

**DECISIONS IN DEATH-PENALTY CASES
(Oregon Appellate Courts cases since 1996)**

TABLE OF CONTENTS

A. PRETRIAL ISSUES 1

 1. Demurrer Challenge to Charge of Aggravated Murder 1

 2. Challenge to Death Penalty 1

 3. Challenge to Charging Decision 3

 4. Disqualification of Judge..... 3

 5. Claim That Defendant Was Denied A Speedy Trial..... 3

 6. Change of Venue..... 5

 7. Competency to Stand Trial..... 5

 8. Motion to Suppress Defendant’s Statements..... 6

 (a) Motion to suppress defendant’s statements—*Miranda*, voluntariness challenges . 6

 (b) Motion to suppress defendant’s statements—other constitutional challenges 7

 (c) Motion to suppress defendant’s statements—evidentiary challenges..... 7

 9. Motions to Suppress Other Evidence for Constitutional Violations..... 8

 10. Security Issues / Shackling 8

 11. Guilty Plea 9

 12. Joinder 9

 13. Discovery / *Brady* Issues 9

 14. Pretrial examination of defendant 9

 15. Issues Related to Court-Appointed Counsel..... 9

B. GUILT-PHASE ISSUES..... 11

 1. Mental Defenses 11

2. Request for Continuance	11
3. Jury Selection.....	11
(a) Jury selection—access to jury records	11
(b) Jury selection— <i>Batson</i> challenges	12
(c) Jury selection—“death qualification”	12
(d) Jury selection—other challenges	12
4. Opening Statement	13
5. Admission of Evidence Offered By State	13
(a) Admission of evidence offered by state—admissions by defendant	13
(b) Admission of evidence offered by state—other bad acts by defendant.....	15
(c) Admission of evidence offered by state—other evidence.....	17
6. Exclusion of Evidence Offered By Defendant	18
7. Challenge to Sufficiency of Evidence.....	19
8. Motion for Mistrial.....	20
9. Closing Argument.....	21
10. Instructions	22
11. Verdict.....	25
C. PENALTY-PHASE PROCEEDINGS.....	25
1. Jury Selection at Penalty-Phase Retrial.....	25
2. Admission of Evidence Offered by State.....	26
(a) Admission of evidence offered by state—other crimes, bad acts, dangerousness	26
(b) Admission of evidence offered by state—victim-impact evidence.....	28
(c) Admission of evidence offered by state—other evidence.....	29
3. Exclusion of Evidence Offered by Defendant	30

4. Motion for Mistrial.....	31
5. Sufficiency of Evidence	31
6. Closing Argument.....	31
7. Allocution.....	32
8. Instructions	32
(a) Instructions—generally	32
(b) Instructions—the “true life” option	33
9. Sentence.....	34
(a) Sentence—merger of convictions	34
(b) Sentence—other issues	35
D. APPEAL AND REVIEW	35
1. Right to Appeal.....	35
2. Record on Review	36
3. Preservation of Error / Waiver.....	36
4. Plain-Error Review	38
5. Harmless Error / Right for Wrong Reason.....	39
6. Proceedings on Remand	41
E. POST-CONVICTION PROCEEDINGS	42
1. Disqualification of Judge.....	42
2. Trial on Petition	42
3. Claims of Inadequate Assistance of Counsel	42
4. Other Claims for Post-Conviction Relief.....	48
5. Petition Filed by Third Party	48
6. Appeal and Review	49

F. EXECUTION OF SENTENCE 50

G. EXECUTIVE CLEMENCY 51

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TABLE OF AUTHORITIES

Bryant v. Thompson,
324 Or 141, 922 P2d 1219 (1996)..... 48

Cunningham v. Thompson,
186 Or App 221, 62 P3d 823,
on recon 188 Or App 289, 71 P3d 110 (2003),
rev den, 337 Or 327 (2004).....3, 8, 22, 47, 48

Hale v. Belleque,
255 Or App 653, 298 P3d 596 (2013) 42, 48, 49

Haugen v. Kitzhaber,
353 Or 715, ___ P3d ___ (2013)..... 51

Hayward v. Belleque,
248 Or App 141, 273 P3d 926 (2012), *rev den*, 353 Or 208 (2013) 15, 28, 43, 49

Montez v. Czerniak,
237 Or App 276, 239 P3d 1023 (2010),
rev allowed, 351 Or 321 (2012) 24, 44, 49

Pinnell v. Palmateer,
200 Or App 303, 114 P3d 515 (2005),
rev den, 340 Or 483 (2006)..... 42, 46, 48

Pratt v. Armenakis,
199 Or App 448, 112 P3d 371,
adh’d to on recon, 201 Or App 217, 118 P3d 217 (2005),
rev den, 340 Or 483 (2006).....5, 11, 45, 50

State ex rel. Carlile v. Frost,
326 Or 607, 956 P2d 202 (1998)..... 35, 41

State v. Acremant,
338 Or 302, 108 P3d 1139,
cert den, 546 US 846 (2005),
and 546 US 1108 (2006).....6, 32, 35, 36

State v. Barone,
328 Or 68, 969 P2d 1013 (1998),
cert den, 528 US 1135 (2000)..... 2, 7, 12, 13, 14, 16, 18, 21, 28, 30, 37

State v. Barone,
329 Or 210, 986 P2d 5 (1999),
cert den, 528 US 1086 (2000).....3, 5, 9, 13, 14, 16, 18, 20, 21, 22, 24, 27, 37, 40

State v. Bowen,
340 Or 487, 135 P3d 272 (2006),
cert den, 549 US 1214 (2007)..... 1, 8, 15, 17, 20, 23, 27, 30, 34, 37, 38, 39

<i>State v. Bowen,</i> 352 Or 109, ___ P3d ___ (2012).....	3, 41
<i>State v. Brumwell,</i> 350 Or 93, 249 P3d 965 (2011).....	1, 15
<i>State v. Compton,</i> 333 Or 274, 39 P3d 833, <i>cert den</i> , 537 US 841 (2002).....	1, 2, 13, 31, 32
<i>State v. Cox,</i> 337 Or 477, 98 P3d 1103 (2004), <i>cert den</i> , 546 US 830 (2005).....	19, 38
<i>State v. Davis,</i> 345 Or 551, 201 P3d 185 (2008), <i>cert den</i> , 130 S Ct 371 (2009).....	4, 10, 13, 19, 20
<i>State v. Fanus,</i> 336 Or 63, 79 P3d 847 (2003), <i>cert den</i> , 541 US 1075 (2004).....	2, 5, 12, 21, 27, 38
<i>State v. Gibson,</i> 338 Or 560, 113 P3d 423, <i>cert den</i> , 546 US 1044 (2005).....	15, 34, 40
<i>State v. Guzek,</i> 336 Or 424, 86 P3d 1106 (2004), <i>rev'd and remanded sub nom. Oregon v. Guzek,</i> 546 US 517 (2006), <i>op on remand</i> , 342 Or 345 (2007).....	28, 30, 32, 33
<i>State v. Guzek,</i> 342 Or 345, 153 P3d 101 (2007).....	30, 36
<i>State v. Hale,</i> 335 Or 612, 75 P3d 448 (2003), <i>cert den</i> , 541 US 942 (2004).....	1, 19, 23, 35, 40
<i>State v. Haugen,</i> 351 Or 325, ___ P3d ___ (2011).....	50
<i>State v. Haugen,</i> 349 Or 174, 243 P3d 31 (2010).....	12, 18, 26, 35, 36, 51
<i>State v. Hayward,</i> 327 Or 397, 963 P2d 667 (1998).....	3, 16, 18, 21, 24, 37
<i>State v. Johnson (Jesse Lee),</i> 342 Or 596, 157 P3d 198 (2007), <i>cert den</i> , 128 S Ct 906 (2008).....	4, 7, 13, 17
<i>State v. Johnson (Martin Allen),</i> 340 Or 319, 131 P3d 173, <i>cert den</i> , 549 US 1079 (2006).....	2, 6, 8, 10, 11, 15, 17, 20, 37
<i>State v. Langley,</i> 351 Or 652, 273 P3d 901 (2012).....	9
<i>State v. Langley,</i> 331 Or 430, 16 P3d 489 (2000).....	7, 13, 33, 34
<i>State v. Langley,</i> 351 Or 652, 273 P3d 901 (2012).....	9, 53

State v. Longo,
341 Or 580, 148 P3d 892 (2006),
cert den, 128 S Ct 65 (2007) 1, 6, 9, 12, 17, 30, 32, 53

State v. McDonnell,
329 Or 375, 987 P2d 486 (1999)..... 34

State v. McDonnell,
343 Or 557,176 P3d 1236 (2007),
cert den, 129 S Ct 235 (2008) 3, 4, 29, 38

State v. McNeely,
330 Or 457, 8 P3d 212,
cert den, 531 US 1055 (2000)6, 14, 20, 22, 31

State v. Metz,
162 Or App 448, 986 P2d 714 (1999),
rev den, 330 Or 331 (2000)..... 29

State v. Montez,
324 Or 343, 927 P2d 64 (1996),
cert den 520 US 1233 (1997)27, 29, 33, 39, 41

State v. Moore,
324 Or 396, 927 P2d 1073 (1996).....3, 6, 9, 11, 16, 27, 31, 33, 38

State v. Oatney,
335 Or 276, 66 P3d 475 (2003),
cert den, 540 US 1151 (2004) 2, 23

State v. Rogers,
330 Or 282, 4 P3d 1261 (2000).....18, 32, 34, 40

State v. Rogers,
334 Or 633, 55 P3d 488 (2002)..... 12

State v. Rogers,
352 Or 510, 288 P3d 544 (2012).....1, 25, 26, 39

State v. Running,
336 Or 545, 87 P3d 661,
cert den, 543 US 1005 (2004) 11, 23, 35

State v. Simonsen,
329 Or 288, 986 P2d 566 (1999),
cert den, 528 US 1090 (2000) 9, 22, 26, 31, 33, 39, 41

State v. Sparks,
336 Or 298, 83 P3d 304,
cert den, 543 US 893 (2004)5, 17, 29, 31, 35, 38

State v. Terry,
333 Or 163, 37 P3d 157 (2001),
cert den, 536 US 910 (2002) 1, 2, 6, 20, 33, 40

State v. Thompson,
328 Or 248, 971 P2d 879,
cert den, 527 US 1042 (1999) 2, 9, 11, 14, 20, 24, 25, 27, 31, 32, 37

State v. Tiner,
340 Or 551, 135 P3d 305 (2006),
cert den, 127 S Ct 1125 (2007)5, 7, 17, 26, 34

<i>State v. Wilson,</i>	
323 Or 498, 918 P2d 826 (1996),	
<i>cert den</i> 519 US 1065 (1997).....	13, 18, 41
<i>State v. Zweigart,</i>	
344 Or 619, 188 P3d 242 (2008),	
<i>cert den</i> , 130 S Ct 56 (2009).....	19, 22, 25, 35, 36
<i>Wright v. Thompson,</i>	
324 Or 153, 922 P2d 1224 (1996).....	48

A. PRETRIAL ISSUES

1. Demurrer Challenge to Charge of Aggravated Murder

State v. Bowen, 340 Or 487, 135 P3d 272 (2006), *cert den*, 549 US 1214 (2007). The trial court correctly overruled defendant’s demurrer to the charge of aggravated felony murder based on first-degree burglary in which he claimed the allegation was insufficient because it did not allege the crime he intended to commit when he entered. “[W]hen alleging aggravated felony murder, it is unnecessary to set forth the elements of the underlying felonies.” *Id.* at 497.

State v. Hale, 335 Or 612, 75 P3d 448 (2003), *cert den*, 541 US 942 (2004). Defendant and codefendant murdered three teenagers in a wooded area outside Eugene. The jury found defendant guilty of most of the crimes charged, including 13 counts of aggravated murder, and sentenced him to death. Defendant claimed that the trial court should have sustained his demurrer to the indictment on the ground that the aggravated-murder charges alleging murder committed to conceal the crime of or the identity of the perpetrator of the crime of third-degree sexual assault was impermissibly vague. The trial court correctly denied the demurrer on vagueness grounds. An indictment generally is sufficient if it charges an offense in the words of the statute. *Id.* at 621.

State v. Compton, 333 Or 274, 39 P3d 833, *cert den*, 537 US 841 (2002). Defendant sexually assaulted, tortured, and murdered his girlfriend’s 2-year-old daughter. ORS 163.095(1)(e) is not unconstitutionally vague as to the mental state required regarding the result of death when the murder occurs as a result of maiming or torturing the victim. *Id.* at 281.

State v. Terry, 333 Or 163, 37 P3d 157 (2001), *cert den*, 536 US 910 (2002). The trial court had subject-matter jurisdiction even if the indictment was defective under *Apprendi v. New Jersey* for not alleging the penalty-phase factors. *Id.* at 185-86. In any event, under the current statutory scheme, a death sentence is not a “penalty enhancement” within the meaning of *Apprendi*. *Id.* at 188.

2. Challenge to Death Penalty

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 reinstated capital punishment, did not thereby automatically revive Art. I, § 36, which was enacted in 1914 and had abolished capital punishment. ORS 174.090. 352 Or at 517. [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. 352 Or at 518-21. [3] Measure 6 effected only four substantive changes to the constitution, but those changes are “closely related” for purposes of the “separate vote” requirement. 352 Or at 521-25.

State v. Brumwell, 350 Or 93, 249 P3d 965 (2011). On review, defendant argued that ORS 163.150 is unconstitutional because it did not require the jury to agree unanimously on the aggravating evidence that it considered in deciding the “fourth question.” *Held*: Affirmed. The trial court correctly overruled defendant’s demurrer. Even if juror unanimity is required on specific aggravating evidence, ORS 163.150 is not facially unconstitutional because it does not preclude a court from instructing the jury accordingly. To the extent that defendant raised an as-applied challenge on the same ground, he cannot raise it by way of demurrer; rather, he was required to request an instruction about juror unanimity. *Id.* at 111-12.

State v. Longo, 341 Or 580, 148 P3d 892 (2006), *cert den*, 128 S Ct 65 (2007). Defendant murdered his wife and children; he pleaded guilty to some of the murder charges. *Held*: Affirmed. The circuit court correctly denied defendant’s motion to prohibit the death penalty because: (1) Article 36 of the VCCR does

not create individually enforceable rights (following *Sanchez-Llamas*, 338 Or 267, 276, *aff'd on other gds sub nom Sanchez-Llamas v. Oregon*, 548 US ___, 126 S Ct 2669 (2006)), and although it *permits* US consular officials to visit US nationals, it does not *require* them to do so; (2) the 1978 United States-Mexico Extradition Treaty does not apply because defendant was not extradited, but rather returned voluntarily to the United States; and (3) even if the Department of State Foreign Affairs Manual applies to an FBI agent without consular duties, it is not a source of law. *Id.* at 590-93. [2] Oregon is not constitutionally required to establish statewide standards for imposing the death penalty, and defendant is not entitled to discovery of information regarding that issue (reaffirming *State v. Cunningham*, 320 Or 47, 880 P2d 431 (1994), *cert den*, 514 US 1005 (1995)); the US Supreme Court's decision in *Bush v. Gore* did not undermine that decision. *Id.* at 602. [3] The second question (probability of future dangerousness) does not allow a defendant to be sentenced on less than proof beyond a reasonable doubt in violation of *Apprendi v. New Jersey*. *Id.* at 604-05.

State v. Johnson (Martin Allen), 340 Or 319, 131 P3d 173, *cert den*, 549 US 1079 (2006). Defendant kidnapped, sexually assaulted, and murdered a young woman, and then dumped her body in the ocean. The indictment was not subject to demurrer for not alleging the penalty-phase factors. *Id.* at 352.

State v. Fanus, 336 Or 63, 79 P3d 847 (2003), *cert den*, 541 US 1075 (2004). [1] Defendant was entitled to raise facial challenges to the constitutionality of the death-penalty sentencing statute by a pretrial demurrer under ORS 135.630 as a claim that the facts do not allege an offense. *Id.* at 68. [2] The trial court correctly disallowed demurrer to the indictment based on his claim that Oregon's death-penalty statutes violate the Eighth Amendment on the ground that the statutes do not limit sufficiently the aggravating evidence that the state may introduce or that the jury may consider in relation to the question set out in ORS 163.150(1)(b)(D), that is, "whether the defendant should receive a death sentence." *Id.* at 73-74.

State v. Oatney, 335 Or 276, 66 P3d 475 (2003), *cert den*, 540 US 1151 (2004). Defendant's unpreserved claim, based on *Apprendi v. New Jersey* and *Ring v. Arizona*, that the indictment was defective because it did not allege that he had committed the murder "deliberately" has no merit. That finding was made by the jury beyond a reasonable doubt, and "*Ring* does not require that 'deliberateness' be charged specifically in the indictment before the question of deliberateness can be submitted to a jury." *Id.* at 296. [2] The court rejected defendant's unpreserved claim that his death sentence is invalid because *Ring v. Arizona* required that, in order for a death sentence to be imposed, the indictment had to allege the penalty-phase factors. *Id.* at 297.

State v. Compton, 333 Or 274, 39 P3d 833, *cert den*, 537 US 841 (2002). Defendant sexually assaulted, tortured, and murdered his girlfriend's 2-year-old daughter. Fact that the indictment did not allege in aggravated-murder charge that defendant committed the crime "deliberately" did not deprive the trial court of authority to submit the death penalty to the jury. *Id.* at 284.

State v. Terry, 333 Or 163, 37 P3d 157 (2001), *cert den*, 536 US 910 (2002). [1] The trial court had subject-matter jurisdiction even if the indictment was defective under *Apprendi v. New Jersey* for not alleging the penalty-phase factors. *Id.* at 185-86. [2] In any event, under the current statutory scheme, a death sentence is not a "penalty enhancement" within the meaning of *Apprendi*. *Id.* at 188.

State v. Thompson, 328 Or 248, 971 P2d 879, *cert den*, 527 US 1042 (1999). Defendant's contentions concerning the constitutionality of Oregon's death-penalty scheme have been previously rejected. *Id.* at 273.

State v. Barone, 328 Or 68, 969 P2d 1013 (1998), *cert den*, 528 US 1135 (2000). Defendant's contentions concerning the constitutionality of Oregon's death-penalty scheme, including his contention that some form of comparative-sentence review is constitutionally necessary, have been previously rejected. *Id.* at 98.

State v. Hayward, 327 Or 397, 963 P2d 667 (1998). The court declined to reexamine its holding in *State v. Cunningham*, 320 Or 47 (1993), regarding proportionality review. *Id.* at 405.

State v. Moore, 324 Or 396, 927 P2d 1073 (1996). Because Oregon law provides for judicial review of a jury's decision to impose the death penalty, the death-penalty statutes do not violate principles of due process. The evidence in this case was sufficient to support the jury's verdict. *Id.* at 430-34.

3. Challenge to Charging Decision

State v. Hayward, 327 Or 397, 963 P2d 667 (1998). Defendant and several other young men staged a robbery at a DariMart and murdered one clerk and severely beat a second. *Held*: Defendant did not meet his burden of proving that the district attorney lacked a coherent, systematic policy regarding plea negotiations in capital cases. *Id.* at 405. [2] The court declined to reexamine its holding in *State v. Cunningham*, 320 Or 47 (1993), regarding proportionality review. *Ibid.*

Cunningham v. Thompson, 186 Or App 221, 62 P3d 823, *on recon* 188 Or App 289, 71 P3d 110 (2003), *rev den*, 337 Or 327 (2004). Petitioner was convicted of aggravated murder and was sentenced to death, and the judgment was affirmed on direct review. *State v. Cunningham*, 320 Or 47, 880 P2d 431 (1994), *cert den*, 514 US 1005 (1995). He petitioned for post-conviction relief, the court denied all of his claims after a trial, and he appealed. *Held*: Affirmed. Trial counsel did not provide inadequate assistance by not challenging, on equal-protection grounds, the district attorney's decision to seek the death penalty, because the evidence established "that the county made its charging and sentencing decisions in petitioner's case in a manner that was consistent with a coherent, systematic policy that, moreover, was not prompted by any impermissible discriminatory motive." *Id.* at 257.

4. Disqualification of Judge

State v. McDonnell, 343 Or 557, 176 P3d 1236 (2007), *cert den*, 129 S Ct 235 (2008). Defendant was on escape status when he murdered a young woman who had picked him up hitchhiking. He originally was found guilty of aggravated murder in 1988 and has been sentenced to death four times, most recently in 2002. Defendant challenge to the validity of the entire retrial proceeding, based on the fact that, in his original trial, he had filed a motion under ORS 14.250 to disqualify a particular judge from presiding over his trial, but, after the 1999 remand by the Supreme Court for the fourth penalty-phase proceeding, the previously disqualified judge was assigned to the case and presided over the penalty-phase retrial. Defendant did not object, but asserted on appeal that his disqualification from the case rendered the judgment void. *Held*: Affirmed. By failing to object, defendant waived any challenge based on the judge's previous disqualification. The disqualification of the judge from any "suit, action, matter or proceeding" under ORS 14.250 extends to both the guilt phase and any penalty phase of an aggravated-murder trial; thus, the court's conduct in presiding over the 2002 penalty-phase retrial rendered the judgment "voidable," and not "void" as a matter of law. Because the record is subject to competing interests (for example, it is possible that the defendant, in 2002, preferred this judge over the other available circuit-court judges), the court refused to exercise its discretion to review the claim as plain error. *Id.* at 570-71.

State v. Barone, 329 Or 210, 986 P2d 5 (1999), *cert den*, 528 US 1086 (2000). A motion to disqualify a judge under ORS 14.270 must be made before the judge rules on any motion other than a motion for extension of time. Because the judge in this case had already ruled on a number of motions, the motion to disqualify him was not timely and properly denied. *Id.* at 220-21.

5. Claim That Defendant Was Denied A Speedy Trial

State v. Bowen, 352 Or 109, ___ P3d ___ (2012). Defendant was convicted of on a couple of alternative counts of aggravated murder and was sentenced to death. On direct review, the Supreme Court rejected all of defendant's claims of error—including a challenge to the use of a stun belt as a security

device—and affirmed his convictions and death sentence. But the court held that the sentencing court erred by not merging the convictions for aggravated murder; the court remanded for entry of a corrected judgment. *State v. Bowen*, 340 Or 487 (2006). Defendant immediately filed a petition for post-conviction relief, and the trial court did not enter a corrected judgment. After a few years, the parties to the post-conviction proceeding realized that the corrected judgment had not yet been entered, and the district attorney in 2010 filed a motion to enter a corrected judgment. In response, defendant filed *inter alia* a motion to dismiss for denial of a speedy trial. The trial court denied those motions, ruling that the remand order required it simply to enter a corrected judgment, and that is all it did. *Held*: Affirmed. The trial court correctly rejected defendant’s speedy-trial claim: “Although nothing in the record justifies the delay that occurred, no prejudice to defendant resulted from the delayed entry of the corrected judgment that implicates either Article I, section 10, of the Oregon Constitution or the Sixth Amendment to the United States Constitution. We ... affirm the trial court’s denial of defendant’s motion to dismiss.” *Id.* at 120-21.

State v. Davis, 345 Or 551, 201 P3d 185 (2008), *cert den*, 130 S Ct 371 (2009). In 1991, two people were murdered at a motel in Portland. Detectives investigated immediately after the murders, and again in 1996, but developed no solid leads until 2002. In 2002, the state charged defendant and his codefendant. Before trial, defendants moved unsuccessfully to dismiss the charges for preindictment delay. The trial court expressly found that the charging delay was caused by the natural “stalling” of the investigation, and that the state did not have probable cause until at least 2002; it also found that the state did not act intentionally to gain a tactical advantage and did not act in bad faith. *Held*: Affirmed. Preindictment delay did not require dismissal. The Supreme Court did not resolve a split among the federal circuits as to the proper test for preindictment delay, but concluded that, under either test—the majority test, which requires a showing of *intentional* conduct by the state to obtain a tactical advantage; or the minority test, which does not require intentional delay but requires a balancing of the reasons for delay against any actual prejudice to the defendant, to determine whether the delay offends “fundamental conceptions of justice”—the trial court correctly denied the motion to dismiss. The trial court’s finding that there was no intentional delay for improper reasons disposed of the claim under the majority test. Defendant’s claim under the minority test failed because he failed to show any actual prejudice due to the delay. Specifically, although he argued that certain evidence was not timely collected, he could only speculate about what that evidence would have shown. In addition, although a 911 tape was lost due to the delay, no evidence showed that its contents would have helped the defendant. *Id.* at 578.

State v. McDonnell, 343 Or 557, 176 P3d 1236 (2007), *cert den*, 129 S Ct 235 (2008). Defendant was on escape status when he murdered a young woman who had picked him up hitchhiking. He originally was found guilty of aggravated murder in 1988 and has been sentenced to death four times, most recently in 2002. Defendant filed a motion to dismiss based on the 14-year “delay” that was caused by the various proceedings between his original trial in 1988 and the 2002 sentence of death; he argued that that delay violated Art. I, § 10. *Held*: Affirmed. [1] The Art. I, § 10, right to justice without delay applies to penalty-phase retrials. [2] The delay in this case, which was caused by appellate remands, was reasonable. The state is authorized by statute to pursue a death sentence, and the state did not engage in dilatory behavior or other vexatious conduct during the appellate process or in the proceedings on remand. Moreover, defendant failed to prove that he suffered any cognizable prejudice due to the delay; although members of his family had died, he failed to prove that they would have provided any support for an argument against the death sentence. *Id.* at 572-75.

State v. Johnson (Jesse Lee), 342 Or 596, 157 P3d 198 (2007), *cert den*, 128 S Ct 906 (2008). [1] The trial court correctly denied defendant’s motion to dismiss based on his claim that the state violated his constitutional right to a speedy trial (Or Const Art I, § 10; 6th Amend) by taking two appeals from separate pretrial orders suppressing evidence. The decision to pursue the appeals was not unreasonable, and the length of the delay caused by the state in pursuing those appeals was not unreasonable. “[T]he length of the delay weighs against the state but the state did not act unreasonably in taking or pursuing the two appeals.” Moreover, defendant failed to prove that he was prejudiced by the delay. “[W]hen the value of the unavailable evidence is only speculative, the unavailability of that evidence will not factor significantly into

the analysis.” Defendant’s claim based on the Sixth Amendment fails because he delayed for five years before asserting his speedy-trial right. *Id.* at 614. [2] Defendant’s claim based on ORS 135.747 fails because the legislature has expressly authorized the state to take pretrial appeals in certain situations; thus, a defendant is brought to trial within a reasonable time within the meaning of ORS 135.747 as long as the state reasonably made the decision to take the appeal and has prosecuted the appeal with reasonable diligence. *Id.* at 617.

State v. Tiner, 340 Or 551, 135 P3d 305 (2006), *cert den*, 127 S Ct 1125 (2007). Defendant and a codefendant murdered a man who had allowed them to stay at his residence. Defendant argued that pretrial delay of four years, three of which were the result of the state pursuing an appeal from a pretrial order suppressing a codefendant’s statements and then dismissing its appeal, violated his constitutional speedy-trial rights. *Held*: Affirmed. [1] Although the state offered little justification for the delay—it should have known that its appeal was unlikely to succeed, particularly where the state offered the codefendant’s statements as an “all or nothing” proposition, and some of the statements clearly were inadmissible—defendant failed to establish significant prejudice from the delay, so defendant was not entitled to a dismissal on speedy-trial grounds under Art I, § 10. *Id.* at 558. [2] “We also reject defendant’s argument that the state violated his right to a speedy trial under the Sixth Amendment,” because “a federal claim requires proof of one more factor, namely, that defendant asserted his right to a speedy trial,” and “defendant did not assert his right to a speedy trial in a timely fashion.” *Id.* at 558-59.

6. Change of Venue

State v. Sparks, 336 Or 298, 83 P3d 304, *cert den*, 543 US 893 (2004). Defendant was convicted on 15 counts of aggravated murder and five noncapital offenses based on his sexual assault and murder of a 12-year-old girl. *Held*: Affirmed. The trial court properly denied a change of venue because defendant had failed to establish that there existed such a level of prejudice against him in Yamhill County so as to preclude a fair and impartial trial. *Id.* at 306.

State v. Fanus, 336 Or 63, 79 P3d 847 (2003), *cert den*, 541 US 1075 (2004). Defendant murdered General Carl and shot his wife during a home-invasion robbery. *Held*: Affirmed. Notwithstanding the large amount of pretrial publicity surrounding the defendant’s capital case, the trial court properly denied a change of venue under ORS 131.355, where there was no evidence of community prejudice against defendant and where jurors indicated during *voir dire* that they could be fair. *Id.* at 80.

State v. Barone, 329 Or 210, 986 P2d 5 (1999), *cert den*, 528 US 1086 (2000). Defendant was a serial murderer who sexually assaulted and murdered several women; he also was convicted and sentenced to death in a separate case. *Held*: Juror exposure to pre-trial publicity adverse to the defendant, and the fact that “most prospective jurors had some familiarity with [the] defendant,” does not require a change of venue. *Id.* at 219.

7. Competency to Stand Trial

Pratt v. Armenakis, 199 Or App 448, 112 P3d 371, *adh’d to on recon*, 201 Or App 217, 118 P3d 217 (2005), *rev den*, 340 Or 483 (2006). Petitioner 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 reversed the convictions and remanded for a new trial. *State v. Pratt*, 309 Or 205, 785 P2d 350 (1990). On retrial in 1991, petitioner again was convicted and sentenced to death., and the court affirmed that judgment on direct review. *State v. Pratt*, 316 Or 561, 853 P2d 827, *cert den*, 510 US 969 (1993). He then petitioned for post-conviction relief, and the court denied all of his claims after a trial. *Held*. Affirmed. The mere fact that petitioner turned down a plea offer for a life sentence with a 30-year minimum term and insisted on a trial with a potential death sentence did not provide a basis on which trial counsel were required to request an aid-and-assist hearing under ORS 161.360. *Id.* at 458-62.

8. Motion to Suppress Defendant's Statements

(a) Motion to suppress defendant's statements—*Miranda*, voluntariness challenges

State v. Longo, 341 Or 580, 148 P3d 892 (2006), *cert den*, 128 S Ct 65 (2007). Defendant murdered his wife and children; he pleaded guilty to some of the murder charges. *Held*: Affirmed. The court correctly admitted defendant's statements to police, which he made after *Miranda* warnings; defendant voluntarily spoke with the officers and did not invoke any right to silence or counsel by picking and choosing what to talk about. *Id.* at 592-3.

State v. Johnson (Martin Allen), 340 Or 319, 131 P3d 173, *cert den*, 549 US 1079 (2006). Defendant kidnapped, sexually assaulted, and murdered a young woman, and then dumped her body in the ocean. *Held*: Affirmed. [1] The trial court correctly denied defendant's *Miranda*-based motion to suppress. Although defendant reasonably could have believed initially that he was in custody when officers with drawn guns ordered him out of his house, "any such belief would have been dispelled when [the officers presented him] with apparently lawful search warrants, asked him to come down to the station to assist in an investigation, and told him explicitly that he was not under arrest." Moreover, some of the statements "were spontaneous on his part and not the product of any interrogation" and "defendant very actively controlled the interrogation ... and, when he asked the investigators to terminate the interview and to return him to his home, they did so." *Id.* at 332. [2] Statements that defendant made to officers who transported him back from Florida, after he had invoked his right to counsel, were made freely, voluntarily, and spontaneously and were not the product of questioning that was the "functional equivalent to interrogation." *Id.* at 333.

State v. Acremant, 338 Or 302, 108 P3d 1139, *cert den*, 546 US 846 (2005), and 546 US 1108 (2006). Defendant was convicted of four counts of aggravated murder based on his murder of two women; he pleaded guilty to all charges and was sentenced to death. *Held*: Affirmed. [1] Defendant unequivocally invoked his right to counsel, and officers improperly failed to cease the interrogation, but defendant later waived his right to counsel when he initiated contact with detectives an hour later and made statements to them after being re-advised of his *Miranda* rights. The statements were voluntary and were properly admitted. *Id.* at 322. [2] Defendant told his father where he had hidden the body of another murder victim, evidence of which was offered in the penalty phase. Defendant's father was not acting as a police agent when defendant told him where the body was hidden because the police "lacked sufficient involvement in controlling and directing" the father's actions to render him a state agent. *Id.* at 328.

State v. Terry, 333 Or 163, 37 P3d 157 (2001), *cert den*, 536 US 910 (2002). [1] Ordinary courtesy and civility by the police did not constitute deceitful behavior such as to render defendant's statements involuntary. *Id.* at 171-72. [2] Defendant's references to his right to counsel during questioning were not a basis for suppression because he was not in custody when he made the statements and each time he subsequently engaged in conversation with the police, thereby waiving any protection from interrogation. *Id.* at 172-74.

State v. McNeely, 330 Or 457, 8 P3d 212, *cert den*, 531 US 1055 (2000). Defendant kidnapped, sexually assaulted, and murdered a dancer. *Held*: Affirmed. Defendant's statements to his cellmate were not subject to suppression where no officer of the state "initiated, planned, controlled or supported [the cellmate's] activities in obtaining information from defendant about [the] case." The cellmate did not become an agent of the state merely because he was attempting to gain a benefit by providing information to the police. *Id.* at 461.

State v. Moore, 324 Or 396, 927 P2d 1073 (1996). A defendant facing a charge of aggravated murder does not have an absolute right to talk to an attorney before any custodial interrogation takes place. When reviewing the voluntariness of a defendant's statements to the police or other representatives of the state, an appellate court will not disturb the trial court's findings of historical fact if evidence supports them. Because defendant's post-arrest statements made to the police and to a state psychiatrist either were

volunteered or were made voluntarily after waiver of defendant's *Miranda* rights, the statements were admissible. *Id.* at 402-03.

(b) Motion to suppress defendant's statements—other constitutional challenges

State v. Johnson (Jesse Lee), 342 Or 596, 157 P3d 198 (2007), *cert den*, 128 S Ct 906 (2008). An officer did not impermissibly comment on defendant's exercise of his right to remain silent by testifying that he had hesitated before answering certain questions during interrogation; rather, "far from testifying that defendant remained silent in the face of questions, the officer testified only that defendant paused before responding." *Id.* at 602.

State v. Tiner, 340 Or 551, 135 P3d 305 (2006), *cert den*, 127 S Ct 1125 (2007). Defendant and a codefendant murdered a man who had allowed them to stay at his residence. *Held*: Affirmed. [1] Examining and photographing tattoos on defendant's torso was not a "critical stage of the proceedings" at which he had a right to have his attorney present. *Id.* at 563-64. Examining and photographing tattoos on defendant's torso did not violate his constitutionally protected privacy interests, and hence was not a search, because defendant was a jail inmate at the time: "Once defendant was imprisoned, he lacked the right to privacy that he enjoyed when he was not in prison." *Id.* at 563. [2] "[T]he state and federal privileges [against self-incrimination] apply to only testimonial evidence—the communication of a person's belief, knowledge or state of mind—but not to defendant's physical characteristics, such as identity, appearance, and physical condition." So, "a defendant may be required to display part of his or her body on request, and such a display does not raise an issue of self-incrimination. In addition, the tattoos were preexisting documentary evidence available to the state as part of the discovery process." Ordering defendant to display his prison-gang tattoos outside the presence of the jury so that a witness could positively identify him, and so that a state's gang expert could testify about them, did not violate defendant's right against compelled self-incrimination. *Id.* at 562.

State v. Barone, 328 Or 68, 969 P2d 1013 (1998), *cert den*, 528 US 1135 (2000). Police officer's testimony that defendant had untruthfully denied ownership of a car was not a comment on defendant's invocation of either his Fourth Amendment (right to prevent police from searching his car) or Fifth Amendment (right to remain silent) rights. *Id.* at 91.

(c) Motion to suppress defendant's statements—evidentiary challenges

State v. Langley, 331 Or 430, 16 P3d 489 (2000). This case was before the court for the second time on automatic and direct review of a sentence of death. Defendant argued that evidence which was privileged pursuant to OEC 504(2) was admitted on remand over his objection. *Held*: Affirmed. Defendant waived his psychotherapist-patient privilege under OEC 504(2) and his constitutional right to privacy because he did not object to the admission of the evidence in his earlier murder trial. Defendant's failure to object to documents and testimony offered by the prosecution in his first penalty-phase proceeding in this case waived his claim of psychotherapist privilege when the prosecutor offered that same evidence during re-sentencing. Moreover, to the extent that these documents and witnesses disclosed a "significant part" of the substance of a separate document, the privilege was also waived with respect to that separate document. Defendant's voluntary waiver terminated his claim of privilege, notwithstanding his claim that another participant in the communications might have violated the privilege at an earlier time without defendant's knowledge or consent. Defendant's waiver of his evidentiary privilege also waived any protection he could claim under the Fourteenth Amendment right of privacy. *Id.* at 446-551.

State v. Barone, 328 Or 68, 969 P2d 1013 (1998), *cert den*, 528 US 1135 (2000). [1] Police officer's testimony that defendant had untruthfully denied ownership of a car was not a comment on defendant's invocation of either his Fourth Amendment (right to prevent police from searching his car) or Fifth Amendment (right to remain silent) rights. *Id.* at 91. [2] After defendant learned that the police had searched

his home and had seized the murder weapon, defendant called his roommate and ordered him to burn down the house “because there was something in there that could link him to a murder.” The roommate’s testimony regarding this call was relevant and was not unfairly prejudicial, notwithstanding defendant’s claim that the state failed to show that defendant had the Bryant murder [the murder at issue in this case] in mind when he ordered the arson. The roommate’s testimony “was relevant to establish defendant’s consciousness of his own guilt in Bryant’s murder. Although prejudicial, the testimony was not unfairly so.” *Id.* at 92.

9. Motions to Suppress Other Evidence for Constitutional Violations

State v. Johnson (Martin Allen), 340 Or 319, 131 P3d 173, *cert den*, 549 US 1079 (2006). Defendant kidnapped, sexually assaulted, and murdered a young woman, and then dumped her body in the ocean. *Held*: Affirmed. [1] Defendant did not “have a cognizable privacy interest in the license plates on his car, photographs taken of him in a public place, the address that he provided to his employer for tax and payroll purposes, or the telephone usage records of his employer.” Although “[d]efendant clearly had a cognizable privacy interest in the *content* of his telephone calls . . . , we cannot identify a source of law that establishes that defendant also had some interest in keeping private any records kept by a third party, his cellular telephone provider, respecting his cellular telephone usage. The cellular telephone provider generated and maintained those records from the provider’s own equipment and for the provider’s own, separate, and legitimate business purposes (such as billing). Neither are we aware of any principle that would prevent the cellular telephone provider from responding to a proper subpoena. Defendant’s assignment of error is not well taken.” *Id.* at 336. [2] The possible invalidity of the first search warrant for defendant’s residence did not entitle him to suppression because the state established that the evidence at issue inevitably would have been discovered and seized during execution of the second warrant, which the officers would have and could have obtained had their first application been denied. Information that was obtained during the first search and was included in the second affidavit was not necessary to establish probable cause. “[T]he inevitable-discovery doctrine is available in such circumstances, at least to the extent that the state affirmatively shows [as it did here] not only that there was an independent basis for obtaining a lawful warrant but that investigators would have sought a lawful warrant regardless of the unlawful search.” *Id.* at 328-29. [3] Defendant’s challenge to some of the informant statements included in the affidavit for the search warrant is unavailing because those statements were not necessary for probable cause. *Id.* at 329. [4] Statements from an informant included in the affidavit were sufficiently reliable because she “was a citizen informant who was willing to have her name used and who had no apparent motive to falsely accuse defendant,” and “her statements were based either on her own personal observation or statements made to her by [the homicide victim].” *Ibid.*

10. Security Issues / Shackling

State v. Bowen, 340 Or 487, 135 P3d 272 (2006), *cert den*, 549 US 1214 (2007). The trial court did not commit reversible error by requiring defendant, who was charged with aggravated murder, to wear a “stun belt” during trial. Defendant did not object to the belt at trial, but he argued on appeal that that was plain error, relying on earlier decisions that had held that forcing a defendant to appear before a jury in shackles was inherently prejudicial to the defendant. Because the stun belt was not visible to the jurors, the cases finding jury bias from leg shackling were not applicable, and defendant failed to make a record that wearing a stun belt may have affected his ability to assist in his defense. Consequently, the court did not find plain error. *Id.* at 496.

Cunningham v. Thompson, 186 Or App 221, 62 P3d 823, *on recon* 188 Or App 289, 71 P3d 110 (2003), *rev den*, 337 Or 327 (2004). Petitioner was convicted of aggravated murder and was sentenced to death, and the judgment was affirmed on direct review. *State v. Cunningham*, 320 Or 47, (1994), *cert den*, 514 US 1005 (1995). He petitioned for post-conviction relief, the court denied all of his claims after a trial, and he appealed. *Held*: Affirmed. Petitioner failed to make a *prima facie* showing that his counsel provided inadequate assistance by failing to make a record re: shackling, because the record provided a factual basis

for restraints and petitioner agreed to the restraints used. *Id.* at 244.

11. Guilty Plea

State v. Simonsen, 329 Or 288, 986 P2d 566 (1999), *cert den*, 528 US 1090 (2000). Defendant and codefendant Jeffery Williams kidnapped, sexually assaulted, and murdered two German women who were hitchhiking; defendant pleaded guilty and was sentenced to death twice. *Held*: A defendant may not withdraw a guilty plea if his case is remanded from an appeals court only for resentencing. *Id.* at 292.

12. Joinder

State v. Barone, 329 Or 210, 986 P2d 5 (1999), *cert den*, 528 US 1086 (2000). Defendant is a serial murderer who sexually assaulted and murdered several women; he also was convicted and sentenced to death in a separate case. *Held*: Affirmed. [1] A defendant who wishes to sever properly joined charges must point to specific facts present in his case that would show that joinder would prejudice him. He may not rely upon “general” considerations of prejudice that would be present in any case involving joined charges of that type. Under the facts as presented by the defendant, the trial court did not err in allowing charges based on three separate murders to be tried to the same jury. [2] Because defendant’s “[s]ummary reference to ‘due process’ is insufficient to present any specific due process argument” about the trial court’s refusal to sever charges for trial, “we decline to address it.” *Id.* at 217-18.

State v. Thompson, 328 Or 248, 971 P2d 879, *cert den*, 527 US 1042 (1999). Defendant was convicted of two murders—after defendant and his friend were kicked out of a tavern, he returned to murder a patron and he later, after escaping, stabbed his friend to death. Defendant moved to sever the charges related to the separate homicides. *Held*: Affirmed. [1] The trial court correctly ruled that the offenses were sufficiently similar to have been joined, ORS 132.560. [2] Defendant had failed to demonstrate that he was prejudiced, within the meaning of ORS 132.560(3), by the trial court’s denial of the motion to sever. *Id.* at 257.

13. Discovery / Brady Issues

State v. Longo, 341 Or 580, 148 P3d 892 (2006), *cert den*, 128 S Ct 65 (2007). Defendant murdered his wife and children; he pleaded guilty to some of the murder charges. *Held*: Affirmed. [1] The prosecutor did not commit discovery or *Brady* violation by failing to disclose statements by witness that were not documented in investigating officer’s report; moreover, defendant was not prejudiced because he received continuance to investigate after witness statements were disclosed at trial. *Id.* at 599. [2] Because Oregon is not constitutionally required to establish statewide standards for imposing the death penalty, defendant is not entitled to discovery of information regarding that issue (reaffirming *State v. Cunningham*, 320 Or 47, 65-68 (1994)); the US Supreme Court’s decision in *Bush v. Gore* did not undermine that decision. *Id.* at 602.

14. Pretrial examination of defendant

State v. Moore, 324 Or 396, 927 P2d 1073 (1996). Defendant murdered his wife’s parents, was convicted on two counts of aggravated murder, and was sentenced to death. *Held*: Affirmed. Under ORS 161.315 and 163.135(5), the state has the right to conduct at least one psychiatric or psychological examination of a defendant after the defendant has given notice of his intent to rely on an EED defense, even if he does not consent to the examination and even if he was examined by a state psychiatrist or psychologist before he gave notice of his intent to rely on EED. *Id.* at 405-06.

15. Issues Related to Court-Appointed Counsel

State v. Langley, 351 Or 652, 273 P3d 901 (2012). In 1989, defendant was convicted of aggravated murder and sentenced to death for murdering Anne Gray. In 1992, the Supreme Court affirmed the

convictions but reversed the death sentence and remanded for a new penalty-phase trial. *State v. Langley*, 314 Or 247 (1992). On retrial, defendant was sentenced to death again, but the Supreme Court reversed and remanded again. *State v. Langley*, 331 Or 430 (2000). On remand, defendant went through numerous defense attorneys over the course of five years of pretrial proceedings before Smith and McCabe were appointed. Shortly after their appointment, they moved to withdraw and submitted sealed affidavits in support of their motions. The trial court directed defendant to disclose his reasons, but he refused to comply with the prosecutors present, and he attempted to submit an *ex parte* affidavit through independent counsel (who was appointed on the motions to withdraw). The trial court refused to accept defendant's affidavit and also did not act on the prosecution's offer to leave the courtroom. The court allowed McCabe to withdraw, but it concluded that defendant's relationship with Smith could be salvaged, and that defendant's refusal to cooperate with his attorneys was "a pattern of manipulation." Immediately thereafter, the trial court gave defendant a choice either to proceed with Smith and third-chair Bergland or to proceed *pro se*. Defendant, on advice of independent counsel, refused to make a choice and continued to assert his right to counsel. The trial court found his refusal to choose was further evidence of his manipulations. After advising defendant of the dangers of proceeding *pro se*, the trial court then allowed Smith to withdraw. Later, the trial court also allowed Bergland to withdraw. Defendant proceeded to trial without counsel, refused to participate throughout the proceedings, and was sentenced to death. *Held*: Reversed and remanded. [1] A defendant may elect to waive his or her right to counsel and proceed *pro se*, but to be valid under Art. I, § 11, that waiver must be knowing and intentional. "Because courts are reluctant to find that a defendant has waived fundamental constitutional rights, we will not presume a waiver of the right to counsel from a silent record." [2] "It is not essential that such a waiver be expressed in words. A defendant's conduct may serve as a valid waiver so long as the conduct adequately conveys the defendant's knowing and intentional choice to proceed in court without counsel. However, to establish a waiver of counsel by conduct, something different is required than a mere showing that the defendant has engaged in past or present misconduct. ... A true 'waiver by conduct' would require that the defendant have received advance warning that continuation of his or her abusive behavior would result in being forced to proceed *pro se*." [3] "When faced with a defense counsel's motion to withdraw, the trial court must consider the circumstances involved and determine whether defense counsel is able to provide adequate representation for the defendant. ... Although a trial court may inquire into a defendant's position on defense counsel's motion, the defendant has no burden to provide information in support of or in opposition to such a motion. Because the right to counsel is one held personally by the defendant, any waiver of that right must originate with the defendant. We review a trial court's decision to grant or deny a motion for withdrawal of counsel for an abuse of discretion." [4] "A defendant, as a represented client, may choose whether to cooperate with his or her appointed legal counsel and is under no legal duty to make an abstract promise to cooperate with counsel in the future." The record did not demonstrate that defendant expressly waived his right to counsel. And defendant's pattern of noncooperation did not support an inference that he impliedly had waived his right to counsel. Moreover, the trial court failed to warn defendant directly that his conduct would result in his proceeding *pro se*. Therefore, defendant did not engage in misconduct by complaining about his lawyers' representation and refusing to make the choice the trial court offered. That choice was based on the trial court's assumption that his complaints were frivolous because it would not consider his complaints, and required defendant to abandon his objections to the representation to avoid having to represent himself.

State v. Davis, 345 Or 551, 201 P3d 185 (2008), *cert den*, 130 S Ct 371 (2009). Denial of defense counsel's motion to withdraw based on defendant's conflicts with counsel did not so compromise counsel's ability to represent the defendant that it violated his right to counsel. The trial court found that defendant's attorneys were fully adequate in their representation of the defendant, despite the strain that his hostility toward them created. *Id.* at 582.

State v. Johnson (Martin Allen), 340 Or 319, 131 P3d 173, *cert den*, 549 US 1079 (2006). Defendant kidnapped, sexually assaulted, and murdered a young woman, and then dumped her body in the ocean. The trial court properly denied defendant's motion for appointment of substitute counsel—the court "considered defendant's complaints and reasonably concluded that those complaints did not present legitimate reasons for appointing new counsel." *Id.* at 349.

State v. Thompson, 328 Or 248, 971 P2d 879, *cert den*, 527 US 1042 (1999). The trial court did not abuse its discretion in denying defendant’s *pro se* motions for substitution of court-appointed counsel. “A trial court, presented with a defendant’s request for substitution of court-appointed counsel, must assess the facts and determine whether the defendant’s complaints are ‘legitimate.’” Here, the trial court made a factual assessment of the legitimacy of defendant’s complaints and determined his complaints were not legitimate. The Supreme Court agreed with the trial court’s assessment. *Id.* at 254-55.

B. GUILT-PHASE ISSUES

1. Mental Defenses

State v. Moore, 324 Or 396, 927 P2d 1073 (1996). Defendant murdered his wife’s parents, was convicted on two counts of aggravated murder, and was sentenced to death. *Held*: Affirmed. [1] Under ORS 161.315 and 163.135(5), the state has the right to conduct at least one psychiatric or psychological examination of a defendant after the defendant has given notice of his intent to rely on an EED defense, even if the defendant does not consent to the examination and even if the defendant was examined by a state psychiatrist or psychologist before he gave notice of his intent to rely on EED. *Id.* at 405-06. [2] EED is not a defense to aggravated murder, including aggravated murder of more than one victim in a single criminal episode. *Id.* at 411-13.

Pratt v. Armenakis, 199 Or App 448, 112 P3d 371, *adh’d to on recon*, 201 Or App 217, 118 P3d 217 (2005), *rev den*, 340 Or 483 (2006). Petitioner 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 reversed the convictions and remanded for a new trial. *State v. Pratt*, 309 Or 205, 785 P2d 350 (1990). On retrial in 1991, petitioner again was convicted and sentenced to death., and the court affirmed that judgment on direct review. *State v. Pratt*, 316 Or 561, 853 P2d 827, *cert den*, 510 US 969 (1993). He then petitioned for post-conviction relief, and the court denied all of his claims after a trial. *Held*. Affirmed. The post-conviction court correctly denied his claims that his trial counsel provided inadequate assistance by not asserting an insanity defense based on its finding that petitioner had instructed his counsel not to assert that defense. “A criminal defendant cannot be found guilty but insane if he has not asserted that affirmative defense. . . . It follows that, if a court cannot find a criminal defendant guilty but insane pursuant to ORS 161.295 over the defendant’s objection, trial counsel cannot reasonably be expected to assert such a defense over the defendant’s objection.” *Id.* at 463.

2. Request for Continuance

State v. Moore, 324 Or 396, 927 P2d 1073 (1996). Granting or denying a continuance is a matter within the trial court’s discretion. When a party requests a continuance because a witness is unable to or fails to appear at trial, that party must show that: (a) the witness can be produced, and (b) if produced, the witness would testify about a material fact. Even if those two requirements are met, the trial court still has discretion to deny the request for a continuance. *Id.* at 410-11.

3. Jury Selection

(a) Jury selection—access to jury records

State v. Johnson (Martin Allen), 340 Or 319, 131 P3d 173, *cert den*, 549 US 1079 (2006). The trial court properly quashed defendant’s subpoena *ducas tecum* to obtain jury records in the absence of a showing “that the method of selecting the jury pool is or was constitutionally suspect.” *Id.* at 353.

State v. Running, 336 Or 545, 87 P3d 661, *cert den*, 543 US 1005 (2004). Defendant challenged the

trial court's order quashing subpoenas *duces tecum* that he issued for jury lists and other records in an attempt to obtain what he conceded was "discovery" to investigate potential challenges to the composition of the jury. *Held*: Affirmed. Defendant was not entitled to obtain jury-selection records pursuant to the Court's previous decision in *State ex rel. Click v. Brownhill*, 331 Or 500 (2000), because that case did not extend such a right to criminal defendants. The court explained further that defendant also was not entitled to obtain those records under ORS 136.580 because, as the court previously held in *State v. Cartwright*, 336 Or 408 (2004), that statute is not a criminal-discovery statute. *Id.* at 558-61.

State v. Rogers, 334 Or 633, 55 P3d 488 (2002). During the penalty phase of the underlying capital case, relator moved under ORS 136.005 and ORS 10.275(2) to obtain Clackamas County master jury lists and other jury records in support of a challenge to the jury pool based on his assertion that "Hispanics are underrepresented" in the jury panel, as supplemented by the other exhibits introduced at the hearing. *Held*: That assertion was sufficient under ORS 136.005 to allege a "material departure" from the requirements of law governing selection of jurors. Therefore, the trial court was required to consider release of the jury records in accordance with ORS 10.275(2), which permits release of records based on findings that they are "likely to produce evidence relevant to the motion" and that their production "is not unduly burdensome." *Id.* at 644.

(b) Jury selection—*Batson* challenges

State v. Longo, 341 Or 580, 148 P3d 892 (2006), *cert den*, 128 S Ct 65 (2007). The court correctly denied defendant's *Batson* challenge because defendant failed to produce evidence sufficient to permit a trial judge to draw an inference that discrimination had occurred; there was no evidence that the juror in question was in fact a minority, and no pattern of questioning by the prosecutor that suggested racial discrimination. *Id.* at 597.

(c) Jury selection—"death qualification"

State v. Barone, 328 Or 68, 969 P2d 1013 (1998), *cert den*, 528 US 1135 (2000). [1] Defendant failed to show that the trial judge was engaged in an unfair pattern of denying defendant's valid "for cause" challenges. "Absent any showing that the trial judge employed a double standard when considering 'for cause' challenges, we find defendant's [due process] claim of procedural unfairness unpersuasive." *Id.* at 73. [2] The trial court did not abuse its discretion in denying defendant's motion to excuse three jurors for actual bias. One of the challenged jurors had strong views in favor of the death penalty; the wife of another challenged juror had been raped (a crime that was relevant to this case); and another challenged juror was acquainted with a state's witness. *Id.* at 73-82

(d) Jury selection—other challenges

State v. Haugen, 349 Or 174, 243 P3d 31 (2010). Defendant and Jason Brumwell, both inmates at OSP, were found guilty of killing a third inmate, and the jury imposed a death sentence. On review, defendant asserted that the trial court erred by excusing two prospective jurors who lacked proficiency in the English language. *Held*: Affirmed. The trial court's decision not to provide an interpreter for a prospective juror who did not speak English, and its subsequent decision to exclude the prospective juror because he was unable to participate at trial without an interpreter, did not violate Oregon statutes. The relevant statutes simply do not require that a person who does not speak English be seated as a juror and provided with an interpreter. Nor is that required by the Sixth Amendment, which gives a defendant the right to trial by a jury drawn from a "fair cross section of the community," or by the Equal Protection Clause. *Id.* at 181-89.

State v. Fanus, 336 Or 63, 79 P3d 847 (2003), *cert den*, 541 US 1075 (2004). The evidence supported the trial court's refusal to excuse juror for cause for actual bias pursuant to ORCP 57 D(1)(g). The potential juror initially stated that she had formed opinions as to defendant's guilt and that she would require

him to prove his innocence; however, after being informed of her duties, she unequivocally stated that she would comply with her oath and require the state to prove its case beyond a reasonable doubt. *Id.* at 84.

State v. Compton, 333 Or 274, 39 P3d 833, *cert den*, 537 US 841 (2002). Defendant sexually assaulted, tortured, and murdered his girlfriend's 2-year-old daughter. [1] The trial court properly declined to excuse a prospective juror based on her answers to a questionnaire and her responses to initial questions on *voir dire* where she stated that she believed that criminal defendants should be required to prove their innocence, but later said if criminal charges were filed against her, the state would be required to prove the charges. *Id.* at 286. [2] Law excluding felons and persons not registered to vote from jury in criminal prosecution did not violate defendant's right to a jury drawn from a fair cross-section. *Id.* at 289.

State v. Barone, 329 Or 210, 986 P2d 5 (1999), *cert den*, 528 US 1086 (2000). Under ORS 136.230(1), a defendant in a capital case gets 12 peremptory challenges and no more. *Id.* at 228.

State v. Barone, 328 Or 68, 969 P2d 1013 (1998), *cert den*, 528 US 1135 (2000). [1] Preemptory challenges "have no constitutional significance in and of themselves, and the fact that a defendant is forced to use them to achieve an impartial jury does not offend the right to a fair trial. ... We conclude that any error in failing to exclude a potential juror who did not serve on the jury cannot be grounds for reversal. Therefore we do not address defendant's assignments of error respecting those potential jurors." *Id.* at 73. [2] Defendant failed to show that the trial judge was engaged in an unfair pattern of denying defendant's valid "for cause" challenges. "Absent any showing that the trial judge employed a double standard when considering 'for cause' challenges, we find defendant's [due process] claim of procedural unfairness unpersuasive." *Id.* at 73. [3] The trial court did not abuse its discretion in denying defendant's motion to excuse three jurors for actual bias. One of the challenged jurors had strong views in favor of the death penalty; the wife of another challenged juror had been raped (a crime that was relevant to this case); and another challenged juror was acquainted with a state's witness. *Id.* at 73-82.

State v. Wilson, 323 Or 498, 918 P2d 826 (1996), *cert den* 519 US 1065 (1997). Defendant's absence from a preliminary jury orientation was harmless error, not structural error. *Id.* at 504-09.

4. Opening Statement

State v. Davis, 345 Or 551, 201 P3d 185 (2008), *cert den*, 130 S Ct 371 (2009). Defendant not entitled to mistrial based on prosecutor's opening statement summarizing the expected testimony of a witness who ultimately did not appear for trial. The prosecutor's statements about anticipated testimony did not so prejudice the defendant as to have denied him a fair trial because: (1) the prosecutor's statements were part of a summary of the testimony that several witnesses were expected to provide; (2) the prosecutor did not place any special emphasis on the expected testimony or its value in establishing the defendant's guilt; and (3) the defendant declined the curative instruction offered by the trial court. *Id.* at 588-89.

5. Admission of Evidence Offered By State

(a) Admission of evidence offered by state—admissions by defendant

State v. Johnson (Jesse Lee), 342 Or 596, 157 P3d 198 (2007), *cert den*, 128 S Ct 906 (2008). An officer did not impermissibly comment on defendant's exercise of his right to remain silent by testifying that he had hesitated before answering certain questions during interrogation; rather, "far from testifying that defendant remained silent in the face of questions, the officer testified only that defendant paused before responding." *Id.* at 602.

State v. Langley, 331 Or 430, 16 P3d 489 (2000). This case was before the court for the second time on automatic and direct review of a sentence of death. Defendant argued that evidence which was privileged pursuant to OEC 504(2) was admitted on remand over his objection. *Held*: Defendant waived his

psychotherapist-patient privilege under OEC 504(2) and his constitutional right to privacy because he did not object to the admission of the evidence in his earlier murder trial. Defendant's failure to object to documents and testimony offered by the prosecution in his first penalty-phase proceeding in this case waived his claim of psychotherapist privilege when the prosecutor offered that same evidence during re-sentencing. Moreover, to the extent that these documents and witnesses disclosed a "significant part" of the substance of a separate document, the privilege was also waived with respect to that separate document. Defendant's voluntary waiver terminated his claim of privilege, notwithstanding his claim that another participant in the communications might have violated the privilege at an earlier time without defendant's knowledge or consent. Defendant's waiver of his evidentiary privilege also waived any protection he could claim under the Fourteenth Amendment right of privacy. *Id.* at 446-551.

State v. McNeely, 330 Or 457, 8 P3d 212, *cert den*, 531 US 1055 (2000). Defendant kidnapped, sexually assaulted, and murdered a dancer. [1] Defendant's statements to his cellmate were not subject to suppression where no officer of the state "initiated, planned, controlled or supported [the cellmate's] activities in obtaining information from defendant about [the] case." The cellmate did not become an agent of the state merely because he was attempting to gain a benefit by providing information to the police. *Id.* at 461. [2] The inability of defendant's cellmate to make an in-court identification of him did not require exclusion of cellmate's testimony regarding statements defendant made to him about the crime while in jail; the trial court correctly determined that a reasonable juror could have found that defendant was the person who spoke to the cellmate in jail, and therefore, that the cellmate's testimony was conditionally relevant. "When dealing with a matter of conditional relevancy under OEC 104(2), the judge determines whether the foundation evidence is sufficient for the jury reasonably to find that the condition on which relevance depends has been fulfilled. If so, the evidence is admitted; if not, the evidence is not admitted." *Id.* at 462-63.

State v. Barone, 329 Or 210, 986 P2d 5 (1999), *cert den*, 528 US 1086 (2000). Defendant was a serial murderer who sexually assaulted and murdered several women; he also was convicted and sentenced to death in a separate case. *Held*: A letter by defendant that arguably could be read as an attempt to engage an inmate to act against a prosecution witness was relevant to show that the defendant had consciousness of guilt. It did not matter that the letter was vague and subject to more than one interpretation. Because the state's interpretation was reasonable, it was relevant. Alternative interpretations of the letter were better left to argument. *Id.* at 238.

State v. Thompson, 328 Or 248, 971 P2d 879, *cert den*, 527 US 1042 (1999). Defendant was convicted of two murders—after defendant and his friend were kicked out of a tavern, he returned to murder a patron and he later, after escaping, stabbed his friend to death. The trial court did not abuse its discretion in admitting evidence that, when defendant was first contacted by the police (shortly after the murders were committed), he falsely denied ever having been arrested or that he had been probation. The evidence was offered for a permissible purpose—to rebut defendant's claim that he was too intoxicated to form the intent to kill—and was not unfairly prejudicial. *Id.* at 259.

State v. Barone, 328 Or 68, 969 P2d 1013 (1998), *cert den*, 528 US 1135 (2000). Defendant is a serial murderer. [1] Police officer's testimony that defendant had untruthfully denied ownership of a car was not a comment on defendant's invocation of either his Fourth Amendment (right to prevent police from searching his car) or Fifth Amendment (right to remain silent) rights. *Id.* at 91. [2] After defendant learned that the police had searched his home and had seized the murder weapon, defendant called his roommate and ordered him to burn down the house "because there was something in there that could link him to a murder." The roommate's testimony regarding this call was relevant and was not unfairly prejudicial, notwithstanding defendant's claim that the state failed to show that defendant had the Bryant murder [the murder at issue in this case] in mind when he ordered the arson. The roommate's testimony "was relevant to establish defendant's consciousness of his own guilt in Bryant's murder. Although prejudicial, the testimony was not unfairly so." *Id.* at 92.

(b) Admission of evidence offered by state—other bad acts by defendant

Hayward v. Belleque, 248 Or App 141, 273 P3d 926 (2012), *rev den*, 353 Or 208 (2013). In 1994, petitioner and several other young men robbed a DariMart store in Eugene and brutally murdered one clerk and seriously injured the other. Evidence presented at trial established that the men were fans of “death metal” music and listened to some immediately before the crime. Petitioner was convicted of aggravated murder and was sentenced to death, and the judgment was affirmed on direct review. *State v. Hayward*, 327 Or 397 (1998). Petitioner then filed a petition for post-conviction relief contending that his trial counsel provided constitutionally inadequate assistance in dozens of respects. The post-conviction court denied all of his claims. *Held*: Affirmed. The post-conviction court correctly denied petitioner’s claim that his trial counsel failed to obtain exclusion of evidence related to death-metal music and Satanism. “When a petitioner in a post-conviction proceeding contends that trial counsel provided constitutionally inadequate assistance by failing to object to evidence, the petitioner is not entitled to post-conviction relief unless such an objection actually would have legal merit. As the Supreme Court held in its opinion on direct review, in light of the state’s theory that petitioner and his codefendants were motivated to commit the crimes at least, in part, by death metal music and Satanism, the evidence was relevant to establish that motive.” *Id.* at 150.

State v. Brumwell, 350 Or 93, 249 P3d 965 (2011). In 1996, defendant was convicted of aggravated murder and attempted aggravated murder and was sentenced to life imprisonment. While serving that sentence, he and another inmate (Haugen) murdered a third inmate. Following a joint guilt-phase trial, the jury convicted both defendants and, in separate penalty-phase trials, both defendants were sentenced to death. On review, defendant argued that the trial court admitting evidence showing that, at the time of his earlier crimes he considered himself a “satanist” and he listened to “death metal” music. According to defendant, that evidence was irrelevant under OEC 401, should have been excluded under OEC 403, and violated his state and federal rights to freedom of religion and expression. *Held*: Affirmed. [1] Defendant’s interest in satanism and death-metal music was relevant under OEC 401 because a jury could infer that it provided one of the motives for his 1996 crimes; his motive was, in turn, relevant to the questions about his future dangerousness, and about whether he should receive a death sentence. *Id.* at 104-07. [2] The trial court did not abuse its discretion under OEC 403 by not excluding the evidence as unfairly prejudicial. *Id.* at 107-11. [3] The evidence did not violate defendant’s rights to religion or expression because it was offered for the permissible purpose of proving one of defendant’s motives for his 1996 crimes. *Id.* at 109-11.

State v. Bowen, 340 Or 487, 135 P3d 272 (2006), *cert den*, 549 US 1214 (2007). The state offered explicit photographs of injuries that the defendant inflicted when he assaulted a different victim, using the same pistol later used to kill the murder victim, earlier on the same day that the murder victim was killed. Defendant objected that the photographs were unduly prejudicial. *Held*: The trial court did not abuse its discretion under OEC 403 when it admitted the photographs. The photographs created no danger of *unfair* prejudice, “other than to evoke a person’s natural revulsion regarding the beating that [the assault victim] endured.” *Id.* at 494.

State v. Johnson (Martin Allen), 340 Or 319, 131 P3d 173, *cert den*, 549 US 1079 (2006). Defendant kidnapped, sexually assaulted, and murdered a young woman, and then dumped her body in the ocean. [1] The trial court properly admitted evidence of defendant’s drugging and sexually assaulting several other young women. “The essential inquiry under OEC 404(3) is not whether the testimony can be made to fit into one of the listed categories, but whether and how it is logically relevant to a noncharacter issue in the case.” In the context of this case, that evidence made it more likely that defendant drugged and raped this victim (distinguishing *State v. Pratt*). *Id.* at 340. [2] The trial court properly admitted as rehabilitative evidence under OEC 801(4)(a)(B) testimony that the witness had told a friend that defendant had drugged and raped her. *Id.* at 343.

State v. Gibson, 338 Or 560, 113 P3d 423, *cert den*, 546 US 1044 (2005). Defendant and codefendants murdered the victim during a home-invasion robbery. [1] “We review the trial court’s ruling

regarding the relevance of evidence for errors of law.” The trial court properly admitted testimony that defendant had used the murder weapon several days previously in an aborted robbery. The evidence was relevant to impeach defendant’s testimony on cross-examination that he had “never fired that gun before.” The evidence was not improper impeachment on a collateral matter because “[t]he state would have been entitled to prove it as part of and tending to establish its case.” “This court consistently has held that a witness may be impeached by evidence that contradicts the witness’s testimony on any independently relevant fact, although the witness cannot be impeached as to merely collateral matters.” Further, the court did not abuse its discretion under OEC 403 in admitting the evidence, because the potential for unfair prejudice was limited. *Id.* at 575, 577. [2] The trial court erred in admitting evidence in rebuttal that defendant had suggested to a companion, after the murder, that she engage in prostitution to support them, because the evidence was not relevant. But that error was harmless under the circumstances. *Id.* at 576-77.

State v. Barone, 329 Or 210, 986 P2d 5 (1999), *cert den*, 528 US 1086 (2000). Defendant was a serial murderer who sexually assaulted and murdered several women; he also was convicted and sentenced to death in a separate case. *Held*: On the same night that one of the charged murders occurred, the defendant and his accomplice used the murder weapon as part of an incident involving a different victim. Evidence of that incident was admissible under OEC 404(3) to show possession of the weapon and proximity to the scene of the charged crime. *Id.* at 236.

State v. Barone, 328 Or 68, 969 P2d 1013 (1998), *cert den*, 528 US 1135 (2000). Defendant is a serial murderer. [1] Testimony of nurse-midwife who had worked with the victim at Tuality Hospital concerning a stalking incident at the hospital (the nurse identified defendant as the stalker) that occurred two days before the victim’s murder was relevant and was not unfairly prejudicial. To the extent the evidence was “other crimes” evidence, it was admissible under OEC 404(3). *Id.* at 86-87. [2] Witness’s testimony that she had seen defendant in possession of a 9-mm semiautomatic pistol two or three weeks *after* the murder was relevant. Other testimony suggested that defendant owned such a weapon *before* the murder and that a nine-millimeter semiautomatic pistol seized from defendant’s home after the murder was the murder weapon. “All that evidence pointed to defendant as the owner (and likely user) of the pistol.” *Id.* at 89.

State v. Hayward, 327 Or 397, 963 P2d 667 (1998). Defendant and several other young men staged a robbery at a DariMart and murdered one clerk and severely beat a second. [1] Evidence concerning death-metal music and Satanism was relevant, OEC 401, and was not unfairly prejudicial, OEC 403. The evidence was relevant to prove defendant’s motive for the crimes and to explain the brutality of the attacks on the victims. In light of the fact that much of that evidence came in without objection, the evidence that defendant did object to was not unfairly prejudicial. *Id.* at 407-08. [2] Even if listening to death-metal music and believing in Satanism are “acts” under OEC 404(3), admission of the evidence did not violate OEC 404(3); the evidence was relevant to the state’s theory regarding defendant’s motive and was not unfairly prejudicial. *Id.* at 409.

State v. Moore, 324 Or 396, 927 P2d 1073 (1996). Defendant murdered his wife’s parents, was convicted on two counts of aggravated murder, and was sentenced to death. *Held*: Affirmed. [1] Trial court properly admitted identity documents defendant had forged to establish that his wife was afraid that he would disappear with their child. Under OEC 403, “[t]he relevant inquiry is not whether evidence introduced over one party’s objection was prejudicial to that party, but whether that evidence was *unfairly* prejudicial.” Unfair prejudice means an undue tendency to suggest a decision on an improper basis. In this aggravated-murder case, the state’s evidence of defendant’s forgery of certain documents was not unfairly prejudicial. *Id.* at 406-08. [2] OEC 403 provides that relevant evidence may be excluded if its probative value is substantially outweighed by the needless presentation of cumulative evidence. When the admission of evidence is challenged under this portion of OEC 403, the rule requires a two-step analysis: (a) whether the evidence is cumulative and, (b) if so, whether its probative value is substantially outweighed by consideration of its cumulative nature. Here, the evidence was not cumulative, and that ends the inquiry. *Id.* at 408-09.

(c) Admission of evidence offered by state—other evidence

State v. Johnson (Jesse Lee), 342 Or 596, 157 P3d 198 (2007), *cert den*, 128 S Ct 906 (2008). Defendant murdered the victim during a home-invasion robbery. The trial court properly ruled that if defendant offered expert testimony to compare two sets of footprints that were found at the scene, he would be opening the door to the admission of previously suppressed evidence that the state had examined defendant's boots and found that they were consistent with one set of prints found at the scene. Defendant's proffered evidence would have created an incorrect inference that the state had failed to test critical evidence; moreover, the court allowed defendant to offer lay testimony that there were two types of prints, and the benefit of using expert testimony would have been "slight, if nonexistent." *Id.* at 215-16.

State v. Longo, 341 Or 580, 148 P3d 892 (2006), *cert den*, 128 S Ct 65 (2007). Defendant murdered his wife and children; he pleaded guilty to some of the murder charges. *Held*: Excited utterances made by wife were properly admitted, because she made the statements soon after he told her that he no longer loved her, and she was upset, sobbing, and visibly shaken when she made the statements. *Id.* at 601-02.

State v. Tiner, 340 Or 551, 135 P3d 305 (2006), *cert den*, 127 S Ct 1125 (2007). Defendant and a codefendant murdered a man who had allowed them to stay at his residence. *Held*: [1] "[T]he state and federal privileges [against self-incrimination] apply to only testimonial evidence—the communication of a person's belief, knowledge or state of mind—but not to defendant's physical characteristics, such as identity, appearance, and physical condition." So, "a defendant may be required to display part of his or her body on request, and such a display does not raise an issue of self-incrimination. In addition, the tattoos were preexisting documentary evidence available to the state as part of the discovery process." *Id.* at 562. [2] Ordering defendant to display his prison-gang tattoos outside the presence of the jury so that a witness could positively identify him, and so that a state's gang expert could testify about them, did not violate defendant's right against compelled self-incrimination. *Ibid.*

State v. Bowen, 340 Or 487, 135 P3d 272 (2006), *cert den*, 549 US 1214 (2007). The state offered explicit photographs of injuries that the defendant inflicted when he assaulted a different victim, using the same pistol later used to kill the murder victim, earlier on the same day that the murder victim was killed. Defendant objected that the photographs were unduly prejudicial. *Held*: The trial court did not abuse its discretion under OEC 403 when it admitted the photographs. The photographs created no danger of *unfair* prejudice, "other than to evoke a person's natural revulsion regarding the beating that [the assault victim] endured." *Id.* at 494.

State v. Johnson (Martin Allen), 340 Or 319, 131 P3d 173, *cert den*, 549 US 1079 (2006). Defendant kidnapped, sexually assaulted, and murdered a young woman, and then dumped her body in the ocean. [1] Testimony from defendant's probation officer did not violate OEC 404(3) or 403, because the officer did not disclose any information regarding defendant's past crimes and addressed only where he lived during the time of the murder, which was relevant to venue, "an issue that defendant chose to contest." *Id.* at 344. [2] The trial court properly admitted as rehabilitative evidence under OEC 801(4)(a)(B) testimony that the witness had told a friend that defendant had drugged and raped her. *Id.* at 343. [3] The trial court correctly admitted as "state of mind" evidence under OEC 803(3) the victim's statement, on the night she disappeared, that she intended to go to defendant's house. The court cannot be faulted for failing to give a limiting instruction that defendant did not request. Admission of that statement did not violate the Confrontation Clause as construed in *Crawford* because the statement was not "testimonial." *Id.* at 347.

State v. Sparks, 336 Or 298, 83 P3d 304, *cert den*, 543 US 893 (2004). Defendant was convicted on 15 counts of aggravated murder and five noncapital offenses based on his sexual assault and murder of a 12-year-old girl. Defendant's offer to stipulate to the content of post-mortem photographs did not have the effect of making the otherwise relevant photographic evidence irrelevant, nor did the stipulation tip the balance in favor of excluding that evidence as unfairly prejudicial. *Id.* at 308, 312.

State v. Rogers, 330 Or 282, 4 P3d 1261 (2000). Decisions about the qualifications of an expert relative to a particular topic are reviewed for errors of law and the expert's qualifications do not depend necessarily on particular education or a professional degree. *Id.* at 310, 316.

State v. Barone, 329 Or 210, 986 P2d 5 (1999), *cert den*, 528 US 1086 (2000). Defendant was a serial murderer who sexually assaulted and murdered several women; he also was convicted and sentenced to death in a separate case. *Held*: [1] A person who has been convicted and has exhausted direct appeals does not retain a Fifth Amendment right to silence based simply on his desire "sometime in the future" to challenge his conviction by way of a post-conviction or *habeas corpus* proceeding. Consequently, the trial court properly compelled defendant's accomplice to invoke his nonexistent Fifth Amendment privilege in the presence of the jury. That invocation tended to prove that the witness wished to protect defendant by refusing to testify. *Id.* at 232-33. [2] On the same night that one of the charged murders occurred, the defendant and his accomplice used the murder weapon as part of an incident involving a different victim. Evidence of that incident was admissible under OEC 404(3) to show possession of the weapon and proximity to the scene of the charged crime. *Id.* at 236.

State v. Barone, 328 Or 68, 969 P2d 1013 (1998), *cert den*, 528 US 1135 (2000). Defendant is a serial murderer. [1] Autopsy photos used by pathologist to illustrate her testimony were relevant and were not unfairly prejudicial. *Id.* at 88. [2] The state's DNA evidence was admissible. Defendant "does not persuade us that the state's DNA analysis involved an unacceptably high margin of error, ... that degradation of DNA samples by the passage of time or exposure to cleaning fluids cast significant doubt on the results[, or] ... that the state's use of racial categories in DNA analysis caused its results to be unreliable with respect to a person, like himself, of mixed race." *Id.* at 93-94.

State v. Hayward, 327 Or 397, 963 P2d 667 (1998). Defendant and several other young men staged a robbery at a DariMart and murdered one clerk and severely beat a second. [1] Evidence concerning death-metal music and Satanism was relevant, OEC 401, and was not unfairly prejudicial, OEC 403. The evidence was relevant to prove defendant's motive for the crimes and to explain the brutality of the attacks on the victims. In light of the fact that much of that evidence came in without objection, the evidence that defendant did object to was not unfairly prejudicial. *Id.* at 407-08. [2] Even if listening to death-metal music and believing in Satanism are "acts" under OEC 404(3), admission of the evidence did not violate OEC 404(3); the evidence was relevant to the state's theory regarding defendant's motive and was not unfairly prejudicial. *Id.* at 409.

State v. Wilson, 323 Or 498, 918 P2d 826 (1996), *cert den* 519 US 1065 (1997). Defendant and codefendant Charboneau kidnapped, assaulted, and murdered a young woman. *Held*: Reversed in part and remanded for new trial. [1] Following *State v. Charboneau*, 323 Or 38, 40-41 (1996), the trial court erred when it allowed the state to rehabilitate witness, who had been impeached with his admission that he had made a deal with the state, by introducing the written plea agreement that recited, in effect, that the DA believed the witness's version of the crimes. *Id.* at 503. [2] A witness's testimony about statements Charboneau made to her were admissible under OEC 804(3) as statements against penal interest. Admission of statements against penal interest under OEC 804(3) do not violate the state or federal constitutional confrontation clauses if the statements have particularized guarantees of trustworthiness and the declarant is unavailable. A codefendant is "unavailable" if he invokes the privilege against self-incrimination. Whether a codefendant is "unavailable" is a question of fact under OEC 104(1). *Id.* at 509-19.

6. Exclusion of Evidence Offered By Defendant

State v. Haugen, 349 Or 174, 243 P3d 31 (2010). Defendant and his codefendant, Jason Brumwell, both inmates at OSP, were found guilty of killing a third inmate, and the jury imposed a death sentence. On review, defendant asserted that the court erroneously excluded evidence of bias on the part of a key prosecution witness. *Held*: Affirmed. The trial court did not abuse its discretion in excluding

evidence suggesting a key prosecution witness's hostility for defendant and Brumwell, because there was ample and specific evidence already in the record to show that hostility. *Id.* at 193-95.

State v. Davis, 345 Or 551, 201 P3d 185 (2008), *cert den*, 130 S Ct 371 (2009). Defendant and codefendants murdered two people in a motel room. *Held*: Exclusion of proffered defense testimony did not violate due process. Even if the defendant had preserved a due-process challenge, it would fail. Even if defendant had a due-process right to examine the officer about the report, he was not entitled to do so selectively and to preclude the admission of other equally relevant portions of the report. The trial court did not err in excluding the evidence. *Id.* at 592-93.

State v. Cox, 337 Or 477, 98 P3d 1103 (2004), *cert den*, 546 US 830 (2005). Defendant was convicted of the aggravated murder of a fellow inmate at OSP. [1] The trial court properly excluded defendant's proffered evidence of the victim's prior acts of violence against inmates other than defendant. The evidence was marginally relevant to defendant's particular theory of defense, but probative value of the excluded evidence was "minimal" while its prejudicial effect "substantially outweighed" its probative value. *Id.* at 487. [2] The trial court properly granted the prosecutor's motion to strike all of defendant's testimony in the guilt phase after he refused to answer some of the prosecutor's questions on cross-examination. [3] Defendant admitted that he stabbed the victim, but argued that he had intended only to injure him in the hope that the victim would be transferred to another institution. To support that claim, defendant sought to offer evidence of the victim's violent acts toward defendant and toward others. The court allowed the former, but excluded the latter, reasoning that, if defendant did not know of the victim's violent acts toward others, they could not be relevant to defendant's intent. A witness testified that defendant had never expressed any fear of the victim. Defendant moved to strike and for a mistrial, and argued that the testimony had opened the door to the evidence previously excluded about the victim's violent acts toward people other than defendant. *Held*: Defendant's proffered evidence was marginally relevant, but the trial court did not abuse its discretion by excluding it because the probative value of the excluded evidence was "minimal" while its prejudicial effect "substantially outweighed" its probative value. The witness's statement was admissible, it did not "interject a new issue" into the case, and nothing he said changed the correctness of the trial court's earlier ruling limiting evidence of the victim's other crimes to prove that defendant feared him. *Id.* at 494.

State v. Hale, 335 Or 612, 75 P3d 448 (2003), *cert den*, 541 US 942 (2004). Defendant and codefendant murdered three teenagers in a wooded area outside Eugene. The jury found defendant guilty of most of the crimes charged, including 13 counts of aggravated murder, and sentenced him to death. Defendant contended that the trial court should have allowed him to introduce evidence that, five years before the events giving rise to this case, his co-defendant had been the subject of a "high risk felony stop," in which a police officer had ordered him to lie face down on the ground—he argued that, because the male victims in the sexual assault and the murders had been ordered to lie face down, that evidence was relevant to prove that the co-defendant, and not defendant, was the perpetrator of both those criminal episodes. *Held*: The court correctly concluded that the "high risk felony stop" evidence was not relevant because it required the jury to make a series of inferential leaps that lacked any factual predicate. *Id.* at 623-24.

7. Challenge to Sufficiency of Evidence

State v. Zweigart, 344 Or 619, 188 P3d 242 (2008), *cert den*, 130 S Ct 56 (2009). Defendant murdered his wife with the help of his girlfriend's nephew, whom defendant solicited to commit the murder. Based on the men's prior agreement, the nephew entered the house while defendant and his wife were home, and, after staging an apparent robbery, either defendant or the nephew shot the victim while she was lying on the floor. Each later claimed that the other was the shooter. *Held*: [1] Kidnapping convictions reversed, because there was insufficient evidence to allow a rational trier of fact could find that either defendant or the nephew intended to interfere substantially with the victim's liberty separate from committing the robbery and murder. *Id.* at 636-37. [2] The evidence supported defendant's convictions for robbery and aggravated felony murder based on robbery. The court rejected defendant's argument that he could not be convicted of

robbery based on the theft of his own property, noting that defendant aided the *nephew* in robbing the victim. In addition, there was sufficient evidence that the victim was a co-owner of the property. Finally, there was sufficient evidence that the nephew acted with force or a threat of force in taking property from the victim; he entered the home at night, was carrying a gun, and, at one point, the victim asked him not to hurt her husband. *Id.* at 633.

State v. Johnson (Martin Allen), 340 Or 319, 131 P3d 173, *cert den*, 549 US 1079 (2006). Defendant kidnapped, sexually assaulted, and murdered a young woman, and then dumped her body in the ocean. The trial court correctly denied defendant’s motion for judgment of acquittal. *Id.* at 350.

State v. Barone, 329 Or 210, 986 P2d 5 (1999), *cert den*, 528 US 1086 (2000). Defendant is a serial murderer who sexually assaulted and murdered several women; he also was convicted and sentenced to death in a separate case. *Held*: To sustain a conviction for felony murder under ORS 163.115(1)(b), the state must prove that the victim was killed *both* “during the course of” *and* “in furtherance of” the underlying felony. It is insufficient to prove merely that death resulted during a felony. *Id.* at 242.

State v. Thompson, 328 Or 248, 971 P2d 879, *cert den*, 527 US 1042 (1999). Defendant was convicted of two murders—after defendant and his friend were kicked out of a tavern, he returned to murder a patron and he later, after escaping, stabbed his friend to death. The evidence was sufficient to allow the jury to find defendant guilty of first-degree burglary. The burglary counts were premised on the state’s theory that the bartender had excluded defendant and his companion from the tavern before defendant reentered and attacked the victim. “[A] rational jury accepting reasonable inferences could have found that, when the bartender said, ‘Good night, fellows,’ (or words to that effect) and pointed to the door, a reasonable person would have understood that he was not ‘licensed or privileged’ to return to the tavern at the time that [defendant] did so.” *Id.* at 265.

8. Motion for Mistrial

State v. Davis, 345 Or 551, 201 P3d 185 (2008), *cert den*, 130 S Ct 371 (2009). Defendant not entitled to mistrial based on prosecutor’s opening statement summarizing the expected testimony of a witness who ultimately did not appear for trial. The prosecutor’s statements about anticipated testimony did not so prejudice the defendant as to have denied him a fair trial because: (1) the prosecutor’s statements were part of a summary of the testimony that several witnesses were expected to provide; (2) the prosecutor did not place any special emphasis on the expected testimony or its value in establishing the defendant’s guilt; and (3) the defendant declined the curative instruction offered by the trial court. *Id.* at 588-89.

State v. Bowen, 340 Or 487, 135 P3d 272 (2006), *cert den*, 549 US 1214 (2007). The prosecutor misread defendant’s rap sheet (he erroneously believed that defendant had a felony theft conviction within the past 15 years) and asked him, on cross-examination, whether he had been convicted of any felonies other than those to which he had admitted on direct. Defendant answered that he had a prior manslaughter conviction, which was not admissible as impeachment because it was over 15 years old. The trial court denied defendant’s motion for a mistrial but gave a cautionary instruction. *Held*: The prosecutor’s behavior, “though careless,” was not a deliberate attempt to admit improper evidence, the court gave a strong immediate curative instruction, and defendant’s admission of the manslaughter conviction violated only an evidentiary, not a constitutional, rule. The jurors are assumed to have followed that instruction. *Id.* at 510-11.

State v. Terry, 333 Or 163, 37 P3d 157 (2001), *cert den*, 536 US 910 (2002). Witness’s passing reference to a polygraph examination what defendant took did not require a mistrial, and the curative instruction the court provided was sufficient to neutralize any possibility of prejudice. *Id.* at 176-77.

State v. McNeely, 330 Or 457, 8 P3d 212, *cert den*, 531 US 1055 (2000). Defendant kidnapped, sexually assaulted, and murdered a dancer. The prosecutor’s argument in the guilt phase of an aggravated-

murder trial asking the jurors not to forget the victim and inviting them to think about what she could have told them if she were still alive was not improper and did not require a mistrial. *Id.* at 464.

State v. Barone, 329 Or 210, 986 P2d 5 (1999), *cert den*, 528 US 1086 (2000). Defendant is a serial murderer who sexually assaulted and murdered several women; he also was convicted and sentenced to death in a separate case. *Held*: [1] Initially misinstructing a jury does not necessitate a mistrial or reversal so long as the jury is eventually properly instructed. The trial jury in this case was improperly instructed regarding the elements of felony murder. It deliberated and returned verdicts, but before those verdicts were read and received, the trial court correctly instructed the jury and the jury redeliberated. Under these circumstances the trial court was not required to declare a mistrial. *Id.* at 242-43. [2] Defendant’s argument that the prosecutor “belittled” defense counsel during closing argument, and that a mistrial was required, was not made until the jury was deliberating and thus was untimely. *Id.* at 242. [3] The trial judge neglected to administer the juror’s oath. The court discovered its error after the jurors had returned a verdict, but before the court had received the verdicts and dismissed the jury. The court examined each juror and was found that no misconduct had occurred. It then instructed the jury to redeliberate. The jury did so, returning verdicts identical to those it had previously reached. Although the court erred in failing to swear in the jury earlier, the error was harmless. The court’s *voir dire* of the jury reflected no “substantial basis for concern that the jury would not follow the court’s instructions [to deliberate ‘anew.’]” The trial court thus acted correctly by denying the defendant’s motion for a mistrial.

Note: The Supreme Court noted that it has never applied a “structural error” doctrine—under which certain errors require reversal absent a showing of actual prejudice—under the Oregon Constitution. *Id.* at 225-27.

State v. Barone, 328 Or 68, 969 P2d 1013 (1998), *cert den*, 528 US 1135 (2000). [1] Defendant twice moved for a mistrial on the ground the prosecutor’s questioning of witnesses implied defendant had been implicated in other crimes. The trial court’s denial of those motions was not an abuse of discretion. “It appears unlikely that the jury would derive from the prosecutor’s [first] question the implication for which defendant’s argues. . . . Moreover, to the extent that the objectionable implication was presented, it was isolated and fleeting.” The trial court noted that the second question was “innocuous.” “That fact alone is sufficient to support the denial of defendant’s [second] motion for a mistrial.” *Id.* at 83-89. [2] Defendant’s mistrial motion based on the state’s alleged failure to provide discovery (the names and addresses of all witnesses) was not timely and, therefore, did not preserve any error for review. Defendant waited to move for a mistrial until after the witnesses had testified. *Id.* at 90. [3] Alleged error in allowing police officer to comment on another witness’s credibility was not preserved for review. *Id.* at 85.

State v. Hayward, 327 Or 397, 963 P2d 667 (1998). Defendant and several other young men staged a robbery at a DariMart and murdered one clerk and severely beat a second. [1] Evidence concerning death-metal music and Satanism was relevant, OEC 401, and was not unfairly prejudicial, OEC 403. The evidence was relevant to prove defendant’s motive for the crimes and to explain the brutality of the attacks on the victims. In light of the fact that much of that evidence came in without objection, the evidence that defendant did object to was not unfairly prejudicial. *Id.* at 407-08. Even if listening to death-metal music and believing in Satanism are “acts” under OEC 404(3), admission of the evidence did not violate OEC 404(3). *Id.* at 409. [2] Defendant’s motion for a mistrial, based on the ground that evidence of death-metal music should not have been admitted during the guilt phase, was untimely. Defendant did not move for a mistrial until after the state had rested its case. *Ibid.*

9. Closing Argument

State v. Fanus, 336 Or 63, 79 P3d 847 (2003), *cert den*, 541 US 1075 (2004). Defendant murdered General Carl and shot his wife during a home-invasion robbery. Prosecutor’s statements that allegedly misinformed jurors that they faced an “all or nothing” choice between guilt or acquittal on all charges did not require a curative instruction and the trial court was not required to *sua sponte* grant a mistrial. *Id.* at 86.

State v. McNeely, 330 Or 457, 8 P3d 212, *cert den*, 531 US 1055 (2000). Defendant kidnapped, sexually assaulted, and murdered a dancer. The prosecutor’s argument in the guilt phase of an aggravated-murder trial asking the jurors not to forget the victim and inviting them to think about what she could have told them if she were still alive was not improper and did not require a mistrial. *Id.* at 464.

State v. Simonsen, 329 Or 288, 986 P2d 566 (1999), *cert den*, 528 US 1090 (2000). Defendant and codefendant Jeffery Williams kidnapped, sexually assaulted, and murdered two German women who were hitchhiking; defendant pleaded guilty and was sentenced to death twice. Prosecutor’s statement during closing argument that “Nobody else in the courtroom had to do that [expose themselves to a ‘snitch jacket’ by testifying]” did not comment on the defendant’s own failure to testify. *Id.* at 299-300.

State v. Barone, 329 Or 210, 986 P2d 5 (1999), *cert den*, 528 US 1086 (2000). Defendant is a serial murderer who sexually assaulted and murdered several women; he also was convicted and sentenced to death in a separate case. *Held*: Defendant’s argument that the prosecutor “belittled” defense counsel during closing argument, and that a mistrial was required, was not made until the jury was deliberating and thus was untimely. *Id.* at 242.

Cunningham v. Thompson, 186 Or App 221, 62 P3d 823, *on recon* 188 Or App 289, 71 P3d 110 (2003), *rev den*, 337 Or 327 (2004). Petitioner was convicted of aggravated murder and was sentenced to death, and the judgment was affirmed on direct review. *State v. Cunningham*, 320 Or 47 (1994), *cert den*, 514 US 1005 (1995). He petitioned for post-conviction relief, the court denied all of his claims after a trial, and he appealed. *Held*: Affirmed. [1] The court correctly rejected petitioner’s claim that his counsel should have objected to statements in the prosecutor’s penalty-phase closing argument as an improper comment on his decision not to testify, because the statement was a proper comment on the limited probative value of certain evidence. *Id.* at 245. [2] The court correctly rejected petitioner’s claim that his counsel should have objected to statements in the prosecutor’s penalty-phase closing argument as an improper comment on his decision not to testify, because the statement was a proper comment on his lack of remorse, which related to his future dangerousness. *Id.* at 250.

10. Instructions

State v. Zweigart, 344 Or 619, 188 P3d 242 (2008), *cert den*, 130 S Ct 56 (2009). Defendant murdered his wife with the help of his girlfriend’s nephew, whom defendant solicited to commit the murder. Based on the men’s prior agreement, the nephew entered the house while defendant and his wife were home, and, after staging an apparent robbery, either defendant or the nephew shot the victim while she was lying on the floor. Each later claimed that the other was the shooter. The jury found defendant guilty on count 1 (aggravated murder by soliciting another to commit the murder and paying the person money for committing the murder, ORS 163.095(1)(b)) and counts 2 and 3 (aggravated felony murder by personally and intentionally killing the victim during the course of committing a felony, ORS 163.095(2)(d)). Defendant argued for the first time on appeal that the trial court committed “plain error” by failing to *sua sponte* give a jury instruction to the effect that the jurors had to agree, on Count 1, that the nephew (rather than defendant) was the person who pulled the trigger and killed the victim. His argument was based on a perceived conflict between the guilty verdicts; he claimed that count 1 required the jury to find that the *nephew* fired the fatal shot, whereas counts 2 and 3 required the jury to find that *defendant* fired the shot. The state responded that no conflict existed, because ORS 163.095(1)(b) does not require the person who was solicited to commit the murder to pull the trigger, and that it is possible for two people to “personally” cause a death even if only one of those people pulls the trigger. *Held*: [1] The court declined to answer that “interesting” question, concluding that the instructions given by the trial court in fact *did* instruct the jurors that, to find defendant guilty on count 1, they had to agree that the *nephew* fired the gun; the court held that the instructions given on count 2 required the jurors to agree that defendant was the triggerman. *Id.* at 247-8. [2] Then, based on those conclusions, the court stated that the instructions given sufficiently required jury unanimity on those theories of the identity of the triggerman. Thus, it concluded that there was no need for any additional “jury unanimity” instruction under *Boots*. [3] And, to the extent that the jury’s unanimous verdicts were

inconsistent with each other, the court noted the statutory procedure in ORS 136.480, which permits a defendant to ask to have jurors reconsider their verdicts, and concluded that it would not review defendant's "inconsistent verdicts" claim on review because of his failure to seek to use the statutory procedure for avoiding inconsistent verdicts. *Id.* at 629-31.

State v. Bowen, 340 Or 487, 135 P3d 272 (2006), *cert den*, 549 US 1214 (2007). Defendant was charged with two counts of aggravated felony murder and one count of intentional murder. Defendant requested an instruction on first-degree manslaughter as a lesser-included offense of aggravated felony murder, but the court denied his request, reasoning that the jurors would first have to consider the charges of aggravated felony murder, then the murder charge, and only if they found defendant not guilty on those counts would they consider the lesser-included offense of first-degree manslaughter. So, the court gave the manslaughter instruction but only as a lesser-included offense of intentional murder. *Held*: [1] The court erred in refusing to give the manslaughter instruction as a lesser-included of aggravated felony murder. Because intentional murder is a lesser-included offense of aggravated felony murder, and manslaughter is a lesser-included offense of intentional murder, defendant was entitled to the manslaughter instruction as a lesser-included of aggravated felony murder. [2] But the error was harmless, because the court instructed the jury to consider the instructions as a whole, and when taken as a whole, the instructions adequately informed the jury of the possible verdicts it could return on all the counts, depending on how it resolved the facts. *Id.* at 517.

State v. Running, 336 Or 545, 87 P3d 661, *cert den*, 543 US 1005 (2004). Defendant murdered two women in a bar and received a true-life sentence for one count and was sentenced to death for the other. Defendant challenged the trial court's jury instruction that they could consider his defense of extreme emotional disturbance (EED) only if they acquitted him of aggravated murder and proceeded to consider the lesser-included offense of murder. *Held*: The court adhered to its previous opinion in *State v. Moore*, 324 Or 396 (1996), holding that the EED defense does not apply to multiple-victim aggravated murder. *Id.* at 562-63.

State v. Hale, 335 Or 612, 75 P3d 448 (2003), *cert den*, 541 US 942 (2004). Defendant and codefendant murdered three teenagers in a wooded area outside Eugene. The jury found defendant guilty of most of the crimes charged, including 13 counts of aggravated murder, and sentenced him to death. Defendant argued that the instructions to the jury on 10 of the 13 aggravated murder counts, alleging murder committed to conceal the crime of or the identity of the perpetrator of the crime of third-degree sexual abuse, and alleging murder committed to conceal the crime of or the identity of the perpetrator of the crime of murder, were insufficient to ensure the requisite degree of jury unanimity because there were multiple potential victims and perpetrators for each of those underlying crimes. *Held*: [1] The jury instructions were insufficient because they did not either limit the jury's consideration to a specific instance of third-degree sexual abuse or murder, committed by a particular perpetrator against a particular victim, or require jury unanimity concerning a choice among alternative scenarios and, therefore, they carried an impermissible danger of jury confusion as to the crime underlying each count. *Id.* at 627. The error was prejudicial as to those counts alleging the predicate offense of sexual abuse, and, as a consequence, the court reversed those six convictions and vacated the sentences of death. *Id.* at 629. [2] The error was harmless, however, with respect to the seven counts involving the underlying crime of murder, because the jury's unanimous convictions on other aggravated murder counts demonstrated the required degree of unanimity. *Ibid.*

State v. Oatney, 335 Or 276, 66 P3d 475 (2003), *cert den*, 540 US 1151 (2004). Defendant and his codefendant jointly kidnapped, assaulted, and murdered the victim, and the codefendant testified for the state. Defendant did not dispute that the crimes occurred but contended that his codefendant committed the crimes alone. Over defendant's objection, the trial court instructed the jurors that the codefendant was an accomplice, that, per ORS 10.095(4), they should view his testimony with distrust, and that, per ORS 136.440, they cannot convict defendant on the basis of his testimony alone. *Held*: Affirmed. [1] There is no accomplice unless another person has committed a crime, and a witness is an accomplice for purpose of the corroboration requirement if the evidence is legally sufficient to justify a charge against the witness as an

accomplice for the same offense for which the defendant is charged, even if the evidence is not sufficient to convict the witness. *Id.* at 283-85. [2] If there is no dispute that the witness was an accomplice, then the trial court may determine as a matter of law that the witness is an accomplice and so instruct the jurors. *Id.* at 284. [3] To resolve whether it was error to give a particular instruction, the instructions are construed as a whole to determine whether they accurately stated the law. *Id.* at 290. [4] Although defendant contended that his codefendant solely committed the crimes, the trial court properly determined that the codefendant was an accomplice and instructed the jurors per ORS 10.095(4). The court rejected defendant's arguments that the accomplice-as-a-matter-of-law instructions effectively undermined his defense and directed a verdict of guilty by implying that he had committed the crimes with the codefendant's assistance. *Id.* at 291-92.

State v. Barone, 329 Or 210, 986 P2d 5 (1999), *cert den*, 528 US 1086 (2000). Defendant is a serial murderer who sexually assaulted and murdered several women; he also was convicted and sentenced to death in a separate case. *Held*: [1] Initially misinstructing a jury does not necessitate a mistrial or reversal so long as the jury is eventually properly instructed. The trial jury in this case was improperly instructed regarding the elements of felony murder. It deliberated and returned verdicts, but before those verdicts were read and received, the trial court correctly instructed the jury and the jury redeliberated. Under these circumstances the trial court was not required to declare a mistrial. *Id.* at 242-43. [2] The trial judge neglected to administer the juror's oath. The court discovered its error after the jurors had returned a verdict, but before the court had received the verdicts and dismissed the jury. The court examined each juror and was found that no misconduct had occurred. It then instructed the jury to redeliberate. The jury did so, returning verdicts identical to those it had previously reached. Although the court erred in failing to swear in the jury earlier, the error was harmless. The court's *voir dire* of the jury reflected no "substantial basis for concern that the jury would not follow the court's instructions [to deliberate 'anew.']" The trial court thus acted correctly by denying the defendant's motion for a mistrial.

Note: The Supreme Court note that it has never applied a "structural error" doctrine—under which certain errors require reversal absent a showing of actual prejudice—under the Oregon Constitution. *Id.* at 225-27.

State v. Thompson, 328 Or 248, 971 P2d 879, *cert den*, 527 US 1042 (1999). Defendant was convicted of two murders—after defendant and his friend were kicked out of a tavern, he returned to murder a patron and he later, after escaping, stabbed his friend to death. [1] The state requested the uniform jury instructions that define "enter or remain unlawfully" and "person in charge"; the trial court inadvertently neglected to give those instructions. After the jury retired to deliberate, it sent a note to the court asking: "What constitutes being asked to leave a bar and what authority does the bartender have? What does he have to 'do or say—legally' to kick someone out." In response to the jury's questions, the court provided written copies of the uniform instructions defining "enter or remain unlawfully" and "person in charge." On review, defendant did not argue that the additional instructions were incorrect; he complained only about *when* they were given. "Defendant has not demonstrated that the timing of the additional instructions prejudiced him" or that the additional instructions "probably created an erroneous impression of the law." *Id.* at 266. [2] Jurors returned a 12-0 verdict on a charge of aggravated felony murder, with robbery as the underlying felony, and an 11-1 verdict on the robbery charge. Defendant argued the verdicts were inconsistent; the Supreme Court disagreed. The fact that the juror voted not guilty on the completed charge of robbery is not inconsistent with a vote of guilty on the aggravated murder charge, which may be committed in the course of committing or attempting to commit robbery. *Id.* at 268.

State v. Hayward, 327 Or 397, 963 P2d 667 (1998). Defendant and several other young men staged a robbery at a DariMart and murdered one clerk and severely beat a second. The state's jury instruction on co-existing intents—"A person often acts with two or more coexisting intents."—was not an improper comment on the evidence. *Id.* at 411.

Montez v. Czerniak, 237 Or App 276, 239 P3d 1023 (2010), *rev allowed*, 351 Or 321 (2012). Petitioner convicted of aggravated murder and was sentenced to death in 1992, and the court affirmed that judgment on direct review. *State v. Montez*, 324 Or 343 (1996), *cert den*, 520 US 1233 (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. 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 on the fourth question: “a court is not obligated to give an instruction that states merely the converse of a correct instruction.” *Id.* at 297.

11. Verdict

State v. Zweigart, 344 Or 619, 188 P3d 242 (2008), *cert den*, 130 S Ct 56 (2009). Defendant murdered his wife with the help of his girlfriend’s nephew, whom defendant solicited to commit the murder. Based on the men’s prior agreement, the nephew entered the house while defendant and his wife were home, and, after staging an apparent robbery, either defendant or the nephew shot the victim while she was lying on the floor. Each later claimed that the other was the shooter. The jury found defendant guilty on count 1 (aggravated murder by soliciting another to commit the murder and paying the person money for committing the murder, ORS 163.095(1)(b)) and counts 2 and 3 (aggravated felony murder by personally and intentionally killing the victim during the course of committing a felony, ORS 163.095(2)(d)). Defendant argued for the first time on appeal that the trial court committed “plain error” by failing to *sua sponte* give a jury instruction to the effect that the jurors had to agree, on Count 1, that the nephew (rather than defendant) was the person who pulled the trigger and killed the victim. His argument was based on a perceived conflict between the guilty verdicts; he claimed that count 1 required the jury to find that the *nephew* fired the fatal shot, whereas counts 2 and 3 required the jury to find that *defendant* fired the shot. The state responded that no conflict existed, because ORS 163.095(1)(b) does not require the person who was solicited to commit the murder to pull the trigger, and that it is possible for two people to “personally” cause a death even if only one of those people pulls the trigger. *Held*: The court declined to answer that “interesting” question, concluding that the instructions given by the trial court in fact *did* instruct the jurors that, to find defendant guilty on count 1, they had to agree that the *nephew* fired the gun; the court held that the instructions given on count 2 required the jurors to agree that defendant was the triggerman. *Id.* at 247-8. *Then*, based on those conclusions, the court stated that the instructions given sufficiently required jury unanimity on those theories of the identity of the triggerman. Thus, it concluded that there was no need for any additional “jury unanimity” instruction under *Boots*. And, to the extent that the jury’s unanimous verdicts were inconsistent with each other, the court noted the statutory procedure in ORS 136.480, which permits a defendant to ask to have jurors reconsider their verdicts, and concluded that it would not review defendant’s “inconsistent verdicts” claim on review because of his failure to seek to use the statutory procedure for avoiding inconsistent verdicts. *Id.* at 629-31.

State v. Thompson, 328 Or 248, 971 P2d 879, *cert den*, 527 US 1042 (1999). Defendant was convicted of two murders—after defendant and his friend were kicked out of a tavern, he returned to murder a patron and he later, after escaping, stabbed his friend to death. Jurors returned a 12-0 verdict on a charge of aggravated felony murder, with robbery as the underlying felony, and an 11-1 verdict on the robbery charge. Defendant argued the verdicts were inconsistent; the Supreme Court disagreed. The fact that the juror voted not guilty on the completed charge of robbery is not inconsistent with a vote of guilty on the charge of aggravated murder, which may be committed in the course of committing or attempting to commit robbery. *Id.* at 268.

C. PENALTY-PHASE PROCEEDINGS

1. Jury Selection at Penalty-Phase Retrial

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 erred by empaneling an "anonymous jury." [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. 352 Or at 532-33. [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. 352 Or at 540-42. [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. *Id.* at 543-46.

State v. Simonsen, 329 Or 288, 986 P2d 566 (1999), *cert den*, 528 US 1090 (2000). Defendant and codefendant Jeffery Williams kidnapped, sexually assaulted, and murdered two German women who were hitchhiking; defendant pleaded guilty and was sentenced to death twice. *Held*: [1] A juror's inadvertent mention of the defendant's previous death sentence did not require dismissal of all jurors who heard the statement. *Id.* at 294. [2] Although a person who had been on jury service within the past 24 months is not eligible to be a juror, objections to a juror's qualifications must be made during *voir dire*. By failing to make a timely objection, the defendant waived his claim that a person ineligible for service actually served upon his jury. *Ibid.*

2. Admission of Evidence Offered by State

(a) Admission of evidence offered by state—other crimes, bad acts, dangerousness

State v. Rogers, 352 Or 510, 288 P3d 544 (2012). 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." *Id.* at 546-47.

State v. Haugen, 349 Or 174, 243 P3d 31 (2010). Defendant and his codefendant, Jason Brumwell, both inmates at OSP, were found guilty of killing a third inmate, and the jury imposed a death sentence. On review, defendant asserted that the trial court erred in admitting testimony from psychologists who evaluated him for the parole board and in connection with the presentence investigation in the trial for his earlier murder. *Held*: Affirmed. Defendant failed to preserve for review his *Brown/O'Key* "scientific foundation" argument concerning the psychologists' testimony at penalty phase, because he failed to satisfy his obligation to make specific objections to the particular parts of their testimony he believed were not supported by the requisite foundation *at the time of their testimony*—defendant's general pretrial motion challenging a wide range of evidence on *Brown/O'Key* grounds, on which the trial court reserved a ruling with respect to the psychologists' testimony, was insufficient to preserve the argument presented on review. *Id.* at 196-99.

State v. Tiner, 340 Or 551, 135 P3d 305 (2006), *cert den*, 127 S Ct 1125 (2007) Defendant and a codefendant murdered a man who had allowed them to stay at his residence. *Held*: Evidence that defendant

associated with the Aryan Warriors prison gang while in prison in Nevada and had white-supremacist tattoos was relevant to rebut his penalty-phase evidence that he “did not associate with problem inmates” while in prison; and the evidence was not unfairly prejudicial. *Id.* at 565.

State v. Bowen, 340 Or 487, 135 P3d 272 (2006), *cert den*, 549 US 1214 (2007). [1] In the penalty phase, and over defendant’s objection that the evidence was unduly prejudicial under OEC 403, the trial court correctly allowed the state to present evidence that defendant had murdered a woman in 1989. The evidence of the earlier murder was relevant to the question of future dangerousness; the evidence was not *unfairly* prejudicial (*i.e.*, encouraging the jury to make a decision on an improper basis); and the trial court mitigated any risk of unfair prejudice by excluding gory photographs of the crime scene and instructing the jury to weigh the evidence calmly and dispassionately. The court also rejected defendant’s argument that the evidence should have been excluded because he was not prepared to defend against a second murder: “A party’s lack of preparedness to meet evidence is not a factor under OEC 403 for determining whether that evidence should be excluded.” *Id.* at 519-20. [2] In the penalty phase, the state introduced evidence that defendant had pleaded guilty to being an accessory after the fact to the 1989 murder and that he may have actually committed that murder. The trial court correctly refused to give defendant’s instruction that such evidence was relevant *only* to the question of his future dangerousness, because it incorrectly stated the law—the evidence also was relevant to the “fourth question” whether defendant should receive a sentence of death. *Id.* at 522.

State v. Fanus, 336 Or 63, 79 P3d 847 (2003), *cert den*, 541 US 1075 (2004) (Douglas). Defendant murdered General Carl and shot his wife during a home-invasion robbery. *Held*: Affirmed. Trial court correctly concluded that evidence of defendant’s Nazi and white-supremacist beliefs was relevant to his future dangerousness and thus was admissible in the penalty phase of the capital trial. *Id.* at 90.

State v. Barone, 329 Or 210, 986 P2d 5 (1999), *cert den*, 528 US 1086 (2000). Defendant is a serial murderer who sexually assaulted and murdered several women; he also was convicted and sentenced to death in a separate case. *Held*: Affirmed. [1] The defendant’s statement that he thought the Green River Killer was a “punk” was relevant during the penalty phase to prove that the defendant took pride in his violent acts, tending to prove future dangerousness. *Id.* at 243. [2] Gruesome photographs were relevant during the penalty phase to show the brutality of the defendant’s attack and the “range and severity of defendant’s prior criminal conduct” and tended to prove future dangerousness. *Id.* at 244-45.

State v. Thompson, 328 Or 248, 971 P2d 879, *cert den*, 527 US 1042 (1999). Defendant was convicted of two murders—after defendant and his friend were kicked out of a tavern, he returned to murder a patron and he later, after escaping, stabbed his friend to death. *Held*: Affirmed. The trial court did not abuse its discretion in admitting a letter written by defendant that detailed a plan to attack a guard and escape from jail; the letter was probative of defendant’s future dangerousness and was not unfairly prejudicial. *Id.* at 270.

State v. Montez, 324 Or 343, 927 P2d 64 (1996), *cert den* 520 US 1233 (1997). Defendant and 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, defendant again was sentenced to death. *Held*: Affirmed. Evidence concerning defendant’s prior performance on probation and parole was properly admitted. *Id.* at 350-54.

State v. Moore, 324 Or 396, 927 P2d 1073 (1996). Defendant murdered his wife’s parents, was convicted on two counts of aggravated murder, and was sentenced to death. *Held*: Affirmed. [1] Evidence of defendant’s attraction to teenage girls was relevant to the jury’s determination of his future dangerousness. *Id.* at 415-16. [2] Evidence concerning defendant’s belief in white supremacy, when considered in context with evidence of his related conduct, was relevant to future dangerousness, and the admission of that evidence did not violate the First Amendment. [3] Admission of evidence of a defendant’s beliefs (here, his

belief in white supremacy) is admissible if it is relevant to the determination of an issue before the jury. In this death-penalty case, the evidence of defendant's specific, hostile beliefs, together with evidence of specific instances of conduct related to those beliefs, was relevant to the jury's determination of the second ("future dangerousness") penalty-phase question, and admission of evidence of defendant's beliefs did not violate the First Amendment (distinguishing *Dawson v. Delaware*, 503 US 159 (1992)). *Id.* at 416-23.

State v. Barone, 328 Or 68, 969 P2d 1013 (1998), *cert den*, 528 US 1135 (2000). [1] Evidence of other crimes defendant had committed was properly admitted during the penalty phase. The fact that defendant had not been convicted of some of the criminal conduct or that he had offered to stipulate to the

fact of his convictions regarding other conduct did not preclude the state from putting on evidence about those crimes. Nor was the evidence inadmissible under OEC 403 or OEC 404(2). *Id.* at 95-96.

(b) Admission of evidence offered by state—victim-impact evidence

Hayward v. Belleque, 248 Or App 141, 273 P3d 926 (2012), *rev den*, 353 Or 208 (2013). In 1994, petitioner and several other young men robbed a DariMart store in Eugene and brutally murdered one clerk (a middle-aged married woman with young children) and seriously injured the other. Evidence presented at trial established that the men were fans of "death metal" music and listened to some immediately before the crime. Petitioner was convicted of aggravated murder and was sentenced to death, and the judgment was affirmed on direct review. *State v. Hayward*, 327 Or 397 (1998). Petitioner then filed a petition for post-conviction relief contending that his trial counsel provided constitutionally inadequate assistance in dozens of respects. The post-conviction court denied all of his claims. *Held*: Affirmed. The post-conviction court correctly denied petitioner's claim that his trial counsel failed to object adequately to the admission of victim-impact evidence based on testimony from victim's husband. [1] Under *State v. Metz*, 162 Or App 448 (2000), admission of victim-impact evidence in petitioner's trial based on the 1995 amendment to ORS 163.150(1)(a) violated the state *ex post facto* clause, Art I, § 21, because that amendment "allows the jury to consider adverse evidence that it could not consider previously and that increases the likelihood of a more onerous sentence." *Id.* at 161-62. [2] But "the reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances. Before the Supreme Court's opinion on direct appeal on petitioner's case, we do not think that counsel could reasonably have predicted that a failure to object to the brief foundational testimony that [victim's husband] provided [in the guilt phase] to allow identification of the victim in a photograph could result in a waiver of subsequent objections to additional victim impact evidence in a subsequent penalty phase." *Id.* at 163. [3] The post-conviction court properly concluded that "even if counsel's representation was deficient, the admission of the evidence was not so prejudicial as to establish a basis for post-conviction relief." Although petitioner's expert witness testified in the post-conviction trial that the husband's penalty-phase testimony was "terribly damaging," petitioner "offered no evidence as to how, in light of the evidence concerning the brutality of the crime and [his] lack of remorse, the relatively brief victim-impact evidence had a tendency to cause the jury to choose a death sentence over imprisonment." *Id.* at 165. [4] "The relief that petitioner seeks is a remand for a new penalty-phase trial without the victim-impact evidence. The Supreme Court's holding in [*State v. Guzek*, 336 Or 424, 439-44 (2004),] means that, at a penalty-phase trial on remand, the evidence would be admissible by virtue of the retroactive application of [Art. I, § 42]. Given the change to the Oregon Constitution, there is no meaningful relief available to remedy the *ex post facto* violation. Considering that fact along with the additional factors previously mentioned, we conclude that petitioner has failed to establish prejudice as the result of any representational inadequacy." *Id.* at 165-66.

State v. Guzek, 336 Or 424, 86 P3d 1106 (2004), *rev'd and remanded sub nom. Oregon v. Guzek*, 546 US 517 (2006), *op on remand*, 342 Or 345 (2007). Defendant was convicted of two counts of aggravated murder and sentenced to death for two murders he committed in 1987. Due to errors in his first two penalty phase trials, defendant received remands for new penalty phases. Defendant challenged the admission of victim-impact evidence on the ground that the statute was not in existence when he committed the offenses and thus was an *ex post facto* law. *Held*: Application of the victim-impact provision to

defendant was an *ex post facto* law under the state constitution, but concluded that the evidence would be admissible against defendant on remand because the *ex post facto* prohibition was superseded by the victims' right to be heard at sentencing under Art I, § 42(1)(a). *Id.* at 441-42.

State v. Sparks, 336 Or 298, 83 P3d 304, *cert den*, 543 US 893 (2004). Defendant was convicted on 15 counts of aggravated murder and five noncapital offenses based on his sexual assault and murder of a 12-year-old girl. *Held*: Affirmed. ORS 163.150(1)(a) does not limit the witnesses who may present victim-impact evidence; rather, the statute limits the scope of that evidence. Because defendant did not argue that the witnesses presented evidence outside the scope of permissible victim-impact evidence, the trial court did not err in admitting the testimony of non-family members. *Id.* at 317.

State v. Metz, 162 Or App 448, 986 P2d 714 (1999), *rev den*, 330 Or 331 (2000). Application of the 1995 version of ORS 163.150(1) (allowing victim-impact evidence in aggravated-murder penalty-phase proceedings) to crimes committed before its effective date violates the *ex post facto* clause of the Oregon Constitution (Art I, § 21). *Id.* at 461. Retroactive application of an evidentiary statute can violate *ex post facto* if it “impermissibly retrenches the rules of evidence.” *Id.* at 457. If an amendment to an evidence rule changes the manner in which something may be proved, then the *ex post facto* provision is not violated, but if such an amendment changes the nature of what is proved, then retroactive application of the amendment violates *ex post facto*. *Id.* at 457. In this case, allowing admission of victim-impact evidence in the penalty phase changed the nature of what was proved (*i.e.*, that the defendant’s crime was particularly aggravated). *Id.* at 46.

(c) Admission of evidence offered by state—other evidence

State v. McDonnell, 343 Or 557, 176 P3d 1236 (2007), *cert den*, 129 S Ct 235 (2008). Defendant was on escape status when he murdered a young woman who had picked him up hitchhiking. He originally was found guilty of aggravated murder in 1988 and has been sentenced to death four times, most recently in 2002. *Held*: Affirmed. [1] Defendant challenged admission of transcripts of testimony from witnesses in the prior proceedings. Although he had objected to the admission of the transcripts in previous proceedings, he did not object in the 2002 proceeding; nonetheless, he asserted that his confrontation rights were violated based on his claim that he had not had sufficient opportunity to cross-examine the witnesses in the earlier proceedings. *Held*: The court correctly admitted the transcripts of prior testimony. ORS 138.012(2)(b) expressly permits the admission of all evidence that was properly admitted in earlier proceedings. The court rejected defendant’s unpreserved argument that the statute is unconstitutional because it fails to include any “unavailability” requirement or that the defendant had a sufficient opportunity and motive to cross-examine the witness in the prior trials. *Id.* at 576-77. [2] Defendant challenged the trial court’s ruling allowing the prosecution to offer rebuttal testimony of an expert whom the prosecution had called in its case in chief to testify about the defendant’s future dangerousness. *Held*: The court has broad discretion to allow rebuttal evidence when it becomes relevant, even if it could have been offered in the case in chief. *Id.* at 579.

State v. Sparks, 336 Or 298, 83 P3d 304, *cert den*, 543 US 893 (2004). Defendant was convicted on 15 counts of aggravated murder and five noncapital offenses based on his sexual assault and murder of a 12-year-old girl. *Held*: Affirmed. Evidence about violence in prison and the weapons that inmates make in prison was relevant to the issue of defendant’s future dangerousness. *Id.* at 319.

State v. Montez, 324 Or 343, 927 P2d 64 (1996), *cert den* 520 US 1233 (1997). Defendant and 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, defendant again was sentenced to death. *Held*: Affirmed. [1] Evidence related to the crimes that was introduced in defendant’s penalty-phase retrial was not “repetitive” in violation of ORS 163.150(1). The newly empaneled penalty-phase jury did not sit through the earlier guilt-phase proceeding and thus this jury had not heard or considered any evidence related to the crimes. *Id.* at 348-49. [2] Where state’s exhibits are

admitted at first trial, are withdrawn by the state after trial, and then are offered again during retrial, and where exhibits have remained continuously in the state's possession in the interim, there is no gap in the chain of custody and no error in admitting the exhibits on retrial. *Id.* at 349-50.

3. Exclusion of Evidence Offered by Defendant

State v. Guzek, 342 Or 345, 153 P3d 101 (2007). This case was remanded by the United States Supreme Court after it reversed the previous Oregon Supreme Court decision holding that defendant had an Eighth Amendment right in the sentencing phase to present transcripts of alibi testimony that had been admitted in the guilt phase, as well as new live alibi (or “residual doubt”) testimony. *Oregon v. Guzek*, 546 US 517 (2006). (defendant had no right under the Eighth Amendment to present the proffered alibi evidence). *Held*: Reversed and remanded. [1] ORS 138.012(2)(b) provides that, in a penalty-phase retrial after a remand by an appellate court, “all exhibits and other evidence properly admitted in the prior trial and sentencing proceeding are admissible in the new sentencing proceeding.” Thus, the *transcript* of all testimony properly admitted in defendant’s prior trial and sentencing proceedings—which, in this case, encompasses “alibi” testimony from both defendant’s mother and grandfather—is admissible in the new penalty-phase proceeding without regard to issues of relevancy or balancing. *Id.* at 356-57. [2] Unlike the transcripts of the prior proceedings, which are categorically admissible, any live testimony is admissible under ORS 138.012(2)(b) only if is “additional *relevant* evidence.” Because the issue of guilt already has been determined at the time of sentencing, “alibi” evidence is not relevant to the issues in the penalty phase. *Id.* at 358-59. [3] Live alibi testimony is not admissible in the penalty phase to “impeach” the testimony of his codefendants regarding his involvement in the crimes because impeachment is permissible only with regard to any “independently relevant fact”; because guilt is not at issue at sentencing, any “alibi” evidence is not admissible to impeach that collateral matter. *Id.* at 359-60.

State v. Longo, 341 Or 580, 148 P3d 892 (2006), *cert den*, 128 S Ct 65 (2007). Defendant murdered his wife and children; he pleaded guilty to some of the murder charges. *Held*: Affirmed. The court properly allowed defendant to offer evidence about the circumstances of his arrest and extradition from Mexico, but it did not prevent defendant from offering relevant “mitigating” evidence when it refused to allow him to offer evidence regarding Mexican extradition and deportation *law*. Mexican law did not demonstrate anything about defendant’s character or make it more or less likely that he planned the murders ahead of time. *Id.* at 609.

State v. Bowen, 340 Or 487, 135 P3d 272 (2006), *cert den*, 549 US 1214 (2007). In the penalty phase, the court correctly refused to allow the defense to elicit from defendant’s ex-girlfriend her belief that defendant should not be sentenced to death. Although defendant argued that this violated his right to present mitigating evidence, the evidence was properly excluded under *State v. Wright*, 323 Or 8 (1996), because it merely expressed the witness’s opinion and was “not relevant to any aspect of defendant’s character or background under ORS 163.150(1)(b)(D).” *Id.* at 525.

State v. Guzek, 336 Or 424, 86 P3d 1106 (2004), *rev’d and remanded sub nom. Oregon v. Guzek*, 546 US 517 (2006), *op on remand*, 342 Or 345 (2007) (*see above*). Defendant was convicted of two counts of aggravated murder and sentenced to death for two murders he committed in 1987. Due to errors in his first two penalty phase trials, defendant received remands for new penalty phases. Defendant challenged the trial court’s exclusion of out-of-court statements made by his co-defendants, whose prior trial testimony was admitted in the penalty-phase retrial. *Held*: The court properly admitted the transcripts of the co-defendants’ prior testimony in the penalty-phase retrial pursuant to ORS 138.012(2)(b); however, any inconsistent statements that defendant offers on remand must be evaluated to determine whether there is a nonhearsay purpose. If it does, then the evidence may not be excluded on the basis of the hearsay rule alone. *Id.* at 449.

State v. Barone, 328 Or 68, 969 P2d 1013 (1998), *cert den*, 528 US 1135 (2000). [1] Evidence that the homicide victim was opposed to the death penalty was not relevant to any of the four penalty-phase questions and, therefore, was properly excluded by the trial court. *Id.* at 97. [2] Testimony that the death

penalty does not deter violent crimes was not relevant to any of the four penalty-phase questions and was properly excluded. *Id.* at 98.

4. Motion for Mistrial

State v. Sparks, 336 Or 298, 83 P3d 304, *cert den*, 543 US 893 (2004). The trial court properly did not grant a mistrial *sua sponte* based on the prosecutor's arguments in the penalty phase because it was not beyond dispute that the comments were so prejudicial as to have denied defendant a fair trial. *Id.* at 321.

State v. Thompson, 328 Or 248, 971 P2d 879, *cert den*, 527 US 1042 (1999). Defendant was convicted of two murders—after defendant and his friend were kicked out of a tavern, he returned to murder a patron and he later, after escaping, stabbed his friend to death. *Held*: Affirmed. The trial court did not abuse its discretion in denying defendant's motion for a mistrial based on a witness's reference to an alleged sex-abuse charge against defendant. The prosecutor had instructed the witness not to mention the sex-abuse charge, the witness's statement was inadvertent, and the trial court immediately gave a curative instruction. *Id.* at 271.

State v. Moore, 324 Or 396, 927 P2d 1073 (1996). [1] Denial of defendant's mistrial motion is reviewed for abuse of discretion. [2] Trial court did not abuse its discretion in denying defendant's mistrial motion which was based on a claim of juror misconduct because, after questioning of the juror, the court did not believe that the misconduct occurred. [3] The court also did not abuse its discretion in denying defendant's request for an additional evidentiary hearing on the issue of juror misconduct: the court allowed defendant to make an adequate offer of proof, and the court was not obligated to allow further questioning of the juror, who the court already had found credible. *Id.* at 423-26.

5. Sufficiency of Evidence

State v. Moore, 324 Or 396, 927 P2d 1073 (1996). [1] Oregon law provides for judicial review of a jury's decision to impose the death penalty. [2] The evidence in this case was sufficient to support the jury's verdict. *Id.* at 430-34.

6. Closing Argument

State v. Sparks, 336 Or 298, 83 P3d 304, *cert den*, 543 US 893 (2004). The trial court properly did not grant a mistrial *sua sponte* based on the prosecutor's arguments in the penalty phase because it was not beyond dispute that the comments were so prejudicial as to have denied defendant a fair trial. *Id.* at 321.

State v. Compton, 333 Or 274, 39 P3d 833, *cert den*, 537 US 841 (2002). Defendant sexually assaulted, tortured, and murdered his girlfriend's 2-year-old daughter. *Held*: Affirmed. The prosecutor's

arguments during the penalty phase concerning the last days of the victim's life did not deprive defendant of a fair sentencing. *Id.* at 293-94.

State v. McNeely, 330 Or 457, 8 P3d 212, *cert den*, 531 US 1055 (2000). [1] A prosecutor is entitled under ORS 163.150(1)(a) and ORCP 58 B(4) to make closing argument on the fourth question. [2] In this case, the prosecutor's penalty-phase argument remarking upon defendant's failure to take responsibility for his conduct was not an improper comment on the his failure to testify, but rather was a reference to the his past failures. *Id.* at 468.

State v. Simonsen, 329 Or 288, 986 P2d 566 (1999), *cert den*, 528 US 1090 (2000). Defendant and codefendant Williams kidnapped, sexually assaulted, and murdered two German women who were hitchhiking; defendant pleaded guilty and was sentenced to death twice. *Held*: Affirmed. The prosecutor made the following statements, without objection, during closing argument: (1) a life sentence "would laugh

[defendant's] crime off"; (2) "[a]ll [the prosecutor] wants in this case is justice, a punishment that fits the crime according to the law"; (3) defendant should not "walk away" from the crime and go to the Oregon State Penitentiary, which "sounds kind of like a racquetball club, to [the prosecutor]"; and (4) the jurors' "duty" was to sentence defendant to death. None of these statements was so prejudicial that the trial court abused its discretion by failing to declare a mistrial on its own motion. *Id.* at 301.

State v. Thompson, 328 Or 248, 971 P2d 879, *cert den*, 527 US 1042 (1999). The trial court did not abuse its discretion in denying defendant's motion to strike a portion of the prosecutor's rebuttal closing argument. The argument was in response to defendant's testimony, and the trial court was in the best position to assess whether the argument was appropriate. *Id.* at 273.

7. Allocution

State v. Rogers, 330 Or 282, 4 P3d 1261 (2000). Although a defendant has the right to give an unsworn statement in the penalty phase of a capital case, the trial court judge may require the defendant to read a prepared statement without offending the constitution. But a trial court may not restrict the substance of the statement to eliminate relevant mitigating information. *Id.* at 305-08.

8. Instructions

(a) Instructions—generally

State v. Rogers, 352 Or 510, 288 P3d 544 (2012). The trial court correctly did not instruct jurors on "third question" in ORS 163.150(1)(b)(C). [1] 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." 352 Or at 526-27. [2] The third question is not unconstitutionally vague. *Id.* at 527-28. [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. *Id.* at 528-30.

State v. Longo, 341 Or 580, 148 P3d 892 (2006), *cert den*, 128 S Ct 65 (2007). Defendant murdered his wife and children; he pleaded guilty to some of the murder charges. *Held*: Affirmed. The fourth question (whether the defendant should be sentenced to death) does not require proof beyond a reasonable doubt because it does not involve any determination of *fact*. *Id.* at 605-06.

State v. Acremant, 338 Or 302, 108 P3d 1139, *cert den*, 546 US 846 (2005), and 546 US 1108 (2006). Application of ORS 163.150(1)(c)(B) (1997)—the instructions to the jury that they should consider victim-impact evidence and aggravating evidence in deciding whether a defendant should receive the death penalty—did not violate constitutional *ex post facto* provisions. *Id.* at 316.

State v. Guzek, 336 Or 424, 86 P3d 1106 (2004), *rev'd and remanded sub nom. Oregon v. Guzek*, 546 US 517 (2006), *op on remand*, 342 Or 345 (2007). Defendant was convicted of two counts of aggravated murder and sentenced to death for two murders he committed in 1987. Due to errors in his first two penalty phase trials, defendant received remands for new penalty phases. *Held*: Reversed and remanded on other issue. Defendant challenged the admission of victim-impact evidence on the ground that the statute was not in existence when he committed the offenses and thus was an *ex post facto* law. Although application of the victim-impact provision to defendant was an *ex post facto* law under the state constitution, the evidence would be admissible against defendant on remand because the *ex post facto* prohibition was superseded by the victims' right to be heard at sentencing under Art I, § 42(1)(a). *Id.* at 441-42.

State v. Compton, 333 Or 274, 39 P3d 833, *cert den*, 537 US 841 (2002). The Eighth Amendment does not require the trial court at the penalty phase to instruct the jurors that they can consider aggravating factors only with respect to defendant's character or the circumstances of the crime. *Id.* at 295.

State v. Simonsen, 329 Or 288, 986 P2d 566 (1999), *cert den*, 528 US 1090 (2000). Defendant and codefendant Williams kidnapped, sexually assaulted, and murdered two German women who were hitchhiking; defendant pleaded guilty and was sentenced to death twice. *Held*: Affirmed. The trial court was not required to instruct the jury that the defendant would receive consecutive sentences if he did not receive the death penalty, because the trial court would have had discretion not to impose consecutive sentences. *Id.* at 296-97.

State v. Montez, 324 Or 343, 927 P2d 64 (1996), *cert den* 520 US 1233 (1997). Defendant and 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, defendant again was sentenced to death. *Held*: Affirmed. [1] Jury instruction that correctly stated the possibility of release of a person sentenced to life imprisonment was properly given in this case because it was relevant to defendant's future dangerousness. *Id.* at 357-61. [2] Trial court correctly declined to give defendant's requested special instruction defining "deliberately." The instructions given adequately addressed the issue. [3] The trial court correctly instructed the jury in accordance with the 1991 amendments to the capital-sentencing scheme; that did not violate the constitutional *ex post facto* or due-process clauses. *Id.* at 363-65.

State v. Moore, 324 Or 396, 927 P2d 1073 (1996). [1] The trial court correctly declined to give defendant's requested instruction that would have allowed the jurors to consider sympathy toward him "if that sympathy is based on mitigating evidence." *Id.* at 427-28. [2] The trial court correctly declined to give defendant's requested instruction on "the ultimate decision"; the instructions given were sufficient. *Id.* at 428-29.

State v. Terry, 333 Or 163, 37 P3d 157 (2001), *cert den*, 536 US 910 (2002). The trial court properly instructed the jurors during the penalty phase that they could consider any aspect of defendant's life in answering the statutory questions. *Id.* at 168-69.

State v. Langley, 331 Or 430, 16 P3d 489 (2000). This case was before the court for the second time on automatic and direct review of a sentence of death. Defendant argued that the trial court erred by failing to instruct the jury in the penalty phase that a witness was an accomplice and her testimony should be viewed with distrust. *Held*: Sentence of death vacated on other ground; remanded for further proceedings. The requirement that accomplice testimony must be corroborated (ORS 136.440(1)) applies only during the guilt phase; it does not apply in the penalty phase of an aggravated-murder trial. *Id.* at 454.

(b) Instructions—the "true life" option

State v. Guzek, 336 Or 424, 86 P3d 1106 (2004), *rev'd and remanded sub nom. Oregon v. Guzek*, 546 US 517 (2006), *op on remand*, 342 Or 345 (2007). Defendant was convicted of two counts of aggravated murder and sentenced to death for two murders he committed in 1987. Due to errors in his first two penalty phase trials, defendant received remands for new penalty phases. At his third penalty-phase proceeding, defendant moved to have the trial court instruct the jury on the option of sentencing him to life imprisonment without the possibility of parole (true life), which the legislature had enacted after defendant had committed his crimes. To that end, defendant expressly waived all constitutional *ex post facto* guarantees that otherwise would have protected him from retroactive application of that option. The trial court denied defendant's motion and did not instruct the jury regarding true life. The jury again sentenced defendant to death. *Held*: Reversed and remanded. Defendant challenged the trial court's ruling regarding the true-life sentence instruction, and the state conceded error pursuant to *State v. McDonnell*, 329 Or 375 (1999). The court accepted the state's concession that defendant was entitled to the "true life" instruction because he had waived his protection from *ex post facto* laws. *Id.* at 430.

State v. Rogers, 330 Or 282, 4 P3d 1261 (2000). A defendant can waive an objection to the protections of the *ex post facto* clauses and have the jury consider the option of true life. This waiver does not need to be in any particular form. *Id.* at 291.

State v. McDonnell, 329 Or 375, 987 P2d 486 (1999). The 1989 and 1991 amendments to the death-penalty statutes were intended to apply to proceedings that occurred after their enactment. A defendant is entitled to waive the protections of the *ex post facto* clause of the Oregon Constitution (Art I, § 21) and demand that the penalty-phase jury consider a true-life option even though such an option was not available when he committed his crime. A trial court's failure to give effect to that waiver constituted reversible error. *Id.* at 385-92.

State v. Langley, 331 Or 430, 16 P3d 489 (2000). This case was before the court for the second time on automatic and direct review of a sentence of death. Defendant argued that the trial court erred when it refused to allow the jury to consider the option of imposing a sentence of true life. Defendant attempted to waive his *ex post facto* objections to a true-life sentence but the court refused to allow him to do so. The trial court instructed the jury as to the sentencing options in effect at the time of defendant's crime, death or ordinary life. *Held*: Sentence of death vacated; remanded for further proceedings. [1] Determination in defendant's first appeal that the retroactive application of the true-life sentencing option over defendant's objection violated *ex post facto* did not preclude, under the "law of the case" doctrine, a subsequent determination of whether defendant could waive the protection of the state and federal *ex post facto* during re-sentencing; however, an appellate determination concerning waiver of the psychotherapist privilege with respect to particular documents was binding on the trial and appellate courts when those documents were subsequently offered at re-sentencing. *Id.* at 439-40. [2] Trial court erred when it did not retroactively apply the option of true life and so instruct the jury, because defendant waived any *ex post facto* objection to the retroactive application of the true-life option. *Id.* at 440.

9. Sentence

(a) Sentence—merger of convictions

State v. Tiner, 340 Or 551, 135 P3d 305 (2006), *cert den*, 127 S Ct 1125 (2007). The sentencing court erred when it entered a separate conviction and sentence of death on the two counts of aggravated murder, and a separate conviction and sentence for intentional murder, based on defendant's murder of the single victim. *Id.* at 567.

State v. Bowen, 340 Or 487, 135 P3d 272 (2006), *cert den*, 549 US 1214 (2007). [1] Because defendant was convicted of two counts of aggravated murder for killing one victim, and each count alleged a different theory of aggravated murder, the court erred when it entered two judgments of conviction and two sentences of death. The case was remanded to the trial court for entry of one judgment of conviction which enumerated both theories, and for entry of one sentence of death. *Id.* at 527. [2] The court also incorrectly sentenced defendant for both the conviction for intentional murder and the conviction for aggravated felony murder. Because intentional murder is a lesser-included offense of aggravated felony murder, the court committed plain error in failing to merge the convictions. *Id.* at 529.

State v. Gibson, 338 Or 560, 113 P3d 423, *cert den*, 546 US 1044 (2005). Defendant was convicted of two alternative counts of aggravated murder for killing a single victim, the court imposed a death sentence on each, and defendant did not object. *Held*: The sentencing court committed plain error under *State v. Barrett* by entering two convictions. "We remand the case for entry of a corrected judgment of conviction reflecting defendant's guilt on the charges of aggravated murder" but the judgment should merge the two convictions while separately enumerating the aggravating factors upon which each conviction is based. *Id.* at 577-78.

State v. Acremant, 338 Or 302, 108 P3d 1139, *cert den*, 546 US 846 (2005), and 546 US 1108 (2006). Defendant murdered two women; he pleaded guilty to all charges. Defendant was convicted of two alternative counts of aggravated murder for each of his two victims, and defendant did not object. *Held*: The sentencing court committed plain error under *State v. Barrett* by entering two convictions for each victim. “We therefore remand the case for entry of a corrected judgment of conviction reflecting defendant’s guilt on the charge of aggravated murder for each victim, with the judgment separately enumerating the aggravating factors upon which each conviction is based.” *Id.* at 330.

State v. Sparks, 336 Or 298, 83 P3d 304, *cert den*, 543 US 893 (2004). Defendant was convicted on 15 counts of aggravated murder and five noncapital offenses based on his sexual assault and murder of a 12-year-old girl. *Held*: Affirmed. The sentencing judgment, which stated that defendant “is sentenced to death on all fifteen counts” of aggravated murder did not impose multiple death sentences. *Id.* at 321.

State v. Hale, 335 Or 612, 75 P3d 448 (2003), *cert den*, 541 US 942 (2004) (Lane). Defendant and codefendant murdered three teenagers in a wooded area outside Eugene. The jury found defendant guilty of most of the crimes charged, including 13 counts of aggravated murder, and sentenced him to death. *Held*: Affirmed in part, reversed and remanded. The trial court erred when it entered multiple judgments and sentences of death for the aggravated murder of each of the three victims in the case. *Id.* at 631.

(b) Sentence—other issues

State v. Haugen, 349 Or 174, 243 P3d 31 (2010). Defendant and Jason Brumwell, both inmates at OSP, were found guilty of killing a third inmate, and the jury imposed a death sentence. *Held*: Affirmed. ORS 137.123(3) does not require that the execution of defendant’s death sentence must be delayed until after he has served his life sentence imposed on his earlier murder conviction. The statutes providing for the imposition of a death sentence are a more specific expression of legislative intent when compared with a sentence of incarceration, because a sentence of death is exceptional. Thus, that particular legislative intent controls over the general intent of the legislature, expressed in ORS 137.123(3), that sentences for crimes committed in prison must be consecutive to previously imposed sentences. *Id.* at 200-05.

State v. Zweigart, 344 Or 619, 188 P3d 242 (2008), *cert den*, 130 S Ct 56 (2009). Defendant murdered his wife with the help of his girlfriend’s nephew, whom defendant solicited to commit the murder. [1] The sentencing court erred when, based on findings it made under ORS 137.123(5)(a), it ordered defendant to serve the sentence on the robbery conviction consecutively to the death sentence on the conviction for aggravated murder, which was based on the same incident, same victim. *Id.* at 638. (*Note*: This holding is no longer good law in light of *State v. Ice*, 346 Or 95 (2009).) [2] The consecutive sentences the court imposed on the other convictions, however, are not error under *Ice* because those counts named different victims and hence, by its verdicts, “the jury necessarily found beyond a reasonable doubt” that defendant committed those crimes against different victims, ORS 137.123(5)(b). *Id.* at 640-41.

State v. Running, 336 Or 545, 87 P3d 661, *cert den*, 543 US 1005 (2004). Defendant murdered two women in a bar and received a true-life sentence for one count and was sentenced to death for the other. The trial court did not violate ORS 163.105(1)(b) when it ordered defendant’s true-life sentence to be served consecutively to his death sentence. *Id.* at 564.

D. APPEAL AND REVIEW

1. Right to Appeal

State ex rel. Carlile v. Frost, 326 Or 607, 956 P2d 202 (1998). The state may appeal under ORS 138.060(3) from an order excluding evidence that is entered prior to a penalty-phase retrial.

2. Record on Review

State v. Acremant, 338 Or 302, 108 P3d 1139, *cert den*, 546 US 846 (2005), and 546 US 1108 (2006). Defendant was convicted of four counts of aggravated murder based on his murder of two women; he pleaded guilty to all charges. Approximately 90 minutes of trial audiotape were accidentally erased. The trial court had authority to correct the record by adding a reconstruction of events despite automatic appeal. Defendant was not entitled to a new trial based on the missing audiotape because, even assuming that he showed “due diligence” in reconstructing the record, he did not make a *prima facie* showing of error in the trial or a miscarriage of justice. *Id.* at 339-40.

3. Preservation of Error / Waiver

State v. Haugen, 349 Or 174, 243 P3d 31 (2010). Defendant and Jason Brumwell, both inmates at OSP, were found guilty of killing a third inmate, and the jury imposed a death sentence. On review, defendant asserted that the trial court erred in admitting testimony from psychologists who evaluated him for the parole board and in connection with the presentence investigation in the trial for his earlier murder. *Held*: Affirmed. Defendant failed to preserve for review his *Brown/O’Key* “scientific foundation” argument concerning the psychologists’ testimony at penalty phase, because he failed to satisfy his obligation to make specific objections to the particular parts of their testimony he believed were not supported by the requisite foundation *at the time of their testimony*—his general pretrial motion challenging a wide range of evidence on *Brown/O’Key* grounds, on which the trial court reserved a ruling with respect to the psychologists’ testimony, was insufficient to preserve the argument presented on review. *Id.* at 198-99.

State v. Zweigart, 344 Or 619, 188 P3d 242 (2008), *cert den*, 130 S Ct 56 (2009). Defendant murdered his wife with the help of his girlfriend’s nephew, whom defendant solicited to commit the murder. Based on the men’s prior agreement, the nephew entered the house while defendant and his wife were home, and, after staging an apparent robbery, either defendant or the nephew shot the victim while she was lying on the floor. Each later claimed that the other was the shooter. The jury found defendant guilty on count 1 (aggravated murder by soliciting another to commit the murder and paying the person money for committing the murder, ORS 163.095(1)(b)) and counts 2 and 3 (aggravated felony murder by personally and intentionally killing the victim during the course of committing a felony, ORS 163.095(2)(d)). Defendant argued for the first time on appeal that the trial court committed “plain error” by failing to *sua sponte* give a jury instruction to the effect that the jurors had to agree, on Count 1, that the nephew (rather than defendant) was the person who pulled the trigger and killed the victim. His argument was based on a perceived conflict between the guilty verdicts; he claimed that count 1 required the jury to find that the *nephew* fired the fatal shot, whereas counts 2 and 3 required the jury to find that *defendant* fired the shot. The state responded that no conflict existed, because ORS 163.095(1)(b) does not require the person who was solicited to commit the murder to pull the trigger, and that it is possible for two people to “personally” cause a death even if only one of those people pulls the trigger. *Held*: The court declined to answer that “interesting” question, concluding that the instructions given by the trial court in fact *did* instruct the jurors that, to find defendant guilty on count 1, they had to agree that the *nephew* fired the gun; the court held that the instructions given on count 2 required the jurors to agree that defendant was the triggerman. *Id.* at 247-8. *Then*, based on those conclusions, the court stated that the instructions given sufficiently required jury unanimity on those theories of the identity of the triggerman. Thus, it concluded that there was no need for any additional “jury unanimity” instruction under *Boots*. And, to the extent that the jury’s unanimous verdicts were inconsistent with each other, the court noted the statutory procedure in ORS 136.480, which permits a defendant to ask to have jurors reconsider their verdicts, and concluded that it would not review defendant’s “inconsistent verdicts” claim on review because of his failure to seek to use the statutory procedure for avoiding inconsistent verdicts. *Id.* at 629-31.

State v. Guzek, 342 Or 345, 153 P3d 101 (2007). This case was remanded by the United States Supreme Court after it reversed the previous Oregon Supreme Court decision holding that defendant had an Eighth Amendment right in the sentencing phase to present transcripts of alibi testimony that had been

admitted in the guilt phase, as well as new live alibi (or “residual doubt”) testimony. *Oregon v. Guzek*, 546 US 517 (2006). (defendant had no right under the Eighth Amendment to present the proffered alibi evidence). *Held*: Reversed and remanded. Although the defendant originally framed his challenge in the appellate courts to the trial court’s exclusion of “alibi” evidence in terms of the Eighth Amendment to the United States Constitution, the “broad legal issue regarding the admissibility of alibi evidence” in the penalty phase was sufficiently preserved below, and thus the new arguments raised by defendant in his supplemental briefs were reviewable on direct review. *Id.* at 351.

State v. Bowen, 340 Or 487, 135 P3d 272 (2006), *cert den*, 549 US 1214 (2007). [1] The trial court did not commit reversible error by requiring defendant, who was charged with aggravated murder, to wear a “stun belt” during trial. Defendant did not object to the belt at trial, but he argued on appeal that that was plain error, relying on earlier decisions that had held that forcing a defendant to appear before a jury in shackles was inherently prejudicial to the defendant. Because the stun belt was not visible to the jurors, the cases finding jury bias from leg shackling were not applicable, and defendant failed to make a record that wearing a stun belt may have affected his ability to assist in his defense. Consequently, the court did not find plain error. *Id.* at 496. [2] The trial court sustained the state’s relevance objection a question defense counsel asked his ballistics expert. Even though defense counsel did not make an offer of proof, defendant argued on appeal that his claim of error was reviewable under OEC 103(1)(b) “because the substance of [the witness’s] proffered testimony was apparent from the context of his direct examination.” *Held*: “Without an offer of proof to that effect, however, defendant failed to make an adequate record for this court to review.” [3] Defendant failed to preserve his claim of error regarding the adequacy of the cautionary instruction, because he did not object or request a supplemental instruction per ORCP 59 H. *Id.* at 507.

State v. Johnson (Martin Allen), 340 Or 319, 131 P3d 173, *cert den*, 549 US 1079 (2006). The Supreme Court refused to consider defendant’s complaints about access to legal materials because his counsel failed to follow through with the trial court’s direction to schedule a special hearing to consider those complaints. *Id.* at 351.

State v. Barone, 329 Or 210, 986 P2d 5 (1999), *cert den*, 528 US 1086 (2000). Defendant is a serial murderer who sexually assaulted and murdered several women; he also was convicted and sentenced to death in a separate case. *Held*: Affirmed. A defendant who wishes to sever properly joined charges must point to specific facts present in his case that would show that joinder would prejudice him. He may not rely upon “general” considerations of prejudice that would be present in any case involving joined charges of that type. Under the facts as presented by the defendant, the trial court did not err in allowing charges based on three separate murders to be tried to the same jury. Because defendant’s “[s]ummary reference to ‘due process’ is insufficient to present any specific due process argument” about the trial court’s refusal to sever charges for trial, “we decline to address it.” *Id.* at 217-18.

State v. Thompson, 328 Or 248, 971 P2d 879, *cert den*, 527 US 1042 (1999). In the trial court, defendant objected to the *disclosure* of his juvenile court records, citing ORS 419A.255. On review, he argued that the *admission* of evidence from his juvenile court records violated his constitutional rights, but, at trial, he did not object to the admission of any such evidence. He thus failed to preserve any error for review. *Id.* at 269.

State v. Barone, 328 Or 68, 969 P2d 1013 (1998), *cert den*, 528 US 1135 (2000). [1] Defendant’s motion for mistrial based on the state’s alleged failure to provide discovery (the names and addresses of all witnesses) was not timely and, therefore, did not preserve any error for review. Defendant waited to move for a mistrial until after the witnesses had testified. *Id.* at 90. [2] Alleged error in allowing police officer to comment on another witness’s credibility was not preserved for review. *Id.* at 85.

State v. Hayward, 327 Or 397, 963 P2d 667 (1998). Defendant and several other young men staged a robbery at a DariMart and murdered one clerk and severely beat a second. [1] Defendant’s motion for a mistrial, based on the ground that evidence of death-metal music should not have been admitted was not

timely, because defendant did not move for a mistrial until after the state had rested its case. *Ibid.* [2] Defendant did not preserve his penalty-phase objection to victim-impact evidence. *Id.* at 414.

State v. Moore, 324 Or 396, 927 P2d 1073 (1996). Because an objection on one ground is not sufficient to preserve another objection, court will not consider defendant's challenges based on OEC 401, OEC 404(3), or the Due Process Clause to the admissibility of certain state's exhibits. At trial, defendant objected based on OEC 403, but he did preserve his other objections. *Id.* at 419.

4. Plain-Error Review

State v. McDonnell, 343 Or 557, 176 P3d 1236 (2007), *cert den*, 129 S Ct 235 (2008). Defendant was on escape status when he murdered a young woman who had picked him up hitchhiking. He originally was found guilty of aggravated murder in 1988 and has been sentenced to death four times, most recently in 2002. Defendant challenge to the validity of the entire retrial proceeding, based on the fact that, in his original trial, he had filed a motion under ORS 14.250 to disqualify a particular judge from presiding over his trial, but, after the 1999 remand by the Supreme Court for the fourth penalty-phase proceeding, the previously disqualified judge was assigned to the case and presided over the penalty-phase retrial. Defendant did not object, but asserted on appeal that his disqualification from the case rendered the judgment void. *Held*: Affirmed. By failing to object, defendant waived any challenge based on the judge's previous disqualification. The disqualification of the judge from any "suit, action, matter or proceeding" under ORS 14.250 extends to both the guilt phase and any penalty phase of an aggravated-murder trial; thus, the court's conduct in presiding over the 2002 penalty-phase retrial rendered the judgment "voidable," and not "void" as a matter of law. Because the record is subject to competing interests (for example, it is possible that the defendant, in 2002, preferred this judge over the other available circuit-court judges), the court refused to exercise its discretion to review the claim as plain error. *Id.* at 570-71.

State v. Bowen, 340 Or 487, 135 P3d 272 (2006), *cert den*, 549 US 1214 (2007). The trial court did not commit reversible error by requiring defendant, who was charged with aggravated murder, to wear a "stun belt" during trial. Defendant did not object to the belt at trial, but he argued on appeal that that was plain error, relying on earlier decisions that had held that forcing a defendant to appear before a jury in shackles was inherently prejudicial to the defendant. Because the stun belt was not visible to the jurors, the cases finding jury bias from leg shackling were not applicable, and defendant failed to make a record that wearing a stun belt may have affected his ability to assist in his defense. Consequently, the court did not find plain error. *Id.* at 496.

State v. Cox, 337 Or 477, 98 P3d 1103 (2004), *cert den*, 546 US 830 (2005). [1] Defendant's argument that the penalty-phase sentencing factors must be pleaded in the indictment was not preserved and would not be reviewed as error apparent on the face of the record. Because the U.S. Supreme Court has not decided "whether the Fourteenth Amendment incorporates the Fifth Amendment right upon which defendant's claim appears to depend, the federal constitutional error that defendant perceives cannot be described as apparent, obvious, or not reasonably in dispute." *Id.* at 499-500. [2] Even if unpreserved claims based on *Crawford v. Washington* are claims of plain error, court would not exercise its discretion to review the claims because, if defendant had objected at trial, the state might have "found other ways to prove the facts that defendant now challenges, or it could have chosen to forgo the testimony and avoid the issue." *Id.* at 500.

State v. Fanus, 336 Or 63, 79 P3d 847 (2003), *cert den*, 541 US 1075 (2004). Defendant murdered General Carl and shot his wife during a home-invasion robbery. Prosecutor's statements that allegedly misinformed jurors that they faced an "all or nothing" choice between guilt or acquittal on all charges did not require a curative instruction and the trial court was not required to *sua sponte* grant a mistrial. *Id.* at 86.

State v. Sparks, 336 Or 298, 83 P3d 304, *cert den*, 543 US 893 (2004). The trial court properly did not grant a mistrial *sua sponte* based on the prosecutor's arguments in the penalty phase because it was not

beyond dispute that the comments were so prejudicial as to have denied defendant a fair trial. *Id.* at 321.

State v. Simonsen, 329 Or 288, 986 P2d 566 (1999), *cert den*, 528 US 1090 (2000). Defendant and codefendant Williams kidnapped, sexually assaulted, and murdered two German women who were hitchhiking; defendant pleaded guilty and was sentenced to death twice. *Held*: Affirmed. The prosecutor made the following statements, without objection, during closing argument: (1) a life sentence “would laugh [defendant’s] crime off”; (2) “[a]ll [the prosecutor] wants in this case is justice, a punishment that fits the crime according to the law”; (3) defendant should not “walk away” from the crime and go to the Oregon State Penitentiary, which “sounds kind of like a racquetball club, to [the prosecutor]”; and (4) the jurors’ “duty” was to sentence defendant to death. None of these statements was so prejudicial that the trial court abused its discretion by failing to declare a mistrial on its own motion. *Id.* at 301.

State v. Montez, 324 Or 343, 927 P2d 64 (1996), *cert den* 520 US 1233 (1997). Trial court’s failure to grant a mistrial *sua sponte* based on the prosecutor’s penalty-phase closing argument amounts to “plain \ error” on appeal only if it is beyond dispute that the prosecutor’s comments were so prejudicial as to have denied the defendant a fair trial. *Id.* at 356-57.

5. Harmless Error / Right for Wrong Reason

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] The trial court erred by empaneling an “anonymous jury.” 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” 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. 352 Or at 540-42. [2] 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. *Id.* at 543-46.

State v. Bowen, 340 Or 487, 135 P3d 272 (2006), *cert den*, 549 US 1214 (2007). [1] The prosecutor misread defendant’s rap sheet (he erroneously believed that defendant had a felony theft conviction within the past 15 years) and asked him, on cross-examination, whether he had been convicted of any felonies other than those to which he had admitted on direct. Defendant answered that he had a prior manslaughter conviction, which was not admissible as impeachment because it was over 15 years old. The trial court denied defendant’s motion for a mistrial but gave a cautionary instruction. *Held*: The prosecutor’s behavior, “though careless,” was not a deliberate attempt to admit improper evidence, the court gave a strong immediate curative instruction, and defendant’s admission of the manslaughter conviction violated only an evidentiary, not a constitutional, rule. The jurors are assumed to have followed that instruction. *Id.* at 510-11. [2] Defendant requested an instruction on first-degree manslaughter as a lesser-included offense of aggravated felony murder, but the court denied his request, reasoning that the jurors would first have to consider the charges of aggravated felony murder, then the murder charge, and only if they found defendant not guilty on those counts would they consider the lesser-included offense of first-degree manslaughter. So, the court gave the manslaughter instruction but only as a lesser-included offense of intentional murder. *Held*: The court erred in refusing to give the manslaughter instruction as a lesser-included of aggravated felony

murder. Because intentional murder is a lesser-included offense of aggravated felony murder, and manslaughter is a lesser-included offense of intentional murder, defendant was entitled to the manslaughter instruction as a lesser-included of aggravated felony murder. But the error was harmless, because the court instructed the jury to consider the instructions as a whole, and when taken as a whole, the instructions adequately informed the jury of the possible verdicts it could return on all the counts, depending on how it resolved the facts. *Id.* at 517.

State v. Gibson, 338 Or 560, 113 P3d 423, *cert den*, 546 US 1044 (2005). The trial court erred in admitting evidence in rebuttal that defendant had suggested to a companion, after the murder, that she engage in prostitution to support them, because the evidence was not relevant. But that error was harmless under the circumstances. *Id.* at 576-77.

State v. Hale, 335 Or 612, 75 P3d 448 (2003), *cert den*, 541 US 942 (2004). Defendant and codefendant murdered three teenagers in a wooded area outside Eugene. The jury found defendant guilty of most of the crimes charged, including 13 counts of aggravated murder, and sentenced him to death. Defendant argued that the instructions to the jury on 10 of the 13 aggravated murder counts, alleging murder committed to conceal the crime of or the identity of the perpetrator of the crime of third-degree sexual abuse, and alleging murder committed to conceal the crime of or the identity of the perpetrator of the crime of murder, were insufficient to ensure the requisite degree of jury unanimity because there were multiple potential victims and perpetrators for each of those underlying crimes. *Held*: [1] The jury instructions were insufficient because they did not either limit the jury's consideration to a specific instance of third-degree sexual abuse or murder, committed by a particular perpetrator against a particular victim, or require jury unanimity concerning a choice among alternative scenarios and, therefore, they carried an impermissible danger of jury confusion as to the crime underlying each count. *Id.* at 627. The error was prejudicial as to those counts alleging the predicate offense of sexual abuse, and, as a consequence, the court reversed those six convictions and vacated the sentences of death. *Id.* at 629. [2] The error was harmless, however, with respect to the seven counts involving the underlying crime of murder, because the jury's unanimous convictions on other aggravated murder counts demonstrated the required degree of unanimity. *Ibid.*

State v. Terry, 333 Or 163, 37 P3d 157 (2001), *cert den*, 536 US 910 (2002). Witness's passing reference to a polygraph examination what defendant took did not require a mistrial, and the curative instruction the court provided was sufficient to neutralize any possibility of prejudice. *Id.* at 176-77.

State v. Barone, 329 Or 210, 986 P2d 5 (1999), *cert den*, 528 US 1086 (2000). Defendant is a serial murderer who sexually assaulted and murdered several women; he also was convicted and sentenced to death in a separate case. *Held*: [1] Initially misinstructing a jury does not necessitate a mistrial or reversal so long as the jury is eventually properly instructed. The trial jury in this case was improperly instructed regarding the elements of felony murder. It deliberated and returned verdicts, but before those verdicts were read and received, the trial court correctly instructed the jury and the jury redeliberated. Under these circumstances the trial court was not required to declare a mistrial. *Id.* at 242-43. [2] The trial judge neglected to administer the juror's oath. The court discovered its error after the jurors had returned a verdict, but before the court had received the verdicts and dismissed the jury. The court examined each juror and was found that no misconduct had occurred. It then instructed the jury to redeliberate. The jury did so, returning verdicts identical to those it had previously reached. Although the court erred in failing to swear in the jury earlier, the error was harmless. The court's *voir dire* of the jury reflected no "substantial basis for concern that the jury would not follow the court's instructions [to deliberate 'anew.']" The trial court thus acted correctly by denying the defendant's motion for a mistrial.

Note: The Supreme Court noted that it has never applied a "structural error" doctrine—under which certain errors require reversal absent a showing of actual prejudice—under the Oregon Constitution. *Id.* at 225-27.

State v. Rogers, 330 Or 282, 4 P3d 1261 (2000). Even if the legal reasoning for a ruling is incorrect, the appellate court will affirm if there was another legally correct reason and if the record developed in the

trial court supports the ruling to the extent necessary. *Id.* at 295.

State v. Montez, 324 Or 343, 927 P2d 64 (1996), *cert den* 520 US 1233 (1997). [1] Erroneous admission of evidence during penalty phase that impeached defendant’s witnesses was harmless because the jury heard substantially similar evidence that was introduced without objection. *Id.* at 355. [2] Defendant’s claim that the trial court erred by not applying Evidence Code during penalty-phase retrial does not provide basis for relief, because he did not establish that any evidence was admitted that would not have been properly admitted under code. *Id.* at 348.

State v. Wilson, 323 Or 498, 918 P2d 826 (1996), *cert den* 519 US 1065 (1997). Defendant’s absence from a preliminary jury orientation was harmless error, not structural error. *Id.* at 504-09.

6. Proceedings on Remand

State v. Bowen, 352 Or 109, ___ P3d ___ (2012). Defendant was convicted of on a couple of alternative counts of aggravated murder and was sentenced to death. On direct review, the Supreme Court rejected all of defendant’s claims of error—including a challenge to the use of a stun belt as a security device—and affirmed his convictions and death sentence. But the court held that the sentencing court erred by not merging the convictions for aggravated murder; the court remanded for entry of a corrected judgment. *State v. Bowen*, 340 Or 487 (2006). Defendant immediately filed a petition for post-conviction relief, and the trial court did not enter a corrected judgment. After a few years, the parties to the post-conviction proceeding realized that the corrected judgment had not yet been entered, and the district attorney in 2010 filed a motion to enter a corrected judgment. In response, defendant filed: (1) a motion contending that the court had to conduct a new sentencing hearing per ORS 138.012; (2) a motion for new trial based on the use of the stun belt at trial; and (3) a motion to dismiss for denial of a speedy trial. The trial court denied those motions, ruling that the remand order required it simply to enter a corrected judgment, and that is all it did. *Held*: Affirmed. [1] “Because this court’s intended disposition in *Bowen I* was to remand solely for entry of a corrected judgment, the corollary result is that the court did not intend that the remand proceed pursuant to the resentencing provisions set out in ORS 138.012(2)(a).” *Id.* at 115-16. [2] “It follows that the error identified in *Bowen I* was remedied by entry of a corrected judgment for a single conviction of aggravated murder and a single sentence of death, which, in turn, ensured that defendant’s record accurately reflected the crimes for which he was convicted. That narrow result is consistent with our statutory and constitutional obligations to affirm the verdict and judgment of the trial court unless an error affects a substantial right of a party. In summary, in denying defendant’s motion to follow ORS 138.012, the trial court on remand correctly reasoned that, consistently with *Bowen I*, ORS 138.012(2)(a) did not apply to the remand proceedings. Instead, this court’s remand direction in *Bowen I* was limited to entry of a corrected judgment, which the trial court entered on remand.” *Id.* at 118. [3] The trial court correctly denied defendant’s motion for new trial as untimely and not properly before the court: “We agree with the trial court that defendant was not permitted to relitigate the stun device issue on remand.” *Id.* at 119-20. [4] The trial court correctly rejected defendant’s speedy-trial claim: “Although nothing in the record justifies the delay that occurred, no prejudice to defendant resulted from the delayed entry of the corrected judgment that implicates either Article I, section 10, of the Oregon Constitution or the Sixth Amendment to the United States Constitution. We ... affirm the trial court’s denial of defendant’s motion to dismiss.” *Id.* at 120-21.

State v. Simonsen, 329 Or 288, 986 P2d 566 (1999), *cert den*, 528 US 1090 (2000). Defendant and codefendant Jeffery Williams kidnapped, sexually assaulted, and murdered two German women who were hitchhiking; defendant pleaded guilty and was sentenced to death twice. *Held*: A defendant may not withdraw a guilty plea if his case is remanded from an appeals court only for resentencing. *Id.* at 292.

State ex rel. Carlile v. Frost, 326 Or 607, 956 P2d 202 (1998). Under ORS 163.150(5)(d), the judge presiding over the penalty-phase retrial is not to determine anew whether disputed evidence is relevant or whether it should be excluded on some other grounds; the only inquiry is whether the court at the earlier proceeding erred in admitting the evidence.

E. POST-CONVICTION PROCEEDINGS

1. Disqualification of Judge

Pinnell v. Palmateer, 200 Or App 303, 114 P3d 515 (2005), *rev den*, 340 Or 483 (2006). Petitioner was convicted of aggravated murder and was sentenced to death, and the judgment was affirmed on direct review. *State v. Pinnell*, 319 Or 438 (1994). He petitioned for post-conviction relief, the court denied all of his claims after a trial, and he appealed. *Held*: Affirmed. The judge did not abuse her discretion in refusing to recuse herself as a result of a conversation she had had with another judge about the mitigation expert who testified in petitioner’s case. It was not an *ex parte* contact, because it was with another judge, and hence there is no presumption of prejudice, and petitioner failed to establish any actual prejudice. *Id.* at 310-12.

2. Trial on Petition

Pinnell v. Palmateer, 200 Or App 303, 114 P3d 515 (2005), *rev den*, 340 Or 483 (2006). Petitioner was convicted of aggravated murder and was sentenced to death, and the judgment was affirmed on direct review. *State v. Pinnell*, 319 Or 438 (1994). He petitioned for post-conviction relief, the court denied all of his claims after a trial, and he appealed. *Held*: Affirmed. The post-conviction court correctly excluded petitioner’s proffered exhibit—unsworn letters between the state and petitioner’s trial counsel—because they did not include inconsistent statements that could impeach counsel’s affidavit testimony. *Id.* at 313.

3. Claims of Inadequate Assistance of Counsel

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. *Id.* at 518-19. [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. *Id.* at 519.

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. The Oregon Supreme Court affirmed. *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.

Claims based on investigation and trial. [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. *Id.* at 665-66, 671-80. [2] 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." *Id.* at 680-85. [3] 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." *Id.* at 679.

Claims based on jury instructions. [4] In light of *State v. Williams*, 313 Or 19, 36-38 (1992), 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. *Id.* at 682. [5] 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. *Id.* at 683-85. [6] 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." *Id.* at 685-87.

Hayward v. Belleque, 248 Or App 141, 273 P3d 926 (2012), *rev den*, 353 Or 208 (2013). In 1994, petitioner and several other young men robbed a DariMart store in Eugene and brutally murdered one clerk (a middle-aged married woman with young children) and seriously injured the other. Evidence presented at trial established that the men were fans of "death metal" music and listened to some immediately before the crime. Petitioner was convicted of aggravated murder and was sentenced to death, and the judgment was affirmed on direct review. *State v. Hayward*, 327 Or 397 (1998). Petitioner then filed a petition for post-conviction relief in Marion County contending that his trial counsel provided constitutionally inadequate assistance in dozens of respects. The post-conviction court denied all of his claims. *Held*: Affirmed.

Claims based on admission of evidence of death-metal music. The post-conviction court

correctly denied petitioner's claim that his trial counsel failed to obtain exclusion of evidence related to death-metal music and Satanism. [1] "When a petitioner in a post-conviction proceeding contends that trial counsel provided constitutionally inadequate assistance by failing to object to evidence, the petitioner is not entitled to post-conviction relief unless such an objection actually would have legal merit. As the Supreme Court held in its opinion on direct review, in light of the state's theory that petitioner and his codefendants were motivated to commit the crimes at least, in part, by death metal music and Satanism, the evidence was relevant to establish that motive." *Id.* at 150. [2] The evidence supports the post-conviction court's finding "that trial counsel's decision not to file a motion *in limine* to exclude the evidence was a tactical one in light of [his] familiarity with the trial court's practice of denying motions *in limine*." *Id.* at 151. [3] "The post-conviction court did not have before it a claim that counsel was ineffective in failing to object to every offer of evidence of Satanism and death metal music. The post-conviction court could not grant relief on a ground not raised in the petition, ORS 138.550(3), and we will not consider on appeal a post-conviction claim not raised in the post-conviction court." *Id.* at 152. [4] Petitioner's reliance on OEC 403 at oral argument provides not basis for relief on appeal because he "did not cite OEC 403 in his appellate briefs and made no specific argument as to how a balancing under OEC 403 would have led the court to conclude that the probative value of the evidence was substantially outweighed by its prejudice." *Id.* at 152-53.

Claims based on mitigating evidence. [5] The post-conviction court properly denied petitioner's claims that his trial counsel failed to hire a mitigation specialist and so did not adequately investigate and present mitigating evidence in the penalty phase. The post-conviction court's findings that trial counsel adequately investigated and made reasonable tactical choices based on the evidence he discovered "are supported by the evidence. Considering the deference to be accorded to trial counsel, we conclude that the post-conviction court did not err in rejecting petitioner's claims concerning the adequacy of counsel's investigation and presentation of mitigation evidence." *Id.* at 155-56.

Claims based on victim-impact evidence. The post-conviction court correctly denied petitioner's claim that his trial counsel failed to object adequately to the admission of victim-impact evidence based on testimony from victim's husband. [6] Under *State v. Metz*, 162 Or App 448 (2000), admission of victim-impact evidence in petitioner's trial based on the 1995 amendment to ORS 163.150(1)(a) violated the state *ex post facto* clause, Art I, § 21, because that amendment "allows the jury to consider adverse evidence that it could not consider previously and that increases the likelihood of a more onerous sentence." *Id.* at 161-62. [7] But "the reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances. Before the Supreme Court's opinion on direct appeal on petitioner's case, we do not think that counsel could reasonably have predicted that a failure to object to the brief foundational testimony that [victim's husband] provided [in the guilt phase] to allow identification of the victim in a photograph could result in a waiver of subsequent objections to additional victim impact evidence in a subsequent penalty phase." *Id.* at 163. [8] The post-conviction court properly concluded that "even if counsel's representation was deficient, the admission of the evidence was not so prejudicial as to establish a basis for post-conviction relief." Although petitioner's expert witness testified in the post-conviction trial that the husband's penalty-phase testimony was "terribly damaging," petitioner "offered no evidence as to how, in light of the evidence concerning the brutality of the crime and [his] lack of remorse, the relatively brief victim-impact evidence had a tendency to cause the jury to choose a death sentence over imprisonment." *Id.* at 165. [9] "The relief that petitioner seeks is a remand for a new penalty-phase trial without the victim-impact evidence. The Supreme Court's holding in [*State v. Guzek*, 336 Or 424, 439-44 (2004),] means that, at a penalty-phase trial on remand, the evidence would be admissible by virtue of the retroactive application of [Art. I, § 42]. Given the change to the Oregon Constitution, there is no meaningful relief available to remedy the *ex post facto* violation. Considering that fact along with the additional factors previously mentioned, we conclude that petitioner has failed to establish prejudice as the result of any representational inadequacy." *Id.* at 165-66.

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*, 520 US 1233 (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.

Pratt v. Armenakis, 199 Or App 448, 112 P3d 371, *adh’d to on recon*, 201 Or App 217, 118 P3d 217 (2005), *rev den*, 340 Or 483 (2006). Petitioner 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 reversed the convictions and remanded for a new trial. *State v. Pratt*, 309 Or 205 (1990). On retrial in 1991, petitioner again was convicted and sentenced to death, and the court affirmed that judgment on direct review. *State v. Pratt*, 316 Or 561, *cert den*, 510 US 969 (1993). He then petitioned for post-conviction relief, and the court

denied all of his claims after a trial. On appeal, petitioner raised a claim that his execution is barred by *Atkins v. Virginia*, 536 US 304 (2002), because he may be mentally retarded, and he asked for remand to litigate that claim. *Held*: Affirmed. [1] Petitioner's new *Atkins* claim cannot be considered on appeal because ORS 138.550(3) precludes review of claims that were not alleged in the petition. The Court of Appeals does not have authority to remand the case for the sole purpose of allowing the petitioner to raise a new claim for post-conviction relief. *Id.* at 454-55. [2] Because petitioner failed to prove that another expert would have provided testimony substantially different from that provided by the defense expert used by trial counsel, he failed to prove that trial counsel unreasonably pursued additional evidence to prove that petitioner suffered from brain damage. *Id.* at 457. [3] Trial counsel reasonably did not seek out and proffer evidence that petitioner's particular sadomasochistic behavior was the product of psychosis when that theory conflicted with the defense theory that the behavior was the product of childhood abuse. *Id.* at 458. [4] The mere fact that petitioner turned down a plea offer for a life sentence with a 30-year minimum term and insisted on a trial with a potential death sentence did not provide a basis on which trial counsel were required to request an aid-and-assist hearing under ORS 161.360. *Id.* at 458-62. [5] The post-conviction court correctly denied his claims that his trial counsel provided inadequate assistance by not asserting an insanity defense based on its finding that petitioner had instructed his counsel not to assert that defense. "A criminal defendant cannot be found guilty but insane if he has not asserted that affirmative defense. ... It follows that, if a court cannot find a criminal defendant guilty but insane pursuant to ORS 161.295 over the defendant's objection, trial counsel cannot reasonably be expected to assert such a defense over the defendant's objection." *Id.* at 463.

Pinnell v. Palmateer, 200 Or App 303, 114 P3d 515 (2005), *rev den*, 340 Or 483 (2006). Petitioner and a codefendant Cornell robbed, hogtied, and murdered the victim during a residential robbery. 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. Pinnell*, 311 Or 98 (1991). On retrial in 1992, petitioner again was sentenced to death, and the judgment was affirmed on direct review. *State v. Pinnell*, 319 Or 438 (1994). He petitioned for post-conviction relief, the court denied all of his claims after a trial, and he appealed. *Held*: Affirmed. [1] The court correctly rejected petitioner's various constitutional challenges to the death-penalty scheme because the claims (a) are barred by *Palmer v. State of Oregon* because he could have raised them at trial and on direct appeal, (b) are barred by ORS 138.550(3) and *Bowen v. Johnson* because he did not allege them in his petition, and (c) have no merit in light of *State v. Oatney* and *Page v. Palmateer*. *Id.* at 315-16. [2] The judge did not abuse her discretion in refusing to recuse herself as a result of a conversation she had had with another judge about the mitigation expert who testified in petitioner's case. It was not an *ex parte* contact, because it was with another judge, and hence there is no presumption of prejudice, and petitioner failed to establish any actual prejudice. *Id.* at 310-12. [3] The post-conviction court correctly excluded petitioner's proffered exhibit, unsworn letters between the state and petitioner's trial counsel, because they did not include inconsistent statements that could impeach counsel's affidavit testimony. *Id.* at 313. [4] The post-conviction court properly denied petitioner's claim of juror coercion, because the juror's affidavit that the court secretary had told him that the judge "would keep us there until we reached a verdict" does not amount to misconduct that would warrant a new trial. *Id.* at 317. [5] The court correctly denied petitioner's claims that his counsel provided inadequate assistance: (a) by not calling a witness, because the witness "could do little, if anything, to impeach" another witness's testimony and hence it was a reasonable tactical decision not to call her; (b) by cross-examining an expert on a particular point, because it was a reasonable tactical decision to take issue with that point; (c) by failing to locate and call another potential witness, because petitioner failed to prove prejudice by failing to present any testimony from that person; (d) by allowing the investigator to disclose information to a witness that caused her to testify truthfully at trial instead of supporting a false alibi, because "petitioner is not entitled to perjured alibi testimony"; (e) by effectively conceding guilt on the felony-murder charge in opening statement, because it was a reasonable tactical decision given the overwhelming evidence and counsel's reasonable choice to contest only petitioner's intent to kill; (f) by failing to *voir dire* the jurors in detail, because counsel had detailed questionnaires available; (g) by failing to do an adequate closing argument, because petitioner failed to prove prejudice; (h) by failing to do an adequate investigation regarding the relative infrequency of violence in prison as possible mitigation, because he failed to demonstrate relevance

or prejudice; (i) by failing to pursue defenses of voluntary intoxication and diminished capacity, because there is no evidence that petitioner was intoxicated during the crime or that he actually has organic brain syndrome; (j) by failing to object to the verdict form, because petitioner failed to produce a copy of the form to demonstrate that it was erroneous as alleged; and (k) for failing to move to dismiss as void under ORS 132.020(4), because he did not allege that claim in his petition and hence it is barred by ORS 138.550(3). *Id.* at 319-44.

Cunningham v. Thompson, 186 Or App 221, 62 P3d 823, *on recon* 188 Or App 289, 71 P3d 110 (2003), *rev den*, 337 Or 327 (2004). Petitioner sexually assaulted and stabbed to death a woman to whom he was giving a ride to Eugene. He was convicted of aggravated murder and was sentenced to death, and the judgment was affirmed on direct review. *State v. Cunningham*, 320 Or 47 (1994), *cert den*, 514 US 1005 (1995). He petitioned for post-conviction relief, the court denied all of his claims after a trial, and he appealed. *Held*: Affirmed. [1] Contains extensive statement of applicable scope of review for a claim of inadequate assistance of counsel. *Id.* at 225-26. [2] Regardless of whether trial counsel should have arranged for a private polygraph examination, petitioner failed to establish that he was prejudiced because the post-conviction court found that the prosecutor would not have accepted a plea to a lesser charge anyway. *Id.* at 230-31. [3] The post-conviction court properly rejected petitioner's claim that counsel should have introduced additional evidence to establish that the rape/murder victim previously may have had sex with other men because he failed to establish that, in light of the other evidence, it would have tended to affect the result of the trial. *Id.* at 236. [4] The court properly denied petitioner's claim that his trial counsel should have requested an instruction on first-degree sexual abuse as a lesser-included offense to the rape charge because (a) given that his defense was consent, "his counsel's deliberate choice not to request [that instruction] was a reasonable tactical choice, and (b) petitioner would not have been entitled to such an instruction in light of *State v. Spring*." *Id.* at 238-9. [5] The court properly denied petitioner's claim that his trial counsel should have requested an instruction on his election not to testify because counsel made a deliberate choice not to request that instruction, "nor was that tactical choice unreasonable." *Id.* at 240. [6] Petitioner failed to make a *prima facie* showing that his counsel provided inadequate assistance by failing to make a record re: shackling, because the record provided a factual basis for restraints and petitioner agreed to the restraints used. *Id.* at 244. [7] The court correctly rejected petitioner's claim that his counsel provided inadequate assistance by failing to argue the evidentiary value of certain items, because "that decision constituted a tactical choice based on reason and professional judgment." *Id.* at 245. [8] The court correctly rejected petitioner's claim that his counsel should have objected to statements in the prosecutor's penalty-phase closing argument as an improper comment on his decision not to testify, because the statement was a proper comment on the limited probative value of certain evidence. *Id.* at 245. [9] The court correctly rejected petitioner's claim that his counsel should have objected to statements in the prosecutor's penalty-phase closing argument as an improper comment on his decision not to testify, because the statement was a proper comment on his lack of remorse, which related to his future dangerousness. *Id.* at 250. [10] The court correctly rejected petitioner's claim that his counsel should have impeached the state's penalty-phase expert for his "licensing and reputation problems" because the value of that evidence was weak and he failed to prove that he was prejudiced. *Id.* at 252-53. [11] The court correctly rejected petitioner's claim that his counsel failed to convey a plea offer, because he failed to prove that an offer in fact was made. *Id.* at 253. [12] Trial counsel did not provide inadequate assistance at the penalty phase by requesting an instruction defining "criminal acts of violence," because the instruction was a correct statement of the law. *Id.* at 255. [13] Trial counsel did not provide inadequate assistance by failing to challenge, on equal-protection grounds, the district attorney's decision to seek the death penalty, because the evidence established "that the county made its charging and sentencing decisions in petitioner's case in a manner that was consistent with a coherent, systematic policy that, moreover, was not prompted by any impermissible discriminatory motive." *Id.* at 257. [14] Trial counsel did not provide inadequate assistance in penalty phase by failing to investigate further a state's witness regarding a prior assault, because he failed to establish that he would have been able to present impeachment evidence that would have been helpful, particularly in light of potential risks. *Id.* at 259.

4. Other Claims for Post-Conviction Relief

Hale v. Belleque, 255 Or App 653, 298 P3d 596 (2013). Petitioner was 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. The Oregon Supreme Court affirmed. *State v. Hale*, 335 Or 612 (2003), *cert den* (2004). He then filed a petition for post-conviction relief and, after a trial, the court rejected all of his claims. *Held*: Affirmed in part and reversed in part. [1] 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. *Id.* at 669-70. [2] 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.” *Id.* at 679.

Pinnell v. Palmateer, 200 Or App 303, 114 P3d 515 (2005), *rev den*, 340 Or 483 (2006). Petitioner was convicted of aggravated murder and was sentenced to death, and the judgment was affirmed on direct review. *State v. Pinnell*, 319 Or 438 (1994). He petitioned for post-conviction relief, the court denied all of his claims after a trial, and he appealed. *Held*: Affirmed. [1] The court correctly rejected petitioner’s various constitutional challenges to the death-penalty scheme because the claims (a) are barred by *Palmer v. State of Oregon* because he could have raised them at trial and on direct appeal, (b) are barred by ORS 138.550(3) and *Bowen v. Johnson* because he did not allege them in his petition, and (c) have no merit in light of *State v. Oatney* and *Page v. Palmateer*. *Id.* at 315-16. [2] The post-conviction court properly denied petitioner’s claim of juror coercion, because the juror’s affidavit that the court secretary had told him that the judge “would keep us there until we reached a verdict” does not amount to misconduct that would warrant a new trial. *Id.* at 317.

Cunningham v. Thompson, 186 Or App 221, 62 P3d 823, *on recon* 188 Or App 289, 71 P3d 110 (2003), *rev den*, 337 Or 327 (2004). Petitioner was convicted of aggravated murder and was sentenced to death, and the judgment was affirmed on direct review. *State v. Cunningham*, 320 Or 47 (1994), *cert den*, 514 US 1005 (1995). He petitioned for post-conviction relief, the court denied all of his claims after a trial, and he appealed. *Held*: Affirmed. Claims of trial-court error that petitioner could have raised at trial and on direct appeal, but did not, cannot provide a basis for post-conviction relief under *Palmer v. State of Oregon*. *Id.* at 224-5.

5. Petition Filed by Third Party

Wright v. Thompson, 324 Or 153, 922 P2d 1224 (1996). [1] Effort by OCDLA to file a post-conviction petition on behalf of death-penalty inmate rejected for lack of “standing”; Oregon law does not recognize “next friend” lawsuits in such cases. [2] Even if there may be circumstances in which someone other than the convicted person may file a petition for post-conviction relief, and assuming that the standards governing the right to file such a proceeding are those applicable to “next friend” filings in the federal system, nevertheless the trial court did not err in refusing to allow someone else to file a petition on Wright’s behalf because the evidence of his supposed incompetence was not sufficient to trigger any further inquiry.

Bryant v. Thompson, 324 Or 141, 922 P2d 1219 (1996). Plaintiffs filed an action for declaratory and injunctive relief, seeking to stay the execution of a death warrant issued for a defendant who had been sentenced to death and had chosen not to file for post-conviction relief. The circuit court dismissed the action. *Held*: Affirmed. Art I, § 10, does not mandate the litigation of an action for post-conviction relief in every death-penalty case. If post-conviction relief is not sought by a person to whom the right belongs, the state constitution does not require that the judicial system conduct some sort of proceeding, either *sua sponte* or at the behest of a third party who is not connected with a person to whom the right belongs.

6. Appeal and Review

Hale v. Belleque, 255 Or App 653, 298 P3d 596 (2013). Petitioner was 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. The Oregon Supreme Court affirmed. *State v. Hale*, 335 Or 612 (2003), *cert den* (2004). He then filed a petition for post-conviction relief and, after a trial, the court rejected all of his claims. *Held*: Affirmed in part and reversed in part. [1] 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. [2] 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).

Hayward v. Belleque, 248 Or App 141, 273 P3d 926 (2012), *rev den*, 353 Or 208 (2013). In 1994, petitioner and several other young men robbed a DariMart store in Eugene and brutally murdered one clerk (a middle-aged married woman with young children) and seriously injured the other. Evidence presented at trial established that the men were fans of “death metal” music and listened to some immediately before the crime. Petitioner was convicted of aggravated murder and was sentenced to death, and the judgment was affirmed on direct review. *State v. Hayward*, 327 Or 397 (1998). Petitioner then filed a petition for post-conviction relief in Marion County contending that his trial counsel provided constitutionally inadequate assistance in dozens of respects. The post-conviction court denied all of his claims. *Held*: Affirmed. [1] “When a petitioner in a post-conviction proceeding contends that trial counsel provided constitutionally inadequate assistance by failing to object to evidence, the petitioner is not entitled to post-conviction relief unless such an objection actually would have legal merit. As the Supreme Court held in its opinion on direct review, in light of the state’s theory that petitioner and his codefendants were motivated to commit the crimes at least, in part, by death metal music and Satanism, the evidence was relevant to establish that motive.” *Id.* at 150. [2] “The post-conviction court did not have before it a claim that counsel was ineffective in failing to object to every offer of evidence of Satanism and death metal music. The post-conviction court could not grant relief on a ground not raised in the petition, ORS 138.550(3), and we will not consider on appeal a post-conviction claim not raised in the post-conviction court.” *Id.* at 152. [3] Petitioner’s reliance on OEC 403 at oral argument provides not basis for relief on appeal because he “did not cite OEC 403 in his appellate briefs and made no specific argument as to how a balancing under OEC 403 would have led the court to conclude that the probative value of the evidence was substantially outweighed by its prejudice.” *Id.* at 152-53. [4] “The relief that petitioner seeks is a remand for a new penalty-phase trial without the victim-impact evidence. The Supreme Court’s holding in [*State v. Guzek*, 336 Or 424, 439-44 (2004),] means that, at a penalty-phase trial on remand, the evidence would be admissible by virtue of the retroactive application of [Art. I, § 42]. Given the change to the Oregon Constitution, there is no meaningful relief available to remedy the *ex post facto* violation. Considering that fact along with the additional factors previously mentioned, we conclude that petitioner has failed to establish prejudice as the result of any representational inadequacy.” *Id.* at 165-66.

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*, 520 US 1233 (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] 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. [2] 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.

Pratt v. Armenakis, 199 Or App 448, 112 P3d 371, *adh’d to on recon*, 201 Or App 217, 118 P3d 217 (2005), *rev den*, 340 Or 483 (2006). Petitioner sexually assaulted and murdered a young woman. He was convicted of aggravated murder and was sentenced to death, and the court affirmed that judgment on direct review. *State v. Pratt*, 316 Or 561, *cert den*, 510 US 969 (1993). He then petitioned for post-conviction relief, and the court denied all of his claims after a trial. On appeal, petitioner raised a claim that his execution is barred by *Atkins v. Virginia*, 536 US 304 (2002), because he may be mentally retarded, and he asked for remand to litigate that claim. *Held*. Affirmed. Petitioner’s new *Atkins* claim cannot be considered on appeal because ORS 138.550(3) precludes review of claims that were not alleged in the petition. The Court of Appeals does not have authority to remand the case for the sole purpose of allowing the petitioner to raise a new claim for post-conviction relief. *Id.* at 454-55.

F. EXECUTION OF SENTENCE

State v. Haugen, 351 Or 325, ___ P3d ___ (2011). Defendant was convicted of aggravated murder and was sentenced to death, and the death sentence was affirmed on direct review. *State v. Haugen*, 349 Or 174 (2010). Defendant then announced that he would not pursue any further legal challenges to his convictions and death sentence, and so Judge Guimond held a death-warrant hearing pursuant to ORS 137.463. At the hearing, defendant was represented by attorneys Simrin and Goody, who took the position, over defendant’s objection, that he was not competent waive further legal challenges, and in support of that position they relied, over defendant’s objection, on an evaluation done by Dr. Lezak. Judge Guimond conducted a colloquy, found that defendant was competent, allowed him to fire Simrin and Goody and proceed *pro se* and to seal Dr. Lezak’s report, and he then issued a death warrant setting an execution date. The Oregon Capital Resource Center (OCRC) filed a petition in the Oregon Supreme Court seeking a writ of mandamus challenging the death warrant, and Simrin and Goody submitted a letter in support. The court concluded that although OCRC had not established “standing,” Simrin and Goody did, and it issued an alternative writ that essentially required Judge Guimond either to have Haugen evaluated pursuant to ORS 137.464 before allowing him to fire his counsel and proceed *pro se* or to show cause why that was not required. Judge Guimond elected to comply and appointed Dr. Hulteng for that purpose. Presiding Judge Rhoades conducted a hearing at which defendant was allowed to fire Simrin and Goody, and she appointed Scholl and Gorham as defendant’s replacement counsel. At a subsequent hearing, Dr. Hulteng testified that defendant is competent, neither party offered Dr. Lezak’s evaluation, and Judge Guimond again conducted a colloquy and determined that defendant voluntarily waived further challenge. Judge Guimond later issued another death warrant scheduling the execution for December 6. OCRC then filed a motion in the Supreme Court in the original mandamus proceeding asking that court to enforce the writ by requiring Judge Guimond to conduct a new hearing at which Dr. Lezak’s evaluation would be presented. *Held*: Request denied. [1] “OCRC has not offered any additional reason why it was entitled in that original petition to seek mandamus on Haugen’s behalf. If OCRC lacked authority to seek a writ of mandamus in the first place, it necessarily follows that it lacks authority to seek to enforce the writ that we issued.” But the court then assumed that it has the authority to consider, on its own motion, to consider whether Judge Guimond fully complied with the writ. *Id.* at 333-34. [2] “Judge Guimond followed through on all procedural actions that our writ required. No further enforcement of the writ is necessary or appropriate.” Nothing in the writ required Judge Guimond to consider Dr. Lezak’s report *sua sponte* or to allow Simrin and Goody to appear to contest defendant’s competency. *Id.* at 335.

Note: Justices Walters, DeMuniz, and Durham dissented, arguing that the writ did require Judge

Guimond to receive and consider Dr. Lezak's opinion. Although they did not question Dr. Hulteng's opinion or the assertions of defense counsel that they also concluded that defendant is competent, they were troubled that Judge Guimond did not consider, in some form, Dr. Lezak's opinion to the contrary.

G. 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 reasons, 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.” *Id.* at 728. [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.” *Id.* at 728. [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.” *Id.* at 743. [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.” *Id.* at 743. [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.” *Id.* at 744-45.

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CITATIONS FOR DEATH PENALTY CASES¹

DIRECT-APPEAL CASES

- State v. Acremant*, 338 Or 302, 108 P3d 1139, *cert den*, 546 US 846 (2005)
- State v. Barone*, 328 Or 68, 969 P2d 1013 (1998), *cert den*, 528 US 1135 (2000) (first case)
- State v. Barone*, 329 Or 210, 986 P2d 5 (1999), *cert den*, 528 US 1086 (2000) (second case)
- State v. Bowen*, 340 Or 487, 135 P3d 272 (2006), *cert den*, 549 US 1214 (2007)
- State v. Bowen*, 352 Or 109, __ P3d __ (2012)
- State v. Brumwell*, 350 Or 93, 249 P3d 965 (2011)
- State v. Brown*, 310 Or 347, 800 P2d 259 (1990)
- State v. Charboneau*, 323 Or 38, 913 P2d 308 (1996)
- State v. Compton*, 333 Or 274, 39 P3d 833, *cert den*, 537 US 841 (2002)
- State v. Cornell/Pinnell*, 304 Or 27, 741 P2d 501 (1987) (*pretrial appeal)
(related to *State v. Pinnell*, below)
- State v. Cox*, 337 Or 477, 98 P3d 1103 (2004), *cert den*, 546 US 830 (2005)
- State v. Cunningham*, 320 Or 47, 880 P2d 431 (1994), *cert den*, 514 US 1005 (1995)
- State v. Danielson*, 79 Or App 278, 719 P2d 44, *rev den*, 301 Or 445 (1986) (*pretrial appeal)
- State v. Davis*, 345 Or 551, 201 P3d 185 (2008), *cert den*, 130 S Ct 371 (2009)
- State v. Douglas*, 310 Or 438, 800 P2d 288 (1990)
- State v. Fanus*, 336 Or 63, 79 P3d 847 (2003), *cert den*, 541 US 1075 (2004)
- State v. Farrar*, 309 Or 132, 786 P2d 161, *cert den sub nom Oregon v. Wagner*,
498 US 879 (1990)
- State v. Gibson*, 338 Or 560, 113 P3d 423, *cert den*, 546 US 1044 (2005)

¹ Unless otherwise indicated, multiple citations to cases involving the same defendant are to separate decisions issued in the same case. A case listed in **boldface** is one in which the court affirmed a death sentence. A case marked with an asterisk (*) is one that was before the appellate court in a pretrial posture—*e.g.*, a pretrial appeal by the state or a pretrial mandamus or *habeas corpus* proceeding—and hence the defendant was not yet convicted of aggravated murder and sentenced to death.

State v. Guzek, 310 Or 299, 797 P2d 1031 (1990)

State v. Guzek, 322 Or 245, 906 P2d 272 (1995)

State v. Guzek, 336 Or 424, 86 P3d 1106 (2004), *vacated and remanded by Oregon v. Guzek*, 546 US 517, 126 S Ct 1226, 163 L Ed 2d 1112 (2006)

State v. Guzek, 342 Or 345, 153 P3d 101 (2007)

State v. Hale, 335 Or 612, 75 P3d 448 (2003), *cert den*, 541 US 942 (2004)

State v. Haugen, 349 Or 174, 243 P3d 31 (2010)

State v. Harberts, 315 Or 408, 848 P2d 1187 (1993) (*pretrial appeal)

State v. Harberts, 331 Or 72, 11 P3d 641 (2000)

State v. Hayward, 327 Or 397, 963 P2d 667 (1998)

State v. Isom, 306 Or 587, 761 P2d 524 (1988)

State v. Isom, 313 Or 391, 837 P2d 491 (1992)

State v. James, 339 Or 476, 123 P3d 251 (2005) (*pretrial appeal)

State v. Johnson (Jesse), 177 Or App 244, 35 P3d 1024 (2001) (*pretrial appeal)

State v. Johnson (Jesse), 335 Or 511, 73 P3d 282 (2003) (*second pretrial appeal)

State v. Johnson (Jesse), 342 Or 596, 157 P3d 198 (2007), *cert den*, 128 S Ct 906 (2008)

State v. Johnson (Martin), 340 Or 319, 131 P3d 173, *cert den*, 549 US 1079 (2006)

State v. Johnson (Stressla), 313 Or 189, 832 P2d 443 (1992)

State v. Langley, 314 Or 511, 840 P2d 691 (1992) (first case)

State v. Langley, 314 Or 247, 839 P2d 692 (1992), *opin adhered to* 318 Or 28, 861 P2d 1012 (1993) (second case)

State v. Langley, 331 Or 430, 16 P3d 489 (2000) (second case)

State v. Langley, 351 Or 652, 273 P3d 901 (2012) (second case)

State v. Lotches, 331 Or 455, 17 P3d 1045 (2000), *cert den*, 534 US 833 (2001)

State v. Longo, 341 Or 580, 148 P3d 892 (2006), *cert den*, 128 S Ct 65 (2007)

State v. Maletta, 98 Or App 643, 781 P2d 350 (1989) (*pretrial appeal)

State v. McDonnell, 84 Or App 728, 733 P2d 935, *rev den*, 303 Or 455 (1987) (*pretrial appeal)

State v. McDonnell, 310 Or 98, 794 P2d 780 (1990)

State v. McDonnell, 313 Or 478, 837 P2d 941 (1992)

State v. McDonnell, 329 Or 375, 987 P2d 486 (1999)

State v. McNeely, 330 Or 457, 8 P3d 212, *cert den*, 531 US 1055 (2000)

State v. Miranda, 309 Or 121, 786 P2d 155, *cert den sub nom Oregon v. Wagner*, 498 US 879 (1990)

State v. Moen, 309 Or 45, 786 P2d 111 (1990)

State v. Montez, 309 Or 564, 789 P2d 1352 (1990)

State v. Montez, 324 Or 343, 927 P2d 64 (1996), *cert den*, 520 US 1233 (1997)

State v. Moore, 324 Or 396, 927 P2d 1073 (1996)

State v. Nefstad, 309 Or 523, 789 P2d 1326 (1990)

State v. Oatney, 335 Or 276, 66 P3d 475 (2003), *cert den*, 540 US 1151 (2004)

State v. Pinnell, 311 Or 98, 806 P2d 110 (1991)

State v. Pinnell, 319 Or 438, 877 P2d 635 (1994)

State v. Pratt, 309 Or 205, 785 P2d 350 (1990)

State v. Pratt, 316 Or 561, 853 P2d 827, *cert den*, 510 US 969 (1993)

State v. Reyes-Camarena, 330 Or 431, 7 P3d 522 (2000)

State v. Rogers, 313 Or 356, 836 P2d 1308 (1992), *cert den*, 507 US 974 (1993)

State v. Rogers, 330 Or 282, 4 P3d 1261 (2000)

State v. Rogers, 352 Or 510, 288 P3d 544 (2012)

State v. Rose, 311 Or 274, 810 P2d 839 (1991)

State v. Running, 336 Or 545, 87 P3d 661, *cert den*, 543 US 1005 (2004)

State v. Shaw, 338 Or 586, 113 P3d 898 (2005) (*pretrial appeal)

State v. Simonsen, 310 Or 412, 798 P2d 241 (1990)

State v. Simonsen, 319 Or 510, 878 P2d 409 (1994)

State v. Simonsen, 329 Or 288, 986 P2d 566 (1999), *cert den*, 528 US 1090 (2000)

State v. Smith (Charles), 310 Or 1, 791 P2d 836 (1990)

State v. Smith (Randal), 319 Or 37, 872 P2d 966 (1994)

State v. Sparks, 336 Or 298, 83 P3d 304, *cert den*, 543 US 893 (2004)

State v. Stevens, 311 Or 119, 806 P2d 92 (1991)

State v. Stevens, 319 Or 573, 879 P2d 162 (1994)
(related case: *State ex rel. Carlile v. Frost*, below)

State v. Terry, 333 Or 163, 37 P3d 157 (2001), *cert den*, 536 US 910 (2002)

State v. Thompson, 328 Or 248, 971 P2d 879, *cert den*, 527 US 1042 (1999)

State v. Tiner, 340 Or 551, 135 P3d 305 (2006), *cert den*, 127 S Ct 1125 (2007)

State v. Tucker, 315 Or 321, 845 P2d 904 (1993)

State v. Wagner, 305 Or 115, 752 P2d 1136 (1988), *vacated and remanded* 492 US 914, 109 S Ct 3235, 106 L Ed 2d 583 (1989)

State v. Wagner, 309 Or 5, 786 P2d 93, *cert den*, 498 US 879 (1990)

State v. Walton, 311 Or 223, 809 P2d 81 (1991)

State v. Weiland, 131 Or App 582, 887 P2d 368 (1994) (*pretrial appeal)

State v. Wickey, 95 Or App 225, 769 P2d 208 (1989) (*pretrial appeal)

State v. Williams, 313 Or 19, 828 P2d 1006, *cert den*, 506 US 858 (1992)

State v. Williams, 322 Or 620, 912 P2d 364, *cert den*, 519 US 854 (1996)

State v. Wilson, 323 Or 498, 918 P2d 826 (1996), *cert den*, 519 US 1065 (1997)

State v. Wright, 323 Or 8, 913 P2d 321 (1996)

State v. Zweigart, 344 Or 619, 188 P3d 242 (2008), *cert den*, 130 S Ct 56 (2009)

POST-CONVICTION PROCEEDINGS

Bryant v. Thompson, 324 Or 141, 922 P2d 1219 (1996)
(related to *State v. Wright*, above)

Cunningham v. Thompson, 186 Or App 221, 62 P3d 823, *mod on recon* 188 Or App 289,
71 P3d 110 (2003), *rev den*, 337 Or 327 (2004)

Hale v. Belleque, 255 Or App 653, 298 P3d 596 (2013)

Hayward v. Belleque, 248 Or App 141, 273 P3d 926 (2012), *rev den*, 353 Or 208 (2013)

Lotches v. Premo, 257 Or App 513, __ P3d __ (2013)

Montez v. Czerniak, 237 Or App 276, 239 P3d 1023 (2010), *rev allowed*, 351 Or 321 (2012)

Pinnell v. Palmateer, 200 Or App 303, 114 P3d 515 (2005), *rev den*, 340 Or 483 (2006)

Pratt v. Armenakis, 199 Or App 448, 112 P3d 371, *adh'd to on recon* 201 Or App 217,
118 P3d 217 (2005), *rev den*, 340 Or 483 (2006)

Williams v. Palmateer, 184 Or App 761, 58 P3d 244 (2002) (*aff'd w/o opinion*),
rev den, 335 Or 656 (2003)

Wright v. Thompson, 324 Or 153, 922 P2d 1224 (1996)

OTHER COLLATERAL PROCEEDINGS

Haugen v. Kitzhaber, 353 Or 715, __ P3d __ (2013) (declaratory judgment)

Rico-Villalobos v. Guisto, 339 Or 197, 118 P3d 246 (2005) (*pretrial mandamus)

State v. Haugen, 351 Or 325, __ P3d __ (2011) (*pre-execution mandamus)

State v. Rogers, 334 Or 633, 55 P3d 488 (2002) (*pre-retrial mandamus)

State ex rel. Carlile v. Frost, 326 Or 607, 956 P2d 202 (1998) (*pretrial mandamus)
(related to *State v. Stevens*, above)

Tiner v. Clements, 173 Or App 168, 20 P3d 262, *rev den*, 332 Or 305 (2001)
(**habeas corpus*) (related to *State v. Tiner*, above)