reversed and remanded. *Harris* overruled; the Sixth Amendment right to jury trial applies to a fact that provides basis for imposition of mandatory minimum sentence. [1] "The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an 'element' or

'ingredient' of the charged offense. In *Apprendi*, we held that a fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed. While *Harris* declined to extend this principle to facts increasing mandatory minimum sentences, *Apprendi*'s definition of 'elements' necessarily includes not only facts that increase the ceiling, but also those that increase the floor. Both kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment. Facts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt." [2] "The floor of a mandatory range is as relevant to wrongdoers as the ceiling. A fact that increases a sentencing floor, thus, forms an essential ingredient of the offense. … This reality demonstrates that the core crime and the fact triggering the mandatory minimum sentence together constitute a new, aggravated crime, each element of which must be submitted to the jury." [3] It does not matter that the 7-year sentence imposed was within the court's authority even without the "brandishing" finding: "Because the fact of brandishing aggravates the legally prescribed range of allowable sentences, it constitutes an element of a separate, aggravated offense that must be found by the jury, regardless of what sentence the defendant *might* have received if a different range had been applicable. Indeed, if a judge were to find a fact that increased the statutory maximum sentence, such a finding would violate the Sixth Amendment, even if the defendant ultimately received a sentence falling within the original sentencing range (*i.e.*, the range applicable without that aggravating fact)." [4] Because the district court imposed a seven-year sentence based on its erroneous assumption that the mandatory-minimum term applied given its own "brandishing" finding, that sentence was vacated and the case was remanded for resentencing.

Notes: [a] The majority opinion reiterated that *Apprendi*, and hence this opinion, does not apply to facts that a sentencing court may find and rely on when exercising discretion within the range prescribed by law: "Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment." In other words, if the sentencing court on remand chooses to *exercise its discretion* to reimpose the same 7-year sentence because it finds that defendant "brandished" the firearm, that sentence evidently would be lawful. [b] The majority also cautioned that its opinion should not be construed to suggest that a mandatory-minimum term that is based solely on the defendant's criminal record must now be based on a jury finding: "In *Almendarez-Torres* v. *United States*, 523 US 224 (1998), we recognized a narrow exception to this general rule for the fact of a prior conviction. Because the parties do not contest that decision's vitality, we do not revisit it for purposes of our decision today." [c] There is language in the majority opinion that suggests that a fact that provides the basis for a mandatory minimum must also be alleged in the indictment, but it must be remembered that the Indictment Clause in the federal constitution does not apply to the States. *See State v. Cox*, 337 Or 447, 499 (2004).

Application of this new rule in Oregon. The latent problem in the Court's analysis is what a "mandatory minimum sentence" may be for purposes of this new rule. Certainly, if a statute expressly *requires* a court to impose a *prison term* of at least X months based on a factual finding of Y—as was the case in *Alleyne*—that is a "mandatory minimum sentence" that is subject to this new rule. There are numerous such mandatory minimum sentences in Oregon, and most do not present any problem under *Alleyne*. Some of the mandatory-minimum sentences apply based only on the nature of the conviction (*e.g.*, ORS 137.700; ORS 163.208(2)) and so there is no *additional* fact that the jury would have to find. Some of the other mandatory-minimum sentences are based solely on the defendant's criminal record (e.g., ORS 137.635; ORS 137.690; ORS 137.717; ORS 137.719; ORS 475.933, *etc.*), and so are within the *Almendarez-Torres* exception that was preserved (at least for now) in *Alleyne*. Some of the remaining mandatory-minimum sentences require additional factfinding, but those minimum terms also require specific jury findings as a matter of state law. ORS 161.610; ORS 475.925.

But there are a few statutes that mandate a minimum sentence based on an aggravating fact that is not specifically included within the elements of the underlying crime but that relates to the

crime. For example, ORS 164.061 requires a court to impose a sentence of "16 months to 45 months" on a conviction for aggravated theft in the first degree if the victim was at least 65 years old. Under *Alleyne*, it will be necessary for that additional finding to be made by the jury (in the absence of a waiver or guilty plea) in order for that minimum term to apply. Similarly, ORS 163.155(1)(a) mandates a sentence of life imprisonment without the possibility of parole if the defendant is "convicted of murdering a pregnant victim … and knew that the victim was pregnant." Under *Alleyne*, it will be necessary those additional findings to be made by the jury in order for that minimum term to apply.

There is also a concern about what the Court meant by a "minimum." For example, ORS 137.700 (Measure 11) mandates minimum sentences based only on the nature of the crime, but ORS 137.712 then allows for a *downward departure* for some of those crimes based on additional findings. The Court of Appeals has held that because those findings merely define an *exemption*, they are not subject to *Apprendi* and so may be made by a judge. *State v. Crescencio-Paz*, 196 Or App 655, 660-64 (2004). But a defendant may argue, based on *Alleyne*, that if ORS 137.712 means that the minimum sentence does not apply if fact X is found, that necessarily also necessarily means that *not-X* is now a finding that requires imposition of a minimum sentence. For example, if a defendant is convicted of first-degree sexual abuse, ORS 137.700(2)(a)(P) mandates a 75-month minimum sentence, but ORS 137.712(2)(e)(A) and (D) allow for a downward departure if a finding is made that "the victim was at least 12 years of age but under 14 years of age," and the "defendant was no more than five years older than the victim." Under current law, it is not necessary for the jury to find the victim's and defendant's age, and it is up to the defendant at the sentencing hearing to prove those additional facts in order to become eligible for a downward departure. But a defendant may argue that *Alleyne* means that, in order to get the 75-month "mandatory minimum sentence," the jury must find that either the victim was *not* in that 12-to-14 gap or that defendant was more than five years older—*i.e.*, that *Alleyne* means that if a statute mandates a minimum but also creates an exception, then the jury must find the *negative* of that exemption (the defendant is *not* eligible) in order for the court to impose the minimum sentence.

In short, *Alleyne* was an easy case because the statute at issue defined the basis for the mandatory minimum sentence in positive terms by the presence of a single, additional aggravating fact. But how does the new rule in *Alleyne* apply when the statute at issue mandates a minimum sentence but then provides an *exemption* that is based on the presence of *mitigating* facts? Imagine if the statute in *Alleyne* mandated a seven-year prison sentence for possessing a firearm during a violent felony but then allowed an exemption down to only five years if the defendant did not "brandish" it. Because the Court did not address that issue in *Alleyne*, it is a fair reading of the opinion that the new rule applies only if the statute mandates imposition of a minimum sentence based on the finding of an *aggravating* fact, but not when it mandates imposition of a minimum sentence for the crime generally and allows an exemption based on a finding of a *mitigating* fact. That is, *Crescencio-Paz* should still be good law.

Another possible concern is ORS 137.750(1), which allows a court to order that the defendant is not eligible for early release on the sentence imposed. The Court of Appeals held in *State v. Clark*, 205 Or App 338, *rev den* (2006), that findings that the sentencing court relies on to *deny* a defendant eligibility for early release are not subject to *Apprendi*, because such an order merely means that the defendant is required to serve the full sentence that court otherwise had authority to impose. But a defendant may argue that denial of eligibility means that the sentence imposed becomes the "minimum sentence" within the meaning of *Alleyne* and hence that the jury must find the facts on which the court may rely to deny such eligibility. But that likely is a stretch too far.

Finally, it is unclear whether the new rule in *Alleyne* will apply to repeat-offender statutes where the sentencing court's counting of previous convictions as only one or several may depend on an additional finding that the defendant committed those crimes during separate criminal episodes. For example, a repeat property offender will be subject to the enhanced presumptive sentence prescribed by ORS 137.717 if he or she has the minimum number of previous convictions, but ORS 137.717(1)(a) requires a finding whether the underlying convictions were or were not part of the same

criminal episode. Is that finding subject to the new rule in *Alleyne*? Perhaps the short answer to that is that ORS 137.717 does not mandate a "minimum sentence" within the meaning of *Alleyne* because it but merely prescribes a "presumptive sentence" with the possibility of a departure. *See also* ORS 137.719 (prescribing "presumptive sentence" for repeat sexual offenders). But that issue is squarely presented by ORS 137.690, which mandates a minimum sentence of 25 years, without any possibility of departure, on a repeat sexual offender.

M.F.K. (Foster) v. Miramontes, 352 Or 401, 287 P3d 1045 (2012). Plaintiff filed a petition under ORS 30.866 in which she requested both a stalking protective order (SPO) against defendant and an award of compensatory damages for lost sick and annual leave, lost wages, and counseling expenses. Defendant demanded a jury trial on the claim for damages; he based that claim on Art. I, § 17, and Art. VII (Am), § 3. The trial court denied that request, and after a trial to the court, it issued a SPO and entered a judgment against defendant for $42,000 in compensatory damages. Defendant appealed, and the Court of Appeals affirmed. *Held*: Reversed and remanded. Defendant is entitled to a jury trial on plaintiff's claim for compensatory damages. [1] ORS 30.866 allows a plaintiff to request both issuance of a SPO and compensatory damages, but it does not authorize the trial court to provide the defendant with a jury trial on the damages claim. [2] Under Art. I, § 17, and Art. VII (Am), § 3, "the relevant inquiry is not whether a newly created statutory claim existed at common law, but whether, because of its nature, it falls within the guarantee of the Constitution to a jury trial." [3] "If plaintiff had sought only money damages under ORS 30.866—that is, had she not combined her claim for money damages with a claim for [an SPO]—then her claim would have been at law and the right to jury trial would have attached." On the other hand, "if plaintiff had sought only injunctive relief [in the form of an SPO], her claim would have been equitable in nature, and the constitution would not provide a right to a jury trial. … There is no right to jury trial on equitable claims." [4] "[T]he right to jury trial must depend on the nature of the relief requested and not on whether, historically, a court of equity would have granted the relief had the legal issue been joined with a separate equitable claim. … Instead, we conclude that [Art. I, § 17, and Art. VII (Am), § 3] do not guarantee a right to jury trial for claims or request for relief that, standing alone, are equitable in nature and would have been tried to a court without a jury at common law. By the same token, in the absence of a showing that the nature of a claim or request for relief is such that, for that or some other reason, it would have been tried to a court without a jury, those provisions do guarantee a right to jury trial on claims or requests that are properly categorized as 'civil' or 'at law.'" [5] Because "plaintiff's claim seeking monetary damage for injury inflicted fits within those terms, even if it does not have a precise historical analog," defendant was entitled to a jury trial on that claim. [6] When a mixed petition is before the trial court in which the plaintiff is seeking both equitable relief and compensatory damages and the defendant demands a jury trial on the damages claim, the court should defer ruling on the equitable claim until the jury has rendered a verdict on the damages claim.

State v. Al-Khafagi, 257 Or App 363, __ P3d __ (2013) (*per curiam*). Defendant appealed from a judgment imposing restitution in the amount of $182,437, and he argued that he was entitled to a jury trial on the issue of restitution. Defendant acknowledged prior case law holding that Art. I, § 17, does not apply to the determination of the amount of restitution, but he contended that amendments to the restitution statutes have changed restitution's purpose from a penalty to a "quasi-civil recovery device" for victims. *Held*: Affirmed. Because defendant's obligation to pay restitution to a victim remains penal in nature despite the statutory amendments, Art. I, § 17, did not apply.

State v. G. L. D., 253 Or App 416, 290 P3d 852 (2012). Youth and a couple of other teenagers broke into a high school, stole 20 computers, and set the school on fire. After a hearing, the juvenile court determined that youth had committed acts that constitute first-degree arson, aggravated first-degree theft, two counts of second-degree burglary, and first-degree criminal mischief. The court imposed restitution in the amount of $194,578. On appeal, youth contended the juvenile court erred when it denied his request for a jury to determine the amount of restitution. *Held*: Affirmed.

Youth's argument that he was entitled to a jury trial on restitution has no merit in light of *State v. N.R.L.*, 249 Or App 321, *rev allowed* (2012).

Sentencing: constitutional issues—proportionality, cruel and unusual punishment

State v. Barajas, 254 Or App 106, 292 P3d 636 (2012), *rev den*, 353 Or 747 (2013). Based on stipulated facts, defendant was convicted of, among other crimes, felony fourth-degree assault and misdemeanor fourth-degree assault, and the court imposed probationary sentences. He subsequently violated the terms of probation, and the trial court revoked his probation and sentenced him to six months in prison for the felony assault per OAR 213-010-0002(1), and 12 months in jail for the misdemeanor assault per ORS 137.545(5)(a). On appeal, defendant argued that the 12-month jail sentence imposed on his misdemeanor conviction is unconstitutionally disproportionate under Art. I, § 16, because it exceeds the 6-month maximum sentence that the court could impose after revoking his probation on the conviction for *felony* fourth-degree assault. *Held*: Affirmed. [1] The 12-month sentence is not unconstitutionally disproportionate. "Where 'the actual sentence imposed' includes a jail term imposed on revocation of probation on a lesser-included misdemeanor, the appropriate comparator is the maximum sentence that was originally available on the greater-inclusive felony. … [T]hat is so because, in revoking probation for a misdemeanor and imposing a jail sentence, a trial court is belatedly imposing the sentence that it could have imposed or did impose at the original sentencing, but which it decided to hold in abeyance in favor of probation. That sentence is punishment for the original offense. Consequently, in evaluating the vertical proportionality of the sentence imposed on a lesser-included misdemeanor, we compare it to the maximum sentence that was available at the original sentencing to punish the greater-inclusive felony." [2] "When the sentence for the greater-inclusive offense is governed by the sentencing guidelines, the proper comparator is the maximum departure sentence available for the gridblock representing the intersection of the defendant's criminal history score and the crime's seriousness rating." Here, that would have been 18 months in prison for the felony assault, which exceeds the 12-month sentence that defendant actually received on the misdemeanor.

State v. Burge, 252 Or App 574, 288 P3d 565 (2012) (*per curiam*), *rev den*, 353 Or 787 (2013). Defendant was found guilty on 12 counts of second-degree sexual abuse. On appeal, he contended that the sentencing court erred, in light *State v. Simonson*, 243 Or App 535 (2011), *rev den* (2013), when it ranked those convictions as category 7 offenses on the crime seriousness scale. *Held*: Reversed and remanded for resentencing. Under *Simonson*, the category 7 ranking violated the "vertical proportionality" principle in Art I, § 16, even for the convictions based on those that involved a victim under the age of 16—the court should have ranked them as category 6 offenses. Under *Simonson*, "vertical proportionality is measured by the sentences that are available for the conduct at issue, not on what any individual defendant actually receives."

See also ***State v. Decamp***, 252 Or App 177, 285 P3d 1130 (2012) (*per curiam*), *rev den*, 353 Or 787 (2013).

Sentencing: constitutional issues—*ex post facto* objections

Peugh v. United States, 569 US __, 133 S Ct 2072 (2013). Defendant engaged in some fraudulent financial dealings in 1999 and 2000, and he was charged and eventually convicted on multiple counts of bank fraud in violation of 18 USC § 1344. At sentencing, he contended that the Ex Post Facto Clause required the court to apply the 1998 version of the federal sentencing guidelines, under which the prescribed range was 30 to 37 months, but the court denied that request and imposed the current guidelines, which prescribed a range of 70 to 87 months. *See* 18 USC § 3553(1)(4)(A)(ii) (requiring application of guidelines in effect at time of sentencing). The court then denied

defendant's request for a downward departure and imposed a 70-month sentence. The Seventh Circuit affirmed. *Held*: Reversed and remanded. The Ex Post Facto Clause precludes retroactive application of new guidelines rules. [1] Under *United States v. Booker*, 543 US 200 (2005), the federal sentencing guideline are only "advisory," not mandatory, but a sentencing court is "required to consult the Guidelines, … must consider all of the factors set forth in [the rules] to guide its discretion at sentencing, … [and] a major departure from the Guidelines should be supported by a more significant justification." [2] Under *Miller v. Florida*, 482 US 423 (1987), "applying amended sentencing guidelines that increase a defendant's recommended sentence can violate the *Ex Post Facto* Clause, notwithstanding the fact that sentencing courts possess discretion to deviate from the recommended sentencing range. … [Florida's] reason-giving requirements and standards of appellate review meant that while variation was possible, it was burdensome; and so in the ordinary case, a defendant would receive a within-guidelines sentence. Under the Florida system, therefore, an increase in the guidelines range applicable to an offender created a significant risk that he would receive a higher sentence." [3] "Although the federal system's procedural rules establish gentler checks on the sentencing court's discretion than Florida's did, they nevertheless impose a series of requirements on sentencing courts that cabin the exercise of that discretion. Common sense indicates that in general, this system will steer district courts to more within-Guidelines sentences." [4] "District courts must begin their sentencing analysis with the Guidelines in effect at the time of the offense and use them to calculate the sentencing range correctly; and those Guidelines will anchor both the district court's discretion and the appellate review process in all of the ways we have described. The newer Guidelines, meanwhile, will have the status of one of many reasons a district court might give for *deviating* from the older Guidelines, a status that is simply not equivalent for *ex post facto* purposes." [5] Applying the Ex Post Facto Clause to the guidelines does not undo what the Court did in *Booker* to eliminate the right-to-jury problem: The Government's argument assumes that the Sixth Amendment and the *Ex Post Facto* Clause share a common boundary; that only where judge-found facts are the basis of a higher sentence in a manner that raises Sixth Amendment concerns can a set of sentencing rules be sufficiently determinate to run afoul of the *Ex Post Facto* Clause. But the Sixth Amendment and *Ex Post Facto* Clause inquiries are analytically distinct. Our Sixth Amendment cases have focused on when a given finding of fact is required to make a defendant legally eligible for a more severe penalty. Our *ex post facto* cases, in contrast, have focused on whether a change in law creates a "significant risk" of a higher sentence; here, whether a sentence in conformity with the new Guidelines is substantially likely. The *Booker* remedy was designed, and has been subsequently calibrated, to exploit precisely this distinction: it is intended to promote sentencing uniformity while avoiding a Sixth Amendment violation."

Note: Unlike the federal sentencing guidelines, Oregon's sentencing guidelines expressly are "mandatory." ORS 137.669. As a result, there never has been a question that *ex post facto* principles preclude retroactive application of *substantive* amendments to the guidelines that would alter, to the defendant's disadvantage, the presumptive sentence or availability of a departure. *But cf. State v. Upton*, 339 Or 673 (2005) (procedural change does not violate *ex post facto* clause). The significance of this case is that the Court has applied the Ex Post Facto Clause to preclude retroactive application of what clearly are only *advisory guidelines* that the sentencing court has broad discretion to disregard entirely, even when the change at issue does affect the maximum sentence the court has authority to impose.

State v. Giles, 254 Or App 345, 293 P3d 1086 (2012). Defendant was convicted of murder based on a crime he committed in August 1999. In 2009, the case was remanded for resentencing. On remand, defendant argued that the court could not impose on his conviction the sentence of "imprisonment of life" required by ORS 163.115(5)(a) because he committed the murder during the so-called "*McLain* window"—*i.e.*, after the date on which the Court of Appeals had invalidated that term as unconstitutionally disproportionate in *State v. McLain*, 158 Or App 419 (1999) (*viz.*, February 17, 1999), and before the legislature had fixed the statute by enacting ORS 163.115(5)(c) (*viz.*, October 23, 1999). Relying on *State v. Haynes*, 168 Or App 565 (2000), the sentencing court

overruled defendant's objection and imposed life imprisonment with a 300-month minimum. *Held*: Reversed and remanded for entry of corrected judgment. [1] "When this court [held in *McLain*] the former version of ORS 163.115(5)(a) was unconstitutional, that statutory provision could no longer be applied. In light of the inapplicability of ORS 163.115(5), we determined … that the proper sentence was that required by other statutes—a 25-year mandatory minimum as provided in ORS 137.700(2)(a)(A) and ORS 163.115(5)(b), followed by post-prison supervision for life in accordance with OAR 213-005-0004. [That decision] identified and was predicated on the only sentence that could lawfully have been imposed as of that time (*i.e.*, before the enactment of the 1999 amendments)." [2] "We conclude that that was the only sentence to which defendant could lawfully have been subjected as of the time he committed the murder, and because the 1999 amendments prescribe a sentence that is patently harsher than that prescribed by *McLain*, the application of the 1999-amended scheme to defendant violates *ex post facto* protections."

Notes: [a] The Court of Appeals held in *Haynes* that the *ex post facto* clauses did not preclude retroactive application of the ORS 163.115(5)(a), as amended in October 1999, to a murder conviction based on a crime that was committed after re-enactment of the "imprisonment for life" sentence in April 1, 1995 and before *McLain* was issued in February 1999. The court in this decision merely distinguished *Haynes* and did not overrule it. As a result, a defendant convicted of murder based on a crime committed after April 1, 1995, must be sentenced to "imprisonment for life" pursuant to ORS 163.115(5) ***unless*** he or she committed the crime during the eight-month "*McLain* window"—February 17 to October 23, 1999. [b] For a murder conviction based on a crime committed during the *McLain* window, the court still must impose, and the defendant must serve, the 300-month minimum sentence per ORS 163.115(5)(b) and a life-time term of post-prison supervision per OAR 213-005-0004. But without the indeterminate "life sentence," the parole board would not have authority under ORS 163.115(5)(c) to delay or bar the defendant's release once he or she has completed serving the 300-month minimum. In other words, for a murder defendant in that window, he or she is legally entitled to release onto post-prison supervision immediately after completing the 300-month minimum.

State v. Carroll, 253 Or App 265, 290 P3d 864 (2012), *rev den*, 353 Or 428 (2013). Defendant was arrested for DUII in December 2009. At that time, a person was eligible for DUII diversion if he had not had any previous DUII diversions or convictions within the preceding 10 years. Effective January 1, 2010, however, the statute was amended to increase the "look back" period for determining diversion eligibility to 15 years. Defendant had two previous DUII convictions from 12 years before his arrest for DUII. He filed a petition to enter diversion in February 2010 and the trial court, relying on the legislative amendment, applied the current version of the statute and denied the petition because of defendant's prior DUII convictions. The trial court also rejected defendant's *ex post facto* challenges to the amendment. The trial court convicted defendant after a stipulated-facts trial. *Held*: Affirmed. [1] "We reject without extended discussion defendant's contention that, by eliminating his eligibility for diversion, the amendment of ORS 813.215(1)(b) deprived him of a 'defense' to the offense of DUII. Diversion is not a defense." [2] The remaining issue is "whether the amended law imposes a form of punishment—either a detriment, restraint, or deprivation primarily intended as a deterrent—that was not annexed to the crime at the time defendant committed the offense." [3] In general, "the purpose of the Oregon Vehicle Code is primarily remedial, not punitive." [4] The legislative history of the amendment at issue in this case reveals that, "despite incidental deterrent effects, the primary purpose of the amendment ... was a concern for public safety, rather than punishment or deterrence. We have no difficulty concluding that the primary purpose of the amendment … was not punitive." [5] Nor was the practical effect of the amendment punitive: "A person's eligibility for diversion is not punishment for the offense; it provides an alternative to prosecution, conviction, and punishment." [6] Finally, "the extension of the 'look-back' period for eligibility for DUII diversion does not impose such a significant detriment, restraint, or deprivation on defendant so as to constitute a form of increased punishment."

Sentencing: constitutional issues—victims' rights

See "Victims' Rights," *below*.

Sentencing: crime-seriousness ranking

State v. Cam, 255 Or App 1, 296 P3d 578 (2013). Defendant was at the center of a massive property-theft ring based in Woodburn. Thieves would bring him stolen goods in exchange for cash or drugs. The jury found defendant guilty of 53 theft and drug-related charges. *Held*: Reversed and remanded for resentencing. Relating to the crime-seriousness ranking of the drug convictions, the trial court correctly denied defendant's motion to strike the "commercial drug" enhancement on possession charges, ORS 475.900(1)(b), on the ground that possession of substantial quantities of one drug (methamphetamine) cannot serve as the basis for a CDO enhancement for possession of *another* drug (marijuana and MDMA). The CDO statute "plainly allows possession of any of the listed controlled substances in sufficient quantities to serve as enhancements for a possession offense. … The substance charged as a CDO need not be the same substance possessed in the enhancement amount," and "[t]here is no requirement of a nexus between the underlying drug offense and the listed factors."

State v. Burge, 252 Or App 574, 288 P3d 565 (2012) (*per curiam*), *rev den*, 353 Or 787 (2013). Defendant was found guilty on 12 counts of second-degree sexual abuse. On appeal, he contended that the sentencing court erred, in light *State v. Simonson*, 243 Or App 535 (2011), *rev den* (2013), when it ranked those convictions as category 7 offenses on the crime seriousness scale. *Held*: Reversed and remanded for resentencing. Under *Simonson*, the category 7 ranking violated the "vertical proportionality" principle in Art I, § 16, even for the convictions based on those that involved a victim under the age of 16—the court should have ranked them as category 6 offenses. Under *Simonson*, "vertical proportionality is measured by the sentences that are available for the conduct at issue, not on what any individual defendant actually receives."

See also ***State v. Decamp***, 252 Or App 177, 285 P3d 1130 (2012) (*per curiam*), *rev den*, 353 Or 787 (2013).

Sentencing: presumptive sentence

State v. Powell, 253 Or App 185, 288 P3d 999 (2012), *rev den*, 353 Or 714 (2013). The sentencing court violated OAR 213-005-0002(4), as construed in *State v. Mitchell*, 236 Or App 248 (2010), when it imposed a 60-month sentence with a 24-month term of post-prison supervision on defendant's PCS conviction, a class C felony. That term is error even though the court also imposed a no-release order per ORS 137.750 and judgment provided that the PPS term "is hereby reduced to the extent necessary to conform the total sentence length to the statutory maximum."

Sentencing: term of post-prison supervision

State v. McCallum, 256 Or App 692, 301 P3d 965 (2013) (*per curiam*). Among other convictions, defendant was convicted on three counts of criminal mistreatment, a class C felony. For those convictions, the trial court imposed a 36-month prison term and 36 months of post-prison supervision, for a total of 72 months. The Court of Appeals reversed because the statutory maximum indeterminate sentence for a class C felony is five years, and the combined prison and PPS terms could not exceed five years. Reversed and remanded for resentencing.

State v. Hall, 256 Or App 518, 301 P3d 438 (2013) (*per curiam*). Defendant was convicted on 100 counts of first-degree encouraging child sexual abuse under ORS 163.684, a Class B felony,

and the sentencing court imposed a sentence of incarceration and a "120 months post-prison supervision less time actually served" on each conviction. Defendant did not object. *Held*: Reversed and remanded for resentencing. The PPS terms were unlawfully "indeterminate" and "constituted plain error in light of our decision in *State v. Mitchell*, 236 Or 16 App 248 (2010)."

Note: The "less time served" clause that the court imposed in this case is correct if the conviction is subject to ORS 144.103(1), which provides that the defendant "shall serve a term of post-prison supervision that continues until the term of the post-prison supervision, when added to the term of imprisonment served, equals the maximum statutory indeterminate sentence for the violation." For other felony convictions, *Mitchell* requires that the sentencing court must impose a specific PPS term. In this case, the defendant's convictions are *not* subject to ORS 144.103(1), which applies only to a specific list of felony sexual offenses—not to all felony sexual offenses (which is a common mistake). Consequently, the sentencing court should have imposed only a 36-month term of PPS on each of the convictions.

State v. Powell, 253 Or App 185, 288 P3d 999 (2012), *rev den*, 353 Or 714 (2013). The sentencing court violated OAR 213-005-0002(4), as construed in *State v. Mitchell*, 236 Or App 248 (2010), when it imposed a 60-month sentence with a 24-month term of post-prison supervision on defendant's PCS conviction, a class C felony. That term is error even though the court also imposed a no-release order per ORS 137.750 and judgment provided that the PPS term "is hereby reduced to the extent necessary to conform the total sentence length to the statutory maximum."

Sentencing: probationary dispositions

State v. Youngs, 256 Or App 755, 301 P3d 976 (2013) (*per curiam*). Defendant pleaded guilty to unlawful possession of methamphetamine, and the sentencing court placed him on probation and, as a condition of probation, ordered forfeiture of his cell phone, which had been seized during the investigation. *Held*: Remanded for resentencing. Under ORS 161.045(4), "the court lacked authority to order forfeiture as a condition of probation.

Sentencing: departures

State v. Alexander, 255 Or App 594, 298 P3d 55 (2013). Defendant was charged by indictment with second-degree burglary and two counts of theft; the indictment did not allege any sentence-enhancement factors. The prosecutor later sent defendant a written pretrial offer that included a "Blakely notice" that state would seek an upward departure; the notice included a check-the-box form listing 18 aggravating factors, including "other," but none of the boxes was checked and the "other" line was not filled in. At the change-of-plea hearing, the prosecutor advised the court that the parties' agreement included "open sentencing" and that the state would seek a departure on four factors for which it had submitted proposed jury instructions. Defendant objected that the state had not provided sufficient notice, but the trial court disagreed, and defendant pleaded no contest to the charges. At sentencing, the prosecutor orally raised a fifth possible ground for departure. The court imposed an upward-departure sentence on the burglary conviction based on the factors the state had noted. *Held*: Reversed and remanded for resentencing. [1] "A 'notice' that the state 'may' rely on any of 18 individual departure factors (including some ineffable 'other')—or any combination thereof—is the functional equivalent of 'That's for us to know and you to find out,'" and "is no notice at all." To be adequate under ORS 136.765(2), "the state's written notice must specify the enhancement fact, or enhancement facts, on which it intends to rely." [2] Although the state's proposed jury instructions specifically identified four enhancement facts, it did not satisfy the notice requirement. The record on appeal was sufficient to show that the trial court had received those proposed instructions in written form, but those instructions were not included in the record on appeal and "the record does not demonstrate that defendant, in fact, received such written notice."

State v. Cam, 255 Or App 1, 296 P3d 578 (2013). Defendant was at the center of a massive property-theft ring based in Woodburn. Thieves would bring him stolen goods in exchange for cash or drugs. The jury found defendant guilty of 53 theft and drug-related charges. *Held*: Reversed and remanded for resentencing. [1] The trial court correctly submitted the "harm greater than typical" enhancement factor to the jury even though that factor was not alleged in the indictment; sentencing enhancement factors need not be alleged in an indictment. [2] The court correctly allowed the jury to consider, in determining whether the "persistent involvement" factor applied to eight theft counts, defendant's prior criminal conduct that did not result in conviction, and other crimes that the jury itself found defendant guilty of committing, because those crimes were unrelated to the eight counts.

State v. Ramos, 254 Or App 748, 295 P3d 176 (2013) (*per curiam*). The sentencing court committed plain error when it imposed, by upward departure, a 144-month sentence on defendant's conviction for assault in the second degree, a class B felony.

Sentencing: consecutive sentences

See also "Sentencing: probation revocation," *below*.

State v. Monro, 256 Or App 493, 301 P3d 435 (2013). Defendant committed a series of home-invasion robberies, and was convicted of multiple counts relating to three different incidents. The trial court imposed a series of consecutive Measure 11 and departure sentences, including a consecutive 144-month departure sentence on the conviction for first-degree robbery. Defendant argued for the first time on appeal that the court erred by not applying the "shift to column I" rule, OAR 213-012-0020, when it imposed the consecutive sentence on his conviction for first-degree robbery. *Held*: Reversed and remanded for resentencing. The trial court erred by not complying with the "shift to column I" rule. [1] Because the trial court chose to impose a departure sentence for first-degree robbery that was longer than the Measure 11 sentence, "the court [was] required to follow the guidelines' rules, including the 'shift to column I' rule for imposing sentences consecutively. … Had the court followed the 'shift to column I' rule, the maximum departure sentence permitted to be imposed consecutively was 72 months, rather than the 144 months that the court imposed. However, because the mandatory incarceration term for the offense under Measure 11 is greater—90 months—the court was required to impose that sentence rather than the 72-month consecutive guidelines sentence. ORS 137.700(1)." Because the court failed to comply with that rule, "defendant received a sentence for his [first-degree robbery] conviction … that is 54 months longer than the maximum permitted by law." [2] The Court of Appeals exercised its discretion to review the claim as plain error because it was not "certain" on the record that, if defendant had objected below, the trial court would have imposed the same aggregate incarceration term by structuring the sentence differently.

State v. Powell, 253 Or App 185, 288 P3d 999 (2012), *rev den*, 353 Or 714 (2013). Based on a high-speed chase during which he threw baggies of methamphetamine out the window, defendant was convicted of seven offenses including PCS, third-degree assault, and attempting to elude. The court imposed a series of consecutive departure sentences. The Court of Appeals remanded for resentencing based on a *Blakely* error, and the court on remand reimposed the same overall sentence. *Held*: Affirmed. The trial court did not violate the "shift to column I" rule, OAR 213-012-0020(2) when it imposed a 60-month sentence on his PCS conviction, using gridblock 6-A rather than 6-I, after it had imposed a 6-month sentence, using gridblock 2-A, on his conviction for eluding. Application of the "shift to column I" rule does not depend on "the chronological order in which the court imposed sentences" but rather on which conviction is the "primary offense," which means the offense of conviction with the highest crime-seriousness ranking. OAR 213-003-0001(17). Because the PCS conviction was the primary offense, the court correctly used gridblock 6-A when it imposed sentence on that conviction.

Sentencing: statutory sentences—murder (ORS 163.115(5))

State v. Giles, 254 Or App 345, 293 P3d 1086 (2012). Defendant was convicted of murder based on a murder he committed in August 1999. In 2009, the case was remanded for resentencing. On remand, defendant argued that the court could not impose on his conviction the sentence of "imprisonment of life" required by ORS 163.115(5)(a) because he committed the murder during the so-called "*McLain* window"—*i.e.*, after the date on which the Court of Appeals had invalidated that term as unconstitutionally disproportionate in *State v. McLain*, 158 Or App 419 (1999) (*viz.*, February 17, 1999), and before the legislature had fixed the statute by enacting ORS 163.115(5)(c) (*viz.*, October 23, 1999). Relying on *State v. Haynes*, 168 Or App 565 (2000), the sentencing court overruled defendant's objection and imposed life imprisonment with a 300-month minimum. *Held*: Reversed and remanded for entry of corrected judgment. [1] "When this court [held in *McLain*] the former version of ORS 163.115(5)(a) was unconstitutional, that statutory provision could no longer be applied. In light of the inapplicability of ORS 163.115(5), we determined … that the proper sentence was that required by other statutes—a 25-year mandatory minimum as provided in ORS 137.700(2)(a)(A) and ORS 163.115(5)(b), followed by post-prison supervision for life in accordance with OAR 213-005-0004. [That decision] identified and was predicated on the only sentence that could lawfully have been imposed as of that time (*i.e.*, before the enactment of the 1999 amendments)." [2] "We conclude that that was the only sentence to which defendant could lawfully have been subjected as of the time he committed the murder, and because the 1999 amendments prescribe a sentence that is patently harsher than that prescribed by *McLain*, the application of the 1999-amended scheme to defendant violates *ex post facto* protections."

Notes: [a] The Court of Appeals held in *Haynes* that the *ex post facto* clauses did not preclude retroactive application of the ORS 163.115(5)(a), as amended in October 1999, to a murder conviction based on a crime that was committed after re-enactment of the "imprisonment for life" sentence in April 1, 1995 and before *McLain* was issued in February 1999. The court in this decision merely distinguished *Haynes* and did not overrule it. As a result, a defendant convicted of murder based on a crime committed after April 1, 1995, must be sentenced to "imprisonment for life" pursuant to ORS 163.115(5) ***unless*** he or she committed the crime during the eight-month "*McLain* window"—February 17 to October 23, 1999. [b] For a murder conviction based on a crime committed during the *McLain* window, the court still must impose, and the defendant must serve, the 300-month minimum sentence per ORS 163.115(5)(b) and a life-time term of post-prison supervision per OAR 213-005-0004. But without the indeterminate "life sentence," the parole board would not have authority under ORS 163.115(5)(c) to delay or bar the defendant's release once he or she has completed serving the 300-month minimum. In other words, for a murder defendant in that window, he or she is legally entitled to release onto post-prison supervision immediately after completing the 300-month minimum.

Sentencing: statutory sentences—dangerous offender (ORS 161.725 *et seq.*)

^ ***State v. Reinke***, 245 Or App 33, 260 P3d 820 (2011), *rev allowed*, 351 Or 541 (2012). Defendant was convicted of second-degree kidnapping, and the court found him to be a dangerous offender and imposed a 180-month sentence. *Held*: Reversed and remanded for resentencing. [1] Defendant's challenge to the dangerous-offender sentence on the ground that those facts were not specially alleged in the indictment has no merit in light of *State v. Sanchez*, 238 Or App 259 (2010). [2] But the dangerous-offender sentence is error because, under ORS 161.725(1) and 161.737 it must contain "both a determinate mandatory minimum term of incarceration and an indeterminate term, not to exceed 30 years."

Sentencing: statutory sentences—Measure 11 (ORS 137.700)

State v. Brooks, 256 Or App 348, 300 P3d 256 (2013). Defendant was convicted of first-degree burglary and two counts of second-degree robbery. On the robbery counts, the sentencing court denied defendant's request for a departure under ORS 137.712 and imposed a 70-month sentence. *Held*: Reversed and remanded for resentencing. In light of *State v. Arnold*, 214 Or App 201 (2007), the court erred in ruling that defendant was disqualified under ORS 137.712(2)(d)(C) from obtaining a departure. "We remand for resentencing, at which time the trial court can consider whether defendant is otherwise eligible for a lesser sentence under ORS 137.712 and, if so, whether to exercise its discretion to impose such a sentence."

Sentencing: statutory sentences—firearm-minimum (ORS 161.610)

State v. Saechao, 256 Or App 369, 300 P3d 287 (2013). Defendant was convicted of several "firearm" offenses arising from a single incident which he used of a gun to take money from a store. The sentencing court imposed six separate 60-month mandatory minimum firearm sentences pursuant to ORS 161.610(4)(a), despite defendant's objection that the court did not "need" to impose firearm sentence on more than one conviction. Each of those sentences was subsumed in other, longer sentences imposed in the case, and the total sentence was 210 months—120 months on a conviction for attempted aggravated murder and a consecutive 90 months on a conviction for first-degree robbery. *Held*: Reversed and remanded for resentencing. Under *State v. Hardesty*, 298 Or 616, (1985), the multiple firearm-minimum sentences were not authorized under ORS 161.610(4)(a).

Sentencing: statutory sentences—repeat property offenders (ORS 137.717)

State v. Williams, 254 Or App 746, 295 P3d 693 (2013) (*per curiam*). The sentencing court erred when it imposed a sentence under ORS 137.717 based defendant's prior conviction for theft of services under ORS 164.125, because such a conviction does not count as a predicate offense for purposes of the statute.

Sentencing: statutory sentences—"three strikes" law (ORS 137.719)

State v. Molette, 255 Or App 29, 296 P3d 594, *rev den*, 353 Or 788 (2013). Defendant was convicted of second-degree sexual abuse as a lesser-included offense to the charge of first-degree rape, and the jury also found in a special sentencing verdict that defendant had convictions for prior felony sex crimes in Texas; that prior criminal sanctions had not deterred him; that he had been persistently involved in similar criminal activity; and his incarceration was necessary for public safety. At sentencing, the state requested the presumptive life sentence under ORS 137.719. Defendant asked the court to impose a lesser sentence. The sentencing judge said that he was "forced to give him life then," and imposed the life sentence. On appeal, defendant argued that the trial court lacked authority to impose the presumptive sentence under ORS 137.719, because the state failed to prove the predicate facts— *i.e.*, that he had received two prior "sentences" for felony sex crimes—because he received only probation for his two previous sex offenses. Relying on *Gordon v. Hall*, 232 Or App 174 (2009), he argued that his two prior "Unadjudicated Judgments" entered by Texas courts that placed him on probation were not "sentences," because probation was not a sentence under Texas law. He also argued that the court erred because it imposed the life sentence based on an incorrect assumption that a downward departure sentence under ORS 137.719 may not exceed the authorized statutory maximum for the offense. *Held*: Affirmed. Neither argument was preserved, and neither qualifies as "plain error," because it is not obvious that the sentencing court erred in either respect.

Note: The court noted that *Gordon* was not on point because the out-of-state probationary disposition in that case was entered before 1989—when such a disposition became a "sentence" under Oregon law—and the probationary dispositions in this case were entered in the 1990s. The court observed: "We decline to determine whether a 'sentence' for purposes of ORS 137.719 refers to that term under Oregon law or the law of Texas."

Sentencing: statutory sentences—no-release order (ORS 137.750)

State v. Baskette, 254 Or App 751, 295 P3d 177 (2013) (*per curiam*). Defendant was convicted, based on guilty pleas, of various drug- and firearm-related offenses in two consolidated cases. In orally imposing sentence, the trial court stated that defendant would be eligible for "earned time" credits but not AIP; the court did not make findings to support that decision. The subsequent written judgments denied defendant consideration for "any form of temporary leave from custody, reduction in sentence, work release, alternative incarceration program or of conditional or supervised release authorized by law for which the defendant is otherwise eligible at the time of sentencing." On appeal, defendant argued that the trial court erred in denying him eligibility for sentence reductions under ORS 137.750 without making the requisite findings. Acknowledging that he had not raised that issue below, defendant argued that, because the error did not become apparent until the court's written judgments were issued, he was not required to preserve the claim of error for appeal. *Held*: Remanded for resentencing. "The trial court did not make the findings required under ORS 137.750 to deny defendant eligibility for early release, sentence reduction, or other programs; indeed, the court affirmatively stated, in sentencing defendant, … that defendant would be eligible for earned time. … [T]he error as to the denial of earned time did not become apparent until after the court had entered its written judgments, which contradicted the statement that the court had made at sentencing in open court that defendant would be eligible for earned time. In those circumstances, preservation as to that error is not required."

Sentencing: statutory sentences—other prior-conviction offenses

Descamps v. United States, 569 US__, 133 S Ct 2276 (2013). Defendant was convicted in federal court on a charge of felon in possession of a firearm, and the government sought an enhanced sentence under the Armed Career Criminal Act (ACCA), 18 USC § 924, which requires proof of three previous convictions for, *inter alia*, "a violent felony," which is defined to include "burglary." Among defendant's previous convictions was one entered in California state court, based on his plea of guilty, for the offense of "burglary," which is defined by state law to include entering certain locations with an intent to commit larceny or "any felony." Because the state statute does not include as an element either "breaking" or an unlawful entry, the burglary offense is defined broadly enough to include shoplifting. Defendant argued that his conviction for burglary could not be counted as a predicate under the ACCA because the California statute defines the offense too broadly, but the district court overruled that objection after reviewing the record of that case to determine that his offense, in fact, involved "breaking and entering" a business. As a result, the court imposed a significantly longer sentence under the ACCA. The Ninth Circuit, in a split *en banc* decision, affirmed. *Held*: Reversed and remanded. Defendant's conviction cannot count as a predicate under the ACCA. [1] For a prior conviction to count as one for a "violent felony" under the ACCA, it must have been for the "generic" version of one of the listed offenses. "So, for example, we held that a defendant can receive an ACCA enhancement for burglary only if he was convicted of a crime having the basic elements of generic burglary— *i.e.*, 'unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.'" [2] Under *Taylor* v. *United States*, 495 US 575 (1990), the rule for determining when a defendant's prior conviction counts as one of ACCA's enumerated predicate offenses (*e.g.*, burglary) requires a "categorical approach": "Sentencing courts may look only to the statutory definitions—*i.e.*, the elements—of a defendant's prior offenses, and *not* to the particular facts underlying those convictions. If the relevant statute has the same elements

as the 'generic' ACCA crime, then the prior conviction can serve as an ACCA predicate; so too if the statute defines the crime more narrowly, because anyone convicted under that law is necessarily guilty of all the generic crime's elements. But if the statute sweeps more broadly than the generic crime, a conviction under that law cannot count as an ACCA predicate, even if the defendant actually committed the offense in its generic form." [3] When the statute defines the offense in alternative language, the court may use the "modified categorical approach": "it may look beyond the statutory elements to the charging paper and jury instructions used in a case" to determine whether the defendant was convicted of an alternative that would constitute the "generic version" of the listed offense. "For example, if the burglary statute prohibits 'entry of a vehicle or a building,' one of those alternatives (a building) corresponds to an element in generic burglary although the other (a vehicle) does not," in which case resort to the statute alone does not resolve the question. "Because the statute is 'divisible'—*i.e.*, comprises multiple, alternative versions of the crime—a later sentencing court cannot tell, without reviewing something more, if the defendant's conviction was for the generic (building) or non-generic (vehicle) form of burglary. Hence *Taylor* permitted sentencing courts, as a tool for implementing the categorical approach, to examine a limited class of documents to determine which of a statute's alternative elements formed the basis of the defendant's prior conviction." *See also Shephard v. United States*, 544 US 13 (2005). [4] The "generic version" of burglary that applies to the ACCA "requires an unlawful entry along the lines of breaking and entering." But California's version "does not, and indeed covers simple shoplifting." Because California "defines burglary more broadly than the generic offense," defendant's burglary conviction "cannot serve as an ACCA predicate. Whether [he] *did* break and enter makes no difference. And likewise, whether he ever admitted to breaking and entering is irrelevant. Our decisions authorize review of the plea colloquy or other approved extra-statutory documents only when a statute defines burglary not (as here) overbroadly, but instead alternatively, with one statutory phrase corresponding to the generic crime and another not." [5] "The Ninth Circuit erred in invoking the modified categorical approach to look behind [defendant's burglary] conviction in search of record evidence that he actually committed the generic offense. The modified approach does not authorize a sentencing court to substitute such a facts-based inquiry for an elements-based one. A court may use the modified approach only to determine which alternative element in a divisible statute formed the basis of the defendant's conviction."

Note: A conviction in Oregon for first- or second-degree burglary presents a problem under this decision. To be sure, ORS 164.215 and ORS 164.225 generally define the offense as a "generic" burglary—i.e., they require an allegation and proof that the defendant "enters or remains unlawfully in a building." But the definition of "building" in ORS 164.205(1) is far broader than the common-law conception of that term—it also includes "any booth, vehicle, boat, aircraft, or other structure adapted for overnight accommodation of persons or for carrying on business therein." Consequently, the Ninth Circuit held in *United States v. Mayer*, 560 F3d 948, 958-59 (9th Cir 2009), that an unadorned conviction for first-degree burglary under ORS 164.225(1) does not count as a predicate under the "burglary" term in 18 USC § 924(e)(2)(B)(ii). (But the court then went on to hold that the defendant's prior burglary conviction at issue in that case otherwise met the catch-all definition of "violent felony." 560 F3d at 960-63.) It appears from the Court's discussion in *Deschamps* of "divisible" statutes that an Oregon prosecutor can avoid the problem that tripped up the Ninth Circuit in *Mayer* by specifically alleging that the defendant committed the crime in a *real* building. Because the problem identified in *Mayer* is that "building" is defined in overbroad terms for purposes of the "generic" analysis, and because the definition of "dwelling" in ORS 164.205(2) incorporates the term "building," it may be necessary to allege something more specific than just "building" or "dwelling." That is, if you are charging a first- or second-degree burglary that was committed in a *real* building and you are far-thinking enough that you want to ensure that the eventual conviction later may serve as a predicate under the ACCA, you may want to specifically allege in the *videlicet* or to-wit clause the exact nature of the building—e.g., "a dwelling, to-wit: the house at 103 Braeburn Street" or "a building, to-wit: the Newman's store at 1234 Main Street").

^ ***State v. Stark***, 248 Or App 573, 273 P3d 941, *rev allowed*, 352 Or 564 (2012). Defendant was convicted of a felony offense in 2004, and the judgment in that case allowed him to apply for "misdemeanor treatment" upon his completion of probation. In 2006, defendant obtained an order reducing his felony conviction to a misdemeanor. *See* ORS 161.705(1)(d). In May 2008, defendant was charged with being a felon in possession of a firearm. Defendant then obtained a *nunc pro tunc* judgment memorializing that his felony conviction had been reduced to a misdemeanor. At the trial, defendant moved for acquittal, arguing that the reduction of his conviction to a misdemeanor meant that he was not a felon at the time he possessed the firearm. The trial court denied his motion, and he was found guilty. *Held*: Affirmed. Under ORS 166.270(3)(a), a person "has been convicted of a felony" for purposes of the FIP offense "if, at the time of conviction for an offense, that offense was a felony under the law of the jurisdiction in which it was committed" but that such a conviction is not a felony if "[t]he court declared the conviction to be a misdemeanor at the time of judgment." The phrase "at the time of judgment" in that provision "refers to the time when an original felony judgment of conviction was entered, not to a later time when a judgment reducing such conviction to misdemeanor status might be entered."

Sentencing: merger—under ORS 161.067(1) (necessarily or lesser-included offenses)

State v. Foster, 257 Or App __, __ P3d __ (July 31, 2013) (*per curiam*). Defendant threw a beer glass into the victim's face causing serious physical injury. She was convicted on two counts of **second-degree assault**, in violation of ORS 163.175(1)(a) ("causes serious physical injury to another") and (1)(b) ("causes physical injury to another by means of a deadly or dangerous weapon"). The sentencing court entered separate convictions. *Held*: Reversed and remanded. The court should have merged the convictions under ORS 161.067(1), because ORS 163.175(1)(a) and (b) are not separate "statutory provisions" for purposes of that subsection.

State v. Dahl, 256 Or App 848, 302 P3d 480 (2013) (*per curiam*). Defendant was convicted of assault in the fourth degree and two counts of **attempted assault in the second degree**. Both of the attempted-assault convictions were based on an incident in which defendant slammed a door on the victim and then kicked her in the face. On appeal, defendant claimed that the sentencing court committed plain error by not merging the attempted-assault convictions. *Held*: Reversed and remanded. Because ORS 161.485(2) precludes a person from being "convicted of more than one offense … for conduct designed to commit or to culminate commission of the same crime," and because there was not a sufficient pause between the attempted assaults, the trial court committed plain error by failing to merge the guilty verdicts into a single conviction for attempted assault.

State v. Van Newton, 256 Or App 474, 300 P3d 286 (2013) (*per curiam*). Based on multiple incidents, defendant was found guilty of 26 crimes including one count of second-degree assault and one of **fourth-degree assault**, both of which involved the same victim and incident. At sentencing, the state conceded that the latter was a lesser-included of the former and that the verdicts have to merge, and the sentencing court agreed. The judgment stated that, "for the purpose of imposing sentence," the second count "merges" with the first. *Held*: Reversed and remanded for resentencing. The judgment constitutes plain error that requires a remand: "We have previously held that the precise language that the trial court used in it judgment fails to merge a defendant's guilty verdicts."

State v. Arbgast, 256 Or App 482, 300 P3d 309 (2013) (*per curiam*). The sentencing court "committed plain error in failing to merge the guilty verdict for **unlawful use of a weapon** with the guilty verdict for second-degree assault," because those crimes were based on the same incident and involved the same victim.

State v. Brooks, 256 Or App 348, 300 P3d 256 (2013). Defendant was convicted of first-

degree burglary and two counts of **second-degree robbery**. On the robbery counts, the sentencing court entered separate convictions, and imposed concurrent 70-month sentences. *Held*: Reversed and remanded for resentencing. In light of *State v. White*, 346 Or 275 (2009), the court erred in entered separate convictions on the two robbery counts.

State v. Wytcherley, 256 Or App 128, 299 P3d 606 (2013) (*per curiam*). Based on a single incident in which defendant shot his brother in the leg, he was charged with second-degree assault and **unlawful use of a weapon**. A jury found him guilty on both counts, and the trial court entered separate convictions. *Held*: Reversed and remanded. Because all of the elements of UUW are contained within second-degree assault committed with a weapon, and because the offenses did not involve a pause sufficient to preclude merger, the trial court plainly erred by failing to merge the two counts.

State v. Valenzuela, 255 Or App 738, 298 P3d 640 (2013) (*per curiam*). The sentencing court committed plain error when it did not merge defendant's conviction for **unlawful use of a weapon**, ORS 166.220, into his conviction for second-degree assault, ORS 163.175, where both offenses were based on his single act of stabbing the victim with a knife.

State v. Pinard, 255 Or App 417, 300 P3d 177, *rev den*, 353 Or 787 (2013). Defendant shot his neighbor's dog with a razor-bladed hunting arrow. The dog's injuries were so severe that her owners euthanized her at home, believing that she would not survive a trip to the vet. Defendant was charged with one count of aggravated **first-degree animal abuse**, ORS 167.322, and two counts of first-degree animal abuse, ORS 167.320. The trial court convicted defendant on all counts. On appeal, he argued that the trial court plainly erred by not merging the aggravated first-degree animal abuse with the first-degree animal abuse count, and by not merging the two first-degree animal abuse counts with each other. The state conceded that the two first-degree animal abuse counts, which were based on a single incident, were subject to merger, but argued that aggravated first-degree animal abuse and first-degree animal abuse do not merge, because each crime requires proof of a different mental state—aggravated abuse requires proof of a "malicious" killing (killing with malicious intent), whereas abuse requires proof of a "cruel" killing (killing in a manner calculated to cause pain). *Held*: Reversed and remanded for entry of a single count of first-degree animal abuse; otherwise affirmed. [1] The court did not plainly err in entering separate convictions for first-degree animal abuse and aggravated first-degree animal abuse. "[W]e need not conclusively resolve whether the two statutes require proof of different elements; the question is at least reasonably in dispute, and defendant's challenge therefore does not establish plain error." [3] As the state conceded, the trial court did plainly err in entering two convictions for first-degree abuse based on the single incident, and on remand should merge the two counts into a single conviction.

State v. Epps, 255 Or App 290, 296 P3d 663 (2013) (*per curiam*). Defendant was found guilty on two counts each of **possession of a stolen vehicle**, ORS 819.300 (PSV), and unauthorized use of a vehicle, ORS 164.135 (UUV), and the court entered a separate conviction on each. *Held*: Reversed and remanded for merger and resentencing. Each UUV conviction must merge with the companion PSV conviction.

State v. Cam, 255 Or App 1, 296 P3d 578 (2013). Defendant was at the center of a massive property-theft ring based in Woodburn. Thieves would bring him stolen goods in exchange for cash or drugs. The jury found defendant guilty of 53 theft and drug-related charges. *Held*: Reversed and remanded for resentencing. [1] The two convictions for "commercial drug offense" **PCS** do not merge even though the counts dealt with the same substances. "In determining whether convictions merge under ORS 161.067(1), the court considers the statutory elements of each offense, not the underlying factual circumstances recited in the indictment," and offense subcategories such as CDO "are not statutory elements of the offense." [2] The court accepted the state's concession that counts

of **theft** against the same victim should have merged, reducing the number of defendant's total convictions by four.

State v. Joynt, 254 Or App 415, 294 P3d 534 (2012) (*per curiam*), *rev den*, 353 Or 788 (2013). Defendant was found guilty of two counts of **first-degree theft** for stealing a truck and parts from that truck, and was found guilty on three pairs of counts charging unlawful use of a vehicle, ORS 164.135 (UUV), and **unlawful possession of a stolen vehicle**, ORS 819.300 (PSV), for illegally towing three cars. The court entered separate convictions on those verdicts. *Held*: Reversed and remanded to merge various verdicts and for resentencing. [1] The two theft verdicts merge. *State v. Noe*, 242 Or App 530, 532 (2011). [2] Also based on *Noe*, all of the elements of the PSV offense are subsumed into the companion UUV offense, "in a case like this one," and so those verdicts merge.

Bumgarner v. Nooth , 254 Or App 86, 295 P3d 52 (2012). In 2004, petitioner was convicted of two counts of **first-degree rape**, two counts of first-degree unlawful sexual penetration, two counts of first-degree sexual abuse, two counts of first-degree kidnapping, and one count of third-degree assault. Trial counsel did not argue that the verdicts should have merged. The judgment was affirmed on appeal. At the time of trial, there was case law that the convictions on the sex crimes and kidnapping did not merge, but there were also cases suggesting that convictions for the same offense merge when the charges had been based on different statutory subsections. It was not until after the trial in this case that the appellate courts definitely announced that the verdicts should merge. *State v. Parkins*, 346 Or 333 (2009). Petitioner sought post-conviction relief, arguing that his trial counsel was constitutionally inadequate for not requesting merger. The post-conviction court agreed and granted post-conviction relief, and the state appealed. *Held:* Affirmed. [1] Reasonable trial counsel would have discerned, from existing case law holding that different theories of aggravated murder merged, that the structure of the aggravated-murder statute and the statutes involved in this case was similar, and that the convictions at issue in this case should merge. [2] "Uncertainty in the law regarding when convictions would merge … did not relieve trial counsel of the obligation to assert that the sentences at issue were subject to merger." Despite any ambiguity in the law, the benefits of raising merger as an issue were so obvious that any reasonable lawyer would have done so. [3] Given the "obvious possible benefits" of arguing that the verdicts should merge, trial counsel's failure to argue for merger constituted inadequate assistance.

State v. Kinsley, 253 Or App 251, 289 P3d 367 (2012) (*per curiam*). Defendant was found guilty on charges of **delivery of methamphetamine** within 1,000 feet of a school, delivery of methamphetamine, first-degree child neglect, and **endangering the welfare of a minor**, and the court entered separate convictions. *Held*: Remanded for resentencing. [1] Under *State v. Rodriquez-Gomez*, 242 Or App 567 (2011), convictions for delivery of methamphetamine within 1,000 feet of a school and delivery of methamphetamine merge. [2] Under *State v. Reiland*, 153 Or App 601 (1998), and based on the manner in which the offenses were charged, the convictions for endangering the welfare of a minor and first-degree child neglect merge.

State v. Ledford, 252 Or App 572, 287 P3d 1278 (2012) (*per curiam*), *rev den*, 353 Or 209 (2013). Based on a single incident, defendant was convicted of **first-degree rape**, first-degree sexual abuse, and second-degree sexual abuse by jury verdicts, and the court entered separate convictions on those verdicts. *Held*: Reversed and remanded. The trial court erred by not merging the guilty verdicts on the first-degree rape and second-degree sexual abuse charges into a single conviction for first-degree rape.

Sentencing: merger—under ORS 161.067(2) (different victims)

State v. Haney, 256 Or App 506, 301 P3d 445 (2013). Defendant stole a car in Washington, where police arrested him and towed the vehicle to an impound lot; later that night, defendant broke

into the impound lot, took the car, and drove to Oregon, where he was arrested and charged with two counts of **unauthorized use of a vehicle**, ORS 164.135(1)(a) (one count naming the victim as the car owner; the other count naming the victim as the tow company) and two counts of possession of a stolen vehicle (each listing the same victims individually). Before trial, the prosecutor agreed to drop the two PSV counts and to recommend no more than 13 months incarceration in exchange for defendant's guilty plea to the UUV counts. Later, at sentencing after his guilty plea, defendant argued that the two UUV counts should merge under ORS 161.067(2) because owners must be considered a "single victim for purposes of determining the number of separately punishable offenses." The trial court (Judge Christopher Marshall) agreed with the prosecutor's argument that there were separate victims here because the nature of their ownership interests (lienhold vs. ownership) differed, and it entered two UUV convictions (with concurrent sentences). *Held:* Reversed and remanded with instructions to merge UUV convictions and for resentencing; otherwise affirmed. [1] The owner and the tow company were UUV victims under ORS 161.067(2) because they both had a right of possession superior to the taker of the car (ORS 164.005(4)). [2] But even though "the property interests held by the owner and the lienholder are distinct, the interest that a defendant infringes on in committing UUV is their possessory interest and, thus, the defendant causes the same infringement of the right to possess the vehicle that both parties have, despite their differing interests."

^ ***State v. Nix***, 251 Or App 449, 283 P3d 442 (2012), *rev allowed*, 353 Or 410 (2013). Defendant was charged with 93 counts of **first- and second-degree animal neglect** for neglecting horses and goats that he owned. The jury found him on 20 counts of second-degree animal neglect. At sentencing, defendant argued that all the verdicts should merge into a single conviction for second-degree animal neglect. The trial court agreed, holding that the animals were not separate "victims" under ORS 161.067(2); rather, the sole victim was the public generally. *Held*: Remanded for entry of separate convictions for each guilty verdict and for resentencing; otherwise affirmed. [1] Because ORS 167.325 does not expressly state who the "victim" is of an animal-neglect offense, "we examine the statute to identify the gravamen of the crime and determine the class of persons whom the legislature intended to directly protect by way of the criminal proscription." [2] Although an animal is not a "person," no provision "expressly or implicitly provides that the victim of a violation of the animal neglect statutes is a person," and neither 131.007(2) (which defines "victim" for much of the criminal code) nor Art. I, § 44(3), by their terms, applies to the animal-neglect statutes or ORS 161.067. [3] "[T]he legislature has the power to designate, either expressly or by implication, a different meaning of victim than person. In fact, we have concluded, not infrequently, that the legislature has intended for the public, not a person or persons, to be the victim of a criminal offense. . . Thus, ever mindful of the ordinary meaning of victim, our objective remains to ascertain whether the legislature intended that meaning or a different meaning with respect to ORS 167.325." [4] "The gravamen of the offense of second-degree animal neglect is the defendant's 'fail[ure] to provide minimum care for an animal in such person's custody or control.' Thus, the fact that ORS 167.325 proscribes the failure to act with regard to 'an animal' indicates that the legislature intended to protect animals by creating the crime of second-degree animal abuse," as does the statutory definition of "minimum care." [5] **"**Our conclusion that the legislature intended to protect animals when it enacted ORS 167.325 is not the end of the inquiry, however, because it does not inexorably follow from that conclusion that the legislature intended for animals to be victims." A "generalized legislative concern is not enough to establish who the victim is under ORS 161.067(2). Instead, there must be affirmative textual evidence of a deliberate choice by the legislature." [6] "For there to be a human victim in this case, it would be necessary to conclude that the legislature intended to treat neglected animals as property of their owners who, in turn, would qualify as victims of the offense. … Here, there is no textual indication that the legislature intended ORS 167.325 to protect the property interest of an animal's owner by criminalizing acts of neglect that would adversely affect that interest. … In light of the statute's focus on the harm to individual animals, that outcome likewise would make little sense. Thus, we conclude that the victim under ORS 167.325 is not a person." [7] "Based on the text and

context of ORS 167.325, it appears that the legislature's primary concern was to protect individual animals as sentient beings, rather than to vindicate a more generalized public interest in their welfare. . . The legislative history confirms that tentative conclusion." [9] "We conclude that the individual animal identified in each count of second degree animal neglect for which defendant was found guilty qualified as a separate victim under ORS 167.325 for purposes of the application of ORS 161.067(2). It follows that the trial court erred in merging those guilty verdicts into a single conviction."

Note: The court did not "detain [itself] with a potential parade of horribles such as the prospect of multiple convictions arising from an omission such as the failure to adequately care for a fish bowl full of guppies. To the extent that the exercise of sound prosecutorial and judicial sentencing discretion do not resolve such hypothetical concerns, their ramifications are best left for another day."

Sentencing: merger—under ORS 161.067(3) (repeated violations of same offense)

State v. Ostrom, 257 Or App 520 __ P3d __ (2013) (*per curiam*). Defendant was charged with multiple counts of **theft**. Each count alleged that he had committed the theft "on or between November 01, 2010 and August 05, 2011." Pursuant to a plea agreement, defendant pleaded guilty to three counts of second-degree theft without qualification, and the state dismissed two other counts. After the court accepted his guilty pleas, defendant argued that the three counts should merge into a single conviction because "they're alleged exactly the same." The state argued that the counts should not merge because the three thefts were "discrete incidents." The trial court declined to merge the counts. *Held*: Affirmed. "We conclude that, because defendant pleaded guilty to committing each theft within a date range, the trial court could conclude that defendant committed each theft on different dates—separated by, for example, months—within that range." *See Hibbard v. Board of Parole*, 144 Or App 82, 88 (1996), *vac'd on other grounds*, 327 Or 594 (1998) (when a defendant pleads guilty to committing a crime within a date range and thereby fails to limit his plea temporally, the defendant "assent[s] to the broadest construction of his pleas, *i.e.*, that the state could prove that he committed the offenses on any of the dates alleged in the indictment"). "From there, the trial court could conclude that the thefts were separated by sufficient pauses and, therefore, were separately punishable offenses."

State v. Chappell, 256 Or App 123, 299 P3d 604 (2013) (*per curiam*). Defendant was found guilty of 46 crimes, including five counts of being a **felon in possession of a firearm**. He argued that the trial court should have merged those counts into a single conviction because he stole them in a single burglary from a single victim. The trial court refused to merge the convictions. On appeal, the state acknowledged that the trial court erred under the Court of Appeals' opinion in *State v. Torres*, 249 Or App 571 (2012), but argued that *Torres* was wrongly decided. *Held*: Reversed and remanded. "We adhere to our holding in *Torres* and conclude that, because the record in this case contains no evidence of a sufficient pause in defendant's criminal conduct, the trial court erred in failing to merge defendant's guilty verdicts for being a felon in possession of a firearm stemming from the single burglary."

State v. Reed, 256 Or App 61, __ P3d __ (2013). Defendant led several police officers on a chase that spanned an hour and a half. He managed to get away for various periods, only to be found again and resume the chase. He was charged with, among other things, four counts of **attempting to elude** a police officer, which each count corresponding to a particular officer that defendant attempted to elude. He was convicted on all counts, and argued that the counts should merge into a single conviction. The trial court declined to merge the counts, entering four counts of conviction. *Held*: Affirmed. The four counts do not merge under ORS 161.067(3) because defendant committed four crimes, and those crimes were separated by sufficient pauses. [1] "In order to support multiple attempts to elude, (a) the defendant must have completed each attempt to elude—that is, he must have

stopped running or hiding—before beginning the next attempt to elude, and (b) each attempt to elude must have been separated from the others by a pause in the defendant's conduct sufficient to afford him an opportunity to renounce his criminal intent." [2] "Whether a defendant stopped running or hiding from the police at a particular point in time is a question of historical fact" for the trial court, and that finding binds the appellate court when it is supported by "constitutionally sufficient evidence in the record." [3] The record supported the trial court's implicit factual findings that defendant ceased running or hiding between his attempts to elude, as well as its legal conclusion that "there was a sufficient pause between each of the attempts to elude to afford him the opportunity to renounce his criminal intent."

State v. Gerlach, 255 Or App 614, 300 P3d 193, *rev den*, 353 Or 787 (2013). Defendant drove into and knocked a 10-year-old girl off her bicycle, he then forced her into his car, drove her to a remote area, parked, and sexually assaulted her. He then got back into the driver's seat and drove off, with the victim still in the car, heading toward a forested, mountainous area, possibly with an intent to murder her and dump her body. Fortunately, the police caught up with him and forced his car off the road, and the victim was rescued. Defendant was charged with two counts of **first-degree kidnapping**, among other crimes. The state's theory was that his act of forcing the victim into his car and driving to the location of the sexual assault constituted one kidnapping, and his act of driving the victim from that location toward the mountainous area constituted the second kidnapping. Defendant stipulated that he committed all of the acts alleged in the indictment. At sentencing, he argued that the two kidnapping counts should merge. The sentencing court rejected that argument holding that, under ORS 161.067(3), the two counts did not merge because they constituted "repeated violations" of the kidnapping statute and were separated by a "sufficient pause in the defendant's criminal conduct to afford the defendant an opportunity to renounce the criminal intent." *Held*: Reversed and remanded. [1] Defendant's stipulation to the facts alleged in the indictment does not preclude review of his claim: "the scope and application of ORS 161.067 is a question of law that we review for errors of law." [2] "Because kidnapping is the seizure of a person for the purpose of substantially interfering with the person's liberty, it is a continuing crime. It continues for as long as the seizure continues. Therefore, if defendant commits the crime of kidnapping by taking a person from one place to a second place, the defendant does not commit an additional kidnapping by moving the person from a second place to a third place." [3] Because a single deprivation of the victim's personal liberty is a single violation of ORS 163.225, and, consequently, a single violation of ORS 163.235, merger of defendant's kidnapping counts is not prevented by ORS 161.067(3)."

State v. Aitken, 255 Or App 17, 296 P3d 587 (2013). Defendant committed a knife attack on two victims (Walker and Torres) in an apartment. A jury found defendant guilty on one count of first-degree assault and three counts of second-degree assault against Walker, and two counts of **second-degree assault** against Torres. The trial court merged several of the convictions, but refused to merge two counts in which Walker was the victim, finding that defendant had a "substantial opportunity to stop" and "renounce [his] criminal intent" between the assaults underlying those counts. *Held:* Remanded for resentencing; otherwise affirmed. In determining whether to merge counts committed against the same victim in a single criminal episode under ORS 161.067(3), the issue is whether there was a "sufficient pause in defendant's criminal conduct to permit the two offenses to be separately punishable," which means that "one offense ended before the other began." The sentencing court found that there was such a pause in defendant's attack on Walker, a finding that is binding on appeal.

State v. G. L. D., 253 Or App 416, 290 P3d 852 (2012). Youth and a couple of other teenagers broke into a high school, stole 20 computers, and set the school on fire. After a hearing, the juvenile court determined that youth had committed acts that constitute first-degree arson, aggravated first-degree theft, two counts of **second-degree burglary**, and first-degree criminal mischief. *Held*: Affirmed. The juvenile court correctly did not merge the two burglary adjudications because the

evidence allowed the court to find that youth made two separate entries—first to take the computers, then 15 minutes later to the school to set the fire—which provided him a sufficient opportunity to renounce his criminal intent, for purposes of ORS 161.067(3).

Note: Because the Court of Appeals affirmed the juvenile court's ruling that the burglary adjudications do not merge under ORS 161.067(3), it did not address the state's argument that ORS 161.067 does not apply to delinquency proceedings.

State v. Glazier, 253 Or App 109, 288 P3d 1007 (2012), *rev den*, 353 Or 280 (2013). Defendant assaulted the victim by dragging her out of bed by her ankle, causing her to hit her head and hip on the floor, dragging her out of the room, repeatedly striking her head against a hardwood floor, and kicking her in the torso. Defendant was found guilty on charges of **second-degree assault** and two counts of fourth-degree assault. At sentencing, he argued that his guilty verdicts on the three assault counts should merge into a single conviction for second-degree assault because his actions were part of a single criminal episode and were not separated by sufficient pauses. The court disagreed and entered separate convictions. *Held*: Reversed and remanded with instructions to merge the guilty verdicts into a single conviction for second-degree assault and for resentencing; otherwise affirmed. Defendant's actions were not "separately punishable" assaults under ORS 161.067(3) because "there was no evidence of a temporal break such that a trier of fact could find that one assault had ended before another began. Defendant's conduct was continuous and uninterrupted; there was no evidence that he paused his aggression from the time he pulled the victim off the bed to final charged act of kicking her in the torso."

State v. Jay, 251 Or App 752, 284 P3d 597 (2012) (*per curiam*), *rev den*, 353 Or 209 (2013). As a result of a single burglary/robbery incident after which defendant and his co-perpetrators divided up the loot, defendant was convicted on two counts of **first-degree theft** by receiving based on a laptop and knives that were stolen. *Held*: Reversed and remanded. The sentencing court erred by entering separate convictions on those counts, because both items were stolen "during the court of one criminal episode and without evidence of a sufficient pause between the thefts."

Sentencing: probation revocation

State v. Lewis, 257 Or App __, __ P3d __ (July 24, 2013). Defendant was charged by a six-count indictment with a variety of drug crimes that he committed on December 29 and 30, 2009, within 1000 feet of a school. Pursuant to a plea agreement he pleaded guilty to four counts, he stipulated that the crimes "are all separate acts that … warrant consecutive sentences," the state dismissed the other charges, and the parties stipulated to dispositional departures to probationary sentences on three of the convictions. Later, he was back before the court on allegations that he violated his probation by possessing and using marijuana. He admitted that allegation, and the court revoked his probation and imposed the presumptive sentences in the range of 23 to 26 months. Defense counsel said, "I *ask* the court to run in concurrent," noting "with one admission, there is only one sanction to be imposed." The sentencing court ordered him to serve those sentences consecutively, because that was contemplated in the parties' plea agreement, and defense counsel did not object, much less argue that the court *had* to impose concurrent sentences, nor he cite any authority for that proposition. On appeal, defendant argued for the first time that OAR 213-012-0040(2)(b) *required* the court to impose concurrent sentences because the revocation was based on only a single violation, and he also cited *State v. Stokes*, 133 Or App 355 (1995), for that proposition. In response, the state argued that the parties had effectively stipulated to the imposition of consecutive sentences upon revocation as part of their plea deal and that, in any event, the rule does not apply where, as here, the underlying convictions are based on crimes the defendant committed during separate criminal episodes, relying on *Miller/Bucholz* which adopted essentially the same rule for purpose of imposing consecutive sentences under OAR 213-012-0020(2). *Held*: Reversed and remanded. The court erred by imposing consecutive sentences upon revocation. [1] The parties had

not stipulated to imposition of consecutive sentence upon revocation—rather, the parties' plea agreement merely allowed that the state could *request* consecutive sentences. [2] Although the convictions are based on crimes defendant committed during separate criminal episodes, OAR 213-012-0040(2)(b) required the court to order that the revocation sanctions are to be served concurrently, because there was only one violation.

Notes: [a] As this case illustrates, OAR 213-012-0040(2)(a) requires the court to impose *concurrent* sentences if it revokes probation on multiple *felony* convictions based only a single violation. If you want the court to be able to impose consecutive sentences, ensure that defendant admits to, or the court finds, more than one violation. Whether the court can impose consecutive sentences depends entirely on whether there are multiple violations and not on whether consecutive sentences otherwise may be proper under ORS 137.123. *See State v. Newell*, 238 Or App 385 (2010). [b] The Court of Appeals concluded that the parties' plea agreement was not quite specific enough to permit the court on revocation to disregard the limitation in OAR 213-012-0040(2)(a). If you want a "zero tolerance" probation, ensure that the plea agreement expressly provides that the parties stipulate that upon revocation for any violation the court will or may impose consecutive sentences despite any limitation in OAR 213-012-0040(2)(a). *See State v. Ivie*, 213 Or App 198 (2007) (enforcing a similar agreement). [c] Note that the rule, and hence this opinion, does *not* apply to a revocation on probation on a conviction for a misdemeanor.

State v. Brand, 257 Or App __, __ P3d __ (July 24, 2013). Defendant was charged with a variety of drug and sexual offenses involving minors. He pleaded guilty to two counts of DCS/minor (each count specifically named a different child), the state dismissed all the other charges, and the court dispositionally departed from the presumptive prison sentence and imposed probationary sentences. Later, defendant was back before the court on an allegation that he violated his probation by consuming alcohol in a single incident. The court revoked his probation, imposed the presumptive 27- and 29-month prison sentences, and ordered him to serve them consecutively. Defendant objected, but the court overruled the objection, noting simply, "They're two different minors; two different girls." On appeal, defendant that OAR 213-012-0040(2)(b) *required* the court to impose concurrent sentences because the revocation was based on only a single violation, and he also cited *State v. Stokes*, 133 Or App 355 (1995), for that proposition. In response, the state argued that those authorities have been trumped by Art. I, § 44(1)(b), which provides, "No law shall limit a court's authority to sentence a criminal defendant consecutively for crimes against different victims." *Held*: Reversed and remanded. The court erred by imposing consecutive sentences upon revocation. Although the convictions are based on crimes defendant committed against different victims, OAR 213-012-0040(2)(b) required the court to order that the revocation sanctions are to be served concurrently, because there was only one violation.

State v. Milnes, 256 Or App 701, 301 P3d 966 (2013). Defendant was charged with felon in possession of a firearm and violating her probation (by failing to comply with special conditions that she remain law-abiding and abstain from use of intoxicants). At trial, defendant admitted that she and her boyfriend had been arguing and that she was drunk (in violation of her probation). But she denied trying to stall police entry into her room to allow her boyfriend to escape and denied seeing a rifle or ammunition in her room. Based on the discrepancy between defendant's statements at the scene to police and her testimony at trial, the prosecutor requested the uniform "witness false in part" instruction. *See* UCrJI 1026; ORS 10.095(3). The circuit court gave the instruction over defendant's objection, and the jury found her guilty. The court then found her in violation of her probation based on that conviction and on her admitted use of alcohol. *Held*: Reversed. The trial court committed reversible error by giving "witness false in part" instruction. The circuit court's finding that defendant violated her probation also must be reversed and remanded because the stated basis for its decision included both her conviction and her admitted probation violation by being intoxicated—it did not indicate that it would have reached the same finding based only on defendant's admitted intoxication, so the case should be remanded to allow the court to make that decision.

State v. Barajas, 254 Or App 106, 292 P3d 636 (2012), *rev den*, 353 Or 747 (2013). Defendant was convicted of felony fourth-degree assault and misdemeanor fourth-degree assault, and the court imposed probationary sentences. He subsequently violated the terms of probation, and the trial court revoked his probation and sentenced him to six months in prison on the felony conviction pursuant to OAR 213-010-0002(1), and 12 months in jail for the misdemeanor conviction pursuant to ORS 137.545(5)(a). On appeal, defendant argued that the 12-month jail sentence imposed on his misdemeanor conviction is unconstitutionally disproportionate under Art. I, § 16, because it exceeds the 6-month maximum sentence that the court could impose after revoking his probation on the conviction for *felony* fourth-degree assault. *Held*: Affirmed. [1] The 12-month sentence is not unconstitutionally disproportionate. "Where 'the actual sentence imposed' includes a jail term imposed on revocation of probation on a lesser-included misdemeanor, the appropriate comparator is the maximum sentence that was originally available on the greater-inclusive felony. … [T]hat is so because, in revoking probation for a misdemeanor and imposing a jail sentence, a trial court is belatedly imposing the sentence that it could have imposed or did impose at the original sentencing, but which it decided to hold in abeyance in favor of probation. That sentence is punishment for the original offense. Consequently, in evaluating the vertical proportionality of the sentence imposed on a lesser-included misdemeanor, we compare it to the maximum sentence that was available at the original sentencing to punish the greater-inclusive felony." [2] "When the sentence for the greater-inclusive offense is governed by the sentencing guidelines, the proper comparator is the maximum departure sentence available for the gridblock representing the intersection of the defendant's criminal history score and the crime's seriousness rating." Here, that would have been 18 months in prison for the felony assault, which exceeds the 12-month sentence that defendant actually received on the misdemeanor.

State v. Erives, 252 Or App 93, 284 P3d 1276 (2012), *rev den*, 353 Or 203 (2013). Defendant, who speaks Spanish and some English, appeared before the court on allegations that he had violated his probation. Neither he nor his counsel requested an interpreter, and the trial court did not appoint an interpreter. During defendant's testimony, the court *sua sponte* brought in an interpreter. The court found him in violation. On appeal, defendant argued for the first time that the trial court erred by not appointing an interpreter for the entirety of the proceedings. *Held*: Affirmed. [1] On this record, defendant was entitled to the services of an interpreter. ORS 47.275(1). [2] Under the circumstances of the case, however, it was not obvious that an interpreter was required: (a) at the outset of the hearing, defendant engaged in a colloquy with the court that suggested that he understood English; (b) defendant was represented by counsel who had previously conferred with defendant and informed the court at the outset of the hearing that defendant was ready to proceed; and (c) neither defendant nor his attorney every requested the appointment of an interpreter.

Sentencing: fines and compensatory fines

M.F.K. (Foster) v. Miramontes, 352 Or 401, 287 P3d 1045 (2012). Plaintiff filed a petition under ORS 30.866 in which she requested both a stalking protective order (SPO) against defendant and an award of compensatory damages for lost sick and annual leave, lost wages, and counseling expenses. Defendant demanded a jury trial on the claim for damages; he based that claim on Art. I, § 17, and Art. VII (Am), § 3. The trial court denied that request, and after a trial to the court, it issued a SPO and entered a judgment against defendant for $42,000 in compensatory damages. Defendant appealed, and the Court of Appeals affirmed. *Held*: Reversed and remanded—defendant is entitled to a jury trial on plaintiff's claim for compensatory damages. [1] ORS 30.866 allows a plaintiff to request both issuance of a SPO and compensatory damages, but it does not authorize the trial court to provide the defendant with a jury trial on the damages claim. [2] Under Art. I, § 17, and Art. VII (Am), § 3, "the relevant inquiry is not whether a newly created statutory claim existed at common law, but whether, because of its nature, it falls within the guarantee of the Constitution to a jury trial."

[3] "If plaintiff had sought only money damages under ORS 30.866—that is, had she not combined her claim for money damages with a claim for [an SPO]—then her claim would have been at law and the right to jury trial would have attached." On the other hand, "if plaintiff had sought only injunctive relief [in the form of an SPO], her claim would have been equitable in nature, and the constitution would not provide a right to a jury trial. … There is no right to jury trial on equitable claims." [4] "[T]he right to jury trial must depend on the nature of the relief requested and not on whether, historically, a court of equity would have granted the relief had the legal issue been joined with a separate equitable claim. … Instead, we conclude that [Art. I, § 17, and Art. VII (Am), § 3] do not guarantee a right to jury trial for claims or request for relief that, standing alone, are equitable in nature and would have been tried to a court without a jury at common law. By the same token, in the absence of a showing that the nature of a claim or request for relief is such that, for that or some other reason, it would have been tried to a court without a jury, those provisions do guarantee a right to jury trial on claims or requests that are properly categorized as 'civil' or 'at law.'" [5] Because "plaintiff's claim seeking monetary damage for injury inflicted fits within those terms, even if it does not have a precise historical analog," defendant was entitled to a jury trial on that claim. [6] When a mixed petition is before the trial court in which the plaintiff is seeking both equitable relief and compensatory damages and the defendant demands a jury trial on the damages claim, the court should defer ruling on the equitable claim until the jury has rendered a verdict on the damages claim.

State v. Choat, 251 Or App 669, 284 P3d 578 (2012). Defendant was the driver of a car involved in an accident in which two of his passengers died and another was injured. A jury found him guilty of two counts of second-degree manslaughter, three counts of recklessly endangering another person, and one count each of assault, reckless driving, and driving under the influence of intoxicants. The court imposed a 156-month sentence and a compensatory fine of $1,590.02, which was designated to repay a witness—the sister of one of the killed passengers—for her airfare and hotel expenses incurred in order to attend the trial. Defendant had objected to imposition of that sum as *restitution*, but he did not object when the court imposed it as a compensatory fine instead. *Held*: Affirmed. [1] ORS 137.101(1) limits a compensatory fine only to expenses that may be recovered in a civil action, and costs associated with an injured person's family attending trial are not recoverable by civil action. [2] Defendant's objection is not preserved because "this record indicates that defendant objected to restitution, arguing that it was not authorized because the expense was a normal cost of prosecution; the court, alerted to defendant's objection to restitution, ordered a compensatory fine instead, to which defendant did not object. Moreover, even if defendant's objection to restitution were broad enough to encompass an objection to the compensatory fine, the fact remains that his argument—whether against restitution, compensatory fine, or both—was not developed in enough detail to permit the state to respond to it or the court to evaluate it." [3] Even though the error in this case is an error of law and is not reasonably in dispute, the Court of Appeals declined to review it as "plain error" because "an inference that might be drawn from the record is that defendant's decision not to object to the imposition of a compensatory fine in the amount of $1,590.02 was a strategic choice, because doing so would have provided the trial court with the opportunity to reconsider its decision not to impose a fine of $50,000 for the benefit of Allstate."

Sentencing: restitution

^ ***State v. Algeo***, S 060830 (on victim's petition for review under ORS 147.539). Did the sentencing court err when it applied comparative-negligence principles under ORS 31.600 to apportion responsibility for the victim's injuries between the victim and defendant, and then reducing the amount it ordered defendant to pay in restitution to the percentage of the victim's economic damages attributed to defendant's conduct?

State v. Wagoner, 257 Or App __, __ P3d __ (July 24, 2013). Defendant pleaded guilty to identity theft. Although the victim previously had submitted her restitution request for $800, the

victim's advocate who received it failed to forward that information to the prosecutor. When the prosecutor represented at sentencing that the victim had not provided restitution information, the court did not award restitution. Several months later, the victim's request was found, and she filed a motion under Art. I, § 42(1)(d), asserting her right to restitution. The court granted that request and imposed restitution in a supplemental judgment. On appeal, defendant asserts that, because the state did not investigate and present to the court the nature and amount of restitution prior to the time of sentencing, the court had no authority to impose restitution. *Held*: Affirmed. [1] Under Art. I, § 42(1)(d), "a victim in a criminal prosecution has the right to receive prompt restitution from the convicted criminal who caused the victim's loss or injury," and the legislature may provide by law for effectuation of that right. [2] In light of *State v. Thompson*, 257 Or App 336 (2013), "ORS 137.106 did not prevent the court from imposing restitution in order to provide the victim a remedy by due course of law, after it was discovered that her constitutional right to restitution was violated."

State v. Thompson, 257 Or App 336, __ P3d __ (2013). Defendant crashed into a stop sign and street light pole owned by the City of Monmouth, and he was charged with failing to perform the duties of a driver. He pleaded guilty and agreed to pay restitution. At sentencing, the court awarded $162 in restitution for damages to the stop sign, but denied the prosecutor's request for $1694.37 in restitution for the damaged light pole because "the prosecutor was late in presenting that figure to the court." Three months later the victim, the City of Monmouth, filed a claim that the trial court violated its constitutional right "to prompt restitution" under Art. I, § 42(1)(d). Two months after that, the trial court held a hearing on the claim and granted the victim its requested relief by amending the judgment to include the restitution requested for the damaged light pole. *Held*: Affirmed. The trial court properly amended the judgment to include additional restitution as a remedy for the violation of the victim's right to prompt restitution. [1] The victim was not limited to seeking relief only in the Supreme Court: Art. I, § 42(3)(b), does not limit a crime victim's remedies for a rights violation to a petition for writ of mandamus to the Supreme Court in a case that is not pending; rather, the Oregon Constitution "makes clear that the legislature is authorized to create procedures for a crime victim to pursue remedies in addition [to mandamus]," which the legislature has done by enacting ORS 147.515. [2] The victim's failure to file its claim in the trial court within time specified in ORS 147.515 was not a jurisdictional defect: "the time window of ORS 147.515, when read in context of the victims' rights scheme as a whole, does not operate as a restriction on the trial court's jurisdictional authority to hear a victim's untimely claim." Consequently, "we decline to address the merits of defendant's unpreserved argument that the city's claim was untimely." [3] The 90-day limit in ORS 137.106(1) (2011), "by its plain language, does not constrain the time in which a trial court may resentence a defendant as a means of remedying a violation of a victim's constitutional rights."

State v. Al-Khafagi, 257 Or App 363, __ P3d __ (2013) (*per curiam*). Defendant appealed from a judgment imposing restitution in the amount of $182,437, and he argued that he was entitled to a jury trial on the issue of restitution. Defendant acknowledged prior case law holding that Art. I, § 17, does not apply to the determination of the amount of restitution, but he contended that amendments to the restitution statutes have changed restitution's purpose from a penalty to a "quasi-civil recovery device" for victims. *Held*: Affirmed. Because defendant's obligation to pay restitution to a victim remains penal in nature despite the statutory amendments, Art. I, § 17, did not apply.

State v. Coronado, 256 Or App 780, 302 P3d 477 (2013). Defendant was convicted on two counts of second-degree assault and one count of third-degree assault. At the first sentencing hearing, the state asked the court to impose restitution of $5,932 to the victim and $38,677 to the victim's insurer. Defense counsel stated, "No objection." At the second sentencing hearing, the trial court ordered that the parole board would determine the amount of restitution. Defendant did not object, and the judgment reflected the trial court's order for the board to set the amount of restitution. *Held*: Affirmed. [1] Although ORS 137.106(4)(a) allows a trial court to have the board set a payment schedule for restitution, only the trial court has the authority to determine the *amount* of restitution.

[2] But even though the trial court committed plain error, the Court of Appeals refused to exercise its discretion to reach the error: (1) defendant could have brought the error to the trial court's attention; (2) it would have been an easy error for the trial court to fix; and (3) striking the award of restitution, as defendant had asked the appellate court to do, could have resulted in a windfall for defendant.

State v. Nelson, 256 Or App 480, 300 P3d 307 (2013) (*per curiam*). The sentencing court erred when it imposed restitution in the amount of $250 upon defendant's convictions for coercion and fourth-degree assault, because there was an "absence of a causal relationship between his criminal conduct and the victim's economic loss." Remanded for resentencing.

State v. White, 255 Or App 560, 298 P3d 50 (2013). Defendant was convicted of assault in the fourth degree and the court imposed, by supplemental judgment, restitution in the amount of $1,337.27. On appeal, he challenged the restitution on grounds that the amount and nature of the victim's economic damages had not been proved prior to the time of sentencing. *Held*: Reversed and remanded. Because the evidence to support the restitution order was not presented "prior to or at sentencing," the order imposing restitution is plain error under *State v. McLaughlin*, 247 Or App 334 (2011), *rev allowed* (2012), and the Court of Appeals exercised its discretion to correct the error.

State v. Griffin, 255 Or App 509, 296 P3d 1288 (2013) (*per curiam*). After defendant's sentencing, the trial court issued a judgment that ordered the state to submit "restitution figures" within 60 days. Then, 91 days later, and without holding a hearing, the court signed a supplemental judgment imposing $640 in restitution. The judgment was entered the following week. Defendant appealed, arguing that the supplemental judgment was signed more than 90 days after the initial judgment, in violation of ORS 137.106. *Held*: Remanded for resentencing. Before extending the 90-day statutory deadline for signing a supplemental judgment of restitution, the court was required to make a "good cause" determination under ORS 137.106(1)(b).

State v. Oidor, 254 Or App 12, 292 P3d 629 (2012). Based on evidence that defendant sold music CDs that contained unauthorized reproductions of the original recordings, he was found guilty of unlawful sound recording, ORS 164.865(1)(b), and unlawful labeling of a sound recording, ORS 164.868. The sentencing court imposed restitution of $500 to the Recording Industry Association of America (RIAA). *Held*: The trial court erred by imposing restitution to the RIAA, because the record contained no evidence "that defendant's criminal conduct caused any economic damages to a victim."

State v. Beckham, 253 Or App 609, 292 P3d 611 (2012). Defendant was convicted of fourth-degree assault constituting domestic violence. The trial court entered a supplemental judgment imposing restitution 104 days after the original judgment had issued. Defendant appealed, contending that the trial court erred by imposing restitution because the supplemental judgment was entered after the 90-day period allowed under ORS 137.106(1)(b), and the court did not find good cause for extending that time, and the record lacked evidence to support the amount of restitution imposed. The state conceded error in both respects but argued that the proper remedy is to vacate the supplemental judgment and remand for a hearing for the trial court to now determine whether good cause existed to extend the restitution determination and, if so, the amount of economic damages. *Held*: Supplemental judgment vacated and remanded; otherwise affirmed. Because the good-cause determination does not have to be made within the 90-day period, and because the legislative intent behind the restitution statute is to ensure that crime victims receive restitution, the proper remedy is to vacate the supplemental judgment and remand for the trial court to determine: (1) whether the failure to include a requirement of restitution in the original judgment precludes the court from now awarding restitution; (2) if not, whether, at the time the court entered the supplemental judgment, there was good cause to extend the restitution determination; and (3) if so, the amount of the victim's economic damages.

State v. G. L. D., 253 Or App 416, 290 P3d 852 (2012). Youth and a couple of other teenagers broke into a high school, stole 20 computers, and set the school on fire. After a hearing, the juvenile court determined that youth had committed acts that constitute first-degree arson, aggravated first-degree theft, two counts of second-degree burglary, and first-degree criminal mischief. The court imposed restitution in the amount of $194,578. On appeal, youth contended the juvenile court erred when it awarded restitution to insurance companies and denied his request for a jury to determine the amount of restitution. *Held*: Affirmed. [1] Under *State v. E.V.*, 240 Or App 298 (2010), the juvenile court properly ordered youth to pay restitution to insurance companies. [2] Youth's argument that he was entitled to a jury trial on restitution has no merit in light of *State v. N.R.L.*, 249 Or App 321, *rev allowed* (2012).

State v. Barker, 252 Or App 357, 287 P3d 1179 (2012) (*per curiam*). The sentencing court erred when it awarded restitution on defendant's conviction for telephonic harassment for damages the victim suffered as a result of conduct defendant engaged in before he committed the crime of conviction—conduct for which he "had not been convicted and did not admit having committed."

^ ***State v. N. R. L.***, 249 Or App 321, 277 P3d 564, *rev allowed*, 352 Or 378 (2012). Youth who was found within the jurisdiction of the juvenile court on charges of burglary and criminal mischief, and the juvenile court ordered him to pay restitution to the victims in the amount of $114,071.13. On appeal, youth argued that the court erred when it denied his motion to empanel a jury; he argued that Art. I, § 17, entitled him to a jury trial on the issue of restitution because the amendments to the restitution statute, ORS 419C.450, had changed the statute's purpose from penal to "quasi-civil." *Held*: Affirmed. [1] "A jury trial is guaranteed only in those classes of cases in which the right was customary at the time the constitution was adopted or in cases of like nature. To determine whether cases are of like nature, courts must look at the particular issue in the proceeding rather than the controversy." [2] "Because juvenile delinquency proceedings are *sui generis* and did not exist when Article I, section 17, was adopted in 1857, youths generally are not entitled to a trial by jury in such proceedings." [3] "The juvenile court thus imposes restitution as a sanction, an aspect of the youth's disposition, not as a form of civil recovery for the victim." Moreover, "the restitution available to victims does not fully compensate the victim and the judgment for restitution also serves rehabilitative and deterrent purposes." A youth is not entitled to a jury trial on the amount of restitution because "juvenile court's order of restitution in a juvenile proceeding is penal, not civil, in nature."

^ ***State v. McLaughlin***, 247 Or App 334, 269 P3d 104 (2011), *rev allowed*, 352 Or 107 (2012). Defendant ripped a bronze plaque off the wall at PPB Central Precinct and dumped it in the street; it was recovered unharmed and was re-installed. He was charged with "knowingly" committing first-degree theft in violation of ORS 164.055(1), and the state presented evidence at trial that the plaque was worth $2,000 (replacement value). A jury found him guilty. At sentencing, the state asked for a set-over to present evidence to establish the amount restitution, and the court granted that motion, overruling defendant's objection. At a later hearing within the 90-day period allowed by ORS 137.106(1)(b), the court imposed $495 in restitution based on the cost of the re-installation. The Court of Appeals held that the state had failed to meet its "procedural deadline" under ORS 137.106(1) to present "evidence of the nature and amount of damages prior to the time of sentencing." The court ordered that the "judgment awarding restitution [be] vacated and [the case] remanded for resentencing," and otherwise affirmed. Defendant petitioned for reconsideration that, given the state's failure to meet its obligations under ORS 137.106(1), the trial court now lacked authority to impose any restitution and that the proper disposition is to vacate and reverse the supplemental judgment awarding restitution, rather than to vacate the judgment and remand for resentencing. *Held*: Conviction affirmed; restitution order vacated, remanded for resentencing. [1] The sentencing court erred when it imposed restitution because the state did not present evidence to the court *before the sentencing hearing* about the "nature and amount" of damages the victim suffered

as required by ORS 137.106(1). The evidence presented at trial regarding the "replacement value" was not sufficient to comply with the statute, because restitution later was sought based on cost of re-installation. [2] "The trial court's original sentence indicated its desire to have defendant compensate the victim, although the court was mistaken that it could award restitution at the time of sentencing. In light of the possible compensatory fine and ORS 138.222(5)(a), we must permit the court to reconsider its sentence."

Notes: [a] When evidence of the "nature and amount" of the victim's loss is presented at trial, that generally should be sufficient to comply with ORS 137.106(1) if that same loss will be relied upon at sentencing for restitution. The problem in this case arose because of the discrepancy between the loss proved at trial and the separate loss on which the restitution order is based. [b] The court's opinion assumes that the "prior to the time of sentencing" clause in ORS 137.106(1) refers only to the original sentencing hearing and does not include a subsequent restitution hearing that may be allowed by subsection (1)(b) of that statute. In other words, the court implicitly held that the state must present a sufficient statement of "nature and amount" before the original sentencing hearing and cannot defer doing that until a later restitution hearing.

Sentencing: other costs and fees

State v. Naylor, 256 Or App 478, 300 P3d 307 (2013) (*per curiam*). Defendant was convicted of second-degree theft, and the sentencing court ordered defendant to repay $390 for his court-appointed attorney. *Held*: Attorney fee assessment reversed; otherwise affirmed. The court erred when it imposed that assessment because "the record does not support defendant's ability to pay those fees."

State v. Akim, 256 Or App 352, 300 P3d 261 (2013) (*per curiam*). Based on a crime he committed before January 1, 2012, defendant was convicted of fourth-degree assault and harassment. The sentencing court imposed a $500 unitary assessment on each conviction. *Held*: Reversed and remanded. The sentencing court erred "because the statute that provided for those assessments was repealed effective January 1, 2012." *Former* ORS 137.290(2)(b) (2009), *repealed by* Or Laws 2011, ch 597, § 118; Or Laws 2012, ch 89, § 1.

State v. Eshaia, 253 Or App 676, 291 P3d 805 (2012). Defendant pleaded guilty to a charge of menacing. At sentencing, defense counsel asked the court to waive fees because defendant was unable to pay them; counsel asserted that defendant "doesn't work" and is disabled, but defendant admitted that he receives both "SSI and SSD." The trial court ordered him to repay $400 in fees for his court-appointed attorney pursuant to ORS 151.505 and ORS 161.665 ("CAA fees"). *Held*: Affirmed. [1] ORS 151.505 and ORS 161.665 provide that a court may not impose attorney fees "unless the defendant 'is or *may be able*' to pay them. A court's determination of that issue must be supported by the record." [2] Here, "the record is not silent regarding defendant's ability to pay attorney fees—the record establishes that defendant was receiving disability income. Although the record provides nothing further regarding defendant's ability to pay, …defendant's indication that he was receiving some income is sufficient." (Distinguishing *State v. Pendergrapht*, 251 Or App 630 (2012).)

State v. Kuehner, 252 Or App 628, 288 P3d 578 (2012). Defendant was arrested and indicted on charges of kidnapping, rape, sexual abuse, and resisting arrest. He was released pending trial. He then armed himself with a knife and broke into the victim's apartment again, sexually and physically attacked her, and threatened to commit suicide. During a standoff with the police, he stabbed himself in the neck. He was taken to a hospital, where he was held for a week with round-the-clock police security. Based on the second incident, defendant pleaded guilty, to charges of first-degree rape, kidnapping, and burglary. The state requested recovery as "costs" under ORS 161.665(1) of $7,808.34 the City of Medford paid in overtime to the officers guarding defendant at

the hospital. The sentencing court agreed, ruling that "the expenses were not excluded from recovery because the specific overtime payments were the direct result of defendant's conduct and would not otherwise have been incurred." *Held:* Reversed and remanded. [1] As a general rule, costs that may be recovered under ORS 161.665(1) "excludes regular and overtime salary payments alike." [2] The statute does not permit recovery of salary expenditures to its employees as costs of prosecution, even overtime pay that is unforeseen and unbudgeted: "Even if extraordinary, unforeseeable, and unbudgeted, the salary payments to the officers in guarding defendant were required to maintain the operations of the Medford Police Department."

State v. Battles, 252 Or App 569, 287 P3d 1277 (2012) (*per curiam*), *rev den*, 353 Or 533 (2013). Defendant was convicted of attempted murder, second-degree assault, and unlawful use of a weapon. The sentencing court imposed a unitary assessment on the conviction for attempted murder. *Held*: Reversed and remanded. The sentencing court erred because the unitary assessment cannot be imposed on a conviction for an attempt crime. *State v. Becker*, 171 Or App 721, 722 (2000).

State v. Pendergrapht, 251 Or App 630, 284 P3d 573 (2012). Defendant pleaded guilty to two counts of failure to appear. At sentencing, defense counsel asked the court not to require defendant to repay the fees for his court-appointed counsel, explaining that he has medical issues and "doesn't have any money. He's unable to pay, he doesn't work. He's unable to pay court-appointed attorney's fees. We'd ask that the court not impose them under ORS 151.505(4) because he is unable to pay." The court imposed a 60-day sentence and, without explanation, ordered him to repay $400 in CAA fees. *Held*: Reversed and remanded. [1] Under ORS 151.505, "only a person who presently is able, or who may be able in the future, to pay costs may be ordered to do so." In addition, when an objection is raised, "a court's determination that a defendant is or may be able to pay fees must be supported by the record." [2] "Thus, a court cannot impose attorney fees based on a record that is silent regarding the defendant's ability to pay those fees. There must be some information from which the court can find the statutorily required factual predicate to imposition of the fees: that the defendant 'is or may be able to pay' them. A court cannot impose fees based on pure speculation that a defendant has funds to pay the fees or may acquire them in the future." [3] "Whether a defendant is or may be able to pay fees depends on the defendant's particular circumstances, and the record in this case says nothing about defendant's particular circumstances from which the trial court could find, as required, that he 'is or may be able' to pay the fees."

Sentencing: forfeiture

State v. Youngs, 256 Or App 755, 301 P3d 976 (2013) (*per curiam*). Defendant pleaded guilty to unlawful possession of methamphetamine, and the sentencing court placed him on probation and, as a condition of probation, ordered forfeiture of his cell phone, which had been seized during the investigation. *Held*: Remanded for resentencing. Under ORS 161.045(4), "the court lacked authority to order forfeiture as a condition of probation."

Sentencing: other issues—contempt

State v. Quade, 252 Or App 577, 287 P3d 1278 (2012) (*per curiam*). For several years, defendant failed to pay $17,000 in restitution and related costs, failed to appear in court, and disobeyed court orders. He pleaded guilty to four counts of contempt of court based on that misconduct. The court entered misdemeanor convictions and imposed unitary assessments and misdemeanor surcharges on each conviction. *Held*: Reversed and remanded. The sentencing court erred, because contempt of court is not a criminal conviction, and the court lacked the authority to impose assessments and surcharges associated with criminal convictions.

Sentencing: other issues—continuance

State v. Dawson, 252 Or App 85, 284 P3d 1272 (2012). Defendant was found guilty of DUII and reckless driving, and he requested a two-day delay before sentencing. The trial court denied that request, ruling that there was no authority that required it, and immediately proceeded to sentencing. On appeal, the state conceded that ORS 137.020(2) entitled defendant to the requested delay, but argued that the error was harmless because he did not challenge the sentence imposed or argue that he was prejudiced by the trial court's refusal to grant his request for the delay. *Held*: Remanded for resentencing; otherwise affirmed. [1] "A trial court has a duty to pass sentence in accordance with the pertinent sentencing statutes, ORS 137.010(1), and a sentence's validity is determined solely by how well it comports with those statutes." But "the court's failure to comply with the sentencing statutes does not require reversal and remand for resentencing unless the error 'prejudiced the defendant in respect to a substantial right.' *See* ORS 131.035." [2] To determine whether the trial court's failure to allow a sentencing delay, the court examined "the record in light of the nature and purposes of the statutory right." Although the record does not indicate that the trial court would have imposed a different sentence if defendant had more time to prepare for sentencing, there is "another, more subtle, purpose" behind the two-day waiting period: "to create a measure of distance between the sentencing proceeding and the momentum to pronounce final judgment that often exists in the wake of a criminal trial." [3] "That concern is manifest in this case. The trial judge here acknowledged that the case had an emotional impact on him, and the lack of waiting period denied defendant the substantial right of having a "deliberate and carefully considered pronouncement of judgment."

Sentencing: appeals—appealable orders

State v. Mullins, 352 Or 343, 284 P3d 1139 (2012). In February 2009, defendant was convicted on charges of second- and third-degree assault, and the court entered a judgment that included a statement that he will pay restitution "in an amount to be determined as ordered and pursuant to ORS 137.106(1)(b)." Defendant filed a notice of appeal. In July, the state moved for an "amended" judgment and requested $2,604 in restitution. Without a hearing, the court entered a supplemental judgment that included that amount of restitution. Neither defendant, his trial counsel, or his appellate counsel received notice of the amended judgment. In November 2009, defendant's trial counsel received notice of the supplemental judgment. In March 2010, defendant's appellate counsel found out about the supplemental judgment and filed an amended notice of appeal, and then filed an appellate brief assigning error to the supplemental judgment. The state moved to dismiss the amended notice of appeal because defendant's amended notice of appeal was not timely under ORS 138.071(4). The Court of Appeals affirmed original judgment and, relying on *State v. Fowler*, 350 Or 133 (2011), dismissed defendant's attempted appeal from the supplemental judgment. *Held*: Affirmed. [1] Because ORS 138.071(4) states that the 30-day appeal period commences when the defendant "receives notice" of entry of the supplemental judgment, "the legislature intended that a defendant receive actual rather than constructive notice of entry of the supplemental judgment. In other words, the legislature contemplated that (1) some person or entity would provide the defendant with the notice in question (that is, that entry of a qualifying judgment had occurred); and (2) the defendant need not act to preserve the time for appeal until receiving that notice. Entry of the supplemental judgment in the register would not alone be sufficient to trigger the 30-day appeal period… It follows that a defendant is not deemed to receive that notice by virtue of its entry and is not independently obligated to determine the date or fact of entry of a supplemental judgment under ORS 138.083 to preserve the time for appeal." [2] "It follows as a textual and contextual matter that, in referring to notice received by 'the defendant,' ORS 138.071(4) includes notice received by the defendant's counsel in the case." [3] The term "notice received by 'the defendant' included notice received by defendant's trial counsel and, therefore, that trial counsel's receipt of notice of entry of the supplemental judgment sufficed to trigger the 30-day appeal period. [4] "Defendant's trial

counsel received notice of the entry of the supplemental judgment in November 2009, at a time when that counsel continued to serve as attorney of record for defendant in the trial court proceeding. Therefore, trial counsel was serving as defendant's agent on that date. Given the wording [in] ORS 138.071(4), … trial counsel's receipt of notice of entry of the supplemental judgment amounted to notice received by 'the defendant' under ORS 138.071(4) that that judgment had been entered and, therefore, that the 30-day appeal period began to run as of the date of trial counsel's receipt of that notice. The amended notice of appeal that incorporated the supplemental judgment, filed in March 2010, therefore was not timely filed."

State v. White, 255 Or App 560, 298 P3d 50 (2013). Defendant was convicted of assault in the fourth degree and the court imposed, by supplemental judgment, restitution in the amount of $1,337.27. On appeal, he challenged the restitution on grounds that the amount and nature of the victim's economic damages had not been proved prior to the time of sentencing. The Court of Appeals dismissed his appeal, ruling that failed to timely file notice of appeal from supplemental judgment. After the Supreme Court decided *State v. Mullins*, 352 Or 343 (2012), it remanded this case to the Court of Appeals for reconsideration. 352 Or 665 (2012). *Held*: Reversed and remanded. In light of *Mullins*, defendant's notice of appeal was timely even though the supplemental judgment was entered on February 24, 2010, and defendant did not file an amended notice of appeal from that judgment until July 14, 2010. The notice was timely under ORS 138.071(4) because defendant and his trial and appellate counsel did not become aware of entry of the supplement judgment until June 30, 2010.

State v. Landahl, 254 Or App 46, 292 P3d 646 (2012), *rev den*, 353 Or 787 (2013). Defendant was charged with DUII and pleaded no contest in order to enter into diversion. The diversion agreement provided that the charge would be dismissed if he completed diversion and that, if he failed to complete diversion, a conviction would be entered based on his plea. Later, defendant moved to terminate diversion and dismiss the charge, asserting that he had completed diversion, and the court granted the motion. Shortly thereafter, the district attorney discovered that defendant had another DUII charge pending and moved to set aside the dismissal. The trial court granted the motion to set aside, terminated diversion, entered a DUII conviction, and imposed a probationary sentence. Defendant appealed and asserted only a claim that the trial court erred when it set aside the dismissal and entered a judgment of conviction; he did not challenge the sentence. *Held*: Appeal dismissed. [1] A defendant who has pleaded guilty or no contest may appeal under ORS 138.050 only when he "makes a colorable showing that the disposition" exceeds the maximum allowable by law or is unconstitutionally cruel and unusual. For purposes of ORS 138.050, "disposition" refers to the types of dispositions listed in ORS 138.053(1). [2] Under that statute, and in light of *State v. Cloutier*, 351 Or 68 (2011), entry of a conviction is not a "disposition." [3] The Court of Appeals does not have jurisdiction over defendant's appeal pursuant to ORS 138.050 because he challenges only the entry of the conviction itself and does not challenge the sentence imposed on his conviction.

State v. Sager, 249 Or 252, 274 P3d 890 (2012) (*per curiam*). In 2001, defendant was convicted on several charges of assault, and those convictions were affirmed in 2005. In 2009, he filed motions under ORS 137.754 to correct the judgments, but the trial courts denied his motions. He appealed. *Held*: Appeals dismissed. For the reasons discussed in *State v. Hart*, 188 Or App 650, *rev den* (2003)—in which the court held that an order denying a motion to amend the judgment under ORS 138.083(1) is not appealable—the courts' denial of a defendant's motions to correct the judgments are not appealable because they left the original conviction and sentence "untouched."

Sentencing: appeals—reviewability

State v. Engerseth, 255 Or App 765, 299 P3d 567 (2013). After a jury trial, defendant was convicted of unlawful use of a weapon, menacing, and tampering with a witness. At sentencing,

defendant stipulated that he was "on supervision" and, on that basis, the sentencing court imposed a 60-month sentence by upward departure. Defendant did not object. Later, he filed a motion under ORS 138.083(1) to "correct" the judgment by deleting the departure term contending that the departure was unlawful because, despite the stipulation, the court did not obtain a *written* waiver of his right to a jury trial on the enhancement fact, as is required by ORS 136.773(1). The court denied that motion. *Held*: Affirmed. [1] Defendant failed to preserve the argument that he makes on appeal, because his motion to correct the judgment under ORS 138.083(1)(a) "preserved only the limited issue of whether the court abused its discretion in refusing to correct the judgment, not the issue of whether the sentence is erroneous." "Filing a post- judgment motion does not retroactively preserve predicate sentencing error." [2] The Court of Appeals declined to decide whether the sentencing court committed plain erred under ORS 136.773(1). "Because he stipulated to the enhancement fact, defendant was not prejudiced by any error. On this record, no reasonable factfinder could conclude anything other than that defendant was on supervision when he committed the relevant crime. Under those circumstances, any error is not grave, the state has a significant interest in avoiding a second, unnecessary sentencing hearing, and remanding to the trial court would not advance the ends of justice."

Sentencing: appeals—preservation and plain-error review

State v. Monro, 256 Or App 493, 301 P3d 435 (2013). Defendant committed a series of home-invasion robberies, and was convicted of multiple counts relating to three different incidents. The trial court imposed a series of consecutive Measure 11 and departure sentences, including a consecutive 144-month departure sentence on the conviction for first-degree robbery. Defendant argued for the first time on appeal that the court erred by not applying the "shift to column I" rule, OAR 213-012-0020, when it imposed the consecutive sentence on his conviction for first-degree robbery. *Held*: Reversed and remanded for resentencing. The trial court erred by not complying with the "shift to column I" rule. [1] Because the trial court chose to impose a departure sentence for first-degree robbery that was longer than the Measure 11 sentence, "the court [was] required to follow the guidelines' rules, including the 'shift to column I' rule for imposing sentences consecutively. … Had the court followed the 'shift to column I' rule, the maximum departure sentence permitted to be imposed consecutively was 72 months, rather than the 144 months that the court imposed. However, because the mandatory incarceration term for the offense under Measure 11 is greater—90 months—the court was required to impose that sentence rather than the 72-month consecutive guidelines sentence. ORS 137.700(1)." Because the court failed to comply with that rule, "defendant received a sentence for his [first-degree robbery] conviction … that is 54 months longer than the maximum permitted by law." [2] The Court of Appeals exercised its discretion to review the claim as plain error because it was not "certain" on the record that, if defendant had objected below, the trial court would have imposed the same aggregate incarceration term by structuring the sentence differently.

State v. Saechao, 256 Or App 369, 300 P3d 287 (2013). Defendant was convicted of several "firearm" offenses arising from a single incident which he used of a gun to take money from a store. The sentencing court imposed six separate 60-month mandatory minimum firearm sentences pursuant to ORS 161.610(4)(a), despite defendant's objection that the court did not "need" to impose firearm sentence on more than one conviction. Each of those sentences was subsumed in other, longer sentences imposed in the case, and the total sentence was 210 months—120 months on a conviction for attempted aggravated murder and a consecutive 90 months on a conviction for first-degree robbery. *Held*: Reversed and remanded for resentencing. [1] Under *State v. Hardesty*, 298 Or 616, (1985), the multiple firearm-minimum sentences were not authorized under ORS 161.610(4)(a). [2] Although review of a claim of plain error is discretionary, and even though the sentencing court may impose the same total amount of incarceration on remand, the Court of Appeals exercised its discretion to review the error in this case because the record did not clearly establish that the sentencing court would do so. Because it was not certain that a remand would provide no benefit to

defendant, the court remanded for resentencing.

State v. Rice, 255 Or App 181, 296 P3d 622 (2013) (*per curiam*). Defendant was convicted on two misdemeanor counts. The sentencing court suspended imposition of sentence and put defendant on probation. For the first time on appeal, defendant cited ORS 137.010(4) and argued that the sentencing court erred by suspending his entire sentence, instead of just "a part of" the sentence. *Held*: Affirmed. "During the sentencing hearing, defendant argued that the court was limited to imposing and suspending a jail sentence that did not exceed 180 days or that the court was required to impose a jail sentence and to specify the number of days of jail time that the court was suspending so that the sentence would be clear. Defendant did not cite ORS 137.010 or assert below what he argues now—that the trial court could not suspend *all* of his sentence, only 'a part of' his sentence, before it could impose probation. Accordingly, defendant's assignments of error were not preserved below; nor does defendant contend that they amount to plain error."

State v. Molette, 255 Or App 29, 296 P3d 594, *rev den*, 353 Or 788 (2013). Defendant was convicted of second-degree sexual abuse as a lesser-included offense to the charge of first-degree rape, and the jury also found in a special sentencing verdict that defendant had convictions for prior felony sex crimes in Texas; that prior criminal sanctions had not deterred him; that he had been persistently involved in similar criminal activity; and his incarceration was necessary for public safety. At sentencing, the state requested the presumptive life sentence under ORS 137.719. Defendant asked the court to impose a lesser sentence. The sentencing judge said that he was "forced to give him life then," and imposed the life sentence. On appeal, defendant argued that the trial court lacked authority to impose the presumptive sentence under ORS 137.719, because the state failed to prove the predicate facts— *i.e.*, that he had received two prior "sentences" for felony sex crimes—because he received only probation for his two previous sex offenses. Relying on *Gordon v. Hall*, 232 Or App 174 (2009), he argued that his two prior "Unadjudicated Judgments" entered by Texas courts that placed him on probation were not "sentences," because probation was not a sentence under Texas law. He also argued that the court erred because it imposed the life sentence based on an incorrect assumption that a downward departure sentence under ORS 137.719 may not exceed the authorized statutory maximum for the offense. *Held*: Affirmed. Neither argument was preserved, and neither qualifies as "plain error," because it is not obvious that the sentencing court erred in either respect.

State v. Aitken, 255 Or App 17, 296 P3d 587 (2013). Defendant committed a knife attack on two victims (Walker and Torres) in an apartment. A jury found him guilty on one count of first-degree assault and three counts of second-degree assault against Walker, and two counts of second-degree assault against Torres. The sentencing court imposed 144-month sentences on two of the convictions for second-degree assault. *Held:* Remanded for resentencing; otherwise affirmed. The court committed plain error by imposing 144-month sentences on those two convictions, because the statutory maximum sentence for second-degree assault is 120 months.

State v. Baskette, 254 Or App 751, 295 P3d 177 (2013) (*per curiam*). Defendant was convicted, based on guilty pleas, of various drug- and firearm-related offenses in two consolidated cases. In orally imposing sentence, the trial court stated that defendant would be eligible for "earned time" credits but not AIP; the court did not make findings to support that decision. The subsequent written judgments denied defendant consideration for "any form of temporary leave from custody, reduction in sentence, work release, alternative incarceration program or of conditional or supervised release authorized by law for which the defendant is otherwise eligible at the time of sentencing." On appeal, defendant argued that the trial court erred in denying him eligibility for sentence reductions under ORS 137.750 without making the requisite findings. He argued that he was not required to preserve the claim of error for appeal because the error did not become apparent until the written judgments were issued. *Held*: Remanded for resentencing. "The trial court did not make the findings

required under ORS 137.750 to deny defendant eligibility for early release, sentence reduction, or other programs; indeed, the court affirmatively stated, in sentencing defendant, … that defendant would be eligible for earned time. … The error as to the denial of earned time did not become apparent until after the court had entered its written judgments, which contradicted the statement that the court had made at sentencing in open court that defendant would be eligible for earned time. In those circumstances, preservation as to that error is not required."

State v. Battles, 252 Or App 569, 287 P3d 1277 (2012) (*per curiam*), *rev den*, 353 Or 533 (2013). Defendant was convicted of attempted murder, second-degree assault, and unlawful use of a weapon, and the sentencing court imposed a unitary assessment on the attempted-murder conviction and a 144-month upward-departure sentence on the assault conviction. *Held*: Reversed and remanded. [1] The sentencing court committed plain error because the unitary assessment cannot be imposed on a conviction for an attempt crime. *See State v. Becker*, 171 Or App 721, 722 (2000). [2] The court erred by imposing a 144-month sentence on the conviction for second-degree assault, because it is a class B felony and the maximum sentence in only 120 months. (Although that sentence is to be served concurrently with a longer sentence, the Court of Appeals reviewed it as "plain error" because it had remanded for resentencing based on the first error.)

State v. Burge, 252 Or App 574, 288 P3d 565 (2012) (*per curiam*), *rev den*, 353 Or 787 (2013). Defendant was found guilty on 12 counts of second-degree sexual abuse. For the first time on appeal, he contended that the sentencing court committed "plain error," in light *State v. Simonson*, 243 Or App 535 (2011), *rev den* (2013), when it ranked those convictions as category 7 offenses on the crime seriousness scale. *Held*: Reversed and remanded for resentencing. Under *Simonson*, the category 7 ranking violated the "vertical proportionality" principle in Art I, § 16, even for the convictions based on those that involved a victim under the age of 16—the court should have ranked them as category 6 offenses. Under *Simonson*, "vertical proportionality is measured by the sentences that are available for the conduct at issue, not on what any individual defendant actually receives."

State v. Decamp, 252 Or App 177, 285 P3d 1130 (2012) (*per curiam*), *rev den*, 353 Or 787 (2013). Defendant was convicted of six counts of second-degree sexual abuse, and the court sentenced him to three consecutive 24-month sentences, with the other three sentences concurrent. On appeal, defendant claimed that his sentences are disproportionate in light of *State v. Simonson*, 243 Or App 535 (2011), *rev den* (2013). *Held*: Reversed and remanded for resentencing. [1] In light of *Simonson*, the sentencing court erred by ranking his convictions for second-degree sexual abuse as a "7" on the crime-seriousness scale. [2] The error warranted plain-error review: "Application of a crime-seriousness score of 6 rather than 7 yields a lower presumptive sentence for each of defendant's six second-degree sexual-abuse convictions; thus, it is possible that defendant could receive a substantially shorter prison term on remand. Moreover, the state has no interest in sustaining a constitutionally infirm sentence."

State v. Dimmick, 252 Or App 359, 287 P3d 1180 (2012) (*per curiam*). The sentencing court orally imposed an 18-month probationary sentence on defendant's conviction for attempting to elude, but the written judgment imposed a 24-month term. *Held*: Reversed and remanded. [1] Ordinary preservation-of-error principles "are inapposite, because defendant had no opportunity to object to the sentencing error." [2] The 24-month term is plain error because, "in the absence of findings justifying an upward departure, the correct probationary term was 18 months."

State v. Choat, 251 Or App 669, 284 P3d 578 (2012). Defendant was the driver of a car involved in an accident in which two of his passengers died and another was injured. A jury found him guilty of two counts of second-degree manslaughter, three counts of recklessly endangering another person, and one count each of assault, reckless driving, and driving under the influence of intoxicants. The court imposed a 156-month sentence and a compensatory fine of $1,590.02, which

was designated to repay a witness—the sister of one of the killed passengers—for her airfare and hotel expenses incurred in order to attend the trial. Defendant had objected to imposition of that sum as *restitution*, but he did not object when the court imposed it as a compensatory fine instead. *Held*: Affirmed. [1] ORS 137.101(1) limits a compensatory fine only to expenses that may be recovered in a civil action, and costs associated with an injured person's family attending trial are not recoverable by civil action. [2] Defendant's objection is not preserved because "this record indicates that defendant objected to restitution, arguing that it was not authorized because the expense was a normal cost of prosecution; the court, alerted to defendant's objection to restitution, ordered a compensatory fine instead, to which defendant did not object. Moreover, even if defendant's objection to restitution were broad enough to encompass an objection to the compensatory fine, the fact remains that his argument—whether against restitution, compensatory fine, or both—was not developed in enough detail to permit the state to respond to it or the court to evaluate it." [3] Even though the error in this case is an error of law and is not reasonably in dispute, the Court of Appeals declined to review it as "plain error" because "an inference that might be drawn from the record is that defendant's decision not to object to the imposition of a compensatory fine in the amount of $1,590.02 was a strategic choice, because doing so would have provided the trial court with the opportunity to reconsider its decision not to impose a fine of $50,000 for the benefit of Allstate."

Sentencing: appeals—scope of review

State v. Eshaia, 253 Or App 676, 291 P3d 805 (2012). Defendant pleaded guilty to a charge of menacing. At sentencing, defense counsel asked the court to waive fees because defendant was unable to pay them; counsel asserted that defendant "doesn't work" and is disabled, but defendant admitted that he receives both "SSI and SSD." The trial court ordered him to repay $400 in fees for his court-appointed attorney pursuant to ORS 151.505 and ORS 161.665 ("CAA fees"). *Held*: Affirmed. [1] Defendant's claim that the order requiring him to pay $400 for his CAA fees is reviewable under ORS 138.050. [2] ORS 151.505 and ORS 161.665 provide that a court may not impose attorney fees "unless the defendant 'is or *may be able*' to pay them. A court's determination of that issue must be supported by the record."

State v. Beckham, 253 Or App 609, 292 P3d 611 (2012). Defendant was convicted of fourth-degree assault constituting domestic violence. The trial court entered a supplemental judgment imposing restitution 104 days after the original judgment had issued. Defendant appealed, contending that the trial court erred by imposing restitution because: (1) the supplemental judgment was entered after the 90-day period allowed under ORS 137.106(1)(b), and the court did not find good cause for extending that time; and (2) the record lacked evidence to support the amount of restitution imposed. The state conceded error in both respects but argued that the proper remedy is to vacate the supplemental judgment and remand for a hearing for the trial court to now determine whether good cause existed to extend the restitution determination and, if so, the amount of economic damages. *Held*: Supplemental judgment vacated and remanded; otherwise affirmed. Because defendant was convicted of a misdemeanor after a trial, ORS 138.040, rather than ORS 138.222(5) (which applies only to felony sentences), governs appellate review and disposition options.

Sentencing: appeals—claims that may be moot, waived, or harmless

State v. Powell, 253 Or App 185, 288 P3d 999 (2012), *rev den*, 353 Or 714 (2013). Based on a high-speed chase during which he threw baggies of methamphetamine out the window, defendant was convicted of seven offenses including PCS, third-degree assault, and attempting to elude. The court imposed a series of consecutive departure sentences, including a 60-month sentence with a 24-month term of post-prison supervision on defendant's PCS conviction, a class C felony. *Held*: Affirmed. [1] The court violated OAR 213-005-0002(4), as construed in *State v. Mitchell*, 236 Or App 248 (2010), when it imposed a 24-month term of post-prison supervision on the PCS conviction,

even though the court also imposed a no-release order per ORS 137.750 and judgment provided that the PPS term "is hereby reduced to the extent necessary to conform the total sentence length to the statutory maximum." [2] But that error is harmless, because defendant must serve a PPS term on another conviction and a remand to enter a corrected judgment "would not have the potential to improve defendant's position."

State v. Dawson, 252 Or App 85, 284 P3d 1272 (2012). Defendant was found guilty of DUII and reckless driving, and he requested a two-day delay before sentencing. The trial court denied that request, ruling that there was no authority that required it, and immediately proceeded to sentencing. On appeal, the state conceded that ORS 137.020(2) entitled defendant to the requested delay, but argued that the error was harmless because he did not challenge the sentence imposed or argue that he was prejudiced by the trial court's refusal to grant his request for the delay. *Held*: Remanded for resentencing; otherwise affirmed. [1] "A trial court has a duty to pass sentence in accordance with the pertinent sentencing statutes, ORS 137.010(1), and a sentence's validity is determined solely by how well it comports with those statutes." But "the court's failure to comply with the sentencing statutes does not require reversal and remand for resentencing unless the error 'prejudiced the defendant in respect to a substantial right.' *See* ORS 131.035." [2] To determine whether the trial court's failure to allow a sentencing delay, the court examined "the record in light of the nature and purposes of the statutory right." Although the record does not indicate that the trial court would have imposed a different sentence if defendant had more time to prepare for sentencing, there is "another, more subtle, purpose" behind the two-day waiting period: "to create a measure of distance between the sentencing proceeding and the momentum to pronounce final judgment that often exists in the wake of a criminal trial." [3] "That concern is manifest in this case. The trial judge here acknowledged that the case had an emotional impact on him, and the lack of waiting period denied defendant the substantial right of having a "deliberate and carefully considered pronouncement of judgment."

Sentencing: appeals—remedy

State v. Leistiko, 254 Or App 413, 292 P3d 670 (2012) (*per curiam*). The sentencing court entered a supplemental judgment under HB 3408 (2009) that denied defendant eligibility for additional earned-time credits. Defendant appealed arguing that the court had no authority to enter such a judgment, and the state agreed. *State v. Portis*, 233 Or App 256, *dism'd as moot*, 348 Or 559 (2010). *Held*: Appeal dismissed. "The appropriate remedy … is thus exceedingly narrow: dismiss the appeal and remand the case to the trial court with instructions to vacate the supplemental judgment concerning HB 3508 earned-time credits."

State v. Beckham, 253 Or App 609, 292 P3d 611 (2012). Defendant was convicted of fourth-degree assault constituting domestic violence. The trial court entered a supplemental judgment imposing restitution 104 days after the original judgment had issued. Defendant appealed, contending that the trial court erred by imposing restitution because: (1) the supplemental judgment was entered after the 90-day period allowed under ORS 137.106(1)(b), and the court did not find good cause for extending that time; and (2) the record lacked evidence to support the amount of restitution imposed. The state conceded error in both respects but argued that the proper remedy is to vacate the supplemental judgment and remand for a hearing for the trial court to now determine whether good cause existed to extend the restitution determination and, if so, the amount of economic damages. *Held*: Supplemental judgment vacated and remanded; otherwise affirmed. [1] Because defendant was convicted of a misdemeanor after a trial, ORS 138.040, rather than ORS 138.222(5) (which applies only to felony sentences), governs appellate review and disposition options. [2] Because the good-cause determination does not have to be made within the 90-day period, and because the legislative intent behind the restitution statute is to ensure that crime victims receive restitution, the proper remedy is to vacate the supplemental judgment and remand for the trial court to determine:

(1) whether the failure to include a requirement of restitution in the original judgment precludes the court from now awarding restitution; (2) if not, whether, at the time the court entered the supplemental judgment, there was good cause to extend the restitution determination; and (3) if so, the amount of the victim's economic damages. Supplemental judgment vacated and remanded.

^ ***State v. McLaughlin***, 247 Or App 334, 269 P3d 104 (2011), *rev allowed*, 352 Or 107 (2012). In *State v. McLaughlin*, 243 Or App 214 (2011), the court held that the state had failed to meet its "procedural deadline" under ORS 137.106(1) to present "evidence of the nature and amount of damages prior to the time of sentencing." The court ordered that the "judgment awarding restitution [be] vacated and [the case] remanded for resentencing," and otherwise affirmed. Defendant petitioned for reconsideration that, given the state's failure to meet its obligations under ORS 137.106(1), the trial court now lacked authority to impose any restitution and that the proper disposition is to vacate and reverse the supplemental judgment awarding restitution, rather than to vacate the judgment and remand for resentencing. *Held*: Remanded for resentencing. "The trial court's original sentence indicated its desire to have defendant compensate the victim, although the court was mistaken that it could award restitution at the time of sentencing. In light of the possible compensatory fine and ORS 138.222(5)(a), we must permit the court to reconsider its sentence."

Sentencing: challenges to sentences on collateral review

Bumgarner v. Nooth, 254 Or App 86, 295 P3d 52 (2012). In 2004, petitioner was convicted of two counts of first-degree rape, two counts of first-degree unlawful sexual penetration, two counts of first-degree sexual abuse, two counts of first-degree kidnapping, and one count of third-degree assault. Trial counsel did not argue that the verdicts should have merged. The judgment was affirmed on appeal. At the time of trial, there was case law that the convictions on the sex crimes and kidnapping did not merge, but there were also cases suggesting that convictions for the same offense merge when the charges had been based on different statutory subsections. It was not until after the trial in this case that the appellate courts definitely announced that the verdicts should merge. *State v. Parkins*, 346 Or 333 (2009). Petitioner sought post-conviction relief, arguing that his trial counsel was constitutionally inadequate for not requesting merger. The post-conviction court agreed and granted post-conviction relief, and the state appealed. *Held:* Affirmed. [1] Reasonable trial counsel would have discerned, from existing case law holding that different theories of aggravated murder merged, that the structure of the aggravated-murder statute and the statutes involved in this case was similar, and that the convictions at issue in this case should merge. [2] "Uncertainty in the law regarding when convictions would merge … did not relieve trial counsel of the obligation to assert that the sentences at issue were subject to merger." Despite any ambiguity in the law, the benefits of raising merger as an issue were so obvious that any reasonable lawyer would have done so. [3] Given the "obvious possible benefits" of arguing that the verdicts should merge, trial counsel's failure to argue for merger constituted inadequate assistance.

^ ***Westfall v. Oregon Department of Corrections,*** 247 Or App 384, 271 P3d 116 (2011), *rev allowed*, 352 Or 564 (2012). Plaintiff was convicted of various felony offenses in Jackson County in January 2000, and the court imposed a series of consecutive sentences. Plaintiff escaped from a work crew, and he was convicted of escape in Marion County in July 2001, and the court imposed a consecutive prison sentence. Petitioner then was convicted in Douglas County of various felony offenses in July 2002, and the court imposed more consecutive sentences. Finally, plaintiff was convicted of various felony offenses in Douglas County in September 2002, and the court imposed more consecutive sentences. In 2005, plaintiff obtained post-conviction relief on his Marion County escape conviction, and that sentence was vacated. As a result, DOC employees applied an established policy to readjust all of his various consecutive sentences based on the "consecutive to all previously imposed sentences" clause in the Josephine County judgment, and calculated a new release date. After his release, plaintiff filed a civil action for negligence and false imprisonment contending that

his sentences should have been readjusted in a manner that would have resulted in his release 13 months previously. The state moved for summary judgment on the ground that the restructuring of plaintiff's sentences were actions for which, under ORS 30.265(3)(c), the state is immune from tort liability. The trial court granted the motion. *Held*: Reversed and remanded for trial. [1] ORS 30.265(3)(c) "insulates public bodies from tort liability for acts or decisions that constitute a choice among alternative public policies by persons to whom responsibility for such policies has been delegated, yet the immunity does not come to bear on the merely routine decisions that a public employee makes in the course of everyday governmental activities." [2] "Although, as the state argues, the adoption of the DOC policy may reflect a choice among competing policy objectives by individuals within the agency to whom the responsibility to make such a choice has been delegated, the DOC employees implementing that policy were *not* delegated similar responsibility; the policy choice had been made for them through the instructions in the DOC policy that required them to make certain decisions when confronted with particular language in a judgment. Put differently, even if the employees' sentence-restructuring decisions in this case were made in perfect conformity with the DOC sentencing policy, those decisions were not the product of policy choices by the employees."

SETTING ASIDE CONVICTION/ARREST

State v. Roberts, 255 Or App 132, 296 P3d 603 (2013). In 2007, defendant pled guilty to unlawful delivery of marijuana, which was reduced under a plea agreement to a misdemeanor. In 2010, he pled "no contest" to public urination, a municipal-code violation. Later that year, he moved to set aside his drug conviction under ORS 137.225, which allows a defendant to move for expunction of certain convictions if three or more years have passed, provided that the defendant was not conviction of any other offense (excluding traffic violations) within the ten years before the motion is filed. The state argued that defendant's public urination conviction made him ineligible. The trial court rejected that argument without explanation and granted defendant's motion to set aside his drug conviction. *Held*: Reversed. The trial court erred in setting aside defendant's drug conviction. [1] For purposes of ORS 137.225, a municipal code violation is an "offense," a term that includes "violations." [2] Defendant's no-contest plea resulted in a "conviction." Accordingly, "defendant's no contest plea to the violation of public urination resulted in a 'conviction' of an offense within the 10 years preceding defendant's motion to expunge his marijuana conviction."

State v. Beck, 254 Or App 609, 295 P3d 169 (2013). In 1961, defendant was convicted of negligent homicide under *former* ORS 163.091 (1957). That offense was defined as causing the death of another person by driving a motor vehicle in a grossly negligent manner, and it was punishable as either a misdemeanor or a felony. In 2010, defendant moved under ORS 137.225 to set aside his conviction. The state opposed the motion, contending that the conviction is not eligible to be set either because of the exclusion for traffic offenses, set out at ORS 137.225(6)(a), or because of the specific exclusion for a conviction for criminally negligent homicide under ORS 163.145, set out at ORS 137.225(7). The trial court denied defendant's motion, ruling that the ORS 137.225 does not allow his conviction to be set aside. *Held*: Affirmed. The trial court correctly denied defendant's motion to set aside his conviction. [1] ORS 137.225(7) precludes the setting aside of defendant's conviction. Although ORS 137.225(7) specifically refers just to ORS 163.145 (the current statute defining the offense of criminally negligent homicide) and to Class C felonies (a classification that did not exist when defendant committed his crime), defendant's conviction is one the legislature intended to preclude from being set aside under ORS 137.225(7). The legislative history of ORS 163.145 establishes that the legislature intended the crime of criminally negligent homicide to encompass the previous crime of negligent homicide. Moreover, the legislature has clearly demonstrated its intent to prevent convictions for criminally negligent homicide from being set aside. [2] The reference in ORS 137.225(7) to a conviction under the current statute number, ORS 163.145, does not preclude its application to a conviction under *former* ORS 163.091. *See State v. Kellar*, 349 Or 626 (2011), and *State v. Andre*, 142 Or App 285, *rev den* (1996).

SEXUAL OFFENSES

See also "Evidence," and "Sentencing," *above*.

Sexual Offenses: child pornography

State v. Ritchey, 257 Or App 291, __ P3d __ (2013) (*per curiam*). Defendant was found guilty on multiple counts of encouraging child abuse in the first and second degree, ORS 163.684 and ORS 163.686. *Held*: Affirmed. [1] In light of *State v. Evans*, 178 Or App 439 (2001), the evidence was sufficient to prove "that the images were of 'sexually explicit conduct.'" [2] The trial court correctly denied defendant's motion for judgment of acquittal on the venue element, because the evidence showed that he "had duplicated the photographs by downloading them onto his computer" and that "he had accessed the internet at three places, all of which a trier of fact reasonably could find were within Douglas County."

State v. Pugh, 255 Or App 357, 297 P3d 27, *rev den*, 353 Or 748 (2013). Defendant was charged with various counts of first-degree encouraging child sexual abuse under ORS 163.684 (2001) for knowingly "duplicating" images of sexually explicit conduct involving children by downloading them from the Internet and saving them on his desktop computer in Clatsop County. Defendant moved for a judgment of acquittal arguing: (1) downloading and saving images from the internet did not constitute "duplicating" under ORS 163.684, and (2) that the state failed to prove venue because the evidence did not show that he downloaded the images in Clatsop County. The trial court denied the motion, and defendant was convicted. *Held*: Affirmed. The trial court correctly denied defendant's motion for judgment of acquittal. [1] "Duplication" of an image from the internet occurs when the defendant downloads that image and saves it to his or her computer. When that occurs, "the original image remains with the original owner, and a copy is saved onto the downloading party's computer." [2] Proof of duplication does not require proof that, after downloading and saving the image, the defendant took some further action (like e-mailing or printing the image). [3] The state offered sufficient proof of venue in Clatsop County because the state's evidence "[tied] defendant's computer usage to his residence in Clatsop County." In particular, the evidence showed that defendant's computer was hooked up to a monitor in the middle of his living room; the computer used a dial-up Internet connection through his phone line; and defendant lived at his home in that county for 10 years.

State v. Tilden, 252 Or App 581, 288 P3d 567 (2012). Defendant was convicted by jury verdict of 101 counts of encouraging child sexual abuse in the second degree, ORS 163.686 (2005), based on evidence that he had accessed sexually explicit images of children on his home computer; the images were found in the unallocated space on his hard drive. On appeal, he contended for the first time that the state did not submit evidence from which a rational juror could infer that he "possessed" or "controlled" the images, for the reasons found in *State v. Ritchie*, 349 Or 574 (2011), and *State v. Barger*, 349 Or 553 (2011), which were decided after his trial. The state responded by arguing that defendant did not preserve his claim of error, and that he had not asked the Court of Appeals to address it as plain error. *Held*: Reversed. [1] Defendant failed to preserve his claim of error because, at trial, he did not raise the particular argument that he raised on appeal. [2] The court ordinarily will not review a claim as plain error unless an appellant has explicitly asked the court to do so by explaining "why an error satisfies the requisites of plain error and, further, why we should exercise our discretion to correct" it. [3] But even though defendant did not use the term "plain error" in his brief on appeal, he nonetheless satisfied the requisites of ORAP 5.45 (governing plain-error review). [4] The trial court committed plain error by not granting defendant's motion for a judgment of acquittal for the reasons discussed in *Ritchie* and *Barger*, and based on several discretionary factors, the court elected to address it.

Sexual Offenses: sufficiency of proof

State v. Ofodrinwa, 353 Or 507, 300 P3d 154 (2013). When he was 21 years old, defendant had sexual intercourse with his 16-year-old girlfriend. He was charged with **second-degree sexual abuse** under ORS 163.425(1)(a) on an allegation that he subjected her to sex and she did "not consent thereto by reason of being under 18 years of age." The case was tried to the court, the victim did not testify, and state did not present any evidence that she did not *in fact* consent; the state relied only on her being under 18 years of age and the rule in ORS 163.315(1)(a) that a person under 18 is "considered incapable of consenting to a sexual act." Defendant moved for a judgment of acquittal arguing that the "does not consent thereto" clause in ORS 163.425(1) required proof that the victim did not in fact consent and could not be proved by the "incapable of consenting" rule. The trial court rejected that argument and found him guilty on one count. The Court of Appeals affirmed based on *State v. Stamper*, 197 Or App 413 (2005). *Held*: Affirmed. The trial court correctly denied defendant's motion for judgment of acquittal. [1] The "incapable of consent" rule applies to the "does not consent thereto" element: "this is a case is which the 1991 amendment added a defense to the crime of second-degree sexual abuse that, as a matter of the statute's text and legislative history, rests on the proposition that 'does not consent' in ORS 163.425 includes instances 'in which the victim's lack of consent was due solely to incapacity to consent by reason of being less than a specified age.'" [2] "The 1991 amendment is the legislature's last word on the subject and, as such, controls the meaning of the phrase 'does not consent' in ORS 163.425." [3] Applying the "incapable of consent" rule to second-degree sexual abuse does not create an untenable conflict in the classification of felony sexual offenses. "Rather, it aligns the crime of second-degree sexual abuse with other sexual offenses that the legislature has classified according to the victim's age. Defendant's arguments provide no persuasive reason for saying that the 1991 amendment does not control our resolution of this case. We accordingly conclude that the phrase 'does not consent' in ORS 163.425 refers to the victim's lack of capacity to consent due to age, as well as to the lack of actual consent."

State v. Palomo, 256 Or App 498, 301 P3d 439 (2013). A police officer responded to a report that a woman in the alley behind a homeless shelter for men was flashing her breasts and asking people for a cigarette. He overheard a man tell defendant that he would "give you that just for showing me your tits"; defendant replied, "No, I'll give you a [indiscernible] job"; and the officer then saw defendant performing oral sex on the man in an alley. Defendant was charged with **prostitution**, ORS 167.007. She moved for a judgment of acquittal arguing that there was insufficient evidence that she had agreed to exchange sexual conduct for a fee and insufficient evidence to establish what the fee. The trial court denied the motion and found defendant guilty. *Held*: Reversed. [1] "The ordinary meaning of 'fee' and the legislative history of ORS 167.007 support the conclusion that a fee is something that has economic value in a transaction that is commercial in character. There is no doubt that certain things, such as money and drugs, constitute a fee, the agreement to exchange sexual conduct for which constitutes prostitution. However, we disagree that, as the state argued at trial, anything that is of value to the recipient, including a kiss, likewise constitutes a fee." [2] The trial court erred in denying the motion for judgment of acquittal because "there was no evidence from which the trier of fact could find that the thing for which defendant had agreed to exchange sexual conduct had economic value." Although the state's theory was that she had exchanged sexual conduct for a cigarette, "there was no admissible evidence to support such a finding"; the officer testified that he had received a report that a woman in the alley was "flashing her breasts and asking people for a cigarette," but that testimony had not been admitted for its truth.

State v. Tilden, 252 Or App 581, 288 P3d 567 (2012). Defendant was convicted by jury verdict of 101 counts of **encouraging child sexual abuse in the second degree**, ORS 163.686 (2005), based on evidence that he had accessed sexually explicit images of children on his home

computer; the images were found in the unallocated space on his hard drive. On appeal, he contended for the first time that the state did not submit evidence from which a rational juror could infer that he "possessed" or "controlled" the images, for the reasons found in *State v. Ritchie*, 349 Or 574 (2011), and *State v. Barger*, 349 Or 553 (2011), which were decided after his trial. *Held*: Reversed. The Court of Appeals reversed the convictions as "plain error."

Sexual Offenses: juveniles

State v. D. M. T., 254 Or App 631, 295 P3d 175 (2013) (*per curiam*). Based on his admissions pursuant to a plea agreement, youth was adjudicated on two counts of attempted first-degree sexual abuse. Before final disposition, youth filed a motion to amend the petition and order to allege only attempted *third*-degree sexual abuse. The juvenile court denied the motion, noting that it did not "have authority" to do so. *Held*: Reversed and remanded. "The juvenile court has discretion under the juvenile code to dismiss or amend a petition and to set aside or modify its orders even after a youth has admitted to allegations in the petition and the court has accepted those admissions. … *See* ORS 419C.261(1); ORS 419C.610(1)."

State v. C. E. B., 254 Or App 353, 295 P3d 118 (2012). In 1997, when he was 11 or 12 years old, youth committed acts against his sister that constituted first-degree sodomy and rape. The state filed a delinquency petition, youth admitted the acts and was adjudicated delinquent, and the juvenile court placed him on probation. The court terminated youth's probation in 2003. In 2010, when he was 24 years old, youth filed a motion pursuant to ORS 419C.261(2), to set aside the order finding him within the jurisdiction of the court. The state opposed the motion. At a hearing held after youth had turned 25 years old, the juvenile court suggested that it would have granted the motion on the merits but denied the motion on the ground that it no longer had authority to consider the motion. *Held*: Reversed and remanded. The juvenile court erred when it ruled that it lacked authority to consider youth's motion to dismiss. [1] ORS 419C.261(2) "authorizes the trial court to dismiss the petition 'in furtherance of justice after considering the circumstances of the youth.' There is no explicit time limitation on the court's authority to dismiss a petition." [2] "In light of the juvenile court's general jurisdiction, ORS 419B.090(1), we conclude that the juvenile court's authority to dismiss a petition under ORS 419C.261(2) is not limited to cases in which the person continues to be within the juvenile court's jurisdiction, but also extends to cases in which the person is no longer within the juvenile court's jurisdiction under ORS 419C.005 by reason of having reached age 25. … Reversed and remanded with instructions for juvenile court to consider merits of youth's motion to dismiss."

Sexual Offenses: corroboration

State v. Hernandez, 256 Or App 363, 300 P3d 261 (2013). Defendant was charged with numerous felony sexual offenses that he committed against a five-year-old victim, "caregiver" of his live-in girlfriend. She disclosed that he had put his penis in her mouth and had rubbed and licked her nipples; she also stated that he had given her "owies where the pee comes out." Defendant eventually confessed to having the victim "grind" her anal and vaginal area on his groin. At trial, he moved for a judgment of acquittal, arguing that although there was some corroborative evidence as to the sodomy counts, the state had failed to adduce any evidence to corroborate his confession, as required by ORS 136.425(1) (2007), as to the charge of sexual abuse by touching the victim's vaginal or anal area—he contended that the victim's "owies" did not establish that he touched her vaginal area for purposes of sexual gratification. The trial court denied the motion, and defendant was found guilty. *Held*: Affirmed. The trial court correctly denied defendant's motion for judgment of acquittal. [1] For purposes of the corroboration requirement, the *corpus delicti* of first-degree sexual abuse, ORS 163.427, "is that the victim was subjected to sexual contact." [2] Viewed in the context of the other evidence in the record—including the victim's statements that he took off her clothes, rubbed and

licked her nipples, told her she looked pretty, and put his penis in the her mouth—a jury could infer that the "owies" she described referred to sexual contact. "To be sure, a jury could conclude that the evidence was insufficient to convict defendant of sexual abuse of S. Nevertheless, in order for that issue to go to the jury, the state was only required to submit enough evidence from which a rational trier of fact could draw an inference that *tends* to show that the charged crimes occurred. The state's evidence met that standard."

Sexual Offenses: evidence

State v. Brown, 256 Or App 774, 302 P3d 1214 (2013). Defendant, a high-school coach, was charged with second-degree and third-degree sexual abuse based on his abuse of two teenaged athletes, M and E, who he sexually abused during massages. At trial, he objected to medical diagnoses that M had been sexually abused and that E was "highly concerning for sexual abuse," but the trial court admitted that evidence and defendant was found guilty. After trial, the Supreme Court decided *State v. Southard*, 347 Or 127 (2009), which held that such a sexual-abuse diagnosis is inadmissible under OEC 403, at least in the absence of physical evidence of abuse. The state conceded on appeal that the trial court erred in admitting the diagnoses under *Southard*, but argued that the error was harmless in light of the fact that medical staff recovered defendant's DNA from a swab of M's labia and that a jury would not have been likely to have been affected by the inadmissible diagnosis. *Held*: Reversed and remanded. The error was not harmless because defendant took the stand and offered an explanation for his conduct, which was that he allegedly only performed "sports massages" on the victims near their vaginal areas, and that that contact may have resulted in the detection of his DNA on M.

Note: Although there was DNA evidence linking defendant to the sexual abuse of one victim, the record showed that the DNA had been analyzed seven months after the sexual-abuse diagnosis. In addition, the diagnosing doctor did not discuss the DNA results in his testimony or provide any explanation as to whether that information would have supported or bolstered his diagnosis or expert testimony concerning his opinion about whether the victim had been sexually abused. Without some testimony linking physical evidence to the medical doctor's diagnosis or opinion, *Southard* may still bar a diagnosis despite the possibility that corroborating physical proof may exist. *See State v. Ovendale*, 253 Or App 620 (2012) (requiring that a medical expert "actually rely on the physical evidence in making a diagnosis of sexual abuse").

State v. Lopez-Cruz, 256 Or App 32, 299 P3d 569 (2013). Defendant was convicted of first-degree sexual abuse several months after the Oregon Supreme Court decided *State v. Southard*, 347 Or 127 (2009). At trial, defendant called an emergency room doctor, who testified that he did not observe physical evidence of abuse. On cross-examination, and with no objection by defendant, the doctor admitted that he diagnosed the victim as suffering "abusive contact of an adult with a patient, no penetration or genital contact." On appeal, defendant argued that the trial court committed plain error under *Southard* by admitting the diagnosis given the absence of physical evidence of abuse. *Held*: Reversed and remanded. The trial court erred in admitting the diagnosis. The Court of Appeals rejected the state's arguments that an "abusive contact" diagnosis is different than a sexual abuse diagnosis and that error, if any, was not obvious or apparent on the record.

State v. Ovendale, 253 Or App 620, 292 P3d 579 (2012), *rev den*, 353 Or 714 (2013). The four-year -old victim reported to his mother that defendant had anally penetrated him. The mother observed fecal matter in the bedroom, where the victim had said the penetration had occurred. The mother later reported her observation to a nurse practitioner at Liberty House. Defendant was charged with first-degree sodomy (ORS 163.405) and first-degree sexual abuse (ORS 163.427). At trial, the court allowed the nurse practitioner to testify that she had diagnosed the child as sexually abused, because that diagnosis was based, in part, on the fecal matter the mother had observed on the floor. Defendant was convicted, and on appeal challenged the trial court's ruling that the nurse's

testimony was admissible. *Held*: Affirmed. The trial court properly admitted the sexual-abuse diagnosis. [1] *State v. Southard*, 347 Or 127 (2009), does not preclude admission of any diagnosis of sexual abuse; its holding is narrow and it only excludes those diagnoses where there is no "physical evidence of abuse." [2] The necessary physical evidence is not limited to trauma on the victim's body; thus, the fecal matter the mother saw on the floor was "physical evidence of abuse." [3] The nurse practitioner expressly relied on the fecal matter in making her diagnosis. She explained its medical significance, demonstrating that the import of the evidence would not be within the knowledge of the typical juror. [4] The fecal matter had corroborative value because it supported the victim's description of the crime. [5] "[W]e hold … that there is sufficient physical evidence of abuse to avoid *Southard*'s proscription—that is, there is sufficient physical evidence so that the diagnosis of sexual abuse tells the jury something that it is not equally capable of determining—when (1) the significance of that physical evidence is 'the sort of complex factual determination that a lay person cannot make as well as an expert,' (2) the physical evidence is corroborative of the type of abuse actually alleged, and (3) the medical expert actually relies on the physical evidence in making a diagnosis of sexual abuse."

Sexual Offenses: instructions

State v. Cluver, 255 Or App 284, 296 P3d 638 (2013). Defendant, an employee at an assisted-care facility, was charged with various sexual offenses that he committed against an elderly lady with dementia. One charge was first-degree sodomy under ORS 163.405(1)(d) based on an allegation that she was incapable of consenting. Defendant primarily denied that he had committed the offense, but he also argued that if it happened, the victim had consented. He requested an instruction on second-degree sexual abuse, ORS 163.425(1)(a), as a lesser-included offense. The trial court denied that request on the ground that the nature of the consent required for the two crimes were not the same. The jury found defendant guilty. *Held*: Reversed. The trial court erred by refusing to instruct on second-degree sexual abuse. [1] Where a defendant is charged with first-degree sodomy on a theory that the victim was incapable of consent under ORS 163.405(1)(d), second-degree sexual abuse is a lesser-included offense. [2] It does not matter that the requested instruction on a lesser-included offense might be inconsistent with the defendant's primary defense; the trial court must give a lesser-included offense instruction if the evidence supports it. [3] The error was not harmless. The Court of Appeals once again rejected the state's argument that because the jury was given an "acquittal first" instruction, ORS 136.460(2), and found defendant guilty of the charged offense, the error is inconsequential because the jury could not have considered the lesser crime anyway.

State v. Sullivan, 253 Or App 103, 288 P3d 1004 (2012). In separate incidents, defendant compelled the victim, a 13-year-old girl, to commit oral sodomy and to submit to anal rape. He was charged with two counts of first-degree sodomy by forcible compulsion. In closing argument, the prosecutor described the first incident as that defendant had pushed the victim's head toward his exposed penis and then had threatened to kill her if she screamed, and the second incident as that "when he flips her over the next time and puts her down on the bed, she still is going under that implied threat." Defendant argued that because the state had presented two different theories of forcible compulsion—actual physical force and the threat of physical force—a *Boots* instruction was required that would require the jurors to agree on one of those two theories. The trial court refused to give the instruction, and the jury found him guilty. *Held*: Affirmed. [1] "The decisive question in reviewing the court's rejection of defendant's requested instruction is whether the jury was allowed to base its verdict on alternative factual occurrences, each of which would be a separate crime, or whether the state merely presented alternative evidence to establish a single element of the offense." [2] "ORS 163.305(2) defines 'forcible compulsion,' as either physical force or a threat. Both are merely different ways of proving the element of forcible compulsion." [3] "Accordingly, we conclude that the state was entitled to present evidence that defendant engaged in forcible compulsion by physical force or by threat, and the trial court did not err in denying defendant's requested jury

instruction."

Sexual Offenses: sex-offender registration

United States v. Kebodeaux, 570 US __, 133 S Ct 2496 (2013). In 1999, defendant was convicted in a special court-martial of a sexual offense involving a minor, and the court imposed a sentence of 3 months imprisonment and a bad-conduct discharge. In 2004, defendant registered with Texas authorities in accordance with Wetterling Act of 1994. In 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA), 42 USC § 16901 *et seq*., which evidently superseded or supplemented that Wetterling Act and requires those convicted of sexual offenses to register with state authorities. In 2007, defendant moved within Texas without notifying authorities. As a result, he was charged with and convicted of violating SORNA. The Fifth Circuit, in an *en banc* decision, reversed, holding that the federal government lacked authority under the Necessary and Proper Clause in Art. I, § 8, to require defendant to register because he had "fully served" his sentence and had been "unconditionally let free" before SORNA was enacted. *Held*: Reversed, judgment affirmed. [1] "As of the time of [defendant's] offense, conviction and release from federal custody, these Wetterling Act provisions applied to [him] and imposed upon him registration requirements very similar to those that SORNA later imposed. Contrary to what the Court of Appeals may have believed, the fact that the federal law's requirements in part involved compliance with state-law requirements made them no less requirements of federal law." [2] The Wetterling Act, "as applied to military sex offenders" such as defendant, falls within the scope of the Necessary and Proper Clause. "The Clause allows Congress to adopt any means, appearing to it most eligible and appropriate, which are adapted to the end to be accomplished and consistent with the letter and spirit of the Constitution. … It could specify that the sex offense of which [defendant] was convicted was a military crime under that Code. It could punish that crime through imprisonment and by placing conditions upon [his] release. And it could make the civil registration requirement at issue here a consequence of [his] offense and conviction. This civil requirement, while not a specific condition of [his] release, was in place at the time [he] committed his offense, and was a consequence of his violation of federal law. And Congress's decision to impose such a civil requirement that would apply upon the release of an offender like [defendant] is eminently reasonable." [3] "The upshot is that here Congress did not apply SORNA to an individual who had, prior to SORNA's enactment, been 'unconditionally released,' *i.e*., a person who was not in any special relationship with the federal government, but rather to an individual already subject to federal registration requirements that were themselves a valid exercise of federal power under the Military Regulation and Necessary and Proper Clauses. SORNA, enacted after [defendant's] release, somewhat modified the applicable registration requirements. In general, SORNA provided more detailed definitions of sex offenses, described in greater detail the nature of the information registrants must provide, and imposed somewhat different limits upon the length of time that registration must continue and the frequency with which offenders must update their registration. But the statute, like the Wetterling Act, used Spending Clause grants to encourage States to adopt its uniform definitions and requirements. It did not insist that the States do so." Consequently, "the SORNA changes as applied to [defendant] fall within the scope Congress's authority under the Military Regulation and Necessary and Proper Clauses."

SHACKLING

Hale v. Belleque, 255 Or App 653, 298 P3d 596 (2013). In late 1995, when he was 19 years old, petitioner and Susbauer committed a string of crimes, including residential burglaries, in Eugene. In the evening of December 20, petitioner and Susbauer came across petitioner's former girlfriend, her boyfriend, and another boy (all of whom were about 15) and gave them a ride. They took the three up a remote logging road, sexually assaulted the girl, and then murdered them all, execution style. Petitioner and Susbauer were charged with numerous counts of aggravated murder and sexual offenses, as well as with counts of burglary based on previous crimes. The jury found petitioner

guilty on the charges and imposed a death sentence. Susbauer pleaded guilty and was sentenced to life imprisonment. The Oregon Supreme Court affirmed petitioner's conviction and death sentence. *State v. Hale*, 335 Or 612 (2003), *cert den* (2004). Petitioner then filed a petition for post-conviction relief in which he alleged numerous claims. After a trial, the post-conviction court rejected all of his claims. *Held*: Affirmed in part and reversed in part. The post-conviction court correctly denied petitioner's claim that the trial court erred by ordering him to wear physical restraints during trial: the claim is barred by *Palmer v. State of Oregon*, 318 Or 352 (1994), and ORS 138.550; the restraints he wore during trial were not visible and he did not testify, and so he suffered no prejudice; and the record "supports the criminal trial court's decision to require the physical restraints," and so his counsel reasonably chose not to object.

State v. Wall, 252 Or App 435, 287 P3d 1250 (2012), *rev den*, 353 Or 280 (2013). Defendant was charged with DUII and reckless endangerment. She was in custody at the time of trial and appeared in court wearing a leg restraint under her clothing. Defendant had been convicted of 13 felonies in the past, but none of those convictions was for a violent crime or for a escape-related offense. For unknown reasons, the jail classified defendant as a "medium" security risk. Defendant moved to have the leg restraint removed, but the trial court denied her motion. She then entered a conditional guilty plea reserving the right to challenge the court's decision on appeal. *Held*: Reversed and remanded. [1] "To restrain a defendant during trial, the judge must find, on the record, that the defendant posed an immediate or serious risk of committing dangerous or disruptive behavior, or that he posed a serious risk of escape. We also have stated that restraint of a defendant during trial without substantial justification results in manifest prejudice." [2] "A trial judge has the discretion to order the shackling of a defendant if there is evidence of an immediate and serious risk of dangerous or disruptive behavior. In exercising that discretion, the court must receive and evaluate relevant information and must make a record allowing appellate review of its decision. The information need not be presented in a formal adversarial proceeding, but it must provide a basis for the trial court to make an independent assessment of the risk. Although a sheriff's deputy or a prosecutor may provide helpful and necessary information in order to assist in the assessment of the risk posed by an unrestrained defendant, the trial court may not simply accept the conclusions of others; it must make an independent determination that restraint is justified." [3] The state's argument that a lesser showing should be required because the leg restraint was not visible had no merit: whether a restraint is visible or not is a "distinction … without a difference under Oregon law," and the same standard applies in all cases. [4] Defendant's criminal history and unexplained jail classification were insufficient factual bases for making that threshold finding. Therefore, requiring the leg restraint was unlawful. [5] Because defendant had entered a conditional guilty plea, "harmless error" analysis did not apply. When a defendant enters a conditional guilty plea pursuant to ORS 135.335(3) and later prevails on appeal, she then has a statutory right to return to the trial court and withdraw the guilty plea. Harmless error analysis is inconsistent with that statutory right and is, in fact, impossible on the record: the court cannot speculate what decision the defendant will make on remand and, thus, cannot determine on the record whether the error was harmless.

SOLICITATION

^ ***State v. Everett***, 249 Or App 139, 274 P3d 297, *rev allowed*, 352 Or 377 (2012). Defendant attempted to run over Deputy Moss. Then, while in jail, he attempted to solicit Piatt, who was an enforcer for "the Outsiders" (an outlaw motorcycle gang) to murder Moss. But Piatt informed the police and testified before the grand jury, which indicted defendant for solicitation to commit aggravated murder of Moss, listing Piatt as a witness. Defendant then talked with another inmate who was about to be released, Van Alstine, and asked him to give information to the Outsiders about Piatt's ratting him off, hopefully tell Van Alstine that they would murder Piatt. But Van Alstine also was an informer, and defendant was charged with solicitation to commit aggravated murder of Piatt, too. At trial, Piatt testified at trial, admitted he had engaged in illegal activities as "enforcer," but he

invoked the Fifth and refused to answer a question on cross-examination whether he had ever killed anyone. Defendant moved to strike Piatt's testimony or for a mistrial, but the trial court denied those motions. Defendant was convicted of those charges. *Held*: Affirmed. The trial court correctly denied defendant's motion for a judgment of acquittal on the charge that he solicited Van Alstine to murder Piatt. Although defendant intended that Van Alstine to be only a messenger to the Outsiders rather than the killer, if Val Alstine had provided the information he knowingly would have been an accomplice. "As a matter of law, a person commits the crime of solicitation when that person solicits an intermediary to procure a third party to commit the intended crime so long as the intermediary is aware of that intended crime."

SPEEDY TRIAL

Boyer v. Louisiana, 569 US __, 133 S Ct 1702 (2013) (*per curiam*). In February 2002, defendant robbed and murdered a man who had picked up him and his brother while they were hitchhiking. Defendant confessed, his brother agreed to testify against him, and the evidence of his guilt was overwhelming. He was charged with capital murder and the state announced that it would seek the death penalty. Over the next three years, the defense obtained continuances on eight occasions that resulted in delays of 20 months, and the court granted continuances at the state's request without objection from defendant. At that point, the proceedings stalled because funding dried up for court-appointed counsel in capital cases. In 2005, defendant filed a motion to dismiss, contending that the delay violated the Speedy Trial Clause. After further delay caused by Hurricane Katrina, the court denied the motion. About a year later, the state broke the impasse by waiving the death penalty, and the case proceeded as a normal case, albeit "at a plodding pace." Defendant filed another motion to dismiss, which the trial court denied. Trial eventually began in September 2009. The jury found defendant guilty of second-degree murder and robbery. His convictions were affirmed by the Louisiana Court of Appeals. The court noted that the seven-year post-indictment delay was "presumptively prejudicial," and found that a "majority" of the delay was caused by the "lack of funding," but concluded that that portion of the delay could not be charged against the state. Defendant then filed a petition for certiorari in the United State Supreme Court, and the Court allowed review to decide "whether a state's failure to fund counsel for an indigent defendant for five years, particularly where failure was the direct result of the prosecution's choice to seek the death penalty, should be weighed against the state for speedy-trial purposes." *Held*: Petition dismissed as improvidently granted. The Court did not issue a primary opinion that gave a reason for the dismissal, but Justice Alito wrote a "concurring" opinion that explained that, upon a close examination of the record, most of the seven-year delay was defendant's own doing: "In sum, the record shows that the single largest share of the delay in this case was the direct result of defense requests for continuances, that other defense motions caused substantial additional delay, and that much of the rest of the delay was caused by events beyond anyone's control. It is also quite clear that the delay caused by the defense likely worked in petitioner's favor. The state court observed that petitioner's assertions of his speedy trial right were 'more perfunctory than aggressive.' And what started out as a very strong case of first-degree murder ended up, after much delay, in a conviction for lesser offenses. … We have before us the same record that was before the Court of Appeals, and the record simply does not support the proposition that much—let alone 'most'—of the delay was caused by the State's failure to fund the defense. Having taken up this case on the basis of a mistaken factual premise, I agree with the Court's decision to dismiss the writ as improvidently granted."

State v. Cupp, 257 Or App __, __ P3d __ (July 24, 2013). Defendant was charged with DUII in March 2007. In June 2007, the put the case on hold, to "trail" an unrelated felony case that was pending against defendant. In May 2009, after that felony case was resolved, the court took up consideration of a pending pretrial motion, and litigation of that motion was not finally resolved until April 2010. Before the trial date, defendant moved to dismiss for lack of speedy trial under Art. I, § 10, and ORS 135.747. The trial court denied the motion and a jury convicted defendant. *Held*:

Affirmed. The trial court correctly denied the motion to dismiss. [1] The parties agree that the state was responsible for 11 out of the 38 months of total delay. "We conclude that the relevant delay of approximately 11 months exceeds expectations for bringing a one-count misdemeanor case that was not complex … to trial." Oregon's Standards for Timely Disposition indicate that only a small percentage of misdemeanor cases should take longer than six months. [2] When determining whether the delay between scheduled court dates is reasonable, "[w]e assume that … the court selects the earliest available date that is mutually agreed upon by the parties unless the record or the unusual length of time before a future scheduled event suggests otherwise." [3] "Out of the 11 months of delay, only 34 days were unexplained and, therefore, unjustified. The other periods of delay were due to routine scheduling delays that are inherent in every case. Throughout the case, the court regularly scheduled status conferences and held multiple hearings for the parties' motions; this case was not one languishing from inattention."

State v. McGee, 255 Or App 460, 297 P3d 531 (2013). Defendant was charged with DUII. He filed a motion to suppress and served a subpoena *duces tecum* on the city police officer who investigated the crime, which required the officer to bring various documents with him to court. Due to an administrative error, the officer did not receive the subpoena until shortly before the court date, nor was it forwarded to the city attorney. The officer appeared at the court hearing with only one of the items listed in the subpoena. When questioned by defense counsel regarding his failure to bring all of the subpoenaed documents, the officer at one point provided a flippant response. The trial court continued the hearing for a month, during which time the defense was provided with all of the documents responsive to the subpoena. On the date of the next hearing, the defense sought to initiate contempt proceedings against the officer, reasoning that the officer's actions were indicative of bias, and that if the officer were held in contempt, he could use that information to demonstrate bias at trial. The trial court ruled that it did not have authority to initiate contempt proceedings. Defendant sought mandamus on that issue. Numerous delays in the case ensued. Perhaps the most significant resulting from the fact that defendant sought a stay of the DUII proceeding pending the outcome of the mandamus proceeding and, then, pending the outcome of the contempt proceeding. Ultimately, the officer was not held in contempt. When proceedings in the DUII case resumed, defendant moved to dismiss based on violation of his speedy-trial rights under ORS 135.747. According to defendant, all of the delay resulting from staying the proceedings pending the mandamus and contempt proceedings was attributable to the state because it could be traced back to the officer witness's original failure to produce all of the documents at the first hearing. The trial court granted the motion and the state appealed, arguing that all of the delays resulting from defense requests for continuances and requests to stay the proceedings were attributable to the defense, and that the remainder of the delay attributable to the state was minimal and reasonable. *Held*: Reversed. The trial court should have denied the motion to dismiss. After examining each period of delay, the court concluded that all but six months of the pretrial delay was attributable to the defense, and the six months attributable to the state was reasonable. [1] The 28-day delay resulting from officer's initial failure to produce the documents is attributable to the state. [2] "Although it is the state's duty to work to comply with defense subpoenas, and although—like the trial court—we do not condone some of [the officer's] comments, the subpoena *duces tecum* was served on [the officer] with very little time to arrange to gather the documents, the number and kind of documents requested took time to locate and provide, and [the officer] provided the requested documents within an acceptable time frame. Although this one-month period counts more heavily against the state than those flowing from routine scheduling expectations, we do not conclude that it was unreasonable." [3] Even accepting that defendant's pursuit of mandamus and contempt charges against the officer were good-faith efforts to present a defense, the resulting delays were attributable to defendant. "Whenever a defendant in good faith seeks a setover, demurs to an indictment, moves to change venue, or moves to suppress evidence—actions that we or the Supreme Court have concluded led to delay that a defendant applied for or consented to—the defendant is taking that action in order to protect the defendant's ability to present his defense. That a defendant is taking an action in order to present a defense does not change the fact

that the defendant's actions will lead to delay or that, under ORS 135.747, such delay is delay that defendant applies for or consents to." [4] Reasonable delays to resolve a defendant's pretrial motions are attributable to the defendant. [5] When a defendant requests a trial setover, he or she is considered to have applied for or consented to the resulting delay for purposes of ORS 135.747. [6] As when a defendant seeks a trial setover or files a motion requiring pretrial resolution, when a defendant seeks a stay of his prosecution, he applies for or consents to delay of the trial. [7] The court rejected defendant's contention that he should not be responsible for all of the delay resulting from the stay while the mandamus case was proceeding because the mandamus case took longer than necessary due to the state's failure to join his arguments against the city, because that contention is speculative.

State v. Beddingfield, 255 Or App 384, 296 P3d 1278 (2013) (*per curiam*). Defendant was convicted of felony DUII and DWS after the trial court denied her motion to dismiss on speedy trial grounds. More than two years passed between the issuance of the secret indictment and warrant and defendant's arrest. The state conceded that the 26 month delay was attributable to the state and the record did not demonstrate that the delay was reasonable. The Court of Appeals accepted that concession, agreeing that the delay was not reasonable under the circumstances, and the trial court should have granted defendant's motion to dismiss.

State v. Murr, 254 Or App 456, 295 P3d 122, *rev den*, 353 Or 787 (2013). Defendant was cited for DUII, reckless driving, and criminal mischief in October of 2007 by way of a citation and complaint, but those citations were "no-complainted" and never filed with the court, and the district attorney did not file a superseding accusatory instrument within 30 days. Nearly two years later, the district attorney filed an information charging defendant with those crimes based on the same incident in 2007. Defendant moved to dismiss those charges on statutory speedy- trial grounds under ORS 135.747, based on the two-year delay between the original citations and filing of the information. The trial court denied that motion, and defendant was convicted. *Held:* Affirmed. The trial court correctly denied defendant's motion to dismiss. [1] It is the *filing* of an accusatory instrument with the court—whether a citation and complaint, information, or indictment—that charges a defendant with a crime, and therefore that filing starts the clock for purposes of determining whether a defendant is brought to trial within a reasonable time. [2] "In the case at bar, there was never an information or indictment to replace an earlier-filed accusatory instrument. Instead, the citations—one with a criminal complaint and the other without—were never filed with the court as required by ORS 133.065. In fact, the district attorney 'no-complainted' the DUII citation under ORS 133.069(2) by not filing the citation with the court. Thus, neither citation operated to initiate the prosecution or to file a complaint and charge defendant with a crime. Defendant remained uncharged until the information was filed with the court on September 16, 2009. The filing of that accusatory instrument marked the beginning point of the speedy-trial calculation under ORS 135.747. Because the trial delay after that point was reasonable under ORS 135.747, the trial court did not err in denying defendant's motion to dismiss." [3] The ensuing eight-month delay between charging and trial was reasonable.

State v. Coburn, 254 Or App 36, 292 P3d 640 (2012). On August 6, 2007, defendant was arraigned on charges of MCS and misdemeanor child endangerment. Defendant requested change of counsel, and a plea hearing was set for October 8, 2007. Defendant requested another change of counsel and a status conference was set for December 3, 2007, at which she failed to appear. On January 7, 2008, at a further status hearing, she requested a trial. The initial trial date of March 13, 2008, was set over by the court because no judges were available. A second trial date of July 23, 2008, was set over at the state's request due to the unavailability of a law-enforcement witness. The third trial date of September 30, 2008, was set over at defendant's request after her motion to allow a witness to testify by telephone was denied. She then failed to appear on March 19, 2009, the fourth trial date. A fifth trial date was set for May 21, 2009, but was set over because no judges were

available, and the sixth trial date of September 3, 2009 was also set over because no judges were available. A seventh trial date of January 6, 2010 was set over because defendant's attorney was unavailable. Finally, the case was tried on March 18, 2010. Defendant moved to dismiss, alleging that the delay violated his right to a speedy trial under ORS 135.747. In a detailed letter opinion, the trial court denied the motion, finding that of the 951 days of total delay, 566 days were attributable to the state and 385 days were attributable to defendant, and that the delay was reasonable. Defendant was convicted. *Held*: Affirmed. The trial court correctly denied defendant's motion to dismiss. [1] "A delay of 18.5 months is longer than would ordinarily be expected to bring a defendant to trial on felony charges." [2] But the "two-month period of delay caused by the unavailability of a witness 'was reasonable'" and "another two months of delay caused by another trial judge's decision to prioritize a different case involving another defendant represented by defense counsel [also] was reasonable." [3] Regarding the 14 months of delays caused by the unavailability of judges, "the record does reflect particular circumstances that contributed to the delay, namely, recurring systemic factors that caused judges to be unavailable for defendant's reset trial dates: the commitment of one-half of the available judges to fixed, specific dockets on any given day, and the priority given to older cases and juvenile, child-welfare, and in-custody criminal cases as well as the priority given to cases involving child and out-of-state witnesses," which render each of the individual periods of delay attributable to the state reasonable under the circumstances. [4] In a case involving a felony charge with a three-year statute of limitations, "the cumulative delay" of 18½ months, which is "only slightly more than one-half the length of the statute of limitations," was not unreasonable.

State v. Baranovich, 254 Or App 98, 295 P3d 58 (2012), *rev den*, 353 Or 747 (2013). Defendant argued that the 17-month delay between her arraignment on a charge of second-degree theft and eventual trial violated her statutory right to speedy trial under ORS 135.747. She failed to appear at the next required hearing, prompting the court to issue a bench warrant. Unbeknownst to the both the DA's office and the court, defendant was busy racking up new criminal cases in neighboring Clackamas County, where she eventually was held in custody pending trial. She remained in Clackamas County until resolving that county's charges, then was sent to Coffee Creek Correctional Facility to serve a 36-month and a 20-month sentence. Approximately 14 months after her arraignment, while serving her prison terms, she filed a demand for a speedy trial in Multnomah County. She received a trial date shortly after that. She moved to dismiss for violation of her right to a speedy trial under ORS 135.747. A number salient facts were established at the hearing: (1) The DA's office was never officially informed about defendant's Clackamas County and Coffee Creek incarcerations until she filed her demand for a speedy trial; (2) during that time, the trial court's FTA warrant remained active; (3) both Clackamas County Corrections and DOC were aware of the pending warrant and had "placed" a Multnomah County detainer on her. The trial court denied her motion, and she was found guilty. *Held:* Affirmed. The delay, although attributable to the state, was reasonable "because defendant knowingly failed to demand an early trial under ORS 135.760(1) while incarcerated." *See State v. Bircher*, 253 Or App 382 (2012). Defendant was aware of the pending theft charges in Multnomah County, it was therefore her burden to assert her right to a speedy trial once she was taken into custody by the neighboring county and DOC.

State v. Bircher, 253 Or App 382, 290 P3d 841 (2012), *rev den*, 353 Or 562 (2013). Defendant was charged with DUII in September 2006. The trial was repeatedly rescheduled, and defendant twice failed to appear, resulting in warrants being issued. He was arrested on a warrant in September 2008. In October 2008, his probation was revoked in an unrelated case and he was sentenced to 36 months in prison. A detainer was lodged on the DUII charge but defendant did not request prosecution per ORS 135.760 until July 2009. The case was set for trial in September 2009, and defendant filed a motion to dismiss for denial of speedy trial under ORS 135.747. The trial court denied the motion, and he entered a conditional guilty plea. On appeal, defendant conceded that he consented to 20 months of the total delay by asking for defense set-overs, or was caused by his absconding and, thus, was reasonable as a matter of law under ORS 135.747, but argued that the

remainder was attributable to the state and was unreasonable. *Held*: Affirmed. [1] The 10-month delay while defendant was incarcerated "is deemed to have been caused by [him] for purposes of ORS 135.747": because he was aware of the DUII charge and was represented by counsel at the time his incarceration commenced, his failure to make an earlier request under ORS 135.760 constitutes "an informed choice." Thus, such delay is classified as reasonable for purposes of ORS 135.747. [2] Because the remaining seven months of scheduling delays attributable to the state were also reasonable, the trial court did not denying the motion to dismiss the charge under ORS 135.747.

State v. Johnson, 253 Or App 392, 290 P3d 305 (2012). Defendant was convicted of misdemeanor DUII in Glendale Justice Court in February 2005; he appealed to circuit court pursuant to ORS 157.010 for a trial *de novo*. After numerous reschedulings, the case was finally tried in January 2009. Defendant moved to dismiss for denial of speedy trial under ORS 135.747. The trial court denied the motion, and defendant was convicted after a jury trial. *Held*: Affirmed. [1] "ORS 135.747 … does not regulate the timing of a second trial obtained under ORS 157.010." [2] ORS 53.090 regulates only "the manner in which the circuit court tries the case" on appeal—it "does not incorporate speedy-trial statutes into the processing of circuit court retrials under ORS 157.030." [3] Because the justice court tried the DUII charge within six months, the circuit court correctly denied defendant's motion to dismiss.

State v. Garner, 253 Or App 64, 289 P3d 351 (2012), *rev den*, 353 Or 280 (2013). Defendant's first trial on a DUII charge ended in a mistrial in 2007. Before retrial, the court dismissed the case on former-jeopardy grounds, the state appealed, and the Court of Appeals reversed and remanded. The appeal became final in August 2010. The trial court scheduled the new trial for December 2010. Defendant moved to dismiss, arguing that he had not been "brought to trial within a reasonable period of time" as required by ORS 135.747. He claimed that the delay that had been caused by the state's appeal was unreasonable, noting that it had taken the Court of Appeals 8 months after the briefs had been filed to schedule oral argument and the court then took an additional 11 months after oral argument to issue its decision. The state countered that the appellate delay was "reasonable and typical for a case of this kind." The trial court granted defendant's motion to dismiss, ruling that the appellate delay was "too long for the court to decide a case of this limited complexity." *Held:* Reversed and remanded. [1] The parties wrongly assume that the appellate delay is relevant to the disposition of this case. "Implicit in that assumption was that, even though defendant's June 2007 trial ended in a mistrial, he had not yet been 'brought to trial' for purposes of ORS 135.747." But ORS 135.747 "is satisfied when a defendant's trial is commenced even if that trial ultimately ends in a mistrial and the defendant is retried. Simply put, ORS 135.747 does not apply to retrials following a mistrial. … Once a trial has been commenced, a case is no longer languishing for purposes of ORS 135.747." [2] "To the extent that we assumed to the contrary" in our previous cases, "we now overrule" those cases. [3] Therefore, the relevant period of delay in this case is from when the state filed its complaint until defendant's original trial in 2007 commenced. [4] Of that delay, the state is responsible for 7½ months. "Under any measure of analysis, that period of delay is reasonable." [5] The delay occasioned by the state's first appeal did not violate defendant's right to a speedy trial under Art. I, § 10, and the Sixth Amendment because he "had failed to demonstrate the necessary prejudice."

State v. Benner, 253 Or App 164, 288 P3d 1016 (2012). Defendant was charged with driving while revoked, and he moved to dismiss for failure to bring him to trial within 90 days, as required by ORS 135.760 to 135.765. It was undisputed that defendant properly served a demand for trial on the DA and that he was not tried within the 90-day period. But the state argued that defendant consented to (or waived) a delay when his trial counsel, by an email exchange a court clerk, arranged for trial date beyond the 90-day period, and when defendant remained silent during two hearings in which the set trial date was discussed. The trial court denied defendant's motion to dismiss. *Held*: Reversed and remanded. Defendant was entitled to dismissal under ORS 135.765. [1] "Under the statutory

scheme, the state cannot abdicate its responsibility to control a prosecution. It must take affirmative action to bring a defendant to trial within 90 days, request a continuance for good cause or suffer a dismissal under ORS 135.765. Thus, an inmate is not required to remind the district attorney of the 90-day limit, nor is an inmate required to object to a trial date set outside the 90-day time period without his involvement." [2] "A defendant who has invoked his speedy trial right under ORS 135.760 may waive that right by agreeing to a trial date outside the 90-day limit." [3] But defendant did not personally waive his 90-day speedy trial right, and defense counsel did not waive it on defendant's behalf: "there is no evidence that defendant knew that defense counsel had agreed to the trial date, we cannot conclude that [his] failures to object at the pretrial hearings were endorsements or ratifications of defense counsel's agreement, as opposed to silence in the face of a scheduling decision that he believed was made by either the trial court or the state and which he had no duty to correct." Moreover, because "there is no evidence in the record to show that defense counsel knew that defendant had sent the speedy trial request, … we cannot conclude that defense counsel waived defendant's 90-day speedy trial right."

State v. Stephens, 252 Or App 400, 287 P3d 1181 (2012). On remand from Supreme Court for reconsideration in light of *State v. Glushko/Little*, 351 Or 297 (2011). *State v. Stephens*, 351 Or 545 (2012). Defendant was charged with misdemeanor DUII in April 2002, and he entered diversion in May. One of the conditions of diversion provided that defendant "g[a]ve up his right to speedy trial," and the agreement notified him that he would receive notice of hearings "by regular mail," and failure to appear could lead to termination of the diversion agreement. Defendant appeared at a show-cause hearing in December 2002, but did not appear at a second show-cause hearing in June 2003, but his counsel did appear at that hearing. The court terminated the diversion agreement and issued a bench warrant, which was sent to defendant's last-known address, but with a typo in the zip code. The notice was not returned as undeliverable. He was arrested on the warrant in November 2008; his address had changed between 2003 and 2008. The trial was scheduled for January 2009, but after setovers by both sides and by the court, was reset for March 11, 2009. Defendant moved to dismiss on statutory speedy trial grounds; the trial court denied the motion and convicted defendant. *Held*: Affirmed. [1] "Because defendant waived his right to a speedy trial when he entered into the diversion agreement, the period of delay between May 15, 2002, and June 16, 2003, when defendant's diversion was terminated, does not count toward the calculation of the relevant amount of cumulative delay in this case. Accordingly, we examine the approximately 66 months of delay that occurred between the termination of defendant's diversion and his arrest on the outstanding warrant." [2] In light of *Glushko/Little*, defendant's failure to appear "did not constitute consent to the ensuing 66 months of delay. Accordingly, that delay was not attributable to defendant." [3] The record supports the trial court's finding that defendant had notice of the June 2003 hearing. The OJIN case register notations showed that the court sent notice of the June hearing date to defendant and defense counsel; moreover, the diversion agreement required the court to send defendant notices my mail of show-cause hearings. "A presumption attaches that the court clerk sent those hearing notices, including notice of the rescheduled ... hearing date, to defendant at the address that he had provided to the court," as well as "a presumption that each of those notices was, in fact, received." *See* OEC 311(1)(j), (q). Moreover, because defense counsel received the notice, and "[d]efense counsel did not indicate that he had lost contact with defendant," the "trial court was entitled to infer from the fact that counsel had notice ... that defendant did as well." [4] Because defendant "knowingly failed to appear for that hearing," he was "entirely in control of the amount of delay that followed his failure to appear, regardless of what additional steps the state may have been able to take to locate him." [5] Accordingly, the delay that resulted from defendant's failure to appear was reasonable (as was the four months of delay in resetting the trial date).

State v. Turner, 252 Or App 415, 287 P3d 1206 (2012). Defendant was charged with DUII in January 2002. She failed to appear at a diversion hearing in June 2002. She was arrested in 2008, and her case was set for trial in September 2009. After setovers by both sides, her trial was set for

May 2010. She moved to dismiss on statutory speedy-trial grounds, but the court denied her motion and convicted her of DUII. *Held*: Affirmed. [1] The "approximately seven years and eight months of delay that defendant neither requested nor consented to" was reasonable given defendant's failure to appear at scheduled hearings, because defendant "was aware that the charge was pending," and "under an obligation to keep the court apprised of her current address." [2] OJIN reflects that the court sent defendant notice of a scheduled hearing. Although "no evidence was adduced that defendant actually *received* that notice, … the result of the inquiry does not hinge on whether the state can affirmatively prove that … defendant actually received the notice," because her release agreement provided that she would receive notices of hearings by mail and thus it was her responsibility to update her mailing address with the court. [3] Because "notice of the hearing was sent to the address defendant provided to the court, … and, if defendant did not receive it, that was because she had moved from that address without informing the court of her new address[.]" Thus, the resulting period of delay, along with brief setovers to accommodate scheduling, was reasonable.

State v. Peterson, 252 Or App 424, 287 P3d 1243 (2012). Defendant was charged with misdemeanor DUII and refusal to submit to a breath test in September 2008. Because of scheduling issues, including a five-month unexplained court scheduling error, and because of setovers to wait for the Supreme Court to issue its decision in *Machuca*, which would dispose of a contested issue in the case, trial was not scheduled until August 2010. Defendant moved to dismiss on statutory speedy-trial grounds; the trial court denied the motion and convicted defendant. *Held*: Reversed and remanded for judgment of dismissal. [1] The parties agreed that the state was responsible for approximately 19 months of cumulative delay, which included five-months of delay attributable to an unexplained court scheduling error. [2] "A delay of 19 months to which the defendant did not consent exceeds expectations for bringing a case of this type to trial." [3] In examining whether delay is reasonable, "there is no precise formula," but generally "the acceptability of the total delay in a case is influenced by the extent to which it is justified." [4] Although individual segments of the delay were reasonable, including delay while awaiting the Supreme Court's decision in *Machuca*, "five months was inadequately explained and, perforce, unreasonable … We have not found an appellate decision in which the court upheld the denial of a [statutory speedy-trial motion] in a misdemeanor case where, as here, the cumulative period of delay attributable to the state exceeded 15 months and where a significant part of the delay was determined to be unreasonable." [5] Because the delay was unreasonable and the state did not demonstrate a "sufficient reason" not to dismiss the indictment, "we reverse."

State v. Hernandez-Lopez, 251 Or App 546, 284 P3d 1170 (2012). Defendant was charged with DUII and DWS in September, 1999. When he failed to appear at a pretrial conference the following February, the trial court issued a bench warrant. That warrant was not served for more than eight years. When it was, defendant moved for dismissal on speedy-trial grounds, which the court denied; he was tried and convicted in January 2009. The Court of Appeals affirmed without opinion, and defendant petitioned for review. The Oregon Supreme Court remanded the case to the Court of Appeals to reconsider in light of *State v. Glushko/Little*, 351 Or 297 (2011). *Held:* Affirmed. [1] Under *Glushko/Little*, defendant did not consent to the more than nine-year delay by failing to appear or failing to contact the court before the warrant was served. Accordingly, that delay is attributable to the state. [2] But the delay was reasonable. As in *Glushko/Little*, "here, the fact that the state may have been able to take additional steps to track defendant down is not the point; defendant was entirely in control of the amount of delay that followed his failure to appear." Defendant's release agreement provided that he was obligated to appear, and he knew that failing to do so would result in the issuance of a warrant for his arrest. [3] The remaining period of eight and one-half months between arrest and trial was also reasonable.

STALKING

M.F.K. (Foster) v. Miramontes, 352 Or 401, 287 P3d 1045 (2012). Plaintiff filed a petition under ORS 30.866 in which she requested both a stalking protective order (SPO) against defendant and an award of compensatory damages for lost sick and annual leave, lost wages, and counseling expenses. Defendant demanded a jury trial on the claim for damages; he based that claim on Art. I, § 17, and Art. VII (Am), § 3. The trial court denied that request, and after a trial to the court, it issued a SPO and entered a judgment against defendant for $42,000 in compensatory damages. Defendant appealed, and the Court of Appeals affirmed. *Held*: Reversed and remanded. [1] ORS 30.866 allows a plaintiff to request both issuance of a SPO and compensatory damages, but it does not authorize the trial court to provide the defendant with a jury trial on the damages claim. [2] Under Art. I, § 17, and Art. VII (Am), § 3, "the relevant inquiry is not whether a newly created statutory claim existed at common law, but whether, because of its nature, it falls within the guarantee of the Constitution to a jury trial." [3] "If plaintiff had sought only money damages under ORS 30.866—that is, had she not combined her claim for money damages with a claim for [an SPO]—then her claim would have been at law and the right to jury trial would have attached." On the other hand, "if plaintiff had sought only injunctive relief [in the form of an SPO], her claim would have been equitable in nature, and the constitution would not provide a right to a jury trial. … There is no right to jury trial on equitable claims." [4] "[T]he right to jury trial must depend on the nature of the relief requested and not on whether, historically, a court of equity would have granted the relief had the legal issue been joined with a separate equitable claim. … Instead, we conclude that [Art. I, § 17, and Art. VII (Am), § 3] do not guarantee a right to jury trial for claims or request for relief that, standing alone, are equitable in nature and would have been tried to a court without a jury at common law. By the same token, in the absence of a showing that the nature of a claim or request for relief is such that, for that or some other reason, it would have been tried to a court without a jury, those provisions do guarantee a right to jury trial on claims or requests that are properly categorized as 'civil' or 'at law.'" [5] Because "plaintiff's claim seeking monetary damage for injury inflicted fits within those terms, even if it does not have a precise historical analog," defendant was entitled to a jury trial on that claim. [6] When a mixed petition is before the trial court in which the plaintiff is seeking both equitable relief and compensatory damages and the defendant demands a jury trial on the damages claim, the court should defer ruling on the equitable claim until the jury has rendered a verdict on the damages claim.

State v. Nahimana, 252 Or App 174, 285 P3d 763 (2012) (*per curiam*). Defendant was charged with two counts of violating a stalking protective order (ORS 163.750), and one count of stalking (ORS 163.732) based on two electronic communications from his MySpace account to the victim's account. Defendant moved for a judgment of acquittal on all three counts, claiming that his contacts were protected speech under Art I, § 8, and did not constitute "unequivocal threats" under *State v. Rangel*, 328 Or 294 (1999), which narrowed the stalking statute to apply only to communications that were "threats." The trial court denied the motions and defendant was found guilty. *Held*: Stalking conviction reversed; convictions for violation of stalking order affirmed (*per curiam*). [1] Defendant's communication fell within the narrowing construction of the stalking statute set forth in *Rangel*. [2] Under *State v. Ryan*, 350 Or 670 (2011), the *Rangel* standard for communications does not apply to the crime of violating a stalking protective order, because ORS 163.750 does not require the state to required to prove that defendant's communication constituted an "unequivocal threat." The state's evidence established all of the elements of ORS 163.750.

STATUTE OF LIMITATIONS

State v. Hunter, 257 Or App __, __ P3d __ (August 7, 2013). Defendant was charged with six convictions for first-degree aggravated theft. She filed a demurrer and alternative motion to dismiss two of those counts on the ground that the period of time alleged in Count 1 of the indictment was wholly outside the three-year statute of limitations for the crime, and because the period of time

alleged in Count 2 "straddled" the statute of limitations (thereby alleging that conduct occurred over a time period that included periods inside and outside the statute of limitations). The prosecutor argued that the statute-of-limitations extension provision in ORS 131.125(8) allowed a prosecution within one year after discovery of the offense. The trial court denied the demurrer and motion, and defendant was convicted on stipulated facts. The stipulation did not expressly narrow any of the time frames alleged in the indictment, but instead merely acknowledged that, for each of the six time periods alleged in the indictment, defendant misappropriated money. *Held*: One conviction reversed, otherwise affirmed. [1] Under *State v. Ricker*, 107 Or App 245, 246 (1991), the crime of theft does not fall within the exception to the statute of limitations that exists for crimes that have as a "material element either fraud or breach of a fiduciary obligation." Therefore, the trial court erred in denying the demurrer and motion on that ground. Because the entire time period alleged in Count 1 was outside the three-year statute of limitations for aggravated theft, the trial court should have granted the demurrer to that charge. [2] The court correctly denied the demurrer and motion to dismiss Count 2 on the ground that *part* of the time period alleged was outside the statute of limitations. The indictment was facially sufficient because it could be determined from its face that it alleged that a crime had occurred within the limitations period. And, although the trial court had authority to amend the indictment to narrow the time period alleged, the court was not *required* to do so. [3] Although defendant *could* have insisted on a trial and sought factual resolution of precisely when the acts in Count 2 occurred, she instead stipulated broadly that she committed the crimes within the time period alleged; thus, as a matter of law, she was convicted based on acts within the statute of limitations.

State v. Gruhlke, 257 Or App 485, __ P3d __ (2013). On April 20, 2002, defendant was issued uniform citations and complaints for DUII and attempting to elude police. Defendant was then charged by way of a district attorney's information on April 22. That information was superseded by an indictment filed on April 30, again charging defendant with felony attempt to elude and misdemeanor DUII for the April 20th incident. After defendant successfully demurred to that indictment, the state filed an "Amended Indictment" in November 2004, which again charged the same April 2002 offenses. Defendant again demurred and moved to dismiss, arguing that the amended indictment started a new case and, with respect to the DUII charge, was filed beyond the two-year statute of limitations. The trial court overruled the demurrer and denied the motion to dismiss. In 2005, defendant entered a conditional guilty plea to the DUII charge, and the state dismissed the felony attempt to elude charge. She then appealed her DUII conviction arising from the 2004 indictment. The Court of Appeals observed that, although the 2004 indictment, on its face, charged crimes that had occurred more than two years before its issuance, it did not allege "any facts that would demonstrate that the state commenced the prosecution" in a timely fashion. *State v. Gruhlke*, 214 Or App 169, 170, 162 P3d 380 (2007). The court then held that the indictment did not satisfy the requirements of ORS 132.540(1)(c), and reversed and remanded. In the meantime, while defendant's appeal in *Gruhlke* was pending, the state filed yet another accusatory instrument in May 2007, which was titled an "amended information" and again charged defendant with DUII for the same April 20, 2002, incident. It also included the following additional allegation: "The state further alleges that the prosecution was originally commenced and consistently maintained thereafter prior to the expiration of the original statute of limitations." After the Court of Appeals decided *Gruhlke* and remanded the case to the trial court, defendant sought dismissal of both the 2004 indictment and the 2007 information because they each alleged that defendant had committed the DUII offense more than two years—the limitation period for misdemeanors—before the dates of the accusatory instruments. In response, the state argued that the 2004 indictment was superseded by the 2007 information, which in turn had cured the pleading deficiency that plagued the 2004 indictment. In 2008, the trial court denied defendant's motion to dismiss and entered an amended judgment of conviction, which defendant appealed. The Court of Appeals eventually vacated the judgment upon a joint motion of the parties, because the plea for that conviction was deficient, and remanded the case to the trial court a second time, in March 2010. On remand, defendant had new defense counsel and

relitigated the propriety of the 2007 information through another demurrer and motion to dismiss. The trial court again denied defendant relief. Defendant entered a conditional guilty plea to DUII, and the court entered a judgment of conviction in 2010. *Held:* Reversed and remanded with instructions to enter an order granting defendant's demurrer to the 2007 information. "Applying a 'four corners' analysis of the information under ORS 135.630(5), we agree with defendant that the additional conclusory allegation in the 2007 information is insufficient to establish a timely prosecution of the DUII charge due to the time gap of over five years between the date of the information and the date of the offense and the requirement … that the state plead 'facts' to demonstrate timeliness."

STATUTORY CONSTRUCTION

See also "Constitutional Law: construction," *above*.

State v. Ofodrinwa, 353 Or 507, 300 P3d 154 (2013). When he was 21 years old, defendant had sexual intercourse with his 16-year-old girlfriend. He was charged with second-degree sexual abuse under ORS 163.425(1)(a) on an allegation that he subjected her to sex and she did "not consent thereto by reason of being under 18 years of age." The case was tried to the court, the victim did not testify, and state did not present any evidence that she did not *in fact* consent; the state relied only on her being under 18 years of age and the rule in ORS 163.315(1)(a) that a person under 18 is "considered incapable of consenting to a sexual act." Defendant moved for a judgment of acquittal arguing that the "does not consent thereto" clause in ORS 163.425(1) required proof that the victim did not in fact consent and could not be proved by the "incapable of consenting" rule. The trial court rejected that argument and found him guilty on one count. The Court of Appeals affirmed based on *State v. Stamper*, 197 Or App 413 (2005). *Held*: Affirmed. The trial court correctly denied defendant's motion for judgment of acquittal. [1] An analysis of the tortured history of the crime of second-degree sexual abuse demonstrates that the 1991 legislature amended the statute with the understanding that the "incapable of consent" rule applies to the "does not consent thereto" element: "this is a case is which the 1991 amendment added a defense to the crime of second-degree sexual abuse that, as a matter of the statute's text and legislative history, rests on the proposition that 'does not consent' in ORS 163.425 includes instances 'in which the victim's lack of consent was due solely to incapacity to consent by reason of being less than a specified age.'" [2] "The 1991 amendment is the legislature's last word on the subject and, as such, controls the meaning of the phrase 'does not consent' in ORS 163.425." [3] Applying the "incapable of consent" rule to second-degree sexual abuse does not create an untenable conflict in the classification of felony sexual offenses. "Rather, it aligns the crime of second-degree sexual abuse with other sexual offenses that the legislature has classified according to the victim's age. Defendant's arguments provide no persuasive reason for saying that the 1991 amendment does not control our resolution of this case. We accordingly conclude that the phrase 'does not consent' in ORS 163.425 refers to the victim's lack of capacity to consent due to age, as well as to the lack of actual consent."

State v. Alvarado, 257 Or App __, __ P3d __ (July 24, 2013). A police officer lawfully stopped defendant for a traffic violation and, during a search of the vehicle, the officer found a pistol with an obliterated identification number. Defendant initially told the officer that he "found" the gun, but he later changed his story, stating that he purchased the gun for protection. The investigating officer explained that "firearm identification numbers are almost always obliterated in order to conceal the fact that they have been stolen." Defendant was charged with unlawful possession of a firearm and unlawful obliteration of an identification number of a firearm, ORS 166.450, which provides:

> "Any person who intentionally alters, removes or obliterates the identification number of any firearm for an unlawful purpose, shall be punished upon conviction by

> imprisonment in the custody of the Department of Corrections for not more than five years. Possession of any such firearm is presumptive evidence that the possessor has altered, removed or obliterated the identification number."

At trial, defendant moved for a judgment of acquittal on the obliteration charge, contending that the "presumptive evidence" clause is unconstitutional, but the court disagreed and denied that motion. The jury found him guilty. *Held*: Reversed and remanded. [1] The reference in ORS 166.450 to "presumptive evidence" does not create a rebuttable presumption that violates the rule in *Sandstrom v. Montana*, 442 US 510 (1979), or OEC 309: that clause "does not create a presumption at all; it merely states that a factfinder may, but need not, consider a defendant's possession of the firearm as evidence that he is the person who obliterated the number. The evidence does not compel that conclusion nor does it necessarily provide enough evidence to establish the state's *prima facie* case and shift the burden of disproof to defendant. The factfinder is free to reject the inference, as factfinders always are." [2] "It is axiomatic that we should construe and interpret statutes in such a manner as to avoid any serious constitutional problems." [3] The evidence was sufficient to for a rational trier of fact to find that defendant intentionally obliterated it for an unlawful purpose.

^ ***State of Oregon and City of Portland v. Christian***, 249 Or App 1, 274 P3d 262, *rev allowed*, 352 Or 564 (2012). Defendant was charged with, *inter alia*, violating Portland City Code § 14A.60.010(1), which provides, subject to numerous exceptions: "It is unlawful for any person to knowingly possess or carry a firearm, in or upon a public place, including while in a vehicle in a public place, recklessly having failed to remove all the ammunition from the firearm." Defendant demurred to charge, contending that the ordinance on its face violates Art. I, § 27, and the Second Amendment. The trial court overruled the demurrer, and defendant was convicted. *Held*: Affirmed. [1] Because defendant made a facial challenge to the constitutionality of the ordinance by way of demurrer: "First, the only relevant facts in this case are that defendant was charged with, and tried for, violating the ordinance, and those facts are relevant only to establish that he has standing to challenge it; the circumstances surrounding his arrest play no part in our analysis. Second, although generally a facial challenge to a law will fail if the law can constitutionally be applied in any imaginable situation, in a facial challenge under Article I, section 27, … [if] we determine that legislation is significantly overbroad—that, in some significant number of circumstances, it punishes constitutionally protected activity—we must declare the legislation to be unconstitutional." [2] The Court of Appeals construed § 14A.60.010(1) to mean that it prohibits: "if a person possesses or carries a loaded firearm in a public place; the person knows that he or she is carrying the firearm, that it is loaded, and that he or she is in a public place; the person is conscious that being in a public place with the loaded firearm creates a substantial risk; the substantial risk is unjustified, that is, it is not a risk that would inhere in using the firearm for the kinds of self-defense, defense of others, or defense of premises that are statutorily justified; and the person nonetheless disregarded that risk." [3] As such, the ordinance does not violate Art. I, § 27, as construed in *State v. Hirsch/Friend*, 338 Or 622 (2005): "The ordinance does not prohibit a person from *any* conduct in home, even reckless conduct and intentional misconduct short of crime. It does not prohibit a person with a permit to carry concealed weapons from knowingly carrying a recklessly not-unloaded firearm in a public place. It does not prohibit a person from carrying a recklessly not-unloaded weapon in a public place in order to engage in justified conduct—reasonable defense of self against felonious attack. Its prohibitory scope includes only a person who has knowingly carried a loaded firearm in a public place for some purpose other than defense of self or home from felonious attack, consciously disregarding the substantial risk that doing so will endanger public safety. Compared to the lawful sweep of the ordinance, such occurrences—if there are any—are rare outliers; thus, even if such occurrences were constitutionally protected, the statute would survive a facial challenge." [4] The ordinance does not violate the Second Amendment, as construed in *District of Columbia v. Heller*, 554 US 570 (2008).

Note: In order to avoid a constitutional problem, the majority opinion construed the ordinance narrowly, in a way that is different from the construction that was offered by the city's own attorney;

the majority observed: "this court is obligated to correctly interpret laws even if the parties do not." The dissenting judges took issue with the majority's construction and concluded that the ordinance is unconstitutionally overbroad because "a restriction that prohibits most people from openly carrying a loaded firearm in all places open to the public" violates Art. I, § 27.

STOP AND FRISK

See also "Arrest," "DUII: stop, search and seizure," and "Search & seizure," *above*.

Stop & Frisk: stop vs. mere encounter

State v. Magana, 257 Or App 251, __ P3d __ (2013). Officers Kenagy, Devlin, Castaneda, and other officers belonging to the Narcotics Task Force were performing a drug-interdiction exercise at a Portland bus stop. Kenagy, wearing plain clothes and carrying a concealed weapon, approached a passenger, Rosales-Perez, as he got off the bus, showed his badge, and asked if he could search Rosales-Perez's bag for narcotics and narcotics paraphernalia. Rosales-Perez consented, and an officer with a drug-detection dog examined the bag. No contraband was detected. When asked for his identification, Rosales-Perez gave Kenagy an identification card that stated he lived at an apartment on Webster Road. Kenagy noted the address and handed the identification back to Rosales-Perez. While Kenagy was talking to Rosales-Perez, Officer Devlin, who was in plain clothes and had a concealed weapon, approached defendant Ramirez-Rivera, who had waved at Rosales-Perez while he was sitting in a pickup truck parked nearby. Devlin explained that he was a narcotics officer and asked whether Ramirez-Rivera knew Rosales-Perez. Officer Castaneda, who was wearing a gun on his belt and a police vest with a badge, acted as a Spanish interpreter. Ramirez-Rivera denied knowing Rosales-Perez, explaining that he had just gone to a nearby mini-mart to make a money-wire transfer. After Ramirez-Rivera produced an identification card that was not a valid Oregon driver's license, he consented to a search of his truck and person, which produced no weapons or contraband. At some point around this time, Castaneda asked Ramirez-Rivera where he lived. He said he didn't remember his address and provided Castaneda with a money-transfer receipt showing the same Webster Road address that was on Rosales-Perez's identification card. Eventually, Ramirez-Rivera admitted that he knew Rosales-Perez. After the officers exchanged information from their separate interviews of Rosales-Perez and Ramirez-Rivera, several of them went to the Webster Road address for a "knock and talk," while the others remained at the scene with Rosales-Perez and Ramirez-Rivera, who had agreed to stay. At the Webster Road address, Officers Kenagy and Castaneda knocked on the apartment door. Castaneda asked Magana for consent to search the apartment for narcotics with a drug dog, and Magana consented. The ensuing search revealed large amounts of heroin and money. Magana was arrested, as was Ramirez-Rivera, who was transported to the Webster Road apartment. Defendants were charged with drug offenses, they moved to suppress, the trial court denied their motions, ruling that the encounters at the bus stop were "mere conversation" and that Magana voluntarily consented to the search. Defendants entered conditional pleas of guilty to unlawful manufacture and delivery of heroin. *Held*: Reversed and remanded. [1] In light of *State v. Radke*, 242 Or App 234 (2011), the officers unlawfully stopped Ramirez-Rivera before they found the money-transfer receipt showing the Webster Road address. "The police officers' initial encounter with Ramirez-Rivera was a stop before they received his identification" because, "given the context of the two officers' presence—the evident organized, multi-officer narcotics investigation—and their questions, a reasonable person in Ramirez-Rivera's position would have believed that he was under criminal investigation for narcotics-related activity and was not free to leave." [2] The stop was unlawful because the officers lacked reasonable suspicion of criminal activity when they initiated it. [3] Because the money-transfer receipt they obtained during the unlawful stop of Ramirez-Rivera led the officers to go to the Webster Road apartment, that tainted Magana's consent to a search and rendered it invalid under *State v. Hall*'s "exploitation" test. "The state failed to meet its burden to prove that the evidence they obtained did not derive from the

preceding unlawful stop." [4] Magana's consent to the apartment search was involuntary.

State v. Dierks, 257 Or App 88, __ P3d __ (2013). A police officer on patrol in a "high-crime, high-drug, high-gang area," spotted a single car parked in a small parking lot where, in the past, he had encountered people who were engaged in drug deals. He pulled his marked patrol car into the parking lot, and as he arrived, he saw the two occupants of the car look up and notice that he was there. He parked without blocking the other car and without turning on his emergency lights. He then approached the parked car and spoke with defendant, who appeared to be the driver, and the passenger, explaining that they were in "a very high-drug, high-crime area." The officer asked defendant and the passenger whether they had seen anything suspicious; he also asked what they were doing. Defendant and the passenger told him that they were waiting for a friend. The officer then asked defendant and her passenger for their names. Defendant said that her name was Stacy Lynn Burke and that she was licensed to drive in Washington, but did not have the license with her. The passenger provided his driver's license. The officer retained the passenger's license and returned to his car and ran the name "Stacy Lynn Burke" through the LEDS in both Oregon and Washington, but nothing came up in either state. Running the passenger's name, however, showed that he had a valid restraining order against a person by the name of Stacy Lynn Dierks. At that point, the officer thought that defendant had lied to him about her identity. He returned to defendant and asked if she had any photo identification on her. As she looked through her purse, the officer saw her twice pass by a paper copy of a Washington state driver's license. When he pointed that out to her, defendant handed him the document, which reflected her true identity. Defendant was charged with contempt for violating the restraining order, and she moved to suppress evidence of her identity, contending it was the fruit of an unlawful stop. The trial court denied the motion, ruling that everything that occurred before the officer checked LEDS was "mere conversation" (*i.e.*, not a stop), and the officer developed reasonable suspicion that defendant had given him a false name when he ran the name Stacy Lynn Burke through LEDS and came up with no matches but a similar name on a restraining order. The court then found her in contempt. *Held:* Reversed and remanded. The trial court erred by denying defendant's motion to suppress. [1] Although "an officer does not stop a person merely by requesting identification, absent other coercive circumstances, … if the person knows that the officer is performing a warrants check on that identification, the person generally has been stopped, at least if the officer also has questioned the person about possible criminal activity." [2] Given the totality of the circumstances that existed when the officer returned to his patrol car after obtaining the passenger's driver's license and a name from defendant, a reasonable person in her circumstances would have believed that he was running a warrants check on the name she had given him and that, given his other inquiries, she was the subject of a criminal investigation and was not free to walk or drive away. Therefore, she had been seized under Art. I, § 9. *Distinguishing State v. Maxie*, 235 Or App 49 (2010). [3] Because the state did not contend either that the officer had reasonable suspicion of criminal activity before he checked LEDS or that the evidence that defendant sought to suppress was not discovered as a result of the stop, the proper remedy is to grant defendant's motion to suppress.

State v. Ross, 256 Or App 746, __ P3d __ (2013). The police lawfully stopped a pickup in which defendant was a passenger. After he obtained the driver's license and defendant's name and address, the officer ran a warrant check and discovered an outstanding warrant for the driver. He then asked the driver for consent to search the vehicle, which he gave. To facilitate the search, the officer asked defendant to step out of the truck and asked whether he had any weapons; defendant responded that he might have a knife and politely declined to consent to an officer-safety pat-down. The officer told defendant that he was free to leave, and defendant asked to retrieve his coat from inside the truck's cab; defendant insisted on retrieving it himself, but the officer instead asked the other passenger hand the coat to him for delivery to defendant. During that transfer, the officer saw a large baggie of marijuana in plain view inside one of the coat's pockets (and later discovered methamphetamine in the pocket, as well as drug paraphernalia in a bag found elsewhere in the truck).

Defendant was charged with DCS, and he moved to suppress the evidence, conceding that the traffic stop was lawful but claiming that he was unlawfully seized because he was a passenger and the officer unlawfully extended the stop by asking the driver for consent to search the truck. The circuit court denied the motion, and he was convicted of the charged offenses. *Held*: Affirmed. [1] "Passengers in a stopped vehicle—whether lawfully or unlawfully stopped—are not seized merely by virtue of their status as passengers. Instead, a passenger is seized only when there has been the imposition, either by physical force or through some 'show of authority,' of some restraint on the individual's liberty." [2] "Because defendant has not attempted to show that he was seized for reasons other than his status as a passenger in a vehicle, … he is attempting to seek suppression of the evidence based on a violation of the driver's rights, and that, he cannot do." [3] In the absence of a claim that the officers exercised a show of authority over defendant—such as by retaining his identification—he was not seized merely by being a passenger in a stopped vehicle. "There having been no seizure of defendant, there was no unlawful seizure of him."

State v. Thompson, 254 Or App 282, 293 P3d 1082 (2012). Three plain-clothes officers went to an apartment for a "knock and talk" with the tenant. Defendant, a friend of the tenant, was in the apartment, and one of the officers asked her to step outside to talk with him, while the other two officers spoke with the tenant inside. Defendant stepped outside to speak with the officer, who did not block her from leaving. The officer asked defendant for her identification and, when she provided it, he wrote down her name and date of birth, and returned it to her; he could not recall how long he retained defendant's identification. The officer told defendant that he was at the apartment for a drug-related investigation, and asked her why she was there. She told him she was visiting. He asked her if she used drugs, and asked defendant if she had any weapons or drugs in her purse. When she when she said "no," he asked to look in her purse. She did not respond orally, but opened her purse for the officer to look inside. The officer saw a small pink coin purse that he thought might contain drugs, so he opened it and found methamphetamine inside. Defendant was charged with unlawful possession of methamphetamine and moved to suppress the evidence. The trial court denied the motion, finding that the encounter was "mere conversation" that did not rise to the level of a stop. Defendant was convicted. *Held*: Reversed and remanded. [1] As the state conceded, the officer had no reasonable suspicion that defendant had committed criminal activity. [2] Under the totality of the circumstances, defendant was seized when the officer asked her to step outside, took her identification, and immediately questioned her about potential criminal activity. Moreover, defendant knew that the officers were there for a drug investigation involving her friend. "We cannot conclude that a reasonable person in these circumstances would believe that she was free to simply stop answering questions and depart. For that reason, we conclude that she was stopped without reasonable suspicion, and the evidence that concededly derived from that stop should have been suppressed."

State v. Canfield, 253 Or App 574, 291 P3d 775 (2012). A police officer on patrol saw defendant and another person acting oddly. The officer approached them, mentioned their behavior, and asked if he could see their identification. They provided their identification, and after the officer wrote the information on his hand, he returned it to them. The officer observed a knife on defendant's person and asked for consent to search him, to which he agreed. The officer explained that defendant would have to assume the standard search position for him to be searched, but that he was nonetheless free to go. The officer discovered a pipe in defendant's pocket and, subsequently, marijuana in his companion's vehicle. Defendant moved to suppress, contending that he was unlawfully stopped, but the trial court denied that motion. Defendant was convicted on stipulated facts. *Held*: Reversed and remanded. [1] "Under the totality of those circumstances, we conclude that a reasonable person in defendant's position would have believed that, before being informed that he was free to leave, his liberty and freedom of movement had been significantly interfered with; in other words, he was stopped." [2] Because the officer obtained defendant's consent during the unlawful stop, his consent was "itself unlawfully obtained and cannot justify a warrantless search absent reasonable suspicion."

State v. Smith, 252 Or App 518, 287 P3d 1210 (2012). At 4:00 a.m. on a January morning, Officer Stearns observed defendant driving around and then park an empty parking lot. Defendant and Nelson, a rear-seat passenger, then got out and began a heated discussion. Officer Stearns parked nearby without turning on his overheads, called for backup, and contacted the group. Officers Stearns directed defendant to stay by the car while he dealt with Nelson; he eventually arrested Nelson on an outstanding warrant. Meanwhile, Officer Gathercoal arrived; he turned on the overheads, parked in a manner that blocked egress from the parking lot, obtained defendant's identification, and called it in for wants. When dispatch reported that defendant was clear, Officer Gathercoal recontacted defendant to ask him about the brouhaha, at which point the officer noticed that defendant was intoxicated. The officer arrested defendant for DUII. Defendant moved to suppress, contending that he was unlawfully stopped, but the trial court denied the motion, and defendant was convicted. *Held*: Reversed and remanded. [1] The officers stopped defendant no later than the point when Officer Gathercoal took his driver's license and performed the warrant check. "During the time Gathercoal was in possession of defendant's driver's license, defendant could not leave the scene without forfeiting his license." [2] Because Officer Gathercoal did not have reasonable suspicion to believe defendant had committed a crime at that time, the stop was unlawful. [3] "Given the temporal proximity between the unlawful police conduct and the acquisition of the disputed evidence, and the absence of any intervening circumstances or other circumstances mitigating the effect of that police conduct, we hold that the disputed evidence was the product of police conduct that violated Article I, section 9, and is therefore inadmissible."

State v. Soto, 252 Or App 50, 284 P3d 1254 (2012), *rev den*, 353 Or 127 (2012). Defendant, whom police knew to be a gang member, was walking with two men who (based on their clothing) appeared to also be gang members. Two police officers, who recognized defendant, wanted to talk to them, so they drove toward them and parked behind them—without activating their lights and sirens—and walked up to the group. The two men with defendant stopped to talk to one of the officers, but defendant kept walking; another officer followed defendant and caught up to him 30 feet later, and said, "We were hoping to talk to you guys. Is that okay?" Defendant stopped walking and said "yeah." The officer asked defendant if "it would be okay" if they walked back to where the other two men were, and defendant said "okay." They walked toward the group, and the officer asked defendant his name. Just before they reached the other men, the officer asked defendant if he had any weapons, and he indicated that he did. The officer patted him down for weapons, and found a handgun in his pants pocket. Defendant was charged with unlawful possession of a firearm. He moved to suppress the gun, the trial court denied the motion, and he was convicted. *Held:* Affirmed. [1] A police officer who interacts with a pedestrian becomes a seizure only when "the officer engages in conduct that is *significantly beyond* that accepted in ordinary social intercourse." *State v. Holmes*, 311 Or 400, 410 (1991). [2] Nothing in the officer's approach, manner, or questioning constituted a show of authority, and no reasonable person in defendant's position would believe that the officer had restricted his freedom of movement. The officer's persistence in following defendant for 30 feet, though it may have "inconvenienced or annoyed" him, was not "*substantially* beyond … what a reasonable person in defendant's position would expect in normal social intercourse," as is required for a seizure under *Holmes*. [3] Although the officer asked defendant for his name, he did not write the name down, ask defendant for "some tangible form of identification," or otherwise indicate that he would be subject to warrants check; it was merely for the officer to "figure out to whom he was talking," which a reasonable person would not find unusual. [4] "As to the question about the weapon, the content of the question, asked in a conversational tone and unaccompanied by some outward show of authority, plainly did not effectuate a seizure." Instead, defendant was seized only after the officer had reasonable suspicion to believe that defendant unlawfully possessed a firearm.

State v. Mazzucchi, 252 Or App 122, 284 P3d 1263, *rev den*, 353 Or 410 (2013). Defendant was a passenger in a car the police stopped for speeding. The driver did not have a driver's license

and gave the officer a Washington ID card. She was "very shaky," "over the top nervous," and had decaying teeth—all of which the officer associated with drug use. The officer told defendant that, if he wanted to drive the car away, he would check his driver's license to make sure it was valid. Defendant handed his license to the officer. While waiting for the results of the records check, the officer told defendant he could move over into the driver's seat, which he did. The officer then asked the driver to step out of the car and asked her some questions about her criminal history; she said she had been arrested previously for DUII and failure to appear and that she had last used methamphetamine one year ago. The driver returned to the car and sat in the passenger seat while the officer began writing traffic tickets. The records check showed the driver's Washington license had been suspended and that she had prior drug arrests. The officer asked the driver to step out of her car and inquired about why she had lied about her prior arrests. He then asked permission to search the car based on his reasonable suspicion that it might contain drugs. The driver said the car did not belong to her; after the officer told her that she nevertheless could consent to a search of her belongings in the car, the driver signed a written consent form allowing a search. The officers also handed defendant (who had remained inside the car) an identical consent form and asked him to read it; he signed the form without hesitation or question. Defendant's license had been returned to him at some point before the request to search. The officer asked him to step out of the car and then conducted a search, finding drug pipes with residue on them inside his suitcase in the car. Defendant moved to suppress, arguing that he was illegally seized when the officer took his license to run a record check, or when the officer ran the record check, or when the officer asked permission to search the car after his record check came back clear instead of telling him he was free to go. The trial court denied the motion, and he was convicted. *Held*: Affirmed. [1] The officer's taking and brief retention of defendant's license to determine if he could lawfully drive the car away did not rise to the level of a seizure. The officer did not physically restrain defendant, show any authority that restricted his freedom of movement, or do anything to indicate he was under investigation. [2] No evidence in this record showed that defendant consented to the search as a result of the initial retention of his license. Thus, any stop of defendant ended once his license was returned, and a reasonable person would not believe he was not free to go at that time. [3] The fact that the officer did not tell defendant that he was free to leave did not constitute a seizure absent some show of authority that restricted his movement. The continued discussion after defendant's license was returned to him was "mere conversation" and did not coerce his consent to search his belongings.

State v. Moats, 251 Or App 568, 284 P3d 568 (2012). Officers were patrolling a parking lot known for a high level of drug activity when they saw defendant, a taxi driver, park next to a parked vehicle, and then saw a woman get out of the other vehicle and get into defendant's taxi. The officers had the property owner's permission to tell people loitering in the lot that they would be arrested for trespass if they were not present for business purposes. After the officers saw the two embrace, and also saw an apparent exchange of some sort, two officers approached the car on foot. One knocked on the passenger-side window to talk to the woman, and the other officer knocked on the driver-side window to talk to defendant. Both officers identified themselves and displayed their badges. The officers explained that the behavior they had seen was suspicious, and informed them that use of the lot for non-business purposes would constitute a trespass. The woman was clenching her fist, so the officer asked if she had any drugs. She denied having drugs, and the officer asked what she had in her hand. The woman was startled and dropped several items from her hand, and the officer recognized them to be drugs. At that point, the other officer asked defendant to get out of the car. Both occupants made incriminating statements. After the trial court denied defendant's motion to suppress, he was convicted on stipulated facts. *Held*: Affirmed. The officers' interaction and their engagement with the occupants of the car was not a sufficient show of authority to constitute a seizure for constitutional purposes.

^ ***State v. Backstrand***, 231 Or App 621, 220 P3d 748 (2009), *rev allowed*, 350 Or 130 (2011). An officer saw defendant in an adult bookstore and thought he might be underage. The officer asked

defendant's age and explained that he thought the store clerk might be committing a crime by allowing a minor inside the store. When defendant said he was 22, the officer asked if he could see defendant's identification. He looked at defendant's identification, called it in to dispatch to verify it and—before he had the results back—handed the identification back to defendant, said "Have a good day," and left the store. After he left the store, he heard back from dispatch that defendant's identification was valid but suspended. Later, the officer saw defendant drive away from the store, and he stopped and arrested defendant for driving while revoked. Defendant moved to suppress the information obtained as a result of the interaction in the store. The trial court denied the motion, and defendant appealed. *Held*: Defendant could have reasonably believed that he was stopped when the officer called in defendant's identification over his radio. Remanded under *State v. Ashbaugh* to determine whether defendant subjectively believed that he was not free to go at that point. If defendant so believed, the officer's "discovery" that defendant's license was revoked should be suppressed.

^ ***State v. Highley***, 219 Or App 100, 180 P3d 1230 (2008), *rev allowed*, 350 Or 130 (2011). [1] When officer effectively stopped defendant when, during a stop of the driver, he contacted defendant, a passenger, asked him whether he was on probation, asked him for identification, wrote down the information and gave back the identification, and then went back to the patrol vehicle, because a reasonable person in defendant's position would believe that the officer was going to run a records check on him. "A *retention* of a suspect's identification, or the length of retention of a suspect's identification, is not the touchstone of whether a stop has occurred." [2] "We also conclude that defendant established the requisite minimal factual nexus [under *Hall*] between the illegality and the seizure of the evidence sought to be suppressed."

^ ***State v. Anderson***, 231 Or App 198, 217 P3d 1133, *on recons*, 234 Or App 420, 228 P3d 638 (2009), *rev allowed*, 350 Or 130 (2011). Officers were inside an apartment executing a search warrant related to alleged drug offenses when two people—defendant and his friend—"peeked" in the window, saw the officers searching the apartment, and quickly returned to the defendant's friend's vehicle. The officers left the apartment to follow the men, who were then seated in the friend's parked car with the windows partly rolled down. One officer asked defendant (in the passenger seat) for his name, and, based on his familiarity with local families, the officer knew that defendant had given him a false name. The officer had defendant step out of his car and produce his identification, confirmed that he had given a false name, and then took him into custody. At the same time, another officer told the friend, who owned the car, that they were executing a search warrant and asked for the name of the apartment's owner. The driver later consented to a search of her car, revealing evidence inculpating both men. Defendant moved to suppress, arguing that the evidence was the product of an unlawful stop without reasonable suspicion. *Held:* Reversed. When the officers approached the car and told the men that they were executing a search warrant and asked for their names, both occupants were constitutionally seized without reasonable suspicion. Therefore, the driver's consent to search the car was invalid, and the evidence was not admissible against the passenger.

Note: Although the Court of Appeals did not expressly address the issue, it appeared to assume that defendant had standing to challenge the alleged violation of the driver's constitutional rights. On reconsideration, the Court of Appeals rejected the state's argument without discussion, but adhered to its original opinion.

Stop & Frisk: legal authority to stop or detain

State v. Fair, 353 Or 588, 302 P3d 417 (2013). Two officers were dispatched to defendant's house based on an interrupted 911 call that suggested a domestic assault in progress; no one answered when the 911 operator called back. The officers circled the house, and one of the officers saw through a sliding glass door "an angry-looking man" inside. The officer "commanded" him to come out, but he did not comply. The officers then knocked on the front door and defendant and her

husband answered the door together. The officers observed a "large swollen area" over defendant's right eye but no injuries to him. An officer "ordered" both of them to come out of the house and onto the porch, and they complied. The officers separated the two; one officer took defendant's husband about 20 feet away, and the other directed her to stay on the porch and not to say anything. Eventually, the first officer arrested defendant's husband and took him away. The other officer interviewed defendant. She admitted making the 911 call but said she did so accidentally. She provided her name to the officer, but dispatch responded that they had no record of that name. In the ensuing conversation on that topic, defendant admitted that she had been arrested for PCS. As the officer interviewed her about the dispute, he "observed an orange plastic syringe cap fall out of defendant's pant leg." He asked her about drug use, she made admissions about intravenous drug use and eventually consented to a search of her person, which uncovered a pipe with residue. She was charged with PCS, and she moved to suppress contending that the officer had unlawfully stopped her and that her admissions and consent to search were the products of that illegality. The trial court denied the motion, and defendant entered a conditional plea of guilty. The Court of Appeals reversed, holding that the he officer had unlawfully stopped defendant by ordering her out of the house. *Held*: Reversed; judgment of trial court affirmed. The trial court correctly denied defendant's motion to suppress. [1] A seizure occurs under Art. I, § 9, either: "(a) if a law enforcement officer intentionally and significantly restricts, interferes with, or otherwise deprives an individual of that individual's liberty or freedom of movement; or (b) if a reasonable person under the totality of the circumstances would believe that (a) above has occurred. In applying that standard, we look to whether the encounter entailed a significant restraint on defendant's liberty imposed either by physical force or through some show of authority." [2] In this case, "the officers' conduct *vis-à-vis* defendant was a seizure. The principal deciding factor is the setting involved—the privacy of defendant's home and her interest in personal autonomy within that place. An ultimate objective of the constitutional protections, both state and federal, against unreasonable searches and seizures is to protect the individual in the sanctity of his or her home. … The officers' orders to defendant to come out of her home and then remain where she was on the porch likewise ran headlong into the added limits on police authority that apply to a citizen in the privacy of her home." [3] Art. I, § 9, does not require probable cause for a temporary seizure: "Rather, due regard for the practical necessities of effective law enforcement requires that the validity of brief, informal detention be recognized whenever it appears from the totality of the circumstances that the detaining officers could have had reasonable grounds for their action. Thus, Art. I, § 9, typically requires a degree of justification for a seizure of a person that correlates with the extent to which police conduct intrudes on that citizen's liberty. … Temporary detention for investigation requires only reasonable suspicion." [4] Officers may lawfully detain a victim or material witness:

> "We likewise conclude that, in appropriate circumstances, it is permissible under Article I, section 9, for officers to stop and detain someone for on-the-scene questioning whom they reasonably suspect can provide material information about a crime's commission. Both potential witnesses to and victims of a crime can be sources of valuable information that can aid officers in the field in making better informed, on-the-spot investigatory decisions about whether and who to temporarily detain or arrest, what leads to pursue, and even which physical or other tangible evidence to gather. Persons who possess material information about a crime are also sources of evidence—testimonial evidence, to be sure, but evidence just the same. Such evidence is potentially as beneficial to the defense as to the prosecution, a fact reflected in the value our legal system places on a criminal defendant's constitutional right to compulsory process and statutory subpoena powers. Knowing the identity of and the information to be provided by a witness to or a victim of a crime is as fundamental to our criminal-justice system as is apprehension of a potential offender. … [A] due regard for the practical necessities of effective law enforcement, considered in tandem with a due regard for a person's protected liberty interests, equally supports the brief, informal investigatory detention of a potential material witness on reasonable suspicion.

> "We therefore hold that officers constitutionally may, in appropriate circumstances, stop and temporarily detain for questioning a person whom they reasonably believe is a potential material witness to a crime. We further agree with the basic test that the state has proposed for determining the circumstances in which such a temporary detention will be reasonable. In particular, we agree that the stop and temporary on-the-scene detention of a likely material witness will be constitutional if: (1) the officer reasonably believes that an offense involving danger of forcible injury to a person recently has been committed nearby; (2) the officer reasonably believes that the person has knowledge that may aid the investigation of the suspected crime; and (3) the detention is reasonably necessary to obtain or verify the identity of the person, or to obtain an account of the crime. In adopting those factors, we do not foreclose refinement of them in future cases involving other factual circumstances. But for purposes of analysis of this case, those considerations suffice."

[5] "Although defendant and her husband answered the officers' knock by opening the door, the husband was still in a position to harm defendant further, to slam the door shut and evade arrest, or to otherwise escalate into physical confrontation. Such exigent circumstances justified ordering defendant and her husband onto the porch, for purposes of taking control of the unpredictable and potentially violent situation, and to take defendant's husband into custody. We further conclude that the officers, having taken that lawful action, could also detain defendant temporarily for purposes of investigation. The officers' observations and information up to that point gave them an objectively reasonable basis to believe that defendant was a victim of a domestic assault that had just occurred at the home and likely possessed information material to that crime." [6] "As long as the officers' actions were constitutionally reasonable, they were entitled to continue their on-the-scene investigation to confirm, dispel, or otherwise further inform the scope and course of the investigation. To that end, it was reasonable for the officers to freeze the situation for a short time, so that they could make inquiry and arrive at a considered judgment about further action to be taken." [7] "When the officers learned that defendant's arrest had not been for a domestic-violence incident, that fact helped to confirm the officers' decision to arrest defendant's husband as the assailant. We therefore conclude that the two questions that the officer asked defendant about whether she had been arrested did not exceed the permissible scope of the stop, or render the otherwise lawful stop unreasonable."

State v. Pettersen, 256 Or App 385, 300 P3d 277 (2013). An officer on routine patrol was unable to see the registration tags on defendant's vehicle as he drove behind it. The officer called dispatch, and dispatch reported, based on records available through DMV, that the registration was expired. The officer initiated a traffic stop, but when walking up behind defendant's vehicle noticed that the license plate was displaying valid registration tags. The officer subsequently developed probable cause that defendant was intoxicated. Defendant was charged with DUII, and he moved to suppress, arguing that any basis for the traffic stop dissipated upon viewing the facially valid tags. The officer testified at the suppression hearing that DMV's computer records are not always current. In that of that discrepancy, the officer testified that it was "possible" that the tags were stolen, but that it was also possible that defendant's registration was current, and DMV had not yet updated its computer records. The officer explained that he felt he should investigate further just to "make sure the vehicle was registered." The trial court denied the motion to suppress, and defendant was found guilty. *Held*: Reversed and remanded. Probable cause exists when the officer subjectively believes that, more likely than not, the suspect has committed an offense, and that belief is objectively reasonable. "On this record, there is no evidence from which a reasonable factfinder could conclude that, upon viewing the facially valid registration tags, [the officer] subjectively believed that defendant had more likely than not committed a violation. Probable cause therefore dissipated at that point, the officer "was then required to cease his investigation and terminate the stop."

State v. Stookey, 255 Or App 489, 297 P3d 548 (2013). Defendant was driving a car with a horizontal crack in the windshield. A police officer on routine patrol perceived the crack as passing through defendant's field of vision and initiated a traffic stop because he was concerned that the crack

could be distracting and dangerous. As part of the stop, the officer ran a routine records check and learned that defendant was out of compliance with his sex-offender registration requirements, and arrested him. Before trial, defendant argued that the traffic stop was not supported by probable cause all evidence obtained as a result of that stop should be suppressed, including his name and sex-offender registration status. The trial court denied the motion. Defendant was convicted, and appealed from the denial of the motion to suppress. *Held*: Reversed and remanded. The trial court should have granted the motion to suppress. [1] The stop was not supported by probable cause. ORS 815.020, which prohibits a person from driving a vehicle that is in such unsafe condition as to endanger any person, encompasses only unsafe conditions that pose a *probable* risk of harm or loss and not unsafe conditions that merely create a *possible* risk of harm or loss. Here, there was no evidence that the crack was unusually large or contained multiple veins, and the officer's only concern was that the crack might reflect light into the defendant's eyes. Thus, the officer could not have objectively believed that the single crack would have exposed another person to a danger of probable harm or loss by interfering with defendant's vision. [2] The court summarily rejected the state's argument, made for the first time on appeal, that even if the stop was unlawful, defendant was not entitled to suppression of his sex-offender registration status. *See State v. Backstrand*, 231 Or App 621 (2009), *rev allowed* (2011).

State v. Hudson, 253 Or App 327, 290 P3d 868 (2012), *rev den*, 353 Or 562 (2013). Defendant rented a room in a boarding house. He murdered both his landlord and a fellow resident, and dumped their mutilated corpses in a remote area 20 feet off of Highway 26 in Washington County. Defendant forgot to remove one of the victims' identification from his pants pocket, so the police were able to identify both victims. The police also recovered a several pieces of bloody clothing found strewn along the shoulder of Highway 26. The ex-wife of one of the victims told police that her ex-husband lived rented a room in a boarding house, and that he did not get along with his fellow resident, "Frank." Given the lack of blood at the recovery site, police felt the murders happened elsewhere, with the most obvious place being the victims' shared residence, so they set up surveillance outside the boarding house. Police saw a person (later identified as defendant) that did not match Frank's description enter the residence and move about inside. Not sure who he was, the police made numerous attempts to call the boarding house but got no response. Concerned that the person inside was destroying evidence, the police hailed him with a loudspeaker and ordered him out of the house. Once defendant came outside, the police noticed blood stains on his pants. They cuffed him, asked him his name, and told him that he was not under arrest, but that the police needed to speak with him. Defendant identified himself as "Frank" and said that he had two roommates, neither of which was home at the time. Because it was raining, one of the officers asked defendant if he would sit in the patrol car while he waited for detectives to speak to him; he said that he did not mind doing so, and was placed in the patrol car while still handcuffed. About half an hour later, detectives arrived to talk to defendant. Because it was still raining heavily, the detectives asked defendant to get out of the car, then took him to their van, removed his handcuffs, and told him they wanted to speak with him; he agreed to talk to them. The detectives told him that they were investigating his housemates' disappearance and asked him for consent to search the house. Defendant signed the consent form. The police entered the house based on defendant's consent, suspending the search after seeing blood in the house and waiting for a warrant. Defendant was charged with aggravated murder. Before trial, defendant moved to suppress, arguing that he was unlawfully seized when he was "loud hailed" out of the house, or alternatively, when he was placed in the patrol car in handcuffs. The trial court denied the motion to suppress, and defendant was convicted of aggravated murder. *Held*: Affirmed. [1] "The officers seized defendant when, using a loudspeaker, they repeatedly ordered him to come out of the house with his hands up," because "under the circumstances, … a reasonable person would believe that his liberty or freedom of movement had been significantly restricted." [2] The seizure was lawful; the circumstances gave rise to reasonable suspicion "that defendant was involved in a crime." [3] Even if the police arrested defendant when they handcuffed him, the arrest "was supported by probable cause."

^ ***State v. Musser***, 253 Or App 178, 289 P3d 340 (2012), *rev den*, 353 Or 533 (2013). At 10 p.m., defendant was standing on a walkway at the back of one building of a two-building shopping center. As an officer on patrol approached, she tried to walk away. He stopped her. During the stop, she consented to a search of her purse, which uncovered methamphetamine. She was charged with PCS, and she moved to suppress, contending that the stop was unlawful. The state argued that the officer had reasonable suspicion to stop her for criminal trespass. At the hearing, there was a dispute whether that building had a "no trespassing" sign posted. Although the second building had "no trespassing" signs, that building and its signs were separated by height, physical barriers, and distance from the walkway on the first building. Two businesses near the walkway were open. The trial court denied defendant's motion to suppress. *Held*: Reversed and remanded. Under the circumstances at the time of the stop, a reasonable person would have concluded that she did not need permission to be on the back walkway. As a result, the officer could not reasonably have suspected her of trespassing, and his stopping her on that basis was unlawful. As a result, evidence found in her bag during the stop should have been suppressed.

State v. Ellis, 252 Or App 382, 287 P3d 1215 (2012), *rev den*, 353 Or 428 (2013). To combat a "huge increase" in burglaries in the Kenton neighborhood, Portland police officers were using undercover cars, marked patrol cars, and an airplane equipped with infrared night-vision technology. At 3:00 a.m., officers in the plane and on the ground observed defendant engage in actions consistent with a car prowl. Officers stopped and eventually arrested defendant and found items in his backpack that could be used to break into cars. Defendant moved to suppress on the ground that the police lacked reasonable suspicion to stop him. Trial court granted the motion, reasoning that there were possible lawful explanations for defendant's behavior, and that information discovered after a stop supported those lawful explanations. The state appealed. *Held*: Reversed and remanded for reconsideration. [1] "We agree with the state that the trial court appears to have applied an incorrect legal framework" in assessing whether the police had objectively reasonable suspicion that defendant had committed a crime. [2] "[T]he fact that there are possible lawful explanations for behavior does not mean that the behavior may not give rise to a reasonable suspicion of criminal conduct." [3] "The relevant time period for determining whether an officer's suspicion of criminal behavior was objectively reasonable is 'the time … the peace officer acts.' ORS 131.605(6). Evidence acquired after a stop cannot be used to establish or negate reasonable suspicion *for* the stop." [4] The Court of Appeals declined to infer that the trial court found that the officers were not credible; although in some circumstances the court will "presume that the trial court decided disputed facts consistently with its ultimate conclusion, … invocation of that factual presumption is necessarily dependent on the trial court's application of the correct factual analysis. If the trial court is operating under a misunderstanding as to the applicable legal principles—as is the case here—we will not infer that the court decided facts inconsistently with that erroneous legal construct."

State v. Ordner, 252 Or App 444, 287 P3d 1256 (2012), *rev den*, 353 Or 280 (2013). Defendant was charged with DUII after an officer stopped defendant's car after seeing him fail to signal a turn for 100 feet and turn too wide; the patrol car's video recorded these events. Defendant moved to suppress, arguing that the stop was unlawful because the officer's suspicion that he committed traffic infractions was not objectively reasonable. After observing the video and listening to the officer's testimony about his observations, the trial court found that the officer's subjective belief that defendant had made an improper wide turn to be objectively reasonable and identified, *sua sponte*, ORS 811.370 (failure to maintain lane) and ORS 811.310 (crossing the centerline) as the infractions for which the officer had probable cause to believe defendant violated. (Defendant's conduct did not violate those statutes, however, but did violate other traffic statutes relating to maintaining a lane of travel.) After the court denied his motion, defendant entered a conditional guilty plea. In its respondent's brief on appeal, the state identified two statutes that defendant *did* violate: ORS 811.295 (failure to drive on the right) and ORS 811.305 (driving left of the center of the

roadway at an intersection). *Held*: Affirmed. The trial court correctly denied defendant's motion to suppress, although the court was "right for the wrong reason." [1] "An officer's subjective belief that a traffic infraction occurred is objectively reasonable if, and only if, the facts as the officer perceived them actually satisfy the elements of a traffic infraction. *State v. Tiffin*, 202 Or App 199, 204 (2005). [2] Although the trial court mistakenly held that the officer reasonably believed that defendant had committed the traffic infractions in question (because a person commits those infractions only on a four-lane road with clearly marked lanes for traffic), "that is not the end of the matter. Although the state has the burden of identifying specific conduct that constitutes the infraction that the officer has probable cause to believe was committed, a misidentification of the statute that applies to the conduct is not dispositive." [3] At trial, it was the trial court—not the state—that cited the incorrect statutory provisions; "both parties understood that the dispositive issue was whether, as a matter of fact, the officer correctly had discerned that defendant had not stayed within his lane in making his turn onto the side street. Defendant never argued that, if the officer's observation was correct, no traffic infraction had occurred." [4] Therefore, the Court of Appeals rejected defendant's argument that it could not consider whether the conduct violated the provisions that the state identified for the first time on appeal, because the record would not have developed differently had the correct statute been cited. [5] The video recording showed that it was "objectively reasonable for the officer to believe that the defendant had committed the offense of failure to drive on the right under ORS 811.295." Accordingly, "the ensuing traffic stop was lawful.

State v. Farrar, 252 Or App 256, 287 P3d 1124 (2012). An officer lawfully stopped defendant for a traffic violation. While processing the stop, the officer noticed that she exhibited several signs that she was under the influence of methamphetamine. The officer eventually obtained her consent to search the car and purse, and found a vial of meth and paraphernalia. Defendant was charged with possession of a controlled substance, and she moved to suppress, arguing that the request for consent did not come during an unavoidable lull and the officers lacked reasonable suspicion to extend the stop to investigate for evidence of PCS. At the hearing on that motion, the officer and another officer testified that, in their training and experience, meth users commonly carry their drug kits with them. Neither officer testified, however, that the kits would be encrusted with detectable amounts of meth. The trial court denied the motion, and defendant appealed. *Held*: Reversed and remanded. [1] The officer's "subjective belief—that defendant's methamphetamine use provided a sufficient basis for concluding that she presently possessed methamphetamine—was not objectively reasonable." [2] "[E]vidence of methamphetamine use, without more, does not give rise to reasonable suspicion that defendant presently possesses more methamphetamine." Nor did the officer's generalized testimony based on his training and experience that "persons who exhibit signs of methamphetamine use may 'possibly' have more methamphetamine does not provide reasonable suspicion. … [H]ere, there was no testimony establishing the number of years that [the officer] had served … much less providing any indication of [his] 'training and experience' related to investigating methamphetamine possession." [3] Although the officer "became suspicious when defendant refused to consent to a search of her purse," that cannot be used to justify the extension of the stop because "a person's assertion of a constitutional right cannot support a reasonable suspicion of criminal activity." [4] The Court of Appeals declined to consider the state's proffered alternative basis for affirmance—"that the arresting officer had, at least, a reasonable belief that defendant recently possessed methamphetamine"—because that argument was not developed below.

State v. Kentopp, 251 Or App 527, 284 P3d 564 (2012). An officer stopped defendant for driving without a seatbelt. While he was pulling onto the shoulder of the highway, defendant leaned over toward the floor of the car, by his feet. When the officer got to the car, he saw a small cosmetic purse in that location. As the officer talked to defendant, defendant began visibly shaking, which was unusual. The officer could see that defendant had gray, rotting teeth, which were consistent with long-term methamphetamine use. Defendant admitted that he did not have a driver's license with him and that he did not have proof of insurance or registration because he had borrowed the car from his

boss. After doing a warrants check, the officer got defendant out of the car, and, because defendant appeared to be about to flee, the officer put his leg against the car door. The officer gave him *Miranda* warnings and detained him while a drug dog arrived; the dog alerted, and defendant admitted that there was meth in the cosmetic purse that the officer had seen. The trial court denied defendant's motion to suppress the evidence, concluding that the officer had reasonable suspicion to investigate him for drug possession. *Held*: Reversed. Defendant's furtive movements, nervous demeanor, rotting teeth, and his conduct consistent with an intent to run from the scene did not supply objective reasonable suspicion to continue the stop to investigate him for current drug possession.

Note: The court noted that the officer had not testified that defendant's nervousness could have been signs of recent drug ingestion.

^ ***State v. Holdorf***, 250 Or App 509, 280 P3d 404 (2012), *rev allowed*, 353 Or 208 (2013). A police officer stopped a vehicle being driven by an individual who was wanted on an outstanding warrant. The officer had information from other officers that the driver of the vehicle was: wanted on an outstanding warrant for violating parole and was under investigation for involvement in a methamphetamine ring; that the driver recently had been observed in the same vehicle involved in an apparent drug transaction; and that the driver had recently eluded capture in a high-speed chase with police in that vehicle. The officer personally knew the driver from other encounters and knew that he had a warrant. Defendant, who was a passenger in the vehicle, appeared nervous and fidgety and would not look the officer in the eye. Based on his experience, the officer believed that defendant was under the influence of methamphetamine. The officer called for backup and confirmed the driver's warrant status. He also checked defendant for warrants and determined that he was "clear." Defendant asked if he could leave, but for officer-safety reasons, the officer told defendant to remain in the vehicle. After the other officers arrived, the driver was arrested and handcuffed. The officer then asked defendant if there were any weapons or contraband in the vehicle. Defendant told him that there was a knife between the passenger seat and the door, and when the officer opened the door, the knife was there. The officer asked defendant if there were any other weapons or contraband in the car. Defendant replied that he was carrying a pocket knife and reached in his pocket to get it. The officer ordered him not to do that, but he did not comply. The officer restrained defendant, handcuffed, him, and patted him down. During the course of the search the officer discovered containers that contained methamphetamine and marijuana. Defendant moved to suppress contending that the officer's discovery of the drugs was the product of an illegal stop. The trial court denied the motion, and defendant was convicted. *Held*: Reversed and remanded. The officer did not have reasonable suspicion to believe that defendant was involved in criminal activity. The mere fact that he associated with someone involved with methamphetamine does not support a reasonable suspicion that he was also involved with methamphetamine. And even if recent methamphetamine use could in some circumstances be an indicator of present methamphetamine possession, "defendant's demeanor, although consistent with methamphetamine use, could be caused by any number of things."

Stop & Frisk: scope or duration of stop

State v. Watson, 353 Or 768, __ P3d __ (2013). Officer Malek saw a car cross over the centerline, and he stopped the car. He immediately recognized defendant, the driver and only occupant, from previous traffic stops and from social interactions; he recently had heard rumors that defendant was dealing small amounts of marijuana in town. When Malek told defendant that he had stopped him for failure to maintain a lane, defendant responded that he had dropped his cell phone and had drifted into oncoming traffic when he reached down to retrieve it. Although Malek could have issued defendant a citation, he decided to give him a warning instead. Nevertheless, Malek asked him for his license, registration, and proof of insurance. Defendant complied, and Malek called dispatch and requested records and warrants checks pursuant to his routine practice, which was to detain drivers he had stopped for traffic violations until dispatch confirmed that the driver had a valid license. In Malek's experience, dispatch usually took between 4 and 10 minutes to return with the

results of the records and warrants checks. Although Malek typically returned to his patrol car to wait for those results, in this case, because he had had so many friendly dealings with defendant and did not see him as "a threat," he remained next to defendant's car so that he could continue to talk to him; Malek had wanted to have a conversation with defendant about his rumored drug dealing. Malek asked defendant if he would step out of his car, and defendant complied, leaving the driver's side door ajar. Malek then asked defendant about the rumors he'd been dealing marijuana. Defendant denied that allegation. When Malek asked defendant for consent to search his car, defendant refused and began to "yell" at the officer. About that time, Deputy Ruble arrived at the scene and approached the passenger side of defendant's car. Ruble told Malek that he could smell "a pretty strong odor" of marijuana emanating from the car. Malek then stepped in front of the open driver's side door, took "a big sniff," and also smelled marijuana. Malek contacted Officer Hooly, who had a drug-detection dog. They arrived shortly thereafter, and the dog "hit on the vehicle," indicating the presence of a controlled substance. While Malek and Ruble were waiting for Hooly to arrive, defendant admitted that he had "approximately an eighth of an ounce" of marijuana in the car. With that information, the alert from the dog, and the officers' detection of the odor of marijuana, Malek—believing he had probable cause to search—reached inside defendant's car, pulled out a backpack, and found cocaine, marijuana, and various drug paraphernalia inside. Malek arrested defendant. A short time later, dispatch informed Malek that defendant's driver's license was valid and that there were no outstanding warrants for his arrest. The record did not reveal whether the records and warrants checks were separate checks and, if so, how much time it took to run each check. The record showed only that Malek asked dispatch to run both checks, and that dispatch returned the results of both checks about 10 minutes later. Defendant was charged with drug offenses, and he moved to suppress the evidence found in his car, as well as his admission concerning possession of marijuana. He argued that, although Malek had detained him for only 10 minutes, his actions—in particular, Malek's drug-related questioning, his requests that defendant exit the car and consent to a search, his use of a drug-detection dog, and his eventual search of the car—constituted a criminal investigation that expanded the scope of the initially lawful stop beyond constitutional bounds. Defendant contended that the officer's authority was strictly limited to a reasonable investigation of the traffic infraction that prompted the stop, because the officer lacked reasonable suspicion of an additional infraction or crime. The state responded that Malek was permitted to question defendant about matters unrelated to the traffic stop even in the absence of reasonable suspicion of criminal activity, because that questioning did not unreasonably prolong the detention. The trial court denied defendant's motion, and defendant was thereafter convicted of delivery and possession of marijuana and cocaine. Defendant appealed, and the Court of Appeals affirmed without opinion. *Held*: Affirmed.
[1] "Malek's stop of defendant was lawful at its inception. Although Malek lacked probable cause to arrest defendant, he had probable cause to believe that defendant had committed a noncriminal traffic violation. Art. I, § 9, permitted Malek to stop and detain defendant briefly for the purposes of investigation." [2] Under ORS 131.615(5) and ORS 810.410(3), "an officer's authority to detain a person based on reasonable suspicion is limited to activities that are reasonably related to the investigation of the suspected violation and reasonably necessary to effectuate that investigation." But because ORS 136.432 precludes suppression based only a statutory violation, it is necessary to address whether the evidence at issue was obtained in violation of a constitutional provision. [3] Officer Malek's continuing detention of defendant pending the results of the records check to verify that he had current driving privileges was reasonable and therefore constitutional under Art. I, § 9, and the Fourth Amendment. "As defendant recognizes, an officer's determination of a person's identity generally is reasonably related to the officer's investigation of a traffic infraction. Contrary to defendant's position, however, verification of a person's identity and the issuance of a citation are not the only activities that may be reasonably related to the investigation. An officer who stops a driver also may release the driver, and a reasonable investigation may therefore include a determination of whether the driver has valid driving privileges, as required by ORS 807.010. When police officers detain a person on probable cause of violating a traffic law, it is reasonable to determine whether the person is licensed to continue on his or her way after the encounter ends. …

Because Malek conducted the records check with the purpose of verifying defendant's driving privileges, Malek's detention of defendant to conduct that check did not violate Art. I, § 9, unless the detention was unreasonably lengthy." [4] The detention was not unreasonably long because "defendant does not contend that 10 minutes was an unreasonably long period of time given the particular circumstances presented." [5] "At the time that Malek searched defendant's vehicle, two officers had smelled marijuana, defendant had admitted that there was marijuana in the car, and a drug-detection dog had indicated that there were drugs in the car. Pursuant to the 'automobile exception,' an officer who has stopped a mobile vehicle may conduct a search without a warrant if the officer has probable cause to believe that the vehicle contains evidence of a crime. We accept the trial court judge's implicit finding that Malek had probable cause to conduct the search as supported by the evidence in the record: The smell, admission, and drug-dog detection were sufficient to create the requisite probable cause of criminal activity."

Notes: [a] Regarding the warrants check, the court commented: "Whether a warrants check is reasonably related to the investigation [of the traffic infraction] or otherwise constitutionally justified, for instance, to protect officer safety, presents an important question, but one that we need not decide here." The court noted: "There is no indication that the warrants check produced incriminating evidence or extended the duration of the stop beyond the time that was reasonably necessary to conduct the records check; thus, even if the warrants check was not reasonably related to the investigation, it was not a basis for suppression of the incriminating evidence that the police discovered." [b] And with respect to an officer's questioning of defendant about matters unrelated to the traffic investigation, the court stated that it was not addressing whether the following principle from *State v. Rodgers/Kirkeby*, 347 Or 610, 623 (2010), "extends to [such] inquiries during the course of a stop" or whether "*Rodgers/Kirkeby* answers that question": "Police authority to detain a motorist dissipates when the investigation reasonably related to the traffic infraction, the identification of persons, and the issuance of a citation (if any) is completed or reasonably should be completed. Other or further conduct by the police, beyond that reasonably related to the traffic violation, must be justified on some basis other than the traffic infraction." In short, the court declined to rule on the validity of the "unavoidable lull" doctrine developed by the Court of Appeals, under which a police officer is permitted to ask the stopped motorist about matters unrelated to the traffic infraction investigation, so long as such questioning occurs at a point at which an officer cannot continue to process a traffic stop, such as when an officer is waiting for the results of a records check.

State v. Alvarado, 257 Or App __, __ P3d __ (July 24, 2013). A police officer lawfully stopped defendant for a traffic violation. After being stopped, defendant opened his window and the investigating officer noticed a strong odor of cologne coming from inside. The officer then noticed "two bottles of body spray on the front passenger seat and numerous air fresheners scattered throughout the vehicle." The officer also noticed that defendant had a cell phone, a pager, and an open energy drink next to his seat, and that he had multiple "religious symbols" throughout the car. Although defendant was from Washington, he was driving a van registered in Oregon and registered to a different person. When asked about his travel plans, defendant stated that he was on his way to Pendleton "to pay his cousin's taxes." The officer ran defendant's name for warrants, determined that the car was not stolen, and otherwise completed all of the tasks necessary to issue a citation for a traffic violation. But because he was suspicious that defendant was involved in drug trafficking, the officer returned to the vehicle and engaged him in conversation regarding the possible presence of controlled substances in the car, at which point defendant became nervous. The officer also requested the assistance of a drug-detecting dog. When the dog arrived, it alerted to the odor of controlled substances, and that alert precipitated a search. The officers did not find controlled substances, but did locate ammunition and a pistol. Defendant was charged with unlawful possession of a firearm and unlawful obliteration of an identification number of a firearm. He moved to suppress evidence contending that the officer unlawfully extended the stop, but the trial court denied that motion, ruling that the officer had reasonable suspicion to justify further inquiry. *Held*: Reversed and remanded. The evidence observed by the investigating officer during the traffic stop, and prior to his decision to

extend the stop beyond the time necessary to issue a citation, was not sufficient to justify an extension of the stop. The officer articulated several facts that are "consistent" with the profile of a drug trafficker, but those facts were not objectively suspicious either individually or viewed in their totality.

State v. Kingsmith, 256 Or App 762, 302 P3d 471 (2013). Police on a remote rural overpass saw what they thought was a drug transaction between people in two cars. Because it was dark, they could not see who among the people in one of the cars was the one who had gotten out to approach the other car. They lawfully stopped one of the cars after the driver committed a traffic violation. Defendant was one of the passengers in the car. While one of the officers processed the traffic citation, the other noticed that defendant was nervous and kept putting her feet on and off a metal case at her feet. The officer did not interact with defendant but, believing that both defendant and the driver were involved in drug activity, one of the officers called a K-9 officer to sniff the car for drugs. The dog alerted, and police found methamphetamine and a pipe in defendant's purse. Defendant moved to suppress, arguing that police lacked reasonable suspicion to extend the initial traffic stop while they waited for the K-9 to arrive. The state conceded that the passenger was stopped, but argued that the extension of the stop was supported by reasonable suspicion. The trial court, assuming the passenger was stopped because of the state's concession, concluded that the extended seizure and search were justified by reasonable suspicion. *Held*: Reversed and remanded. [1] "As noted, the state in this case conceded before the trial court that defendant was seized when the vehicle in which she was a passenger was stopped. That concession … is an essential predicate to the analysis that follows." [2] "[T]he question [then] becomes whether, at the time the stop was extended, there were 'specific and articulable facts' from which [the officer] could have formed a reasonable suspicion that *defendant* had committed a crime based on defendant's conduct." [3] Neither of those things, alone or together, established reasonable suspicion as to defendant specifically.

State v. Maciel, 254 Or App 530, 295 P3d 145 (2013). At about 4 a.m., an officer lawfully stopped a vehicle for speeding on I-5. Before stopping, the vehicle slowed to about 20 miles per hour and did not stop for about ½ mile. During that time, the officer observed the driver lean over and slap defendant, the passenger. When the vehicle finally stopped and the officer approached the vehicle, he noticed that defendant appeared angry. The driver and defendant said they did not own the vehicle. The officer asked who owned the vehicle, and defendant gave a series of inconsistent and suspicious answers, ending up with the story that he had just bought the car from a friend of a friend in California and was driving it back to Oregon. But the car did not appear to have been recently purchased; there was a car seat and trash in the backseat. The officer also noticed that the driver and defendant had identical prepaid cell phones, there was no visible luggage in the vehicle, and there was a religious medallion affixed to the rearview mirror. After defendant, upon request, walked to the officer's patrol car, the officer further questioned him about the purported sale of the vehicle. The officer then asked defendant if cash or drugs were in the vehicle. Defendant became visibly nervous, crossed his arms, sat down on the hood of the patrol car, and stared at the ground. When the officer asked him about individual drugs, defendant said no. Defendant claimed everything in the car belonged to him and refused consent to search the vehicle. Although he had obtained and run a warrants check on defendant's and the driver's licenses, which came back clear, the officer did not write a citation. Rather, about 10 minutes after the warrant check was returned, the officer called for a drug-sniffing dog. After the dog-sniff, drugs were found in the vehicle. Defendant moved to suppress, arguing that the officer lacked reasonable suspicion to detain him for the dog-sniff. The trial court denied the motion. Defendant entered a conditional plea of no contest. *Held*: Reversed and remanded. The trial court should have granted the motion to suppress. [1] Although the officer had reasonable suspicion to detain the vehicle and defendant in order to investigate whether the car was stolen (which he did not do), he did not have reasonable suspicion to detain defendant and the vehicle to investigate a drug crime. [2] The court declined to include the religious medallion or the lack of

visible luggage in the calculation of reasonable suspicion, and it ruled that the remaining indicators—the vehicle's California license plates and its presence on a known route of drug trafficking, the use of a third-party vehicle, the prepaid cell phones, and defendant's suspicious story—did not amount to reasonable suspicion of drug trafficking (as opposed to car theft).

State v. Wiener, 254 Or App 582, 295 P3d 152 (2013). Defendant was the passenger in a car lawfully stopped for a traffic violation. One of the officers approached the car and asked the driver for her identification and documents; she had no driver's license, but gave the officer her passport. The officer, who had noticed defendant had not been wearing his seat belt, also asked him for his identification. The officer gave the two identifications to his partner to run through dispatch. While one officer was on the phone with dispatch, the other approached the car and asked the driver if she had any drugs, weapons, or illegal documents in the car. She answered that she did not, and asked the officer why he was asking. The officer explained his job in a nutshell, then asked the driver if she would consent to a search of her car; she said yes, and got out of the car. The officer then asked defendant "if he would mind stepping out of the vehicle" so they could search. When defendant opened his door, the officer saw a small baggie of methamphetamine. After the officer asked defendant if he had any drugs or weapons on his person (and defendant admitted that he had a knife and a small bag of marijuana); the officer arrested him. Dispatch did not complete the records check until after the driver and defendant were both out of the car—evidently, it "took quite a while" to find the driver's information. Defendant moved to suppress, arguing that the officer's request for consent unlawfully expanded the scope of the stop and therefore violated Art I, § 9. The trial court granted the motion, and the state appealed. *Held*: Reversed and remanded. [1] *State v. Rodgers/Kirkeby*, 347 Or 610 (2010), does not limit an officer's inquiries to those related to the traffic stop—nothing in that case announces a subject-matter limitation. [2] "Under the unavoidable lull rule, [the officer] was free to request the driver's consent while waiting for the results of the records check." (The court declined defendant's invitation to "revisit the issue of the viability of the unavoidable-lull doctrine.") [3] The officer's questions to the driver did not effectuate an additional stop because "we have held that questions about whether a defendant is engaged in criminal activity do not constitute criminal stops." Moreover, "the officer did not accuse the driver of committing a crime; he did not proceed as if he knew or thought that she possessed contraband. Therefore, we reject defendant's argument that [the officer's] request for consent constituted a criminal stop."

State v. Espinoza-Barragan, 253 Or App 743, 293 P3d 1072 (2012). A deputy passed a van with Washington license plates driven by defendant on I-5 at 2 a.m.; defendant failed to make eye contact with the deputy, then slowed down and took the first exit off the freeway, where he failed to signal a turn at the bottom of the exit. The deputy stopped the van and saw two passengers sleeping inside it. He asked defendant for his license, registration, and insurance documents, as well as where he was going and where he had come from; defendant replied "Denny's" and said he had come from Tacoma. Defendant at first indicated his final destination was Denny's but eventually said he was driving to San Jose to pick up his wife and son and planned to stay there for two days. The deputy obtained identification information from the passengers, and defendant said he had no registration or insurance documentation because he just had purchased the van a few days earlier; he gave the vehicle sale paperwork to the deputy, which showed it had been purchased for cash, with some amount still owing. As the deputy walked back to his patrol car, he did not see any luggage inside the van. A records check of defendant and the passengers showed no outstanding warrants. The deputy nevertheless suspected these men were involved in drug trafficking based on defendant's nervous behavior, his strange explanation of his travel destination, the apparent lack of luggage in the van, and the lack of registration or insurance documentation for the newly purchased vehicle. Accordingly, he called for a cover officer, asked defendant to step out of the van, asked whether he had drugs or weapons, and got consent to search the vehicle. He found a backpack and a zippered bag inside, which contained methamphetamine and a large amount of cash. Defendant moved to suppress, but the trial court denied his motion. Defendant was convicted of delivery of methamphetamine. *Held*:

Reversed and remanded. The deputy's belief that defendant was involved in drug trafficking was not objectively reasonable: defendant's nervous and evasive behavior, under the circumstances, did little to support a suspicion of criminal activity; his initial observation of no luggage in the van was not entitled to any weight (because in fact luggage later was found in the cab, and the officer could not reasonably rely on his cursory observation to conclude the van held no luggage); and the lack of documentation for this newly purchased vehicle "contributed little" toward a belief of criminal activity. Even when considered together, these observations did not provide reasonable suspicion.

State v. Knapp, 253 Or App 151, 290 P3d 816 (2012). Defendant was a passenger in a lawfully stopped vehicle, and he was stopped for failing to wear his seatbelt. After running a records check on both the driver and defendant, the officer asked for and received the driver's permission to search the vehicle. That search revealed drugs under the front passenger seat. Defendant was charged with PCS, and he moved to suppress, arguing that officer unlawfully extended the traffic stop and that the evidence was obtained as a result of that illegality. The state argued that defendant lacked a personal privacy interest in the car or its contents, and the trial court denied his motion. *Held*: Reversed and remanded. [1] In determining whether suppression is warranted, courts analyze whether a passenger had been unlawfully seized during the course of a traffic stop as a separate question from the stop of the driver. Here, defendant was unlawfully detained because, rather than process the citation for the seatbelt violation, the officer sought consent to search from the driver. [2] Defendant established the minimal factual nexus between the illegality and the discovery of evidence because, had the officer been processing his traffic citation rather than unlawfully detaining him while seeking consent to search from the driver, the officer would not have discovered the evidence. When the illegality is occurring at the same time and place as the gather of the evidence, the court will almost always find that defendant has established a minimal factual nexus. [3] The state's argument that the officer would have discovered the drugs regardless of the unlawful seizure of defendant (as "inevitable discovery" or "independent source") was really an argument concerning attenuation. And because there was no evidence in the record indicating that the officers would have discovered the evidence inevitably by lawful means, defendant was entitled to suppression.

State v. Farrar, 252 Or App 256, 287 P3d 1124 (2012). An officer lawfully stopped defendant for a traffic violation. While processing the stop, the officer noticed that she exhibited several signs that she was under the influence of methamphetamine. The officer eventually obtained her consent to search the car and purse, and found a vial of meth and paraphernalia. Defendant was charged with possession of a controlled substance, and she moved to suppress, arguing that the request for consent did not come during an unavoidable lull and the officers lacked reasonable suspicion to extend the stop to investigate for evidence of PCS. At the hearing on that motion, the officer and another officer testified that, in their training and experience, meth users commonly carry their drug kits with them. Neither officer testified, however, that the kits would be encrusted with detectable amounts of meth. The trial court denied the motion, and defendant appealed. *Held*: Reversed and remanded. [1] The officer's "subjective belief—that defendant's methamphetamine use provided a sufficient basis for concluding that she presently possessed methamphetamine—was not objectively reasonable." [2] "Evidence of methamphetamine use, without more, does not give rise to reasonable suspicion that defendant presently possesses more methamphetamine." [3] Nor did the officer's generalized testimony based on his training and experience that "persons who exhibit signs of methamphetamine use may 'possibly' have more methamphetamine does not provide reasonable suspicion. … [H]ere, there was no testimony establishing the number of years that [the officer] had served … much less providing any indication of [his] 'training and experience' related to investigating methamphetamine possession." [4] Although the officer "became suspicious when defendant refused to consent to a search of her purse," that cannot be used to justify the extension of the stop because "a person's assertion of a constitutional right cannot support a reasonable suspicion of criminal activity." [5] The Court of Appeals declined to consider the state's proffered alternative basis for affirmance—"that the arresting officer had, at least, a reasonable belief that defendant

recently possessed methamphetamine"—because that argument was not developed below.

State v. Kentopp, 251 Or App 527, 284 P3d 564 (2012). The police lawfully stopped defendant for a traffic infraction. As defendant was pulling over, the officer saw him leaning toward the floorboard. The officer, upon approaching the car, immediately noticed a small cosmetics bag at his feet, where he had been leaning. Defendant was visibly shaking, and had rotting teeth consistent with methamphetamine use. He was unable to produce a driver's license or registration, and said he was borrowing the car from his boss. The officer ran defendant's license and called for backup and, when he returned to defendant's car and asked him to step out, he started rolling up the windows, took the keys from the ignition, and had a panicked look on his face. The officer suspected defendant was about to lock himself in the car or flee, so he braced the car door open with his foot and took his keys. About 15 minutes into the stop, backup officers arrived, and the officer was able to pat defendant down for weapons. He asked whether there were drugs in the car, and defendant said, "Not that I know of." He refused to consent to a search of the car, so one of the backup officers got his drug-sniffing dog from his patrol car to sniff the car. The dog alerted to the door, which led defendant to confess that the cosmetics bag contained methamphetamine. The trial court denied defendant's motion to suppress, and he was convicted of possessing methamphetamine. *Held*: Reversed and remanded. Under the circumstances, the officers did not have reasonable suspicion that defendant was committing the crime of drug possession. Therefore, the officer's "question about drugs and the ensuing drug investigation unlawfully extended the traffic stop in violation of Article I, section 9." Because defendant's admission and the drug evidence "was a product of that illegality," the trial court erred in denying defendant's motion to suppress.

Stop & Frisk: consent

State v. Meza-Garcia, 256 Or App 798, __ P3d __ (2013). Defendant was the passenger in a vehicle lawfully stopped for a traffic violation while it was travelling northbound on I-5. As he approached to contact the driver, the trooper noticed that the vehicle had California plates and no visible luggage; on contact, the trooper noticed that defendant was "very nervous," noticed a strong odor of air freshener with no visible source emanating from inside, and saw two cellphones as well as a Jesus Malverde medallion inside the cab. The driver, who spoke only Spanish, had no personal identification, but defendant provided the driver's name and date of birth to the trooper; defendant retrieved the vehicle registration and proof of insurance documents and explained that the vehicle belonged to a friend, that they had driven from Sacramento, and that they were going to Portland to visit defendant's uncle. Without being asked, defendant provided the trooper with his identification card. While waiting for a records check, the trooper asked defendant if the vehicle contained any weapons or drugs; he said it did not. The trooper then provided consent-to-search forms, written in English and Spanish, to defendant and to the driver; defendant spoke to the driver in Spanish about the form, and then both of them signed the forms. During his search, the trooper found methamphetamine hidden in a speaker. After arresting defendant and advising him of *Miranda* rights, defendant admitted the drugs were "crystal." Defendant was charged with unlawful delivery and possession of methamphetamine and he moved to suppress the evidence, arguing that he was stopped without reasonable suspicion and that his subsequent consent to search was inadmissible because it was the product of an illegal search. The circuit court denied the motion, holding that the trooper had reasonable suspicion of drug trafficking based on the totality of the observations made by the trooper, even though none of those observations individually was sufficient to create reasonable suspicion; it also found that the written consent by defendant was voluntarily given. Defendant was found guilty of the charges. *Held*: Affirmed. [1] The observations by the trooper "considered in their totality, do not give rise to reasonable suspicion that defendant was engaged in drug-related activity," and the continuation of the stop was unlawful. [2] But defendant's voluntary consent "was sufficiently attenuated from the unlawful police conduct to render the evidence admissible." The trooper obtained no evidence from the unlawful stop of defendant that caused him to ask for consent

to search. Moreover, the trooper's provision of the written consent form (which explicitly indicated that a refusal to give consent could not be used against him for any purpose), the absence of any suggestion by the trooper that refusal to consent would imply defendant was hiding contraband, and defendant's opportunity to discuss the form with the driver before signing "suggests that defendant made a considered and deliberate choice to consent. Under those circumstances, the fact that defendant was informed of his rights to refuse consent mitigates the effect of the unlawful police conduct" and, thus, was "sufficiently attenuated from the unlawful police conduct such that the evidence was admissible under Article I, section 9."

Stop & Frisk: officer-safety measures

^ ***State v. Holdorf***, 250 Or App 509, 280 P3d 404 (2012), *rev allowed*, 353 Or 208 (2013). A police officer stopped a vehicle being driven by an individual who was wanted on an outstanding warrant. The officer had information from other officers that the driver of the vehicle was: wanted on an outstanding warrant for violating parole and was under investigation for involvement in a methamphetamine ring; that the driver recently had been observed in the same vehicle involved in an apparent drug transaction; and that the driver had recently eluded capture in a high-speed chase with police in that vehicle. The officer personally knew the driver from other encounters and knew that he had a warrant. Defendant, who was a passenger in the vehicle, appeared nervous and fidgety and would not look the officer in the eye. Based on his experience, the officer believed that defendant was under the influence of methamphetamine. The officer called for backup and confirmed the driver's warrant status. He also checked defendant for warrants and determined that he was "clear." Defendant asked if he could leave, but for officer-safety reasons, the officer told defendant to remain in the vehicle. After the other officers arrived, the driver was arrested and handcuffed. The officer then asked defendant if there were any weapons or contraband in the vehicle. Defendant told him that there was a knife between the passenger seat and the door, and when the officer opened the door, the knife was there. The officer asked defendant if there were any other weapons or contraband in the car. Defendant replied that he was carrying a pocket knife and reached in his pocket to get it. The officer ordered him not to do that, but he did not comply. The officer restrained defendant, handcuffed, him, and patted him down. During the course of the search the officer discovered containers that contained methamphetamine and marijuana. Defendant moved to suppress contending that the officer's discovery of the drugs was the product of an illegal stop. The trial court denied the motion, and defendant was convicted. *Held*: Reversed and remanded. Even if defendant presented a threat to the officer when defendant asked if he was free to leave, by the time the other officers had arrived and the driver had been taken into custody, all danger had dissipated. It was day time, in a public location with three armed officers present. "Allowing defendant to leave the scene would have presented no immediate threat."

THEFT, FORGERY, AND PROPERTY OFFENSES

See also "Burglary," "Sentencing: merger," and "Statute of Limitations," *above*.

State v. Williams, 254 Or App 746, 295 P3d 693 (2013) (*per curiam*) The sentencing court erred when it imposed a sentence under ORS 137.717 based defendant's prior conviction for theft of services under ORS 164.125, because such a conviction does not count as a predicate offense for purposes of the RePO statute.

State v. Oidor, 254 Or App 12, 292 P3d 629 (2012). Based on evidence that defendant sold music CDs that contained unauthorized reproductions of the original recordings, he was charged with unlawful sound recording, ORS 164.865(1)(b), and unlawful labeling of a sound recording, ORS 164.868. Defendant moved to dismiss the first charge, arguing that federal copyright law preempts that offense, but the trial court denied the motion. At trial, defendant moved for a judgment of

acquittal on the second charge, and the trial court also denied that motion. Defendant was found guilty. At sentencing, the trial court imposed restitution of $500 to the Recording Industry Association of America (RIAA). *Held*: Conviction for unlawful sound recording and restitution award reversed; otherwise affirmed. [1] Because federal copyright law, 17 USC § 301(a), expressly preempts ORS 164.865(1)(b), the trial court should have dismissed the unlawful sound-recording count. Section 301(a) of the federal Copyright Act prohibits states from creating rights that are "equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106" of the Act. "Congress intended section 301's preemptive effect to apply to state criminal as well as civil laws." Although ORS 164.865 prohibits offering and advertising sound recordings for sale, and although federal law does not specifically prohibit those acts, ORS 164.865(1)(b) nonetheless "creates a right that is equivalent to the exclusive distribution right that the federal act grants to copyright owners," and federal copyright law thus preempts it. [2] Because the evidence entitled a rational fact finder to find defendant guilty of unlawful labeling of a sound recording under ORS 164.868, the trial court correctly denied defendant's motion for acquittal on that count. Based on testimony that the authorized versions of the recordings at issue were manufactured by RIAA members, that RIAA members require all authorized reproductions to conform to a particular industry standard, and that the CDs in question did not conform to that standard, a rational factfinder "could infer that the labels of the CDs did not contain the true name and address of the manufacturer and that the CDs had been produced without the consent of the owner or performer of the music."

State v. Kowalskij, 253 Or App 669, 291 P3d 802 (2012), *rev den*, 353 Or 748 (2013). Defendant stole mail from the mailboxes of various businesses and individuals, and he was charged with multiple counts of identity and mail theft. Defendant moved for a judgment of acquittal on one of the identity-theft counts, asserting that there was a material variance between the allegation against him and the proof at trial. Specifically, he argued that the indictment alleged that he had unlawfully obtained the personal identification of the Oregon Department of Transportation (ODOT), but the evidence at trial demonstrated that he obtained the personal identification of an *employee* of ODOT. The trial court denied the motion, and defendant was convicted. *Held*: Affirmed. There was no material variance between the indictment and the proof at trial. [1] "The identity of the victim is not material to the offense of identity theft." [2] The indictment sufficiently alleged that defendant obtained the identification of a person by alleging that he obtained "personal identification," and including ODOT as the victim was mere surplusage. [3] Furthermore, the variance between the allegation in the indictment and the proof at trial did not prejudice defendant, because his theories of defense did not depend on the identity of the victim.

State v. Contreras, 253 Or App 693, 291 P3d 799 (2012), *rev den*, 353 Or 787 (2013). In August 2007, defendant was charged with misdemeanor driving under the influence of intoxicants, ORS 813.010. He was tried in May 2009, but the trial resulted in a hung jury. Before he was to be retried in September 2009, defendant moved to dismiss, arguing that he was denied his right to a speedy trial under ORS 135.747. The trial court denied that motion, and defendant was convicted. *Held*: Affirmed. [1] Relying on *State v. Garner*, 253 Or App 64 (2012), the court concluded that ORS 135.747 regulates only the timing of the first trial. [2] Because ORS 135.747 applies only to the first trial, defendant waived any objection to the timeliness of that trial by failing to file a motion to dismiss before trial commenced.

State v. Barboe, 253 Or App 367, 290 P3d 833 (2012), *rev den*, 353 Or 714 (2013). Defendant was involved in the fraudulent use of a stolen credit card. The card was stolen by Mercer, who used the card to pay at a restaurant where defendant was a waiter, giving him a $75 tip on a $32.65 bill. After the victim reported his card stolen, police went to the restaurant where defendant worked. Defendant lied to police about knowing Mercer and denied knowing that the card was stolen. Over a year later, when police again questioned defendant about this, he still denied knowing it was stolen, but he admitted knowing the people who used the card (one of whom was a family

member). Defendant was charged with second-degree theft and fraudulent use of a credit card. The case was tried to the court. In announcing its verdict, the trial court acquitted defendant on the theft charge but specifically found him guilty on the fraudulent-use charge because he kept the tip and failed to assist the police after he learned that the card was stolen. On appeal, defendant argued for the first time that the court improperly found him guilty based upon an "aid-and-abet after-the-fact" theory of liability, which is not a crime in Oregon. The state conceded the error, but argued that the error was not plain, or, alternatively, that the court should not exercise its discretion to consider the error. *Held*: Reversed and remanded. [1] The court exercised its discretion to consider the error "first and foremost" because of "the gravity of the error ... As we recently explained in *State v. Reynolds*, 250 Or App 516 (2012), a defendant 'has a strong interest in having a criminal record that accurately reflects the nature and extent of his or her conduct," and "the state has no competing interest in seeing the law applied incorrectly to sustain a conviction. … Accordingly, we affirmatively exercise our discretion to correct the trial court's plain error in convicting defendant of something that is not a crime." [2] Contrary to its normal practice in sufficiency-of-the-evidence cases, the court remanded for a new trial because "factual issues pertinent to a material element of the crime remain unresolved"—*i.e*., "the trial court's verdict indicates that it did not make findings of fact pertaining to whether defendant aided and abetted before or during the commission of the crime[.] … [B]ecause a factual question as to defendant's knowledge *at the time of the fraudulent transaction* (a material element of the crime of fraudulent use of a credit card, and the evidence pertaining to that question is sufficient to withstand a motion for judgment of acquittal, we reverse defendant's conviction and remand for a new trial on the charge of fraudulent use of a credit card."

State v. G. L. D., 253 Or App 416, 290 P3d 852 (2012). Youth and a couple of other teenagers broke into a high school, stole 20 computers, and set the school on fire. After a hearing, the juvenile court determined that youth had committed acts that constitute first-degree arson, aggravated first-degree theft, two counts of second-degree burglary, and first-degree criminal mischief. The court imposed restitution in the amount of $194,578. *Held*: Affirmed. The juvenile court properly denied youth's motion to dismiss the aggravated-theft allegation based on ORS 164.057(1)(b). The court properly considered the cost of replacing the stolen computers when it determined that their value exceeded $10,000: it did not improperly use the replacement cost in lieu of proof of fair market value; rather, it properly considered replacement value with other evidence to determine the fair market value of the computers and, therefore, based its determination of value not on the replacement cost but on market value.

State v. Smith, 252 Or App 707, 288 P3d 974 (2012), *rev den*, 353 Or 429 (2013). Defendant had originally taken possession of the victim's property with the understanding that he would sell it and give the proceeds to the victim's wife. Instead, he sold some of the property and kept the proceeds, and kept some of the property, to offset a debt that he believed the victim owed him. He was charged with theft by receiving (ORS 164.015; ORS 164.095) on an allegation that he unlawfully "retained" the victim's personal property. He moved for a judgment of acquittal, arguing that the state failed to prove that he took and possessed the items. The trial court denied the motion, and the jury found him guilty. On appeal, he argued that the trial court erred in denying the motion because no reasonable juror could have found that he knew or believed the property was the subject of theft. *Held*: Affirmed. [1] Defendant preserved his "knowledge" argument. Although he, "in moving for judgment of acquittal, indeed failed to raise the argument that he now advances on appeal[,] … we find that defendant's contention regarding the knowledge requirement was preserved, as the trial court raised the issue *sua sponte* … and the state responded at length before the trial court specifically *ruled* on that issue." Therefore, "each purpose underlying the preservation requirement was met." [2] "[T]o be found guilty of theft by receiving, defendant must have known or believed that the articles of personal property at issue were the subject of theft." The record "supports jury determinations that: (1) defendant was given permission to possess the victim's property only in order to sell it and give the proceeds to the victim's wife or to bring it to the wife's garage sale, and

defendant did neither; (2) defendant appropriated the property for a different purpose—to satisfy an alleged debt; and (3) defendant continued to retain the property and deprive the victim of the property and its value despite the victim's efforts to recoup it with the aid of law enforcement." From that, the jury could reasonably infer "that defendant either knew or reasonably believed that the property was stolen."

^ ***State v. Walker***, 252 Or App 1, 285 P3d 751 (2012), *rev allowed*, 353 Or 445 (2013). Defendant was convicted of racketeering based on three incidents in which he and his cohort stole various "idiosyncratic" high-dollar items (namely frozen shrimp, beer, Tide laundry detergent, and diapers) from two Safeway stores over a period of two months. Defendant appealed, arguing that the state failed to prove that the "informal partnership" between he and his cohort constituted an "enterprise" for purposes of the Oregon Racketeering Influenced and Corrupt Organizations Act (ORICO), ORS 166.715-166.735. *Held:* Affirmed. [1] "[T]o establish culpability under ORS 166.720(3), the state must prove both a pattern of racketeering activity and an enterprise." [2] "[A]n 'enterprise' for purposes of ORS 166.715(2) and ORS 166.702(3) must partake of 'an on-going organization, however loose, that is distinct from the commission of separate criminal acts by the defendant. . . . Thus, the prerequisites of an ORICO 'enterprise' are (1) 'organization, however loose' and (2) 'ongoing' continuity. [3] "[I]n many, perhaps most, ORICO prosecutions involving illicit 'associated-in-fact' enterprises, there will be a symbiotic relationship between proof of a 'pattern of racketeering activity' and proof of an 'enterprise.' . . . [A]lthough 'pattern of racketeering activity' and 'enterprise' must each be proved, and proof of one does not *necessarily* establish the other, proof of either can, depending on the circumstances, be legally sufficient to establish the other." [4] The state's evidence "was sufficient to permit the jury to infer that defendant and [his cohort] were 'associated in fact' in an ongoing illicit enterprise—and that defendant, in committing the predicate thefts, acted through that joint criminal enterprise." In all three thefts, defendant and his cohort followed a "precisely planned course of action," entering the stores together and "acting in synchronized fashion," stole identical items. … From the totality of those circumstances, a jury was entitled to infer that the three thefts, far from being random, sporadic, or isolated, originated from, and were the product of, an overarching, coordinated organizational dynamic and design. For many of the same reasons, a reasonable trier of fact could infer the requisite 'ongoing' continuity." . . . "It is the collective character of the informal partnership, including the combination and coordination of its participants' efforts towards the achievement of a common purpose, that rendered this informal partnership an ORICO enterprise."

^ ***State v. Savastano***, 243 Or App 584, 260 P3d 584, *on recon*, 246 Or App 566, 266 P3d 176 (2011) (*per curiam*), *rev allowed*, 351 Or 678 (2012). Defendant embezzled hundreds of thousands of dollars from her employer in numerous individual theft transactions over a 16-month period. The district attorney applied ORS 164.115(5) to aggregate individual theft transactions that occurred within a six-month period, and defendant was charged with 10 counts of aggravated first-degree theft, and six counts of first-degree theft. Each count was based on aggregated thefts she had committed within each month. Before trial, defendant challenged the manner of aggregation, arguing that the prosecution did not have a consistent, coherent, systematic policy regarding aggregation and, accordingly, the aggregation violated Art I, § 20. The prosecutor responded that although the district attorney did not have a policy, he had aggregated the thefts to provide "a clear organizational outline for the jury." The trial court denied the defendant's motion and, following a conditional guilty plea, defendant appealed. *Held*: Reversed and remanded. [1] A prosecutor's decision regarding how to aggregate theft transactions implicates Art I, § 20, because, depending on what how the prosecutor chose to aggregate, defendant could be burdened with the need to defend against various numbers of charges, and could face penalties of varying seriousness. [2] Although defendant did not establish that the charging decision was unsystematic, the state conceded that it did not have a consistent policy. The trial court therefore should have granted defendant's motion to dismiss.

TRAFFIC OFFENSES

See also "Driving Under the Influence of Intoxicants," "*above*.

State v. Cruz-Gonzelez, 256 Or App 811, __ P3d __ (2013). Defendant struck an unattended vehicle with his car, but he continued driving for 472 feet and pulled around a corner before stopping, calling 911, and then returning to the scene. He was charged with failure to perform the duties of a driver when property is damaged in violation of ORS 811.700(1)(b) (H&R), which requires the driver to "immediately stop" and contact the owner or operator of the vehicle or leave a conspicuous note with the vehicle. Defendant asked the court to instruct the jury on "attempt" and the affirmative defense of renunciation, ORS 161.430, arguing that the jury could find that he merely committed a substantial step toward committing H&R but then had renounced his intent when he called 911. The trial court denied his request, and the jury found him guilty. *Held*: Affirmed. [1] Under ORS 136.465, a defendant is entitled to a jury instruction on a lesser offense if it accurately states the law and if the evidence could support the giving of the instruction. [2] An attempt to commit a crime is a lesser-included offense of the greater crime, so the requested instructions here accurately stated the law. [3] "A defendant is not entitled to a jury instruction on a lesser-included offense unless there is evidence from which a jury could *rationally* find guilt of a lesser-included offense and no guilt of the charged offense." [4] Defendant was not entitled to an instruction on attempted H&R because no rational trier of fact could have found on these facts that he attempted, but did not *complete*, the crime of H&R—the jurors could not *rationally* find from the evidence that he stopped "immediately" and attempted to provide contact information. In this context, "immediately" means "without delay." [5] The trial court also correctly denied defendant's request to instruct the jury on "renunciation" because that "is an affirmative defense to a charge of an attempted crime."

State v. Clark, 256 Or App 428, 300 P3d 281 (2013). Defendant was convicted of seven misdemeanors, all of which arose from a traffic accident resulting from her driving while intoxicated. Six of the charged offenses required proof of a reckless mental state. The trial court gave the jury a modified version of the state's requested instruction on the duties of a driver, which was patterned after one approved in *State v. Stringer*, 49 Or App 51 (1980), *aff'd*, 291 Or 527 (1981), *rev'd on other grounds on reh'g*, 292 Or 388 (1982). The instruction, which accompanied an instruction defining "recklessly," said: "The driver of a motor vehicle is required by law to drive upon a highway or premises open to the public at a speed no greater than is reasonable and prudent, having due regard for the traffic, surface and width of the road, hazards at intersections and any other conditions existing. A driver has a continuing duty to keep a reasonable lookout and maintain the automobile under reasonable control, and that is such as would be exercised by a reasonable person." Defendant objected to the instruction on the ground that it would create a substantial risk the jury would convict "based on a theory of negligence instead of recklessness." The jury found her guilty. *Held*: Affirmed. [1] Defendant's challenge to the instruction fails under *Stringer*, in which the court rejected a similar challenge to nearly the same instruction. "The instruction could inform the jury's determination of whether defendant acted recklessly. ORS 161.085(9), defining 'recklessly,' provides that '[t]he risk [that the defendant is aware of and consciously disregards] must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.' Thus, like the defendant in *Stringer*, a defendant charged with crimes with the mental state of recklessness has 'a duty to exercise that degree of care that a reasonably prudent person would use under the circumstances.'" [2] Here, "the disputed instruction explained, in general terms, the degree of care that a reasonable driver observes," and thus provided the jury a yardstick by which to measure the extent to which defendant's driving deviated from the reasonable person's driving.

State v. Reed, 256 Or App 61, 299 P3d 574 (2013). Defendant led several police officers on a chase that spanned an hour and a half. He managed to get away for various periods, only to be

found again and resume the chase. He was charged with, among other things, four counts of attempting to elude a police officer, which each count corresponding to a particular officer that defendant attempted to elude. He was convicted on all counts, and argued that the counts should merge into a single conviction. The trial court declined to merge the counts, entering four counts of conviction. *Held*: Affirmed. The four counts do not merge under ORS 161.067(3) because defendant committed four crimes, and those crimes were separated by sufficient pauses. [1] "In order to support multiple attempts to elude, (1) the defendant must have completed each attempt to elude—that is, he must have stopped running or hiding—before beginning the next attempt to elude, and (2) each attempt to elude must have been separated from the others by a pause in the defendant's conduct sufficient to afford him an opportunity to renounce his criminal intent." [2] "Whether a defendant stopped running or hiding from the police at a particular point in time is a question of historical fact" for the trial court, and that finding binds the appellate court when it is supported by "constitutionally sufficient evidence in the record." [3] The record supported the trial court's implicit factual findings that defendant ceased running or hiding between his attempts to elude, as well as its legal conclusion that "there was a sufficient pause between each of the attempts to elude to afford him the opportunity to renounce his criminal intent."

State v. Stookey, 255 Or App 489, 297 P3d 548 (2013). Defendant was driving a car with a horizontal crack in the windshield. A police officer on routine patrol perceived the crack as passing through defendant's field of vision and initiated a traffic stop because he was concerned that the crack could be distracting and dangerous. As part of the stop, the officer ran a routine records check and learned that defendant was out of compliance with his sex-offender registration requirements, and arrested him. Before trial, defendant argued that the traffic stop was not supported by probable cause all evidence obtained as a result of that stop should be suppressed, including his name and sex-offender registration status. The trial court denied the motion. Defendant was convicted, and appealed from the denial of the motion to suppress. *Held*: Reversed and remanded. The stop was not supported by probable cause. ORS 815.020, which prohibits a person from driving a vehicle that is in such unsafe condition as to endanger any person, encompasses only unsafe conditions that pose a *probable* risk of harm or loss and not unsafe conditions that merely create a *possible* risk of harm or loss. Here, there was no evidence that the crack was unusually large or contained multiple veins, and the officer's only concern was that the crack might reflect light into the defendant's eyes. Thus, the officer could not have objectively believed that the single crack would have exposed another person to a danger of probable harm or loss by interfering with defendant's vision.

State v. Worthington, 255 Or App 177, 296 P3d 624 (2013). Defendant was charged by citation filed in municipal court with a Class B traffic violation. The municipal court scheduled trial for August 30, 2011, and mailed him a notice of trial in July 2011. But that notice was misaddressed and the postal service then returned the notice as undeliverable on August 24, 2011. On August 26, the court re-mailed the same notice to defendant, this time using the correct street address. Defendant did not appear for trial on August 30, and the court convicted him by default. ORS 153.102. He appealed raising a number of arguments, including a claim that the court erred in entering a default judgment. *Held*: Reversed and remanded. The re-mailed notice did not give defendant sufficient notice of the trial date scheduled for August 30, just four days later. ORS 153.073 provides: "Unless notice is waived by the defendant, the court shall mail or otherwise provide to the defendant notice of the date, time and place *at least five days before the date set for trial under ORS 153.070*." Because the record did not show that defendant received notice at least five days before the date set for trial, and the municipal court erred in entering a default judgment.

State v. Cespedes-Rodriguez, 253 Or App 698, 294 P3d 493 (2012). Defendant was driving in downtown Portland and hit a pedicab, causing its operator to fall to the ground. Defendant remained in his car and told the victim that he would give her $100 if he could "just leave." She noted that he smelled of alcohol and appeared intoxicated. The victim's friend approached and told

defendant to get out of the car, but defendant put the car in reverse and drove away backward. The victim's friend then hit defendant's car several times with a metal object. Defendant fled the scene of the accident and went home. In the days following the accident, he did not contact police or respond to their repeated attempts to contact him. Defendant was charged with failure to perform the duties of a driver, ORS 811.700(1), and reckless driving based on the manner in which he drove away. At trial, he asserted a choice-of-evils defense under ORS 161.200 to both charges. After a bench trial, the trial court found defendant guilty on the hit-and-run charge, rejecting his defense to that charge, but acquitted him of reckless driving based on that defense. *Held*: Affirmed. The trial court properly convicted defendant on the hit-and-run charge. [1] To assert a choice-of-evils defense, a defendant must show (a) that his conduct was necessary to avoid a threatened injury, (b) the threatened injury was imminent, and (c) it was reasonable for him to believe that the threatened injury was greater than the potential injury of his illegal actions. After a defendant has made that showing, the state must disprove the defense beyond a reasonable doubt. [2] Here, the evidence that defendant smelled of alcohol and appeared intoxicated, that he offered the victim $100 if he could leave the scene, that he moved his car before the attack, and that he failed to contact the police in the days following the accident disproved the choice-of-evils defense to the hit-and-run charge beyond a reasonable doubt.

Note: The parties argued about whether, even if defendant had a choice-of-evils defense, he was required to stop "as close [to the scene of the accident] as possible," under ORS 811.700(1)(a)(A). Because the Court of Appeals affirmed the trial court's rejection of defendant's choice-of-evils defense, it did not reach that issue.

Richardson v. O.D.O.T., 253 Or App 456, 292 P3d 557 (2012). Between June 1996 and July 1997, plaintiff racked up 17 judgments in Central Lane Justice Court for motor-vehicle violations; each judgment imposed a fine. When plaintiff did not pay any of those fines, the court advised DMV, which then suspended his driving privileges for ten years under ORS 809.415. In 2006, plaintiff obtained a new driver's license. In 2010, the justice court ordered plaintiff to pay his delinquent fines, he did not, the court so advised DMV, and it again suspended his driving privileges. Plaintiff filed an action in circuit court challenging the suspension order on the ground that 10-year period already had expired and it cannot be renewed on the same basis, and the court vacated the suspension. DMV appealed. *Held*: Affirmed. [1] Plaintiff's challenge is not barred on the ground that it constitutes an "improper collateral attack" on the justice court's 2010 order, because it does not appear that plaintiff could have appealed from that order under ORS 53.010. [2] Plaintiff's challenge is not barred merely because it does not fall within the list of defenses set forth in ORS 809.440(2)(b), because the list "is not exclusive." [3] "Both ORS 809.415(4)(a) and ORS 809.416(2) incorporate a binary notion of when suspension of a person's driving privileges will end: *either* when the person pays his or her traffic fines (ORS 809.415(4)(a)(A); ORS 809.416(2)) *or* when 10 years have elapsed (ORS 809.415(4)(a)(B); ORS 809.416(2)). Those two circumstances form the entire universe of possibilities: either the person pays the fines before 10 years have elapsed, thereby cutting short the possible suspension period, or the suspension lasts for a maximum of 10 years if the fines remain unpaid." [4] Because "DMV already suspended plaintiff's driving privileges for the then-applicable five-year statutory period starting in the late 1990s, … DMV lacked authority to suspend plaintiff's driving privileges again, in 2010, for his continued failure to pay the 1996 and 1997 fines."

State v. Ordner, 252 Or App 444, 287 P3d 1256 (2012), *rev den*, 353 Or 280 (2013). Defendant was charged with DUII after an officer stopped defendant's car after seeing him fail to signal a turn for 100 feet and turn too wide; the patrol car's video recorded these events. Defendant moved to suppress, arguing that the stop was unlawful because the officer's suspicion that he committed traffic infractions was not objectively reasonable. After observing the video and listening to the officer's testimony about his observations, the trial court found that the officer's subjective belief that defendant had made an improper wide turn to be objectively reasonable and identified, *sua sponte*, ORS 811.370 (failure to maintain lane) and ORS 811.310 (crossing the centerline) as the infractions for which the officer had probable cause to believe defendant violated. (Defendant's

conduct did not violate those statutes, however, but did violate other traffic statutes relating to maintaining a lane of travel.) After the court denied his motion, defendant entered a conditional guilty plea. In its respondent's brief on appeal, the state identified two statutes that defendant *did* violate: ORS 811.295 (failure to drive on the right) and ORS 811.305 (driving left of the center of the roadway at an intersection). *Held*: Affirmed. The trial court correctly denied defendant's motion to suppress, although the court was "right for the wrong reason. The video recording showed that it was "objectively reasonable for the officer to believe that the defendant had committed the offense of failure to drive on the right under ORS 811.295." Accordingly, "the ensuing traffic stop was lawful.

State v. Wentworth, 252 Or App 129, 284 P3d 1250 (2012). A trooper stopped defendant failing to drive within a lane after the trooper observed defendant's car cross over a fog line, by a few inches, for a few seconds. During the traffic stop, the trooper discovered more than four ounces of marijuana. Defendant moved to suppress, arguing his driving did not constitute a traffic offense. The trial court denied that motion, and defendant was convicted of unlawful possession of marijuana. *Held*: Affirmed. [1] Crossing over a fog line can result in the violation of ORS 811.370(1)(a). [2] The court declined to consider defendant's argument that crossing the fog line for only a few seconds was "too incidental and momentary" to constitute a violation of the statute because he failed to preserve that argument.

TRIAL

See also "Evidence," "Instructions," and "Jury Trial," *above*.

State v. Alderman, 256 Or App 476, 300 P3d 308 (2013) (*per curiam*). Defendant was charged with unlawful delivery of marijuana for consideration, and the trial court found him guilty. On appeal, he argued for the first time that the trial court committed plain error "(1) by eliciting testimony from a defense witness that was irrelevant and impermissibly based upon defendant's confidential affidavit of indigency and (2) by commenting on the credibility of defendant's statements in his affidavit of indigency and relying on those statements in a manner that denied defendant a fair trial." *Held*: Reversed and remanded. Based on a review of the record, "the error is plain" and warrants a reversal and remand.

State v. Hooper, 256 Or App 237, 300 P3d 235 (2013). While driving from Medford to Portland on I-5, the victims saw defendant tailgating very closely and "gesturing," and he then passed them on the left shoulder. They and another driver who had witnessed the event called 911, and an officer pulled him over in Linn County. He was charged in Linn County with reckless driving and reckless endangerment, and the charge included a venue allegation that the crimes occurred in a vehicle in transit through Linn County. Defendant proceeded *pro se* and filed a motion under ORS 131.363 to change venue to Lane County. The trial court denied the motion. At trial, in his closing argument to the jury, defendant started complaining that "it would have been more convenient" for the trial to be held in Jackson or Lane County, and the trial judge interrupted and admonished him: "there's not issue here as to venue, and there has been nothing raised today with regard to proper place of trial [and so] leave that please." The jury found defendant guilty. On appeal, defendant argued that the trial court erred when it limited his argument, given that the state was required to prove venue. *Held*: Affirmed. The trial court did not err by directing defendant to "leave that, please." [1] "Absent abuse, the control of closing arguments is left to the trial court judge, who has broad authority to control the conduct of the trial. … At the time that the trial court interrupted defendant's argument, he was not attempting to argue about the facts pertaining to where the crime occurred. Instead, defendant was discussing where the trial was being held, the issue addressed in his pretrial motion for change of venue. … The trial court did not abuse its discretion in limiting defendant's argument on that issue." [2] The trial court correctly instructed the jury "as to the factual findings that it had to make relating to venue in order for defendant to be convicted. We assume that

jurors follow their instructions, absent an overwhelming probability that they would be unable to do so. Under all the circumstances presented here, we cannot conclude that the trial court's statement to defendant during closing argument would have led the jury to believe that, regardless of the court's specific instructions, there was no need to determine factually whether the crime occurred in Linn County or in a vehicle in transit that passed into Linn County."

State v. Fivecoats, 251 Or App 761, 284 P3d 1225 (2012). Someone stole a firearm out of the victim's van when he made a delivery at a bar. In a photo throw-down, the victim identified defendant as being near the van when he had gone inside, and a surveillance video showed a man who looked like defendant walking up to the van and stealing the firearm. The man in the video had an odd gait. Defendant was charged with first-degree theft, felon in possession of a firearm, and unlawful entry into a motor vehicle. At trial, the state presented the video, and two officers who knew defendant testified as to his odd gait. Although defendant elected not to testify at trial, he asked to show the jury how he walked, because he claimed it was different from the man in the video. The trial court denied defendant's request, concluding that it would be testimonial in nature. The jury found defendant guilty, and defendant claimed on appeal that the trial court erred by denying his request to demonstrate his gait. *Held*: Reversed and remanded. [1] The claim of error is preserved for appeal even though defendant did not make an offer of proof because "the substance of the evidence … was apparent from the context." OEC 103(1)(b). "When defendant made his request [he] intended to demonstrate that his walk, although not a normal gait, was different from the gait of the man in the surveillance video. Whether his walk did or did not resemble the one in the video would be a question for the jury, not a judgment for the court in the exercise of its determination of admissibility." [2] "Testimonial evidence is evidence that communicates by words or conduct an individual's beliefs, knowledge, or state of mind. In contrast, evidence of physical characteristics such as identity, appearance, and physical conditions are not testimonial. Because walking is physical evidence concerning a person's appearance or physical condition and does not communicate beliefs, knowledge, or state of mind, we conclude that it is not testimonial. Thus, it was error for the trial court to rule that demonstrating his walk would have been testimonial so as to waive his right against self-incrimination." [3] "It is conceivable that defendant's walk was so distinctive and so distinctively different from the walk on the brief video that a juror could be persuaded that defendant was not that man."

VENUE

State v. Ritchey, 257 Or App 291, __ P3d __ (2013) (*per curiam*). Defendant was found guilty on multiple counts of encouraging child abuse in the first and second degree, ORS 163.684 and ORS 163.686. *Held*: Affirmed. The trial court correctly denied defendant's motion for judgment of acquittal on the venue element, because the evidence showed that he "had duplicated the photographs by downloading them onto his computer" and that "he had accessed the internet at three places, all of which a trier of fact reasonably could find were within Douglas County."

State v. Pugh, 255 Or App 357, 297 P3d 27, *rev den*, 353 Or 748 (2013). Defendant was charged with various counts of first-degree encouraging child sexual abuse under ORS 163.684 (2001) for knowingly "duplicating" images of sexually explicit conduct involving children by downloading them from the Internet and saving them on his desktop computer in Clatsop County. Defendant moved for a judgment of acquittal arguing: (1) downloading and saving images from the internet did not constitute "duplicating" under ORS 163.684, and (2) that the state failed to prove venue because the evidence did not show that he downloaded the images in Clatsop County. The trial court denied the motion, and defendant was convicted. *Held*: Affirmed. The state offered sufficient proof of venue in Clatsop County because the state's evidence "[tied] defendant's computer usage to his residence in Clatsop County." In particular, the evidence showed that defendant's computer was hooked up to a monitor in the middle of his living room; the computer used a dial-up Internet

connection through his phone line; and defendant lived at his home in that county for 10 years.

State v. Rennells, 253 Or App 580, 291 P3d 777 (2012), *rev den*, 353 Or 410 (2013). Defendant was charged with domestic assault. At trial, he made several motions for judgment of acquittal, arguing that the evidence did not prove venue in Clackamas County with respect to one count of assault and did not prove that the victim suffered "substantial pain" with respect to the other count of assault. The trial court denied the motions, and the jury found defendant guilty. *Held*: One assault conviction reversed; otherwise affirmed. Defendant failed to preserve his challenge to the sufficiency of the evidence establishing venue with respect to one count of assault. Although he made an argument about venue at trial, he did not dispute (and, in fact, he agreed with) the prosecutor's statement that venue had been established for that particular incident.

State v. Thompson, 251 Or App 595, 284 P3d 559 (2012). Defendant failed to register as a sex offender in 2009, after he changed his residence from a treatment facility in Multnomah County. He was not located for 21 days, after which he was arrested and jailed in Multnomah County, where he remained for about two weeks. At that time, an officer came and re-registered him, using the jail's address. Defendant was charged with failing to register as a sex offender "on or between March 31, 2009 and May 11, 2009." At trial, defendant moved for a judgment of acquittal on the ground that the state had failed to prove venue in Multnomah County because there was no evidence of his location between his departure from the treatment facility and his arrest. The trial court denied his motion, and he was convicted. *Held*: Reversed. The crime of failure to report as a sex offender occurs at midnight on the tenth day after a defendant changes his residence. Venue thus lies in whichever county the defendant is located at that time. Because the state offered no evidence of defendant's location at the time of the commission of the offense, defendant was entitled to a judgment of acquittal.

Note: The state did not rely on the alternative venue provision in ORS 131.325. Nor did the state develop an argument at trial or on appeal that defendant committed the crime anew when he failed to register a new "residence" within 10 days after being lodged at the jail after his arrest.

^ ***State v. Mills***, 248 Or App 648, 274 P3d 230, *rev allowed*, 352 Or 564 (2012). At trial on a DWS offense, a North Plains police officer testified that he stopped defendant on Highway 26 near milepost 56 but did not say that that was within Washington County. Defendant moved for a judgment of acquittal, arguing the state had failed to prove venue, and the trial court denied the motion observing that "everyone knows where Highway 26 is, and that means that everyone knows that it's in Washington County." *Held*: Reversed. [1] Venue is material allegation of an indictment that must be proven beyond a reasonable doubt. [2] Although a jury may infer venue from circumstantial evidence, no such evidence was presented—the state did not introduce any evidence showing where North Plains and mile marker 56 on Highway 26 were in relation to Washington County, nor did it introduce evidence tying anything or anyone involved in the case to Washington County. [3] Taking judicial notice on appeal that the location is within Washington County would not provide a basis to affirm, because: "Our review of the trial court's denial of defendant's motion for a judgment of acquittal requires us to review the trial record to determine whether *it* contained sufficient evidence to support a finding on venue."

VICTIMS' RIGHTS

State v. Bray, 352 Or 809, 291 P3d 727 (2012). This case is another round in a forcible-rape victim's dispute with the Deschutes County Circuit Court over whether it can require her to provide private material to defense counsel. *See State v. Bray*, 352 Or 34 (2012) (dismissing her first appeal as untimely). During the course of the trial, defendant served on the victim a subpoena *duces tecum* directing her to bring her private computer with her for examination. When she did not comply, defendant asked the court to compel her to comply. The court denied that motion. At that

time, the victim had a collateral civil action pending against the defendant and, as part of that proceeding, the victim's lawyer had created and was holding a "clone" of the computer's hard drive. On July 30, 2012, the court found defendant guilty on several felony forcible-compulsion sexual offenses, and it imposed sentence on September 28. Thereafter, the victim was reported in the press to have said that she intended to dismiss her civil case. On November 5, 2012, defendant filed an "emergency motion" in the criminal case asking the court to order the victim to produce the clone and have it sealed and included in the record in order to preserve the issue for appeal and ensure that it will be available if he prevails on appeal and the court remands for a new trial. *See State v. Harvey*, 203 Or App 343, 347 (2005) (claim of error not reviewable on appeal because records defendant sought were not included in record). Both the victim and the District Attorney opposed that motion. The victim asserted that such an order violated her right under Art. I, § 42(1)(c), to "refuse … [a] discovery request by the criminal defendant," and the District Attorney argued, in addition, that the court had no authority to so order because it already had rendered a verdict and imposed sentence. The trial court overruled those objections and ordered that the victim was required to produce the clone, providing that the clone would be sealed in the record until further order of the court. The victim timely filed a notice of interlocutory appeal in the Oregon Supreme Court pursuant to ORS 147.535(1). *Held*: Review allowed, order affirmed. The trial court properly ordered victim to produce the clone. [1] "The statutory scheme establishes two avenues for a victim to seek Supreme Court review of an order involving crime victims' rights that are protected by Article I, sections 42 and 43. The first avenue is by interlocutory appeal, which this court must hear and decide as a matter of right. ORS 147.537(1). The second avenue is by a petition for review to this court. Under that procedure, this court has discretion whether to hear the matter on review. ORS 147.539(1)." In this case, because the order at issue was entered after sentencing, ORS 147.535(4) required the victim to file a petition for review under ORS 147.539(1), rather than a notice of appeal. [2] But the victim's mistitling of the initiating document "does not deprive this court of jurisdiction to review this matter," because she completed, filed, and served her notice in compliance with the same procedures that are required for a petition for review. [3] "We need not decide whether context limits the meaning of the term 'discovery.' In this case, the trial court ordered only that the victim deliver an existing hard drive clone so that it could be placed under seal in the trial court file. Even under the broadest definition of the term 'discovery,' the trial court order does not require the disclosure of any information relating to the litigation to anyone. Regardless of what the exact boundaries of 'discovery' may be under Article I, section 42, defendant's request that a clone of the hard drive be preserved under seal for purposes of appellate review, and the trial court's order allowing that request, do not qualify." [4] The court declined to consider the other objections raised by the District Attorney: "Although the district attorney was entitled to file his own petition for review, he did not do so. *See* ORS 147.535(5). … [Consequently,] the new issues raised by the district attorney are not properly before this court. … For interlocutory appeals, the initiating document must be filed within seven days after the trial court issues the challenged order. ORS 147.537(8)(a). … Similar stringent deadlines apply to petitions for review. *See* ORS 147.539. Here, the victim timely sought review in this court. As the petitioner, she was entitled to identify the issues on review. *See* ORS 147.537(4)(c)(A). The district attorney chose not to file a petition for review. Defendant was given seven days to respond to the issues presented by the victim, and he did so. We conclude that assignments of error should be made by petitioners, not respondents; they should be made in a fashion that allows other respondents to respond to those assignments; and they should be made timely, so that this court has an opportunity to give the issues full consideration within the extremely short time frame permitted by law. We do not believe it is appropriate in these cases either to allow issues to be introduced by anyone other than a petitioner, or to allow new issues to be raised so late in this very truncated appellate process. Accordingly, we decline to consider the new issues raised by the district attorney."

Notes: [a] The court declined to decide precisely what "discovery" means for purposes of Art. I, § 42(1)(c), but it noted that "the voters may have intended to refer only to discovery that occurs pretrial." [b] The court also questioned whether it had authority in this proceeding to consider the objections that the DA given that they did not relate to the victim's constitutional rights under § 42

but rather only to procedural issues. But the court did not resolve that issue; rather, it rejected the objections only the ground that they were not raised by the victim.

^ ***State v. Algeo***, S060830 (on victim's petition for review under ORS 147.539). Did the sentencing court err when it applied comparative-negligence principles under ORS 31.600 to apportion responsibility for the victim's injuries between the victim and defendant, and then reducing the amount it ordered defendant to pay in restitution to the percentage of the victim's economic damages attributed to defendant's conduct?

State v. Brand, 257 Or App __, __ P3d __ (July 24, 2013). Defendant was charged with a variety of drug and sexual offenses involving minors. He pleaded guilty to two counts of DCS/minor (each count specifically named a different child), the state dismissed all the other charges, and the court dispositionally departed from the presumptive prison sentence and imposed probationary sentences. Later, defendant was back before the court on an allegation that he violated his probation by consuming alcohol in a single incident. The court revoked his probation, imposed the presumptive 27- and 29-month prison sentences, and ordered him to serve them consecutively. Defendant objected, but the court overruled the objection, noting simply, "They're two different minors; two different girls." On appeal, defendant that OAR 213-012-0040(2)(b) *required* the court to impose concurrent sentences because the revocation was based on only a single violation, and he also cited *State v. Stokes*, 133 Or App 355 (1995), for that proposition. In response, the state argued that those authorities have been trumped by Art. I, § 44(1)(b), which provides, "No law shall limit a court's authority to sentence a criminal defendant consecutively for crimes against different victims." *Held*: Reversed and remanded. The court erred by imposing consecutive sentences upon revocation. Although the convictions are based on crimes defendant committed against different victims, OAR 213-012-0040(2)(b) required the court to order that the revocation sanctions are to be served concurrently, because there was only one violation.

State v. Wagoner, 257 Or App __, __ P3d __ (July 24, 2013). Defendant pleaded guilty to identity theft. Although the victim previously had submitted her restitution request for $800, the victim's advocate who received it failed to forward that information to the prosecutor. When the prosecutor represented at sentencing that the victim had not provided restitution information, the court did not award restitution. Several months later, the victim's request was found, and she filed a motion under Art. I, § 42(1)(d), asserting her right to restitution. The court granted that request and imposed restitution in a supplemental judgment. On appeal, defendant asserts that, because the state did not investigate and present to the court the nature and amount of restitution prior to the time of sentencing, the court had no authority to impose restitution. *Held*: Affirmed. [1] Under Art. I, § 42(1)(d), "a victim in a criminal prosecution has the right to receive prompt restitution from the convicted criminal who caused the victim's loss or injury," and the legislature may provide by law for effectuation of that right. [2] In light of *State v. Thompson*, 257 Or App 336 (2013), "ORS 137.106 did not prevent the court from imposing restitution in order to provide the victim a remedy by due course of law, after it was discovered that her constitutional right to restitution was violated."

State v. Thompson, 257 Or App 336, __ P3d __ (2013). Defendant crashed into a stop sign and street light pole owned by the City of Monmouth, and he was charged with failing to perform the duties of a driver. He pleaded guilty and agreed to pay restitution. At sentencing, the court awarded $162 in restitution for damages to the stop sign, but denied the prosecutor's request for $1694.37 in restitution for the damaged light pole because "the prosecutor was late in presenting that figure to the court." Three months later the victim, the City of Monmouth, filed a claim that the trial court violated its constitutional right "to prompt restitution" under Art. I, § 42(1)(d). Two months after that, the trial court held a hearing on the claim and granted the victim its requested relief by amending the judgment to include the restitution requested for the damaged light pole. *Held*: Affirmed. The trial court properly amended the judgment to include additional restitution as a remedy for the violation of

the victim's right to prompt restitution. [1] The victim was not limited to seeking relief only in the Supreme Court: Art. I, § 42(3)(b), does not limit a crime victim's remedies for a rights violation to a petition for writ of mandamus to the Supreme Court in a case that is not pending; rather, the Oregon Constitution "makes clear that the legislature is authorized to create procedures for a crime victim to pursue remedies in addition [to mandamus]," which the legislature has done by enacting ORS 147.515. [2] The victim's failure to file its claim in the trial court within time specified in ORS 147.515 was not a jurisdictional defect: "the time window of ORS 147.515, when read in context of the victims' rights scheme as a whole, does not operate as a restriction on the trial court's jurisdictional authority to hear a victim's untimely claim." Consequently, "we decline to address the merits of defendant's unpreserved argument that the city's claim was untimely." [3] The 90-day limit in ORS 137.106(1) (2011), "by its plain language, does not constrain the time in which a trial court may resentence a defendant as a means of remedying a violation of a victim's constitutional rights."

Johnson v. D.P.S.S.T, 253 Or App 307, 293 P3d 228 (2012). Petitioner was a licensed private investigator who worked for a criminal defense attorney. DPSST filed a notice of intent to revoke his license based on allegations that he had had contacts with victims in four cases in which he had misrepresented himself as a police officer in violation of ORS 703.450(15) and did not advise them, in accordance with ORS 135.970(2), that he actually represented the defense and that they did not have to talk with him. After a hearing, the ALJ found that petitioner violated those statutes and related rules, and that he violated the victims' rights under Art. I, § 42(1)(c). Based on those findings DPSST revoked petitioner's license and imposed a civil penalty. *Held*: Reversed and remanded. [1] Petitioner's conduct did not violate Art. I, § 42(1)(c)—which guarantees a victim the right to "refuse an interview … by the criminal defendant or other person acting on behalf of the criminal defendant"—because that provision "does not incorporate or imply that a person requesting the interview has a duty to inform the victim of that right." [2] Petitioner's conduct did not violate ORS 135.970(2), because that statute "does not impose a duty on anyone other than the defendant's attorney to inform the victim 'of the identity and capacity of the person contacting the victim' and the victim's other rights under the statute. Petitioner, a private investigator working for a defendant's attorney, could not have violated ORS 135.970(2) by failing to inform the victim himself." [3] The Court of Appeals remanded for DPSST to reconsider whether it would impose the same sanction based on its determination that petitioner violated ORS 703.450(15) and the other rules.

VIOLATIONS

^ ***State v. Fuller***, 252 Or App 391, 287 P3d 1263 (2012), *rev allowed*, 353 Or 203 (2013). Defendant was charged with attempted theft in the first degree and theft in the third degree, both misdemeanors, based on a shoplifting incident. The charges were reduced to violations at arraignment pursuant to ORS 161.566(1). As a consequence, defendant was not entitled to court-appointed counsel, a jury trial, or proof beyond a reasonable doubt. ORS 153.076(1), (2). Defendant demanded a jury trial and proof beyond a reasonable doubt; she contended the prosecution and conviction of the charges retained characteristics that made it a criminal prosecution. The trial court denied those requests, found her guilty by a preponderance of the evidence after a trial to the court, and imposed a $300 fine. (Defendant was represented at trial by retain counsel and on appeal by *pro bono* counsel.) *Held*: Reversed and remanded. [1] Although the legislature may devise a violation system to allow for punishment of people by lesser means than criminal prosecution, the alternative approach must have characteristics sufficiently distinguishable from a criminal prosecution to avoid application of the procedural protections of criminal cases. The factors to be considered include the type of offense, the nature of the prescribed penalty, the collateral consequences associated with conviction, the significance of the conviction to the community, and the pretrial practices associated with an arrest and detention for the offense. *See Brown v. Multnomah County Dist. Ct.*, 280 Or 95, 100-02 (1977). [2] Applying those factors, theft was historically viewed as a criminal offense. In 1999, the legislature modified the "default principle" that initially accords violation treatment, absent

prosecutorial election, to a "default principle" of misdemeanor treatment. The maximum fine for violation has been increased to $6,250, *see* ORS 161.566(2)(b), when, by comparison, the maximum fine under ORS 161.635(1) for a class C misdemeanor of theft in the third degree is only $1,250. When a violation commences as a misdemeanor, the offender is also subject to the "trappings" associated with a criminal offense, such as custodial arrest, search incident to arrest, and bail requirements. [3] The offense of attempted first-degree theft has not been sufficiently decriminalized to deny the defendant the right to jury trial and to proof beyond a reasonable doubt.

^ *See also* ***State v. Benoit***, S060858 (review on alternative writ of mandamus). When prosecutor elects under ORS 161.566 to treat misdemeanor offense as a violation, do any of the constitutional and statutory protections afforded to the defendant in criminal prosecutions apply to the violation proceeding?

WEAPONS OFFENSES AND FIREARMS

See also "Sentencing: merger," *above*.

State v. Alvarado, 257 Or App __, __ P3d __ (July 24, 2013). A police officer lawfully stopped defendant for a traffic violation. During a search of the vehicle, the officer found a pistol with an obliterated identification number. Defendant initially told the officer that he "found" the gun, but he later changed his story, stating that he purchased the gun for protection. The investigating officer explained that "firearm identification numbers are almost always obliterated in order to conceal the fact that they have been stolen." Defendant was charged with unlawful possession of a firearm and unlawful obliteration of an identification number of a firearm, ORS 166.450, which provides:

> "Any person who intentionally alters, removes or obliterates the identification number of any firearm for an unlawful purpose, shall be punished upon conviction by imprisonment in the custody of the Department of Corrections for not more than five years. Possession of any such firearm is presumptive evidence that the possessor has altered, removed or obliterated the identification number."

At trial, defendant moved for a judgment of acquittal on the obliteration charge, contending that the "presumptive evidence" clause is unconstitutional, but the court disagreed and denied that motion. The jury found him guilty. *Held*: Reversed and remanded. [1] The reference in ORS 166.450 to "presumptive evidence" does not create a rebuttable presumption that violates the rule in *Sandstrom v. Montana*, 442 US 510 (1979), or OEC 309: that clause "does not create a presumption at all; it merely states that a factfinder may, but need not, consider a defendant's possession of the firearm as evidence that he is the person who obliterated the number. The evidence does not compel that conclusion nor does it necessarily provide enough evidence to establish the state's *prima facie* case and shift the burden of disproof to defendant. The factfinder is free to reject the inference, as factfinders always are." [2] "It is axiomatic that we should construe and interpret statutes in such a manner as to avoid any serious constitutional problems." [3] Even though the trial court denied defendant's motion for judgment of acquittal based on an erroneous understanding of the law, he is not necessarily entitled to reversal because he "is not entitled to acquittal unless the state's evidence was legally insufficient." [4] The evidence was sufficient to for a rational trier of fact to find that defendant intentionally obliterated it for an unlawful purpose. [5] But because the trial court had treated the "presumptive evidence" as a rebuttable presumption—and consequently, failed to explicitly consider whether defendant acted intentionally—the proper remedy was to remand for further proceedings. *State v. Andrews*, 174 Or App 354, 366 (2001).

State v. Pinckney, 255 Or App 824, 298 P3d 1248 (2013) (*per curiam*). Defendant was charged with unlawful use of a weapon under ORS 166.220(1)(a), which prohibits carrying or

possessing a dangerous or deadly weapon with "intent to use [it] unlawfully against another." Defendant requested an instruction that "threatening to use a dangerous weapon is not use of that weapon." The trial court refused to give the requested instruction. Defendant was found guilty. *Held*: Affirmed. The trial court correctly refused to give defendant's requested jury instruction: Under *State v. Ziska*, 253 Or App 82 (2012), the word "use" in ORS 166.220(1)(a) includes "both the actual use of physical force and the threat of immediate use of physical force." Consequently, the requested jury instruction was not a correct statement of the law.

State v. Valenzuela, 255 Or App 738, 298 P3d 640 (2013) (*per curiam*). The sentencing court committed plain error when it did not merge defendant's conviction for unlawful use of a weapon, ORS 166.220, into his conviction for second-degree assault, ORS 163.175, because defendant committed both offenses in his single act of stabbing the victim with a knife.

^ ***State v. Ziska***, 253 Or App 82, 288 P3d 1012 (2012), *rev allowed*, 353 Or 428 (2013). During a drunken argument, defendant threatened a roommate with a crowbar, raising it and waving it above his head and telling the roommate that he was going to "level" him. Defendant was charged with menacing and unlawful use of a weapon, ORS 166.220(1)(a). At trial, defendant moved for a judgment of acquittal on the unlawful-use charge contending that his intent was merely to menace his roommate with the crowbar, but not to physically assault him with it, and thus he did not have an "intent to use [the crowbar] unlawfully" for purposes of ORS 166.220(1)(a). The trial court denied the motion. Defendant was found guilty. *Held*: Affirmed. [1] The legislature did not intend "to imbue the term 'use' with the legal definition of assault instead of that term's ordinary meaning. While plausible when ORS 166.220(1)(a) is standing alone, that construction would functionally transform ORS 166.220(1)(a) into an attempted-assault statute." [2] The word "'use' in ORS 166.220(1)(a) describes both the actual use of physical force and the threat of immediate use of physical force." Because defendant "intended to threaten the immediate use of physical force with the crowbar," the trial court properly found defendant guilty of unlawful use of a weapon.

Note: The Court of Appeals previously held in *State v. Osborne*, 242 Or App 85, 90 (2011), that the word "use" in ORS 164.415(1)(b), which defines first-degree robbery, includes both actual use of a weapon and the threat of immediate use of weapon.

^ *See also* ***State v. Garza***, 253 Or App 551, 291 P3d 774, *rev allowed*, 353 Or 428 (2013) (same).

^ ***State of Oregon and City of Portland v. Christian***, 249 Or App 1, 274 P3d 262, *rev allowed*, 352 Or 564 (2012). Defendant was charged with, *inter alia*, violating Portland City Code § 14A.60.010(1), which provides, subject to numerous exceptions: "It is unlawful for any person to knowingly possess or carry a firearm, in or upon a public place, including while in a vehicle in a public place, recklessly having failed to remove all the ammunition from the firearm." Defendant demurred to charge, contending that the ordinance on its face violates Art. I, § 27, and the Second Amendment. The trial court overruled the demurrer, and defendant was convicted. *Held*: Affirmed. [1] Because defendant made a facial challenge to the constitutionality of the ordinance by way of demurrer: "First, the only relevant facts in this case are that defendant was charged with, and tried for, violating the ordinance, and those facts are relevant only to establish that he has standing to challenge it; the circumstances surrounding his arrest play no part in our analysis. Second, although generally a facial challenge to a law will fail if the law can constitutionally be applied in any imaginable situation, in a facial challenge under Art. I, § 27, … [if] we determine that legislation is significantly overbroad—that, in some significant number of circumstances, it punishes constitutionally protected activity—we must declare the legislation to be unconstitutional." [2] The Court of Appeals construed § 14A.60.010(1) to mean that it prohibits: "if a person possesses or carries a loaded firearm in a public place; the person knows that he or she is carrying the firearm, that it is loaded, and that he or she is in a public place; the person is conscious that being in a public place with the loaded firearm creates a substantial risk; the substantial risk is unjustified, that is, it is not a

risk that would inhere in using the firearm for the kinds of self-defense, defense of others, or defense of premises that are statutorily justified; and the person nonetheless disregarded that risk." [3] As such, the ordinance does not violate Art. I, § 27, as construed in *State v. Hirsch/Friend*, 338 Or 622 (2005): "The ordinance does not prohibit a person from *any* conduct in home, even reckless conduct and intentional misconduct short of crime. It does not prohibit a person with a permit to carry concealed weapons from knowingly carrying a recklessly not-unloaded firearm in a public place. It does not prohibit a person from carrying a recklessly not-unloaded weapon in a public place in order to engage in justified conduct—reasonable defense of self against felonious attack. Its prohibitory scope includes only a person who has knowingly carried a loaded firearm in a public place for some purpose other than defense of self or home from felonious attack, consciously disregarding the substantial risk that doing so will endanger public safety. Compared to the lawful sweep of the ordinance, such occurrences—if there are any—are rare outliers; thus, even if such occurrences were constitutionally protected, the statute would survive a facial challenge." [4] "The protections afforded by the Second Amendment are incorporated into the Fourteenth Amendment and therefore apply against state and local governments. … Under federal constitutional law, however, First Amendment overbreadth applies only to First Amendment cases; in Second Amendment cases, as in all other facial constitutional challenges outside of the First Amendment, the enactment will be declared unconstitutional only if it is unconstitutional in *every* conceivable application." [5] The ordinance does not violate the Second Amendment, as construed in *District of Columbia v. Heller*, 554 US 570 (2008).

^ ***State v. Stark***, 248 Or App 573, 273 P3d 941, *rev allowed*, 352 Or 564 (2012). Defendant was convicted of a felony offense in 2004, and the judgment in that case allowed him to apply for "misdemeanor treatment" upon his completion of probation. In 2006, defendant obtained an order reducing his felony conviction to a misdemeanor. *See* ORS 161.705(1)(d). In May 2008, defendant was charged with being a felon in possession of a firearm. Defendant then obtained a *nunc pro tunc* judgment memorializing that his felony conviction had been reduced to a misdemeanor. At the trial, defendant moved for acquittal, arguing that the reduction of his conviction to a misdemeanor meant that he was not a felon at the time he possessed the firearm. The trial court denied his motion, and he was found guilty. *Held*: Affirmed. Under ORS 166.270(3)(a), a person "has been convicted of a felony" for purposes of the FIP offense "if, at the time of conviction for an offense, that offense was a felony under the law of the jurisdiction in which it was committed" but that such a conviction is not a felony if "[t]he court declared the conviction to be a misdemeanor at the time of judgment." The phrase "at the time of judgment" in that provision "refers to the time when an original felony judgment of conviction was entered, not to a later time when a judgment reducing such conviction to misdemeanor status might be entered."

WITNESS TAMPERING

State v. Kaylor, 252 Or App 688, 289 P3d 290 (2012), *rev den*, 353 Or 428 (2013). Defendant was a certified nursing assistant at a nursing home where the victim, who suffered from dementia, resided. When the victim was resisting defendant's efforts to clean him, another CNA, Rivera, came over to help. The two women rolled the victim onto his side, with defendant standing near his head and Rivera near his lower body. When the victim, who had been "hollering" loudly, suddenly became quiet, Rivera looked up and saw that defendant had clamped her hand over the victim's mouth and was applying pressure. The victim's face was bright red, his eyes were open wide, and he looked "terrified," as if he could not breathe. Defendant kept her hand over the victim's mouth for ten seconds, at which point defendant told Rivera that the victim had bitten her hand and left to tend to her injury. Rivera sought advice from another co-worker, Mayes, and reported the incident to her supervisor later that day. The next afternoon, defendant left threatening voicemail and text messages for Mayes pass on to Rivera. Soon after Rivera left those messages, her supervisor called the police to report the incident. The state charged defendant with first-degree criminal mistreatment,

strangulation, and two counts of witness tampering. At trial, the state presented evidence that defendant had made threats of harm to the victim previously, as well as to another patient.
Held: Convictions for criminal mistreatment and witness tampering reversed; conviction for strangulation reversed and remanded. With respect to witness tampering, "neither [of the messages] is direct evidence of defendant's intent to induce Rivera not to testify in an official proceeding. At most, the second statement [that she would kill Rivera if she got fired] supports an inference that she intended to induce Rivera not to report her conduct to her employer." Even if the jury could infer that "if Rivera made a report, a nursing board action (or a criminal prosecution) would follow, the jury would still have to infer that defendant's threats (to kill Rivera if she was *fired*) were intended to induce Rivera not to testify in that hypothetical future nursing board action or criminal prosecution. That inference amounts to impermissible speculation."

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