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IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. BRETT NICHOLAS MAZZIOTTI, Defendant-Appellant, Respondent on Review.	Lane County Circuit Court Case No. 201218698 Court of Appeals No. A153713 Supreme Court No. S064085

RESPONDENT'S BRIEF ON THE MERITS

Review of the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court for Lane County
Honorable Josephine H. Mooney, Judge

Opinion Filed: March 9, 2016
Author of Opinion: Sercombe, Presiding Judge
Concurring Judges: Hadlock, Chief Judge, and Tookey, Judge

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RESPONDENT'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

The primary issues presented by this case and the two others consolidated for purposes of oral argument, *State v. Zavala*, S064051, and *State v. Baughman*, S064086, are those that were left unaddressed by the decision in *State v. Williams*, 357 Or 1, 346 P3d 455 (2015). Specifically, this court must resolve whether other acts evidence offered to prove propensity is admissible against a criminal defendant charged with non-sexual offenses or whether, instead, that type of evidence is inadmissible under the Due Process Clause. This court must also determine the role of OEC 403 balancing when the state seeks to admit other acts evidence and the appropriate remedy when a trial court fails to engage in that balancing.

In this case, defendant was charged with failure to perform the duties of a driver, reckless driving, and reckless endangerment for his involvement in a motorcycle accident. Defendant had been speeding and, when a car turned in front of him, he was unable to avoid a collision; his passenger was thrown from the motorcycle and injured. Prior to trial, the state sought a ruling on the admissibility of evidence of two prior instances in which defendant's driving had led to criminal convictions. The trial court ruled that evidence surrounding those prior convictions was relevant for the non-propensity purpose of proving defendant's reckless mental state—that he was aware of the risks of speeding

and disregarded those risk. Although defendant asked the trial court to exclude the evidence under OEC 403 because it was unduly prejudicial, the state contended that OEC 403 balancing was not required. In response, the trial court did not engage in OEC 403 balancing and ruled the evidence admissible. The Court of Appeals reversed defendant's convictions based on the trial court's failure to conduct balancing. *State v. Mazziotti*, 276 Or App 773, 369 P3d 1200 (2016). The state petitioned from the Court of Appeals decision, and this court allowed review. *State v. Mazziotti*, __ Or __, __ P3d __ (June 30, 2016).

Questions Presented and Proposed Rules Of Law

First Question Presented

OEC 404(4) allows for the admission of other crimes, wrongs, or acts to prove a defendant's character and his conformance therewith on the charged occasion unless prohibited by, among other laws, the United States Constitution.[1] OEC 404(4)(d). Does OEC 404(4)(d) categorically prohibit the admission of propensity evidence in cases not involving sexual offenses

[1] Defendant hereafter refers to evidence of a defendant's other crimes, wrongs, or acts offered to prove a defendant's character and his conformance therewith on the charged occasion as "other acts evidence" or "propensity evidence." Defendant will refer to evidence of a defendant's other crimes, wrongs, or acts offered to prove some other purpose as "non-propensity evidence."

because the Due Process Clause categorically prohibits the admission of that evidence in those cases?

First Proposed Rule of Law

The Anglo-American legal tradition has steadfastly banned propensity evidence for more than 300 years in cases not involving sexual offenses and the ban continues to this day in all 50 states. The ban is so embedded as to constitute a fundamental conception of justice protected by the Due Process Clause. The Due Process Clause thus categorically bans the admission of propensity evidence in cases not involving sexual offenses. Because the United States Constitution prohibits propensity evidence in non-sexual offense cases, OEC 404(4)(d) prohibits the admission of that evidence in those cases.

Second Question Presented

OEC 404(4)(a) allows for the admission of propensity evidence in a child sexual abuse prosecution, subject to OEC 403 balancing "to the extent required" by the state or federal constitution. What kind of OEC 403 balancing applies to evidence offered under OEC 404(4)? In other words, what, exactly, does the phrase "to the extent required by" the state or federal constitution mean?

Second Proposed Rule of Law

The text, context, and legislative history of OEC 404(4)(a) demonstrates that the legislature intended the phrase "to the extent required by" the state or

federal constitution to mean "if required by" the state or federal constitution. In other words, the legislature intended to require traditional OEC 403 balancing *if* federal courts construing similar federal evidence rules determined that due process required FRE 403 balancing. If the federal courts did not require balancing under the federal evidentiary rules, then the legislature would not require balancing under the state evidentiary rules. Because federal courts have determined that the admission of propensity evidence in sexual offense cases is constitutional only if subject to FRE 403 balancing, the legislative precondition has been met. Evidence proffered under OEC 404(4) must therefore be subjected to traditional balancing under OEC 403 before being admitted into evidence.

Third Question Presented

What standard of review applies to a trial court's decision under OEC 403 to admit or exclude other acts evidence offered to prove propensity under OEC 404(4)?

Third Proposed Rule of Law

When a trial court conducts OEC 403 balancing, it errs as a matter of law if it fails to exercise discretion, refuses to exercise its discretion, or it fails to make a record that reflects an exercise of discretion. The appellate court reviews whether a trial court properly applied the balancing test that OEC 403 requires for errors of law, and it reviews a trial court's ultimate decision to

admit or exclude evidence for an abuse of discretion. In rare cases, there may be only one legally correct outcome, such as when the probative value of the evidence is so minimal and the danger of unfair prejudice so great that admitting the evidence would violate due process. In that circumstance, the evidence should be excluded as a matter of law.

Fourth Question Presented

When the Court of Appeals reverses and remands a case based on a trial court's failure to conduct proper OEC 403 balancing before admitting other acts evidence, must it reverse and remand the case for a new trial, or may it impose a "conditional remand" that requires the trial court to only hold a hearing and conduct the proper balancing?

Fourth Proposed Rule of Law

When the Court of Appeals reverses a case because the trial court failed to conduct proper balancing before admitting other acts evidence, the proper remedy is a new trial because (1) a limited remand, in substance, abdicates the appellate court's duty to determine whether an error is harmless and whether reversal of a case is warranted; (2) a trial court's decision to admit or exclude evidence in the face of an OEC 403 objection is too intricately intertwined with the trial such that divorcing the two through remand for a hearing rather than a new trial is an inadequate remedy; and (3) when the Court of Appeals orders a limited remand for the trial court to hold a hearing to conduct OEC 403

balancing, there is a risk that the trial court will be invested in the original result.

Summary of Argument

OEC 404(4), as construed by this court in *State v. Williams*, supersedes OEC 404(3) in that it permits the introduction of other acts evidence to prove propensity, at least in a case involving child sexual abuse. This court clarified in *State v. Turnidge* that other acts evidence offered against a criminal defendant for a non-propensity purpose, such as to prove motive or opportunity, continues to be governed by OEC 404(3) and subject to OEC 403. These three consolidated cases will require this court to answer questions left unaddressed by *Williams*—namely, whether due process permits the introduction of propensity evidence to be used against a criminal defendant in a case *not* involving child sexual abuse, and whether traditional OEC 403 balancing applies to propensity evidence admitted under OEC 404(4). This court must further consider the standard of review for a trial court's OEC 403 determination, and what the appropriate remedy should be when a trial court fails to conduct proper OEC 403 balancing before admitting other acts evidence.

OEC 404(4)(d) permits the admission of all relevant evidence against a criminal defendant unless admission would violate the state or federal constitution. Propensity evidence offered against a criminal defendant in a case

not involving sexual abuse is categorically inadmissible under OEC 404(4)(d) because it violates due process. The primary consideration in determining whether a legal principle is so fundamental as to be protected by the Due Process Clause is historical practice. The general ban on propensity evidence, which is over 300 years old, has the historical lineage to qualify for due process protection. Although the rule has been relaxed in sex crime prosecutions, it has been resolutely applied in other types of prosecutions. For that reason, the admission of propensity evidence in a case not involving sexual abuse violates due process principles.

OEC 404(4)(a) permits the introduction of propensity evidence, but that broad grant of admissibility is limited by OEC 403 "to the extent required" by the state or federal constitution. The state suggests that trial courts are to apply a diluted version of OEC 403 to evidence admitted under OEC 404(4), something it calls "due process balancing."

In determining what the legislature intended when it made OEC 403 applicable to OEC 404(4) "to the extent required by" the state or federal constitution, this court must apply the familiar framework for discerning the intent of the legislature. A review of the text, context, and legislative history of the statute reveals that the legislature intended OEC 403 to apply *if* required by the state or federal constitution. Because numerous federal appellate courts have held that federal due process requires the application of Rule 403

balancing to propensity evidence, OEC 404(4)(a) requires the application of traditional, statutory OEC 403 balancing.

The appellate court's review of a trial court's decision to admit or exclude evidence under OEC 403 is mixed. The trial court errs as a matter of law if it fails to exercise discretion, refuses to exercise its discretion, or fails to make a record that reflects an exercise of discretion. Thus, the appellate court reviews whether a trial court properly applied the balancing test that OEC 403 requires for errors of law, and it reviews a trial court's ultimate decision to admit or exclude evidence for an abuse of discretion.

The abuse of discretion standard of review is a spectrum. In some cases, there may be only one legally correct outcome, such as when the probative value of the evidence is so minimal and the danger of unfair prejudice so great that admitting the evidence would violate due process. In that circumstance, the evidence should be excluded as a matter of law. But in most cases, there will be a range of legally correct outcomes. If the trial court's decision was within that range of legally correct outcomes, then the trial court did not abuse its discretion and the appellate court will not disturb the trial court's ruling.

When the Court of Appeals corrects an OEC 403 balancing error on appeal, the only appropriate remedy is to remand for a new trial. First, a limited remand, in substance, abdicates the appellate court's duty to determine whether an error is harmless and whether reversal of a case is warranted. Second, a trial

court's decision to admit or exclude evidence in the face of an OEC 403 objection is too intricately intertwined with the trial such that divorcing the two through remand for a hearing rather than a new trial is inadequate. A trial court's ruling on an OEC 403 objection, either pretrial or during trial, may affect many strategic decisions that a defendant makes.

Finally, when the Court of Appeals orders a limited remand for the trial court to hold a hearing to conduct OEC 403 balancing, there is a risk that the trial court that watched the trial, and presumably sentenced the defendant, will be invested in the original result. Thus, the only proper remedy is for the appellate court to reverse and remand for a new trial.

Argument[2]

I. Introduction

These three consolidated cases raise two issues left unresolved in *State v. Williams*, 357 Or 1, 346 P3d 455 (2015), and *State v. Turnidge*, 359 Or 364, 374 P3d 853 (2016). First, is other acts evidence offered solely to prove a defendant's propensity to commit the charged crime admissible under OEC 404(4) in a criminal case *not* involving sexual abuse? Second, did the

[2] In an effort to provide this court with a comprehensive framework for the admissibility of other acts evidence offered against a criminal defendant under OEC 404(3) and OEC 404(4), the briefs in all three consolidated cases are substantially similar. Specifically, Parts I through VII of the Argument Sections of each brief are identical; only the final section, Part VIII, differs.

legislature intend that a trial court conduct OEC 403 balancing before admitting other acts evidence under OEC 404(4) or did it intend, as the state suggests, that the trial court conduct some sort of limited "due process balancing?" These cases also raise a third issue: What is the appropriate remedy for a trial court's failure to conduct the requisite balancing? And a fourth issue: How should OEC 404(3), OEC 404(4), and OEC 403 apply in each of the three cases under consideration?

Before addressing those four issues, defendant first summarizes this court's *current* description of the interplay between OEC 404(3), OEC 404(4), and OEC 403. Then, defendant establishes that other acts evidence offered to prove propensity in criminal cases not involving sexual abuse is categorically inadmissible under OEC 404(4)(d) because its admission would violate the Due Process Clause. Next, defendant demonstrates that the legislature intended for the trial court to conduct traditional, statutory OEC 403 balancing before admitting propensity evidence under OEC 404(4), and describes the nature of that balancing and the appropriate standard of appellate review. Defendant then establishes that the appropriate remedy for a trial court's failure to conduct the requisite balancing is reversal and remand for a new trial, not a limited remand. Finally, in this case, defendant argues that the trial court committed two separate errors. The trial court erroneously admitted evidence that had no

relevance aside from propensity. Further, the court admitted other evidence for a non-propensity purpose but failed to engage in any OEC 403 balancing.

II. OEC 404(3) governs the admission of other crimes, wrongs, or acts offered for a non-propensity purpose. OEC 404(4) governs the admission of evidence of other crimes, wrongs, or acts offered for a propensity purpose.

Two provisions of the Oregon evidence code apply to evidence of other crimes, wrongs, or acts offered against a criminal defendant: OEC 404(3) and OEC 404(4). OEC 404(3) provides that: "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

OEC 404(4) provides that:

> "In criminal actions, evidence of other crimes, wrongs or acts by the defendant is admissible if relevant except as otherwise provided by:
>
> > (a) [OEC 406-412] and, to the extent required by the United States Constitution or the Oregon Constitution, [OEC 403];
> >
> > (b) The rules of evidence relating to privilege and hearsay;
> >
> > (c) The Oregon Constitution; and
> >
> > (d) The United States Constitution."

Before the enactment of OEC 404(4), OEC 404(3) and OEC 403 governed the admissibility of other acts evidence. *Williams*, 357 Or at 5-6.

OEC 404(3) categorically excluded other acts evidence proffered solely to prove a defendant's disposition or propensity to commit certain crimes, wrongs, or acts. *State v Johns*, 301 Or 535, 548-49, 725 P2d 312 (1986). But other acts evidence under OEC 404(3) was admissible when relevant to establish some other non-propensity purpose, such as to prove motive, opportunity, intent, plan, etc. *Id*. at 549. If the other act evidence was admissible for a non-propensity purpose, then a court considered whether the evidence should be excluded under OEC 403. *Id*. at 549-50.

The legislature enacted OEC 404(4) in 1997. Or Laws 1997, ch. 313, §29. In *Williams*, this court concluded that OEC 404(4) superseded OEC 404(4). 357 Or at 15 ("From the text, context, and legislative history of OEC 404(4), we conclude that the legislature intended OEC 404(4) to supersede OEC 404(3) in criminal cases, except, of course, as otherwise provided by the state or federal constitutions."). That holding seems to suggest that OEC 404(3) no longer applies to other act evidence proffered against a defendant in a criminal case. But this court's holding in *Turnidge* clarifies that OEC 404(4) supersedes OEC 404(3) only when evidence of other crimes, wrongs, or acts is proffered to prove a defendant's propensity.

In *Turnidge*, the defendant was convicted of aggravated murder and other crimes, including bank robbery, for planting a bomb outside a bank and calling in a bomb threat to a nearby bank in 2008. The bomb exploded, killing two

people and injuring others. 359 Or at 366. The defendant objected to the state's evidence that, in 1995, he had called in a bomb threat to another bank in the same vicinity, and then watched the police respond to the call from a restaurant near the bank. *Id*. at 426.

Before the trial court, the state argued that the evidence of the 1995 bomb threat was admissible under OEC 404(3) and *Johns* to prove motive, ability, planning, preparation, intent, and knowledge. *Id*. at 427–28. On review, the state renewed those arguments and also contended that, in light of *Williams*, "OEC 404(4) preempts the limitations that OEC 404(3) otherwise places on the admission of evidence of 'other crimes, wrongs, or acts,' and that such evidence is always admissible under OEC 404(4) if it is relevant—even for a propensity purpose—as long as its admission does not violate due process." *Id*. at 428-29.

In response, this court examined its holding in *Williams*. 359 Or at 431-34. It noted that *Williams* "answered one question": whether "propensity evidence can be admitted in a child sexual abuse case under OEC 404(4) if due process permits." *Id* at 432. It then observed that *Williams* was distinguishable from and did not control *Turnidge* for two reasons: (1) *Turnidge* did not involve child sexual abuse; and (2) more importantly, the state introduced evidence of the defendant's 1995 bomb threat for a non-propensity purpose, specifically, to prove the defendant's plan. *Id*. at 432-33. This court concluded that the

admissibility of that evidence was resolved not by application of OEC 404(4), but by "settled principles under OEC 404(3) and OEC 403." *Id*. at 434.

In so concluding, this court reaffirmed that OEC 403 balancing applied to uncharged misconduct evidence admitted under OEC 404(3):

> "[I]f a trial court determines that prior bad acts evidence is relevant to a nonpropensity purpose under OEC 404(3), the court, on a proper motion, must weigh the probative value of the evidence against its potential to unduly prejudice the defendant, per OEC 403, before admitting the evidence."

Turnidge, 359 Or at 442.[3]

[3] This court's holding in *State v. Moore/Coen*, 349 Or 371, 245 P3d 101 (2010), *cert den*, 563 US 996 (2011), is not to the contrary. In *Moore/Coen*, the trial court had erroneously concluded that a prior driving under the influence of intoxicants (DUII) conviction was relevant *only* to show the defendant's propensity and therefore should be excluded under the Due Process Clause. 349 Or at 387. This court reasoned, however, that evidence of the DUII conviction was relevant for a non-propensity purpose—namely, as evidence of the defendant's reckless mental state in the charged crime. *Id.* at 390. This court reversed the trial court order excluding the evidence on the grounds that uncharged misconduct evidence offered for a *non*-propensity purpose does not violate due process. *Id.* at 392 n 12 ("[W]e hold that the trial court erred in concluding that the evidence would be unfairly prejudicial and therefore violate the due process of the federal constitution."); *see also Spencer v. Texas*, 385 US 554, 561-63, 87 S Ct 648, 17 L Ed 2d 606 (1967) (uncharged misconduct evidence offered for a non-propensity purpose does not violate due process).

footnote continued……

In sum, both OEC 404(3) and OEC 404(4) apply to other acts evidence offered against a criminal defendant. OEC 404(3)—and OEC 403—apply when other acts evidence is proffered against a criminal defendant for a non-propensity purpose. OEC 404(4) applies only when evidence of other crimes, wrongs, or acts is proffered for a propensity purpose.

Having examined this court's current description of the pertinent evidence rules, defendant now addresses the two questions left unanswered in *Williams*: (1) whether other acts evidence offered to prove propensity in criminal cases other than those involving child sexual abuse is admissible under OEC 404(4); and (2) whether, in criminal cases in which evidence is admitted for propensity purposes under OEC 404(4), the legislature intended that a trial court should conduct OEC 403 balancing or some narrower balancing.

It should be noted that in *Moore/Coen*, both the defendant and the state *assumed* that OEC 404(4) mandated a limited application of OEC 403 to uncharged misconduct evidence offered against a criminal defendant. *See, e.g., Moore/Coen*, 349 Or at 387 (defendant arguing that OEC 404(4) is unconstitutional on its face because it limits application of OEC 403). To the extent that any portion of *Moore/Coen* can be read to support an argument that OEC 404(4) abolished traditional OEC 403 balancing, it bears emphasizing that (1) that point was not in dispute in the case, (2) it was not necessary to the holding and was therefore *dicta*, and (3) such a construction of OEC 404(3) and 404(4) was subsequently rejected in *Turnidge*.

III. Other acts evidence offered against a criminal defendant to prove propensity in a case not involving child sexual abuse is categorically inadmissible under OEC 404(4)(d) because it violates the Due Process Clause.

OEC 404(4)(d) provides that, "evidence of other crimes, wrongs or acts by the defendant is admissible if relevant except as otherwise provided by * * * [t]he United States Constitution." As detailed below, the Due Process Clause of the United States Constitution[4] categorically bans the admission of other acts evidence to prove propensity in cases not involving child sexual abuse.[5] That class of other acts evidence is therefore inadmissible under OEC 404(4)(d).

A. The general ban on propensity evidence has the longstanding lineage to qualify for due process protection.

The Due Process Clause has limited operation beyond the specific guarantees contained in the Bill of Rights. *See Dowling v. United States*, 493 US 342, 352, 110 S Ct 668, 107 L Ed 2d 708 (1990) (so providing). Nevertheless, the Due Process Clause will invalidate a state evidentiary rule if it "violates those fundamental conceptions of justice which lie at the base of our

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[4] The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law[.]"

[5] Defendant acknowledges that an argument could be made that due process does not prohibit the admission of other acts evidence to prove propensity in sex crimes involving adults. None of the three consolidated cases before this court involve a sex offense committed against an adult. Because this court need not resolve that question, defendant does not address it.

civil and political institutions, and which define the community's sense of fair play and decency." *Id.*

The foremost consideration in determining whether a legal principle is so fundamental as to be embodied in the Constitution is historical practice. *Montana v. Egelhoff*, 518 US 37, 43-44, 116 S Ct 2013, 135 L Ed 2d 361 (1996) ("Our primary guide in determining whether the principle in question is fundamental is, of course, historical practice."); *see also Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 US (18 How) 272 (1856) (recognizing that courts should "look to those settled usages and modes of proceeding existing in the common and statu[t]e law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.").

The general ban on using other acts evidence to prove propensity has a long and unbroken history in the Anglo-American legal tradition. In fact, it is at least a century older than the "beyond a reasonable doubt" standard, which is itself protected by due process. *See In re Winship*, 397 US 358, 361, 90 S Ct 1068, 25 L Ed 2d 368 (1970) (recognizing that the reasonable doubt standard may have not crystalized into that formula until 1798). The propensity evidence ban can be traced back to at least 1684 in the case *Hampden's Trial*. 9 Cob St Tr 1053 (KB 1684). Several years later, in 1692, the Lord Chief Justice

Holt at the Old Bailey excluded propensity evidence in a murder prosecution in *Harrison's Trial*. 12 How St Tr 834, 864 (Old Bailey 1692). When the prosecution attempted to offer the propensity evidence, Justice Holt interjected,

> "Hold, what are you doing now? Are you going to arraign his whole life? Away, away, that ought not to be; that is nothing to the matter."

Id.

The general ban on character evidence crossed the Atlantic and persisted in colonial courts prior to the American Revolution. In 1892, the United States Supreme Court condemned the use of propensity evidence for the first time in *Boyd v. United States*, 142 US 450, 12 S Ct 292, 35 L Ed 1077 (1892). The defendants in *Boyd* were charged with murder following an attempted robbery. *Id.* The trial court permitted the state to introduce evidence of prior robberies committed by the defendants. *Id.* at 454. The Court reversed, holding that the propensity evidence should not have been admitted because it "tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were

of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law[.]" *Id.* at 458.[6]

One year after *Boyd*, this court recognized the ban on propensity evidence in *State v. Baker*, 23 Or 441, 32 P 161 (1893):

> "The general rule is unquestioned that evidence of a distinct crime unconnected with that laid in the indictment cannot be given in evidence against the prisoner. Such evidence tends to mislead the jury, creates a prejudice against the prisoner, and requires him to answer a charge for the defense of which he is not supposed to have made preparation. And while, as Lord Campbell says, 'it would be evidence to prove that the prisoner is a very bad man, and likely to commit such an offense,' (*Reg v. Oddy*, 5 Cox Crim Cas 210) under no enlightened system of jurisprudence can a person be convicted of one crime on proof that he has committed another. It is of the utmost importance to a defendant that the facts given in evidence by the prosecution shall consist exclusively of the transaction which forms the subject of the indictment, and which he has come prepared to answer."

Id. at 442-43; *see also State v. Houghton*, 43 Or 125, 131, 71 P 982 (1903) (recognizing ban on propensity evidence as "a universal rule of law.").

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[6] In *People v. Molineux*, 61 NE 286, 293-94 (NY 1901), the New York Court of Appeals articulated the historical significance of the character evidence ban:

> "This [no propensity evidence] rule, so universally recognized and so firmly established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others, at least from the birth of the Magna Charta. It is the product of that same humane and enlightened public spirit which, speaking through our common law, has decreed that every person charged with the commission of a crime shall be protected by the presumption of innocence until he has been proven guilty beyond a reasonable doubt."

Although courts have cautioned against the wholesale importation of the common law into the Due Process Clause, the fact that a rule has persisted for more than 300 years is a strong indication that it embodies a "fundamental conception of justice." The rule generally forbidding the admission of character evidence to prove propensity has been codified in 38 states.[7] The remaining 12 states and the District of Columbia have adopted the rule against the general admissibility of propensity evidence through case law.[8] While some jurisdictions have enacted a narrow exception to the ban on propensity evidence that allows the admission of prior similar acts of sexual assault in certain sexual

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[7] *See* Alaska R Evid § 404; Ariz R Evid 404; Ark R Evid 404; Cal Evid Code § 1101; Colo R Evid 404; Del R Evid 404; Fla Stat Ann § 90.404; Haw R Evid 404; Idaho R Evid 404; Iowa R Evid 404; Kan Stat Ann § 60-447; Ky R Evid 404; La Code Evid Ann art 404; Me R Evid 404; Mich R Evid 404; Miss R Evid 404; Mont R Evid 404; Nev Rev Stat § 48.045; NH R Evid 404; NJ R Evid 47; NM Stat Ann § 11-404; ND R Evid 404; Ohio R Evid 404; Okla Stat title § 12, 2404; RI R Evid 404S D Codified Laws Ann § 19-12-5;Tenn Rev Evid 404; Tex R Crim Evid 404; Utah R Evid 404; Vt R Evid 404; Wash R Evid 404; W Va R Evid 404; Wis R Evid 904.03; Wyo R Evid 404.

[8] *See Artis v. United States*, 505 A2d 52 (DC App 1986), *cert den*, 479 US 964 (1986); *Anonymous v. State*, 507 So2d 972 (Ala 1987); *State v. Holliday*, 268 A2d 368 (Conn 1970); *Brown v. State*, 398 SE2d 34 (Ga App 1990); *People v. Kannapes*, 567 NE 2d 377 (Ill 1990); *Penley v. State*, 506 NE 2d 806 (Ind 1987); *Ross v. State*, 350 A2d 680 (Md 1976), *Commonthwealth v. Chalifoux*, 291 NE 2d 635 (Mass 1973); *State v. Clark*, 801 SW2d 701 (Mo App 1990); *People v. Powell*, 152 AD 2d 918 (NY 1989); *Commonwealth v. Lark*, 543 A2d 491 (Pa 1988); *State v. Griffin*, 285 SE2d 631 (SC 1981), *overruled on other grounds by State v. Belcher*, 685 SE2d 802 (SC 2009); *Brooks v. Commonwealth*, 258 S.E.2d 504 (Va 1979).

assault prosecutions[9], *no jurisdiction* permits the blanket admission of propensity evidence against a criminal defendant.

Because of that weighty historical backdrop, courts have recognized that the general ban on propensity evidence is so fundamental as to qualify for due process protection. *See, e.g., Williams*, 357 Or at 17 (citing *United States v. LeMay*, 260 F3d 1018, 1025 (9th Cir 2001), *cert den*, 534 US 1166 (2002) ("[I]t

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[9] Federal Rules of Evidence (FRE) 413-14 allow the prosecutor to introduce the defendant's prior similar acts in rape and child sexual assault cases. The evidence may be considered on any matter to which it is logically relevant, including propensity. FRE 413-14. Twelve states have adopted similar rules. Alaska R Evid 404(b)(2)-(3); Ariz R Evid 404 (c); Cal Evid Code § 1108; Fla Stat Ann § 90.404(2)(b)-(c); Ga Code Ann § 24-4-413; 725 Ill Comp Stat Ann 5/115-7.3; Kan Stat Ann § 21-5502; LSA-CE Art 412.2; Mich Comp Laws Ann § 768.27a; Neb Rev Stat §27-414; Tex Crim Proc Code Ann § 38.37; Utah R Evid 404(c).

Five more states passed similar legislation, but their state Supreme Courts declared the rules unconstitutional on state grounds. *See State v. Gresham*, 269 P3d 207 (Wash 2012) (holding Washington analogs to FRE 413-414 unconstitutional because they govern a procedural matter, conflict with a court rule, and therefore violate separation of powers); *State v. Cox*, 781 NW2d 757 (Iowa 2010) (holding analogous Iowa statues unconstitutional on the grounds that they violate state due process clause); *State v. Ellison*, 239 SW3d 603 (Mo 2007) (holding analogous Missouri statutes unconstitutional because they violate a defendant's state constitutional right to be tried only for crimes for which he was indicted). The Indiana legislature passed rules similar to FRE 413-14 but the Indiana Supreme Court held the statutes to be a nullity because they conflicted with evidence rules promulgated by the state Supreme Court, which has exclusive authority over rules of evidence. *See Day v. State*, 643 NE 2d 1 (Ind Ct App 1994). Lastly, the Delaware Supreme Court rejected similar rules. *See* Thomas J. Reed, *The Re-Birth of the Delaware Rules of Evidence: A Summary of the 2002 Changes in the Delaware Uniform Rules of Evidence*, 5 Del L Rev 155, 166-75 (2002).

seems clear that the general ban on propensity evidence has the requisite historical pedigree to qualify for constitutional status.")); *People v. Falsetta*, 986 P2d 182, 188, 21 Cal 4th 903 (Cal 1999) *cert den*, 529 US 1089 (2000) ("From the standpoint of historical practice, unquestionably the general rule against admitting [propensity] evidence is one of long-standing application."); *McKinney v. Rees*, 993 F2d 1378, 1384, *cert den*, 510 US 1020 (9th Cir 1993) (holding that, in a murder prosecution, "[t]he character rule is based on such a 'fundamental conception of justice' and the 'community's sense of fair play and decency' as concerned the Supreme Court in *Dowling*.").

B. The historical ban on propensity evidence has been relaxed in only one type of prosecution—those involving sex crimes.

Courts, including this one, have recognized that the historical ban on propensity evidence has been less steadfast when it comes to prosecutions for sex crimes: "[T]he historical practice with respect to such crimes is not as clear." *Williams*, 357 Or at 17; *see also United States v. Castillo*, 140 F3d 874, 881 (10th Cir 1998) ("[T]he history of evidentiary rules regarding a criminal defendant's sexual propensities is ambiguous at best, particularly with regard to sexual abuse of children."). More than 150 years ago, the Michigan Supreme Court noted that "courts in several of the [s]tates have shown a disposition to relax the rule [against propensity evidence] in cases where the offense consists

of illicit intercourse between the sexes." *People v. Jeness*, 5 Mich 305, 319-20 (1858).

Today, state courts that do not have rules specifically allowing propensity evidence in sexual assault cases nevertheless allow that evidence by stretching traditional 404(3) exceptions to the ban, or "by resorting to the so-called 'lustful disposition' exception which, in its purest form, is a rule allowing for propensity inferences in sex crime cases." *LeMay*, 260 F3d at 1025-26; *see also* John Henry Wigmore, *1A Evidence in Trials at Common Law*, § 66.2 at 1334-45 (Tillers rev ed 1983) ("Do such decisions show that the general rule against the use of propensity evidence against an accused is not honored in sex offense prosecutions? We think so."). The rationale for admitting propensity evidence in sex crime prosecutions is a practical one: Sex crimes are usually committed in private, without witnesses or corroborating evidence. *Falsetta*, 986 P2d at 188.

In contrast to sex crime prosecutions, courts have maintained an unwavering commitment to the rule against propensity evidence in other types of criminal prosecutions. In *Old Chief v. United States*, 519 US 172, 182, 117 S Ct 644, 136 L Ed 2d 574 (1997), which involved a charge of felon in possession of a firearm, the United States Supreme Court observed that there is "no question that propensity would be an 'improper basis' for conviction[.]" In *McKinney*, 993 F2d at 1385, the Ninth Circuit held that the admission of

evidence in a murder prosecution having *no* purpose other than to demonstrate the defendant's propensity violated principles of due process. And in *Spencer v. Texas*, 385 US 554, 573-74, 575-76, 87 S Ct 648, 17 L Ed 2d 606 (1967), Chief Justice Warren observed, in a dissent, that the Court's "decisions exercising supervisory power over criminal trials in federal courts, as well as decisions by courts of appeals and of state courts, suggest that evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause[.]") (internal footnotes omitted). He went on to note that the majority opinion did not conflict with that understanding. *Id.*

To be sure, the United States Supreme Court has never explicitly held that the admission of other acts evidence to prove a defendant's propensity to commit the charged crime would violate the Due Process Clause. *See Estelle v. McGuire*, 502 US 62, 75 n 5, 112 S Ct 475, 116 L Ed 2d 385 (1991) (declining to reach the issue because it was not necessary to decide the case before it). But the fact that the ban on propensity evidence has endured as a basic component of the British, and then American, criminal justice system compels a conclusion that it is embedded in the concept of due process. *See Hurtado v. California*, 110 US 516, 528, 4 S Ct 111, 28 L Ed 232 (1884) ("[A] process of law, which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country[.]").

C. The admission of other acts to prove propensity offends several aspects of due process.

The admission of character evidence for the sole purpose of proving propensity threatens three bedrock principles of due process. In *Spence*r, Chief Justice Warren observed that, "[e]vidence of prior convictions has been forbidden because it jeopardizes the presumption of innocence of the crime currently charged." 385 US at 575. Second, he recognized that it could lessen the state's burden of persuasion, noting that "the prejudicial effect of prior convictions evidence has traditionally been related to the requirement of our criminal law that the State prove beyond a reasonable doubt the commission of a specific criminal act." *Id*. Nearly 25 years later, Justice O'Connor echoed that concern, pointing out that language in a jury instruction that may have allowed the jury to use evidence to prove propensity, "relieved the State of its burden of proving the identity of [the murderer] beyond a reasonable doubt." *Estelle*, 502 US at 76 (O'Connor, J, concurring in part and dissenting in part).

Last, the admission of pure propensity evidence threatens a third guarantee of due process—a defendant must be found guilty based on the evidence of the crime and not his criminal "status." *Spencer*, 385 US at 575. ("A jury might punish an accused for being guilty of a previous offense, or feel that incarceration is justified because the accused is a 'bad man,' without regard to his guilt of the crime currently charged."); *Smith v. Phillips*, 455 US 209,

217, 102 S Ct 940, 71 L Ed 2d 78 (1982) ("Due Process means a jury capable and willing to decide the case solely on the evidence before it."); *see also Robinson v. California*, 370 US 660, 667, 82 S Ct 1417, 8 L Ed 2d 758 (1962) (punishing a defendant because he is a narcotics addict inflicts a cruel and unusual punishment in violation of the Eighth Amendment).

In *Williams*, this court suggested that the admission of propensity evidence in a non-child sexual abuse case would violate due process:

> "If this were a case in which defendant had been charged with crimes other than child sexual abuse, *we might be persuaded that due process incorporates * * * historical practice and therefore not only requires the application of OEC 403, but also precludes the admission of 'other acts' evidence to prove propensity.* However, in this case, [the] defendant is charged with child sexual abuse, and the historical practice with respect to such charges is not as clear."

357 Or at 17 (emphasis added). For the reasons discussed above, this court should be so persuaded. In a case not involving child sexual abuse, the admission of other acts evidence to prove only that a criminal defendant is the kind of person who commits crimes violates the Due Process Clause. Because the Due Process Clause categorically bans such evidence, OEC 404(4)(d) prohibits its admission.

IV. A trial court should conduct OEC 403 balancing—not some other, narrower balancing—when evidence is admitted for propensity purposes under OEC 404(4).

Although OEC 404(4) allows admission of propensity evidence in a child sexual abuse prosecution, a trial court must still determine whether the

probative value of the evidence outweighs the danger of unfair prejudice under OEC 403 before allowing its admission. "[T]he only way that a court can ensure that the admission of 'other acts' evidence is not unfairly prejudicial and a violation of 'fundamental conceptions of justice' is to conduct OEC 403 balancing." *Williams*, 357 Or at 19. In this court, the state contends that traditional OEC 403 balancing does not apply to evidence relevant under OEC 404(4). Instead, courts are to apply a limited and ill-defined version of the rule, which it calls "due process balancing."

To determine what the legislature intended when it enacted OEC 404(4)(a) and specified that OEC 403 is applicable "to the extent required by the United States Constitution or the Oregon Constitution," this court applies the methodology set forth in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993), and clarified in *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). That is, this court reviews the text, context, and pertinent legislative history. *Gaines*, 346 Or at 172. This court resolves any remaining ambiguity by applying general maxims of statutory construction. *Id.*

A. The text and context of OEC 404(4)(a) demonstrate that the legislature intended traditional OEC 403 balancing to apply if 403 balancing was required by the state or federal constitution.

At the first level of statutory analysis, this court looks to the plain text of the statute. Again, OEC 404(4) provides,

> "(4) In criminal actions, evidence of other crimes, wrongs or acts by the defendant is admissible if relevant except as otherwise provided by:
>
> "(a) [OEC 406 to OEC 412[10]] *and, to the extent required by the United States Constitution or the Oregon Constitution, [OEC 403]*;
>
> "(b) The rules of evidence relating to privilege and hearsay;
>
> "(c) The Oregon Constitution; and
>
> "(d) The United States Constitution."

(Emphasis added).

The statute does not describe what, exactly, OEC 403 balancing "to the extent required by the United States Constitution or the Oregon Constitution" means. The state posits, in a single sentence of statutory construction, that OEC 404(4)(a) mandates application of OEC 403 balancing only *to the degree* required by the state or federal constitutions. Pet BOM at 14 ("Therefore, the limited OEC 403 balancing that is authorized by the plain text of OEC 404(4) is 'due process balancing.'"). In other words, the state assumes that "to the extent required" means that only some small portion of OEC 403 applies—a sliver of the rule that would mandate exclusion under the Due Process Clause.

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[10] OEC 407 through 412 provide for the exclusion of several types of evidence, such as subsequent remedial measures, offers to compromise, and withdrawn guilty pleas. In contrast to those evidence code provisions, OEC 406 provides that evidence of habit is admissible. Its inclusion as an *exception* to admissibility under OEC 404 (4) is perplexing.

But "to the extent required by" the state or federal constitution has another possible meaning besides "to the degree" that is constitutionally-required. It could also mean that OEC 403 applies *if* the state or federal constitution requires the application of OEC 403. In other words, OEC 403 applies in full if a predicate condition has been met: the state or federal constitution requires the application of 403 balancing. Rather than wade into a thorny legal debate concerning due process and the traditional ban on propensity evidence, the legislature could have simply intended to defer the decision on whether 403 balancing is constitutionally required to this court or the federal courts. And if those courts answered the question in the affirmative, then OEC 403 balancing would apply.

Based on the plain text of OEC 404(4)(a), then, "to the extent required by" the constitution could mean that OEC 403 applies only "to the degree required by" the constitution, or that OEC 403 applies only "if required by" the constitution.[11] Neither interpretation is "wholly implausible." *See State v.*

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[11] The dictionary definition of "extent" could arguably support either interpretation. *Webster's* provides the following relevant definition of the word:

> "**5 (a)** (1) **:** the range (as of inclusiveness or application) over which something extends[.]"

Webster's Third New Int'l Dictionary 805 (unabridged ed 1993).

footnote continued.……..

Cloutier, 351 Or 68, 95, 261 P3d 1234 (2011) (recognizing that term at issue was ambiguous because neither party's reading of the statute was "wholly implausible.").

The context supports defendant's interpretation "to the extent required by" the constitution. The context includes other parts of the same statute. *Force v. Dept of Rev*, 350 Or 179, 188, 252 P3d 306 (2011). This court construes "each part together with the other parts in an attempt to produce a harmonious whole." *Lane County v. LCDC*, 325 Or 569, 578, 942 P2d 278 (1997).

OEC 404(4) is divided into three overall parts. The first part declares that relevant other acts evidence is admissible with some exceptions. The second part—OEC 404(4)(a) and (b)—specifically identifies statutes that require exclusion of other acts evidence. The third part—OEC 404(4)(c) and (d)—recognizes that the state or federal constitution might require exclusion of other acts evidence.

This court has cautioned that dictionary definitions are not determinative. *See, e.g.*, 351 Or 68, 96, 261 P3d 1234 (2011) ("In construing statutes, we do not simply consult dictionaries and interpret words in a vacuum. Dictionaries, after all, do not tell us what words mean, only what words *can* mean, depending on their context and the particular manner in which they are used.") (emphasis in original); *State v. Glaspey*, 337 Or 558, 564-65, 100 P3d 740 (2004) (rejecting dictionary definition of term in favor of narrower meaning supported by context).

Given that OEC 404(a) and (b) list *statutes* that might require exclusion of other acts evidence, the legislature likely did not intend to insert some sort of constitutional "due process balancing" test for the exclusion of other acts evidence into the OEC 404(a) list of statutes. If it had meant to do so, it could have just said that without any reference to OEC 403. But it did not. Instead, it listed OEC 403. It did so conditionally—it would require OEC 403 only if such balancing was constitutionally required. But the fact that the legislature listed OEC 403 in a list of applicable statutes shows that it intended the well-defined *statutory* balancing rule to apply and not some undefined constitutional "due process balancing."

Further, given the three-part structure of OEC 404(4), the legislature would have no reason to include some sort of constitutional "due process balancing" test for the exclusion of other acts evidence in OEC 404(4)(a). That is because OEC 404(4)(d) provides that "evidence of other crimes, wrongs or acts by the defendant is admissible if relevant except as provided by * * * [t]he United States Constitution." If the admission of probative other acts evidence was so unfairly prejudicial as to violate due process, then that evidence would already be excluded under OEC 404(4)(d). The legislature would have no need to create in OEC 404(4)(a) a new type of OEC 403 balancing that would require exclusion of other acts evidence only if due process required it. The legislature must therefore have intended something different when it included OEC 403 in

OEC 404(4)(a): It must have meant that other acts evidence was subject to traditional OEC 403 balancing if the courts found that such balancing was constitutionally required.

This court must, whenever possible, construe statutes so as to give effect to all subsections. ORS 174.010; *Force*, 350 Or at 190 ("Statutory provisions, however, must be construed, if possible, in a manner that 'will give effect to all' of them."). Defendant's proposed interpretation does just that. OEC 404(4) provides that evidence of other crimes, wrongs or acts is admissible if relevant; subsection (a) makes admission of that evidence subject to OEC 406-412 and OEC 403 balancing (if, in fact, OEC 403 balancing is constitutionally required); subsection (b) makes admission of that evidence subject to the rules of evidence relating to privilege and hearsay; subsection (c) makes admission of that evidence subject to the Oregon Constitution; and subsection (d) makes admission of that evidence subject to the United States Constitution. The state's interpretation, in contrast, creates redundancy, which should be avoided when, as here, it is possible to do so. *See Blachana, LLC v. Bureau of Labor and Industries*, 354 Or 676, 692, 213 P3d 735 (2014) ("[R]edundancy, of course, is a consequence that this court must avoid if possible."); *State v. Kellar*, 349 Or 626, 636, 247 P3d 1232 (2011) ("Defendant's interpretation results in a redundancy, something that we seek to avoid in interpreting statutes.").

In sum, context supports defendant's interpretation. OEC 404(4)(a) made other acts evidence subject to OEC 403 balancing if a condition was met: Rule 403 balancing was required by the federal constitution.[12]

B. The legislature was told that OEC 403 would apply to evidence sought to be admitted under OEC 404(4), and there was never any discussion of a concept resembling "due process balancing."

Legislative history of OEC 404(4) confirms that "to the extent required by" the state or federal constitution should be interpreted to meant that OEC 403 applies "if required by" the state or federal constitution. The legislature intended to defer to then-pending federal litigation on whether Rule 403 balancing was required in an analogous context. Because OEC 404(4) was adopted shortly after similar, though less expansive, federal rules were adopted by Congress, defendant starts the discussion of legislative history there.

In 1994, Congress adopted FRE 413 and FRE 414, which permit the admission of other acts evidence to prove propensity in sexual assault or child molestation cases. At that time, FRE 414 provided, in relevant part:

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[12] Defendant recognizes that under his interpretation of OEC 404 (4)(a), the legislature could have achieved the same result more succinctly. It could have simply said that OEC 403 applies "if required by" the state or federal constitution, rather than using the wordier phrase, "to the extent required by." Nevertheless, as this court has recognized, legal terminology can be redundant and verbose, "sometimes for clarity, sometimes for emphasis," and sometimes because of the multilingual roots of the English legal vocabulary. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 395-397, 737 P2d 595 (1987).

> "**(a) Permitted Uses**. In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation *is admissible*, and may be considered for its bearing on any matter to which it is relevant."

Pub L N 103322, § 320935, 108 Stat 2135 (1994) (emphasis added). FRE 413, which applied to cases in which the defendant was accused of sexual assault, allowed for the admission of other instances of sexual assault but was otherwise identically-worded to FRE 414.[13] Because the majority of sexual assault and child molestation cases are tried in state court, the sponsors of FRE 413 and FRE 414 hoped that the rules would encourage the states to change their evidence codes to reflect the new federal rules. *See* 140 Cong Reg S10,276 (daily ed. Aug 2, 1994) (Senator Dole stating, "[T]he Federal Government has a leadership role to play in this area. Once the Federal Rules are amended, it's possible—perhaps even likely—that the States may follow suit and amend their own rules of evidence as well.").

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[13] In 2011, Congress amended FRE 413 and FRE 414 and substituted "may admit" for "is admissible." This and other minor changes were intended to be stylistic only. *See, e.g.* FRE 413 advisory committee's notes ("There is no intent to change any result in any ruling on evidence admissibility.").

Shortly after FRE 413 and 414 were enacted, there was vigorous debate about whether FRE 403 would apply to evidence admissible under FRE 413 or 414. That is because the rules used the phrase "is admissible," without qualification. *See, e.g.*, Louis M. Natali, Jr. & R. Stephen Stigall, *"Are You Going to Arraign His Whole Life?": How Sexual Propensity Evidence Violates the Due Process Clause*, 28 Loy U Chi L J 1, 30 (1996) ("By mandating that prior acts evidence *is admissible*, the rules prohibit a district court from balancing the probativeness and prejudice of such evidence as permitted in Rule 403 of the Federal Rules of Evidence."); *United States v. Enjady*, 134 F3d 1427, 1431 (10th Cir), *cert den*, 525 US 887 (1998) ("The Rule 413(a) language 'is admissible' can be read as trumping Rule 403 and requiring admission of such evidence in all circumstances.").

Nevertheless, beginning in 1997, federal appellate courts began to address the issue and held, without exception, that FRE 413 and FRE 414 did not eliminate FRE 403 balancing.[14] *See, e.g., United States v. Larson*, 112 F3d 600, 604 (2nd Cir 1997) (FRE 414 did not eliminate FRE 403 balancing); *United States v. Sumner*, 119 F3d 658 (8th Cir 1997) (same).

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[14] Many of those early decisions holding that FRE 403 applied were based on a statutory analysis rather than a constitutional one. As will be discussed below, federal courts eventually held FRE 413 and FRE 414 would violate due process *but for* the trial court's application of FRE 403.

At the same time that issue was making its way through federal appellate courts, the Oregon legislature enacted OEC 404(4). That rule originated in Senate Bill (SB) 936, introduced in the 1997 legislature. Or Laws 1997, ch 313, § 29. SB 936 was a "legislative paraphrase of selected provisions of an amendment to the Oregon Constitution that was known as Ballot Measure 40 (1996)." *State v. Fugate*, 332 Or 195, 199, 26 P3d 802 (2001). Measure 40 was immediately subject to constitutional challenge and was eventually declared unconstitutional by this court in *Armatta v. Kitzhaber*, 327 Or 250, 959 P2d 49 (1998). Partly in response to then-pending litigation surrounding Measure 40, the legislature enacted SB 936. *Fugate*, 332 Or at 200-01.

SB 936 contained 39 sections. Section 1 of SB 936 became ORS 136.432, which provides that, "A court may not exclude relevant and otherwise admissible evidence in a criminal action on the grounds that it was obtained in violation of any statutory provision" subject to several exceptions. Section 29 of the bill amended OEC 404 to add subsection (4). There were multiple lengthy hearings on SB 936, but the vast majority of the discussion concerning the admission of relevant evidence against a criminal defendant clearly pertained to Section 1, not to Section 29.

At one hearing, however, Mike Phillips, a member of the Board of Governors of the Oregon State Bar, provided testimony. He noted that the Oregon State Bar had concerns about three provisions of SB 936, including

Section 29. House Committee on Judiciary, Subcommittee on Criminal Law, SB 936, Apr 17, 1997, Tape 88, Side A. Phillips stated that he believed that Section 29 would modify OEC 404(3), and that,

> "evidence of someone's prior acts may be used to prove what their character is for the purpose of showing that they acted in conformance with that character now. That is, essentially, if you are a bad person it is more likely you committed this crime. That repeals a part of the evidence law of the Anglo-American system that's been in existence since 1695."

Id.

Assistant Attorney General Mark Gardner, one of the parties involved in drafting SB 936, forcefully spoke in opposition to Phillips' understanding of Section 29:

> "There is a balancing test that is required under the US Constitution. Mr. Phillips should review his constitutional law because it is required that a trial judge balance the probative evidence versus the prejudicial impact before the judge constitutionally can admit the evidence in a case. * * * *What SB 936 does, it puts into statute the fact that we are still going to have a balancing test, because that's what [OEC] 403 presently requires*."

Id. at Tape 89, Side A, (emphasis added). As a representative of an organization that helped draft SB 936, Gardener's understanding of the statute is critical. *See Ram Technical Services, Inc. v. Koresko*, 346 Or 215, 234-35, 208 P3d 950 (2009) (examining legislative history and relying on statement from representative of organization who proposed the amendments at issue). And that construction of the bill was shared by others. Jim Arnesen of the

Oregon Criminal Defense Lawyers Association stated that he understood that the bill would "allow the introduction of evidence against the defendant that is not currently allowed * * * [, and] the only limitation on keeping that evidence out when the state wants to offer it will be the Federal Constitution *and Rule 403* with respect to prejudice.") Tape Recording, Senate Committee on Crime and Corrections, SB 936, March 21, 1997, Tape 43, Side A (emphasis added).

The assistant attorney general's testimony to the legislature was straightforward and unequivocal: OEC 403 would continue to apply because, at least in his opinion, the United States Constitution required the application of a balancing test. His testimony, combined with the fact that federal courts were, at the very same time, grappling with whether the federal constitution required FRE 403 to be applied to evidence admissible under FRE 413 or 414, points to only one tenable construction of OEC 404(4)(a): OEC 403 would apply if federal courts declared that Rule 403 balancing was required as a matter of due process. Notably, that is precisely how this court interpreted the interplay between the statutory text of OEC 404(4) and the uncertain case law at that time in the federal courts:

> "As noted, the Oregon Legislative Assembly adopted OEC 404(4) in 1997, just three years after Congress had adopted FRE 413 and 414. At that time, questions about whether evidence proffered under FRE 413 and 414 was subject to balancing under FRE 403 and whether those rules violated the Due Process Clause were pending in the lower federal courts. The Oregon Legislative Assembly recognized the unsettled state of the law by expressly

> making OEC 404(4) subject to OEC 403 'to the extent required by the United States Constitution.' In so providing, the legislature deferred to the courts to determine *whether* the federal constitution requires the application of OEC 403."

Williams, 357 Or at 15-16 (internal footnote omitted) (emphasis added).

It is worth highlighting that at no point in the voluminous legislative history did defendant find any mention of this concept of "due process balancing." No one discussed the possibility that a weakened version of OEC 403 would apply. It seems unlikely that the legislature was contemplating the use of a *completely novel* and not particularly straightforward form of OEC 403, but neglected to say so. *See State v. Miller*, 309 Or 362, 788 P2d 974 (1990) (declining to infer that legislature intended to depart from established practice of not requiring a culpable mental state in DUII cases, and noting that, "[w]e have not found where any witness appearing before any legislative committee considering DUII statutes asserted that a culpable mental state would be required."). Instead, the most logical reading of the legislative history is that application of OEC 403 was assumed to be an all or nothing proposition: either OEC 403 would apply because federal courts required FRE 403 in an analogous context, or it would apply not at all.

C. Federal appellate courts have held that but for a trial court's ability to exclude evidence under FRE 403, the federal propensity evidence rules would violate due process.

Though the United States Supreme Court has not addressed whether FRE 403 balancing is required when evidence is admissible under FRE 413 or FRE 414, every single federal appellate court to do so has held that, *but for* FRE 403, FRE 413 and FRE 414 would be unconstitutional. *See, e.g.*, *Enjady*, 134 F3d at 1433 (noting that FRE 413 is not unconstitutional on its face because of the safeguards of FRE 403); *United States v. Mound*, 149 F3d 799, 800-02 (8th Cir 1998), *cert den*, 525 US 1089 (1999) (FRE 413 does not violate fundamental fairness as long as FRE 403 applies); *Castillo*, 140 F3d at 884 ("[A]pplication of Rule 403 to Rule 414 evidence eliminates the due process concerns posed by Rule 414."); *see also Falsetta*, 986 P2d at 192 (observing that federal courts "hold, in short, that the possible exclusion of unduly prejudicial evidence saves federal rules 413 and 414 from attack on due process grounds[,]" and noting that California's analogs to FRE 413 and 414 are likewise saved by the state's version of FRE 403.).

Defendant recognizes that federal courts have held that the FRE 403 acts to safeguard due process, not that due process strictly requires FRE 403. *See Williams*, 357 Or at 17 ("Said another way, just because due process is served by a particular evidentiary rule does not mean, at least necessarily, that due process is violated if that rule is not applicable."). But that distinction, while

technically correct, does not alter the analysis here. The legislature contemplated that OEC 403 balancing—traditional OEC 403 balancing—would apply if federal courts concluded that the federal constitution required it and would not apply if federal courts came to the opposite conclusion. Federal courts have unanimously concluded that without FRE 403, FRE 413 and FRE 414 would violate the Due Process Clause. Traditional OEC 403 balancing therefore applies to evidence admitted under OEC 404(4).

D. The state's interpretation of OEC 404(4)(a) would lead to an absurd result because the trial court would have discretion to exclude non-propensity evidence, but no discretion to exclude the much more prejudicial propensity evidence.

The text, context, and legislative history support defendant's construction of OEC 404(4)—that the legislature contemplated that traditional OEC 403 balancing would apply if federal courts concluded that the federal constitution required it. Nevertheless, if this court disagrees, the final step in statutory interpretation is to apply any relevant maxims of statutory construction. *Gaines*, 346 Or at 172. One canon of construction is that a court should presume that the legislature did not intend an absurd result. *State v. Vasquez-Rubio*, 323 Or 275, 282, 917 P2d 494 (1996).

The state's interpretation of OEC 404(4)(a)—that it mandates only a limited "due process balancing"—would lead to an irrational result. Evidence offered for a non-propensity purpose under OEC 404(3), such as to prove

motive or intent, would be subject to traditional OEC 403 balancing. A trial court could therefore engage in fact-specific balancing and exclude that type of evidence under OEC 403 because, for example, it was cumulative, could mislead the jury, or was simply a waste of time. Yet evidence offered under OEC 404(4) to prove only that the defendant has the propensity to commits sex offenses against children would be subject to less stringent balancing—the trial court could determine *only* whether admission of the evidence would violate due process. It is illogical that the trial court would have no discretion to keep out the type of evidence that, for hundreds of years has been excluded because of its overwhelmingly prejudicial nature, but would have wide latitude to exclude evidence that has long been admissible.

Propensity evidence offered under OEC 404(4), even *more* than evidence offered under OEC 404(3), requires a nuanced, fact-sensitive weighing of probative value against unfair prejudice, confusion, or waste of time by the one impartial expert in the courtroom—the trial judge. The state's proposed interpretation flips that presumption on its head. Because the legislature could not reasonably have intended for a trial court to have less discretion to exclude more unfairly prejudicial evidence, this court should adopt defendant's interpretation of OEC 404(4)(a): Traditional OEC 403 balancing applies to all other acts evidence, whether it is admitted under OEC 404(3) or OEC 404(4).

V. OEC 403 balancing of evidence admissible under OEC 404(4) must be rigorous, thorough, and on the record.

OEC 403 balancing requires the trial court to apply a four-step analysis. First, the trial court must consider the probative value of the proffered evidence. Second, the court must determine how prejudicial the evidence is. Third, the court must weigh the proponent's need for the evidence against the danger of unfair prejudice against the opponent. Fourth, the trial court must make a ruling to admit all the proponent's evidence, to exclude all the proponent's evidence, or to admit only part of the evidence. *State v. Mayfield*, 302 Or 631, 645, 733 P2d 438 (1987). Because of the "inherent strength" of other acts evidence offered to prove propensity under OEC 404(4), "a court should pay careful attention both to the significant probative value and the strong prejudicial qualities of the evidence" when conducting OEC 403 balancing. *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F3d 1258, 1268-69 (9th Cir 2000) (making that observation regarding evidence admitted pursuant to FRE 415, which applies in civil proceedings).

A. Probative value considerations

In the first step of OEC 403 balancing, "the judge should assess the proponent's need for the * * * evidence" and also "analyze the quantum of probative value of the evidence and consider the weight or strength of the evidence." *Mayfield*, 302 Or at 645. The probative value of evidence is "essentially a measure of persuasiveness that attaches to a piece of evidence"; it

"concerns the strength of the relationship between the proffered evidence and the proposition sought to be proved." *State v. Lawson*, 352 Or 724, 757, 291 P3d 673 (2012).

A court determining the probative value of other acts evidence offered pursuant to OEC 404(4) should consider factors such as (1) the strength of the probative relationship between the proffered evidence and the material fact it is intended to prove; (2) how seriously disputed the material fact is; (3) the reliability of the proffered evidence and how clearly it can be proved; (4) the similarity of the other acts to the acts charged; (5) the closeness in time of the other acts to the acts charged; (6) the frequency of the prior acts; (7) the presence or lack of intervening circumstances; (8) the necessity of the evidence (that is, whether it is needlessly cumulative); and (9) whether the government can avail itself of any less prejudicial evidence. *See Johns*, 301 Or at 557–58 (when admitting other acts evidence, courts should consider the need for that evidence, the certainty that the other act was committed and that defendant committed it, and the strength or weakness of the evidence); *Williams*, 357 Or at 22, n 21 ("a trial court may consider whether other evidence that does not carry the same risk of unfair prejudice is available to prove an element of the charged crime"); *cf*., *LeMay*, 260 F3d at 1028-30 (applying a number of the listed factors in FRE 403 balancing); *United States v. Benally*, 500 F3d 1085, 1090-91 (10th Cir 2007) (same).

The state does not appear to argue that a trial court should not consider those listed factors when determining the probative value of propensity under its vaguely defined "due process balancing." Indeed, it acknowledges that such factors would be helpful. Pet BOM at 27, n 5.

B. Factors related to prejudicial impact

Unfair prejudice "describes a situation in which the preferences of the trier of fact are affected by reasons essentially unrelated to the persuasive power of the evidence to establish a fact of consequence." *State v. Lyons*, 324 Or 256, 280, 924 P2d 802 (1996); *see also Old Chief*, 519 US at 180 ("The term 'unfair prejudice,' [under FRE 403] as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.").

A court determining the unfair prejudice of other acts evidence offered pursuant to OEC 404(4) should consider a number of factors, including (1) whether the other acts evidence is likely to result in a jury verdict based on an emotional response to the defendant's past offenses or bad character; (2) whether such evidence will "weigh too much with the jury"; (3) whether the introduction of "other acts" evidence will confuse and distract jurors who are uncertain of what the charges actually are or which evidence is offered to prove the charged act versus the other acts; (4) whether the introduction of other acts evidence will result in mini-trials that cause undue delay; (5) whether the

defendant received reasonable notice of the other acts evidence; and (6) whether the defendant had an adequate opportunity to defend against the other acts evidence. *See* OEC 403*; Johns*, 301 Or at 558-59 (in weighing the danger of unfair prejudice of prior act evidence, a court should consider its inflammatory effect on the jury, how time-consuming such evidence will be, whether the evidence will confuse, distract, or mislead the jury, and whether the defense had the opportunity to investigate the offered other act); *State v. Southard*, 347 Or 127, 133-39, 218 P3d 104 (2009) (excluding evidence under OEC 403 which tends to "overly impress" the jury and "divert [it] from the direct and circumstantial evidence" of the crime charged); *cf., United States v. McHorse*, 179 F3d 889, 898 (10th Cir), *cert den*, 528 US 944 (1999) (a court analyzing the prejudicial impact of evidence admissible under FRE 413 or 414 should consider (1) whether such evidence will contribute to an improperly-based jury verdict; (2) the extent to which such evidence will distract the jury from the central issues of the trial; and (3) how time consuming it will be to prove the other acts); Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence §4.22 (4th ed 2013) (stating three reasons to exclude evidence of other acts evidence: (1) it "might persuade the jury to convict in order to penalize the accused for past misdeeds or for being a bad person"; (2) "the jury may overvalue prior crimes in assessing guilt"; and (3) it is "unfair to require the

defendant to be prepared not only to defend against the immediate charges but to answer for other alleged misdeeds").

The state appears to argue for a balancing test that considers only the first prejudicial impact factor: that is, whether the evidence is likely to result in a jury verdict based on an emotional response to the defendant's past offenses or bad character. Pet BOM at 14-15. The state appears to argue for that single-factor balancing test because it presumably believes that consideration of that factor adequately addresses any potential violations of a defendant's due process trial rights. But the state is incorrect.

As noted above, admitting other evidence to prove propensity greatly raises the risk that "the jury will convict for crimes other than those charged, or because the accused deserves punishment for his past misdeeds." *State v. Pinnell*, 311 Or 98, 106, 806 P2d 110 (1991). And, as explained above, that risk threatens a defendant's due process right to the presumption of innocence, proof beyond a reasonable doubt, and not to be convicted based on his bad character. As one legal commentator has noted,

> "[FRE] 403 unfair prejudice may arise if the jurors become so horrified by the prior acts admitted under [FRE] 413 and 414 that they loathe the accused and desire to punish him for past deeds, even though they may not believe he committed the currently charged crime. More subtly, jurors could begin thinking of the accused as guilty, finessing the standard of proof, and convicting him because moral abhorrence of his guilty past assuages their reasonable doubts."

Aviva Orenstein, *Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403*, 90 Cornell L. Rev. 1487 (2005). The state is therefore right to insist that a court consider whether other acts evidence is likely to result in a jury verdict based on an emotional response to the defendant's past offenses or bad character.

But a defendant has due process trial rights other than those three due process rights. And consideration of the other prejudicial impact factors listed above not only accords with traditional concepts of "unfair prejudice" under OEC 403 (and with plain sense), but also addresses the potential infringement of those other due process rights.

A defendant has a due process right to a jury "capable and willing to decide the case solely on the evidence before it," *Smith* , 455 US at 217, and a due process right to a jury "actually []capable of rendering an impartial verdict, based on the evidence and the law." *Peters v. Kiff*, 407 US 493, 501, 92 S Ct 2163, 33 L Ed 2d 83 (1972). Jurors may become confused, distracted, or overwhelmed by OEC 404(4) evidence and consequently be incapable of rendering a verdict based solely on evidence of the charged acts alone. To guard against that, a trial judge should consider three of the OEC 403 factors listed above: (1) whether other acts evidence will "weigh too much" with jurors; (2) whether such evidence will distract jurors from the bad acts charged or confuse jurors as to which bad acts are being charged and what evidence

proves which act; (3) and whether "mini-trials" of the unchanged acts will cause undue delay.

A defendant also has a due process trial right to notice of the state's allegations and an opportunity to prepare for, be heard, and defend against those allegations. *Morrissey v. Brewer*, 408 US 471, 481, 92 S Ct 2593, 33 L Ed 2d 484 (1972) (stating those rights in the context of a parole violation hearing); *Cole v. Arkansas*, 333 US 196, 201, 68 S Ct 514, 92 L Ed 644 (1948) ("No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge."). Although *Morrissey* and *Cole* did not concern the admission of other acts evidence in a trial, those same basic concerns about notice and the opportunity to meet the state's case arise when the state seeks to adduce OEC 404(4) propensity evidence. *See Pinnell*, 311 Or at 106 ("it is viewed as unfair to require an accused to be prepared to not only defend against the immediate charge, but also to defend or explain away unrelated acts from the past"). Accordingly, due process concerns require a trial court contemplating the admission of OEC 404(4) evidence to consider the final two OEC 403 factors listed above: (1) whether the defendant received reasonable notice of the other acts evidence; and (2) whether the defendant had an adequate opportunity to

prepare for and defend against that evidence.[15] *See Morrissey*, 408 US at 481 ("due process is flexible and calls for such procedural protections as the particular situation demands").

The legislature intended that a trial court conduct traditional OEC 403 balancing when considering evidence offered under OEC 404(4), and defendant has listed many of the common prejudicial impact factors that a trial court should consider.[16] The state appears to argue that this court should only consider a single factor—the inflammatory effect of the evidence—because due process requires consideration of only that single factor. But even if a trial court were to consider only those prejudicial impact factors that safeguard a defendant's due process trial rights, the court should still consider all the prejudicial impact factors listed above because each of those factors, in one way or another, safeguards a defendant's due process rights.

C. The trial court has a heightened role as an evidentiary gatekeeper when weighing the probative value of OEC 404(4) evidence against its prejudicial impact.

When applying FRE 403 to evidence admissible under FRE 413 and 414, the Ninth and Tenth Circuit appellate courts require district courts to carefully

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[15] Defendant notes that federal courts do not consider these two factors when conducting FRE 403 balancing. That is because both FRE 413(b) and FRE 414(b) require that the government disclose its intent to offer evidence under those provisions. OEC 404(4) has no similar provision.

[16] Of course, other, more uncommon factors might arise in a particular case.

and completely weigh the FRE 403 factors and to make a clear record of their analyses. As the Ninth Circuit explained:

> "In light of the sensitive nature of the evidence proffered [under FRE 413 and 414], it is important that the district court fully evaluate the factors enumerated above, and others that might arise on a case-by-case basis, and make a clear record concerning its decision whether or not to admit such evidence."

Glanzer, 232 F3d at 1268-69 (internal quotations and citations omitted); s*ee also United States v. Guardia*, 135 F3d 1326, 1331 (10th Cir 1998) ("Because of the sensitive nature of the balancing test in these cases, it will be particularly important for a district court to fully evaluate the proffered Rule 413 evidence and make a clear record of the reasoning behind its findings.").

The Ninth Circuit applied the principle that it announced in *Glanzer* in *LeMay*. It upheld the district court's decision to admit propensity evidence because the district court had carefully considered the evidence and made a clear record of its ruling. *LeMay*, 260 F3d at 1030. The appellate court's discussion of the district court's analysis illustrates the rigorous scrutiny to which propensity evidence should be subjected before it is admitted:

> "[T]he district judge did conduct just the sort of searching inquiry we deemed necessary in *Glanzer*. He held an extensive pre-trial hearing, at which he grilled the prosecutor about all aspects of Rule 414, and questioned her as to why she needed the prior acts evidence and how she intended to introduce it. The judge also reserved the Rule 403 decision until after the prosecution had introduced all of its other evidence, in order to get a feel for the evidence as it developed at trial before ruling on whether LeMay's prior acts of child molestation could come in. *

> * * Finally, the district court reminded the jury in its final instructions that, while it could consider the prior acts evidence for any matter which it deemed relevant, it could only convict LeMay for the charged crimes. In short * * * the record reveals that [the judge] exercised his discretion to admit the evidence in a careful and judicious manner."

LeMay, 260 F3d at 1028. *Cf.*, *Blind–Doan v. Sanders*, 291 F3d 1079, 1082 (9th Cir 2002) (reversing judgment where the trial court failed to make a clear record of FRE 403 balancing).

This court should similarly require that a trial court conduct the same extensive "careful and judicious" balancing when engaged in the third *Mayfield* step: that is, the weighing of the proponent's need for the OEC 404(4) evidence against the danger of unfair prejudice from that evidence. The inherent prejudicial impact of OEC 404(4) evidence compels a trial court to take on that "heightened role as an evidentiary gatekeeper." *See Lawson*, 352 Or at 758 (because eyewitness identifications subjected to suggestive police procedures are particularly susceptible to concerns of unfair prejudice, trial courts "have a heightened role as an evidentiary gatekeeper" when conducting OEC 403 balancing).

VI. Because OEC 403 balancing applies to propensity evidence offered under OEC 404(4), the appellate court reviews a trial court's decision to admit or exclude propensity evidence for an abuse of discretion.

As discussed above, in *Mayfield*, this court established a four-step analysis for trial courts to employ when deciding whether to exclude evidence

under OEC 403. 302 Or at 645. In a traditional OEC 403 analysis, the trial court need not explicitly conduct the *Mayfield* analysis on the record, but the court's findings must at least indicate that it engaged in balancing the cost of the evidence against its benefits. *Pinnell*, 311 Or at 112-13. However, as argued above, because of the strength and often highly prejudicial nature of propensity evidence, trial courts should carefully balance the factors and make a clear record when determining whether to admit or exclude such evidence.

The trial court errs, as a matter of law, if it "fails to exercise discretion, refuses to exercise its discretion, or fails to make a record which reflects an exercise of discretion." *Mayfield*, 302 Or at 645. An appellate court reviews whether a trial court properly applied the balancing test that OEC 403 requires for errors of law, and it reviews a trial court's ultimate decision to admit or exclude evidence for an abuse of discretion. *McCathern v. Toyota Motor Corp.*, 332 Or 59, 71-72, 23 P3d 320 (2001).

The abuse of discretion standard of review as applied to evidentiary rulings is a spectrum. This court has explained how that discretion operates in the context of evidentiary rulings:

> "'[D]iscretion' * * * refers to the authority of a trial court to choose among several legally correct outcomes. * * * It follows that [the appellate court] must first review evidentiary rulings without deference to determine whether proper principles of law were applied correctly. Next, and also without deference, [the appellate court] must determine whether application of those principles leads to only one correct outcome. If there is only one

> legally correct outcome, and the trial court arrived at that outcome, it did not err; conversely, if the trial court arrived at a different outcome, it did err. Only if [the appellate court] determine[s] that application of the correct legal principles leads to more than one correct outcome [does the appellate court] continue to review whether the trial court abused its discretion in choosing an outcome. If the trial court's decision was within the range of legally correct discretionary choices and produced a permissible, legally correct outcome, the trial court did not abuse its discretion."

State v. Rogers, 330 Or 282, 312, 4 P3d 1261 (2000).

Thus, with respect to the admission or exclusion of evidence, the general rule is that so long as the trial court's decision falls within the range of legally correct rulings, the appellate court will defer to the trial court's ruling and not disturb that decision on appeal. But, in rare cases, there may be only one legally correct outcome. For example, in some cases, the probative value of the evidence is so minimal and the danger of unfair prejudice so great that admission of the evidence would violate due process. In that circumstance, the evidence should be excluded as a matter of law. *See, e.g., United States v. Morena*, 547 F3d 191, 194-96 (3d Cir 2008) (in a felon in possession of a firearm trial, admission of extensive evidence of uncharged drug use by the defendant was so prejudicial that it violated due process); *Henry v. Estelle*, 33 F3d 1037, 1042-43 (9th Cir 1993), *judgment vacated on other grounds*, 52 F3d 809 (1995) (in a child molestation case, where evidence of other prior acts "was not probative of any material issue in the case" and was "highly prejudicial," admission of the evidence deprived the defendant of a fair trial); *McKinney*, 993

F2d at 1382-85 (in a murder case where the victim's throat had been slit, evidence of the defendant's possession and interest in knives was so highly inflammatory and had so little relevance that it rendered the trial fundamentally unfair in violation of Due Process).

VII. The appropriate remedy for a trial court's failure to conduct OEC 403 balancing is to remand for a new trial, not remand for after-the-fact balancing.

When an appellate court exercises its discretion to correct an OEC 403 balancing error on appeal, the only appropriate remedy is to remand for a new trial for several reasons. First, a limited remand, in substance, abdicates the appellate court's duty to determine whether an error is harmless and whether reversal of a case is warranted. Second, a trial court's decision to admit or exclude evidence in the face of an OEC 403 objection is too intricately intertwined with the trial such that divorcing the two through remand for a hearing rather than a new trial is an inadequate remedy.

Often times, the admissibility of other acts evidence is litigated pretrial. In that situation, when the trial court rules on the admissibility of the evidence in the face of a defendant's OEC 403 objection, the trial court is looking prospectively at what the state's evidence is going to be and assessing the probative value and the state's need for the evidence against its prejudice. If the admission of the evidence is litigated pretrial, the trial court can craft a case-specific remedy. The trial court could admit only part of the evidence. It could

admit all of the evidence and provide the jury with a limiting instruction. Or, a defendant may offer to stipulate to what the evidence is being offered to show so that it is not admitted.

Other acts evidence is not necessarily entirely admissible or entirely excludable. The remedy of a limited remand for a hearing transforms the forward looking nature of OEC 403 into Monday morning quarterbacking. It turns a trial court's duty to conduct OEC 403 balancing into a harmless error test and changes the tenor and application of the rule.

At the same time, a trial court's pretrial decision to admit, exclude, or admit only part of other acts evidence could affect a defendant's trial strategy and tactical decisions about how to try a case. It could affect the defendant's decision whether to waive his right to a jury trial and try his case to the court. Once a defendant learns of the state's intended use of the evidence, it could also impact the defendant's theory of defense and how the trial is conducted. If the OEC 403 decision is made during trial, it could affect the defendant's decision of whether to request a limiting jury instruction or whether to testify.

All of those factors distinguish a trial court's failure to conduct OEC 403 balancing of other acts from this court's decision in *State v. Campbell*, 299 Or 633, 652-53, 705 P2d 694 (1985). In that case, this court concluded that reversal with a limited remand for the trial court to determine whether a child witness was competent to testify was proper because the trial court had not

made that ruling. *Id.* at 654. But the decision of whether a witness is competent to testify is an all or nothing decision. That is very different from the various discretionary rulings that a trial court can craft when faced with an OEC 403 objection to the admission of other acts evidence.

Finally, when the Court of Appeals orders a limited remand for the trial court to hold a hearing to conduct OEC 403 balancing, there is a risk that the trial court who sat through trial, and presumably sentenced the defendant, will be invested in the original result. Asking a judge to weigh the "unfair prejudice" suffered by a defendant who has already been found guilty is a loaded question. The trial judge may be less likely to order a new trial, even when one is warranted, because he or she has already seen how the trial played out and may have come to the same conclusion as the jury. The court may also be inclined to save judicial resources and not order a new trial. In the context of a similar limited remand approach for resentencing, Judge Ripple of the Seventh Circuit observed that such an approach,

> "in all too many instances * * * will serve as an invitation for the district court to give only a superficial look at the earlier unconstitutionally-imposed sentenced. The constitutional right at stake hardly is vindicated by a looks-all-right-to-me assessment of a busy district court."

United States v. Paladino, 401 F3d 471, 486 (7th Cir), *cert den*, 546 US 849 (2005) (Ripple, J., dissenting).

Because of the unique nature of a trial court's ruling in the face of an OEC 403 objection, in cases involving the admission of other acts evidence, a remand for after-the-fact balancing is an inappropriate remedy. The proper remedy is reversal and remand for a new trial.

VIII. The trial court erred in admitting evidence of defendant's prior driving convictions.

Here, defendant was on trial for failure to perform the duties of a driver, reckless driving, and reckless endangerment committed in 2012 after he was involved in a motorcycle accident and left the scene before police arrived. *See* Pet BOM at 2-7 (statement of facts). The trial court admitted evidence of two prior instances in which defendant had been convicted of crimes involving driving. In 2000, defendant failed to stop at a stop sign and was eventually pursued by an officer. A second police officer joined the chase and tried unsuccessfully to stop defendant's car using a special intervention technique. *Id.* Defendant sped through a neighborhood and eventually pulled into his own garage. He was convicted of reckless driving and attempting to elude a police officer. *Id.* During the second incident, which occurred in 2002, defendant sped through a residential area, lost control of his car, crashed, and was convicted of reckless driving. *Id.*

Over defendant's relevance objections, the trial court admitted evidence of those other acts to prove defendant's reckless mental state for the charged

crimes. Tr 60. Although defendant also argued that, even if relevant, the trial court should exclude the evidence under OEC 403, the trial court did not engage in OEC 403 balancing.

Under the framework described above for the admissibility of other act evidence, the trial court erred in two different respects. First, evidence that defendant attempted to elude a police officer in 2000 had no non-propensity relevance under OEC 404(3). The fact that defendant refused to pull his car over and fled from two police officers 12 years before the charged crime did not make it more likely that defendant had a reckless mental state at the time of the charged crime—that is, that he was more likely to appreciate the risks of unsafe driving . The *only* relevance of that prior act was that defendant has a propensity for running away from police. Or, as the prosecutor argued, that defendant has the inclination to disregard the law. *See* Tr 487 (prosecutor suggesting to jury during closing argument that defendant's convictions, including the attempt to elude conviction, "demonstrate his indifference to the obligation to comply with the laws that pertain to driving[.]"). That theory of admissibility relies on nothing more than propensity. Evidence of his attempt to elude conviction was therefore categorically inadmissible under OEC 404(4)(d).

The trial court committed a second error. Even if evidence of defendant's two reckless driving convictions *was* admissible under OEC 404(3) for a non-propensity purpose—to prove that he was aware of the risks of unsafe

driving and consciously disregarded those risk—the trial court erred by failing to conduct OEC 403 balancing. In this court, the state concedes that the trial court did not conduct OEC 403 balancing. *See* Pet BOM at 9, n 2 ("the state assumes that the court implicitly conducted narrower due-process balancing rather than ordinary OEC 403 balancing").

The state makes no argument in this court that the introduction of the other acts evidence was harmless. And it was not. *See State v. Davis*, 336 Or 19, 33, 77 P3d 1111 (2003) (error is harmless under Article VII (Amended), section 3, only if "there was little likelihood that the error affected the verdict."); *Chapman v. California*, 386 US 18, 24, 87 S Ct 824, 17 L Ed 2d 705 (1967) (under federal constitution, error must be harmless beyond a reasonable doubt). Defendant contended at trial that he had done everything he could to avoid the car accident, and that he had left the scene only to get immediate medical help. *See, e.g.*, Tr 386-89, 413-15. The introduction of defendant's prior driving convictions, especially the attempt to elude conviction in which defendant engaged in a high-speed chase with two police officers in pursuit, almost certainly caused the jury to look at his defense with skepticism. The trial court should not have admitted evidence of defendant's attempt to elude conviction, and it further erred when it failed to engage in OEC 403 balancing before admitting his reckless driving convictions. Defendant is entitled to a new trial.

CONCLUSION

For the above reasons, defendant respectfully asks this court to affirm the decision of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Petition length

I certify that the brief complies with the 15,500 word-count limit requested from this court by motion dated October 14, 2016.

Type size

I certify that the size of the type in this petition is not smaller than 14 point for both the text of the petition and footnotes as required by ORAP 5.05(4)(f).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Respondent's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on October 14, 2016.

I further certify that I directed the Respondent's Brief on the Merits to be served upon Benjamin Gutman attorney for Respondent on Review, on October 14, 2016, by having the document personally delivered to:

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Respectfully submitted,

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