
IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff-Respondent,
Respondent on Review,

v.

EDWARD ZAVALA,

Defendant-Appellant
Petitioner on Review.

Lincoln County Circuit Court
Case No. 122847

CA A154491 (Control), A154492

S064051

PETITIONER'S BRIEF ON THE MERITS FOR DEFENDANT-APPELLANT

Petition to review the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court
for Lincoln County
Honorable Thomas O. Branford, Judge

Opinion Filed: March 2, 2016
Author of Opinion: Ortega, Presiding Judge
Concurring Judges: DeVore Judge, and Garrett, Judge

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PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

At issue in this case is the proper remedy on remand following the Court of Appeals' reversal of a defendant's convictions and sentence in light of *State v. Williams*, 357 Or 1, 346 P3d 455 (2015). Specifically, the issue is whether, when the Court of Appeals, under the plain error doctrine, exercises its discretion to correct evidentiary error under *Williams*, the proper remedy is either for a limited hearing to conduct OEC 403 balancing or a new trial.

Defendant was charged with three counts of sexual abuse in the first degree for touching his ex-girlfriend's two young daughters, and While he admitted to tickling them, he denied that he ever intentionally touched a sexual or intimate part of the victims with a sexual purpose. The state introduced, over defendant's objection, a witness's testimony that she observed defendant inappropriately touch and fondle The trial court concluded that the evidence was admissible under *State v. McKay*, 309 Or 305, 308, 787 P2d 479 (1990), in which this court held that uncharged conduct of sexual predisposition toward the same victim is admissible as evidence for "other purposes" under OEC 404(3) and not as propensity evidence. Defendant did not request that the trial court conduct OEC 403 balancing, because then-current case law did not allow

a trial court exclude uncharged misconduct evidence even if OEC 403 balancing supported that ruling.

A judge found defendant guilty on all counts. Defendant appealed and challenged the admission of the uncharged misconduct evidence. Two weeks after the Court of Appeals affirmed defendant's convictions without opinion, this court decided *Williams*. *State v. Zavala*, 270 Or App 351, 350 P3d 234 (2015). Defendant petitioned for reconsideration in light of *Williams*, arguing that the trial court erred when it admitted the evidence of uncharged misconduct without first considering whether the probative value of that evidence was substantially outweighed by the danger of unfair prejudice.

On reconsideration, the Court of Appeals concluded that the trial court's failure to conduct OEC 403 balancing before admitting the evidence constituted plain error and exercised its discretion to correct the error. *State v. Zavala*, 276 Or App 612, 618-22, 368 P3d 831 (2016). In doing so, the Court of Appeals vacated defendant's convictions and remanded the case with an instruction to the trial court to conduct OEC 403 balancing, and "allow[] a new trial only if the balancing reveals that one is necessary." *Id.* at 622 (labeling its remedy as a "conditional remand"). Defendant petitioned for review on the ground that the Court of Appeals should have remanded his case for a new trial, and this court allowed review. *State v. Zavala*, __ Or __, __ P3d __ (2016). This court also allowed review of the state's petition on the merits of the issue, in which it

argued that (1) a trial court does not commit plain error by failing to conduct balancing in the absence of a request, (2) to satisfy the elements of plain error, a defendant must demonstrate that balancing would have resulted in exclusion of the evidence, and (3) due process balancing under OEC 404(4) is narrower than ordinary OEC 403 balancing and permits exclusion only when the admission of the evidence would render the trial fundamentally unfair. *Id.*

Question Presented and Proposed Rule of Law

Question Presented

When the Court of Appeals exercises its discretion under the plain error doctrine to correct evidentiary error based on the significant change in the law announced in *State v. Williams*, 357 Or 1, 346 P3d 455 (2015), must it reverse and remand the case for a new trial, or may it impose a “conditional remand”?

Proposed Rule of Law

When the Court of Appeals invokes the plain error doctrine based on a significant change in the law, such as announced in *Williams*, a defendant who challenged the evidence but failed to press the previously precluded argument should be in the same position on appeal as a defendant who made a futile objection at trial and preserved the issue. The proper remedy in both situations is to reverse and remand the case for a new trial.

Statement of Historical and Procedural Facts

The Court of Appeals’ opinion accurately states the historical and procedural facts and is sufficient for this court’s review of the legal issue presented:

“The state charged defendant with three acts of sexual abuse: two instances involving and one involving In a bench trial, the trial court admitted testimony from the alleged victims’ mother’s former coworker, who recounted that she had observed defendant touch in a sexual manner on a different occasion than the charged instances, conduct that was uncharged. In the court’s view, the evidence was admissible under *State v. McKay*, 309 Or 305, 308, 787 P2d 479 (1990), in which the Supreme Court held that uncharged conduct of sexual disposition toward the same victim is admissible as evidence for ‘other purposes’ under OEC 404 (3) and not as propensity evidence. The court found defendant guilty on all counts. Defendant appealed, contending that the trial court erred by admitting testimony of the uncharged conduct because, based on evidentiary rules for evidence admitted under OEC 404(3) that were described in *State v. Pitt*, 352 Or 566, 575, 293 P3d 1002 (2012), and *State v. Leistiko*, 352 Or 172, 184-85, 282 P3d 857, *adh’d to as modified on recons*, 352 Or 622, 292 P3d 522 (2012), the evidence was not admissible. As noted, we affirmed without opinion.

“Defendant now petitions for reconsideration because the uncharged, ‘other acts’ evidence against him is subject to the ‘significant change in the law’ announced in *Williams*.”

Zavala, 276 Or App at 614-15 (footnotes omitted).

The Court of Appeals agreed with defendant that the trial court plainly erred in failing to conduct OEC 403 balancing and exercised its discretion to correct the error. *Id.* at 622. But it also concluded that it was speculative whether the trial court’s failure to conduct OEC 403 balancing affected the

outcome of the trial. *Id.* Because of that, the court ordered a “conditional remand.” *Id.* It vacated defendant’s convictions and remanded with instructions for the trial court to conduct the requisite OEC 403 balancing. *Id.* If, on remand, the trial court determines that it would have excluded the challenged evidence as unfairly prejudicial, it is to order a new trial. *Id.* If the trial court determines it would not have excluded the challenged evidence, then it is to reinstate the judgment. *Id.*

Summary of Argument

The Court of Appeals’ reasoning and decision to order a “conditional remand” is unsound. First, the difficulty in determining whether a trial court’s failure to conduct OEC 403 balancing in light of *Williams* harmed the defendant exists in *every* case tried before *Williams*, regardless of whether a defendant requested balancing. Before *Williams*, trial courts could not conduct OEC 403 balancing to exclude or admit the evidence and a request would have been futile. Thus, defendants with unpreserved *Williams* errors—when such error meet the rigors of plain error—should be treated the same on appeal as those with preserved *Williams* errors: reversal for a new trial when the appellate court cannot say that the error was harmless beyond a reasonable doubt or had little likelihood of affecting the.

The Court of Appeals conflated the determination of whether to exercise its discretion to correct an error under the plain error doctrine with the determination of whether the error was harmless. The discretion to correct plain error does not give rise to discretion to fashion a unique “conditional remand.” Once the appellate court concludes that an error satisfies the elements of plain error and decides to exercise its discretion to correct the error, the court is in the same analytical place that it is when addressing a preserved error. Confronted with the error, here, the failure to conduct OEC 403 balancing, the appellate court must ask whether the error was harmless.

In this case, (if Oregon’s harmless error test is to be applied) that means can the appellate court affirmatively say that the trial court would have admitted the evidence after OEC 403 balancing or, even if it would have excluded the evidence, the trial court would have reached the same verdict if had not had the challenged evidence before it. For federal constitutional errors, the court must apply the federal harmless error test. Under that test, the state bears the burden of showing that an evidentiary error was harmless beyond a reasonable doubt. Because the admission of uncharged misconduct evidence taints a trial in an immeasurable way, defendants whose cases present a *Williams* error are entitled to new trials.

The only appropriate remedy for the failure to conduct OEC 403 balancing before admitting evidence of uncharged misconduct in cases that

were tried before *Williams* but decided on appeal after *Williams* 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 for the due process violation. Often times, the admissibility of uncharged misconduct evidence is litigated pretrial. A trial court's ruling to 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, especially a trial court that convicted the defendant as factfinder, is invested in the original result. The court's ultimate decision on guilt could tip the scales when conducting any after-the-fact balancing. Thus, the only proper remedy for any case with a *Williams* error is for the Court of Appeals to reverse and remand for a new trial.

Argument

I. Introduction

In *Zavala*, 276 Or App at 617-22, the Court of Appeals held that a trial court's failure to conduct OEC 403¹ balancing before admitting evidence of uncharged sexual misconduct constituted plain error under ORAP 5.45(1). The Court of Appeals exercised its discretion to correct the error for three reasons: (1) the gravity of the error and the ends of justice, (2) correcting the error did not undermine the policies behind the general rule requiring preservation, and (3) the judicial resources need to correct the failure to conduct OEC 403 balancing could be mitigated with a "conditional remand," one limited to the trial court conducting the requisite balancing. *Id.* at 618.

In explaining why a limited remand was appropriate, the court noted that a trial court's failure to conduct OEC 403 balancing was a due process violation under *Williams*. *Id.* at 619. The court reasoned that when a federal constitutional error is preserved, it is required to apply the federal harmless error test outlined in *Chapman v. California*, 386 US 18, 87 S Ct 824, 17 L Ed

¹ OEC 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence."

2d 705 (1967).² *Id.* But when a defendant fails to preserve a federal constitutional error, the Court of Appeals concluded that it was free to apply state law rules when considering how to correct the error on appeal. *Id.* Under that rubric, the court concluded that because it could not determine whether the *Williams* error was “harmless error” or reversible error under Article VII (Amended) section 3, of the Oregon Constitution (Oregon’s harmless error test)³, the appropriate remedy was to remand to the trial court to conduct OEC 403 balancing. *Id.* at 621-22.

The Court of Appeals was incorrect. In *Williams*, this court concluded that a failure to conduct OEC 403 balancing before admitting evidence of uncharged sexual misconduct was a violation of the due process guaranteed by the Fourteenth Amendment. 357 Or at 18-19 (“[T]he only way that a court can ensure that the admission of ‘other acts’ evidence is not unfairly prejudicial and

² Under the federal harmless error test, “before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.” *Chapman*, 386 US at 24. The state bears the burden of proving harmlessness. *Id.*

³ Article VII (Amended), section 3, of the Oregon Constitution requires the appellate courts to “affirm a judgment, despite any error committed at trial, if, after considering all the matters submitted, the court is of the opinion that the judgment ‘was such as should have been rendered in the case.’” *State v. Davis*, 336 Or 19, 28, 77 P3d 1111 (2003) (quoting Article VII (Amended), section 3). The test for affirmance despite error is whether there is little likelihood that the particular error affected the verdict. *Id.*

a violation of ‘fundamental concepts of justice’ is to conduct OEC 403 balancing. We therefore hold that that balancing is required by the Due Process clause.”). Before *Williams*, trial courts were prohibited from conducting OEC 403 balancing. See *State v. Moore/Cohen*, 349 Or 371, 388-91, 245 P3d 101 (2010), *cert den*, 563 US 996 (2011) (rejecting the defendant’s facial challenge to OEC 404(4) and holding that OEC 403 balancing was not required); *State v. Dunn*, 160 Or App 422, 430, 981 P2d 809 (1999), *rev den*, 332 Or 632 (2001) (holding that the enactment of OEC 404(4) made uncharged misconduct evidence admissible without conducting OEC 403 balancing). Thus, for cases tried before *Williams* but that were on direct appeal when *Williams* was decided, a defendant who did not object to a trial court’s failure to conduct OEC 403 balancing—especially one who challenged the admissibility of the same evidence on other grounds—should be in substantially the same position as a defendant who made a futile request at trial for OEC 403 balancing.

The Court of Appeals’ analysis and conclusion that it should order different remedies in cases with preserved versus unpreserved *Williams* errors is incorrect. In either situation, the appropriate remedy is determined by the same standard: was the error harmless? If an appellate court cannot answer “yes” to that question, it must reverse and remand for a new trial. The Court of Appeals misstepped when it fashioned a “conditional remand,” because it could not answer the question “yes” or “no” with any certainty.

II. A defendant who, prior to *Williams*, did not object to a trial court’s failure to conduct OEC 403 balancing should be in substantially the same position on appeal as a defendant who made a futile request for OEC 403 balancing.

A. The Court of Appeals’ reasoning is unsound.

Beginning with *State v. Brumbach*, 273 Or App 552, 359 P3d 490 (2015), the Court of Appeals has applied *Williams* in cases in which the defendants had preserved the OEC 403 objection, concluding that the error was not harmless beyond a reasonable doubt, and reversed and remanded for a new trial. *Id.* at 563-65 (reversing and remanding for a new trial based on trial court’s failure to conduct requisite OEC 403 balancing for other acts evidence). *See also State v. Holt*, 279 Or App 663, 671-72, ___ P3d ___ (2016) (same), *State v. Altabef*, 279 Or App 268, 271-73, ___ P3d ___ (2016) (same); *State v. Baughman*, 276 Or App 754, 771-72, 369 P3d 423, *rev allowed*, ___ Or ___ (2016) (same). But in this case, the Court of Appeals held that, because defendant failed to preserve the OEC 403 objection, he was entitled to a “conditional remand” rather than a new trial because the court could not determine whether the trial court’s error was or was not harmless under Article VII (Amended), section 3. *Zavala*, 276 Or App at 622 (concluding that “whether the error affected the outcome of this case is speculative”). There are two problems with that conclusion.

1. The same “speculative” problem that the Court of Appeals identified exists in cases with preserved *Williams* errors.

Before *Williams*, under the Court of Appeals’ interpretation of OEC 404(4), trial courts could not exclude uncharged misconduct evidence based on OEC 403. *Dunn*, 160 Or App at 430. A defendant’s objection on that ground would have been futile, and the trial court would not have conducted balancing. Likewise, if a defendant did not request OEC 403 balancing, the trial court did not conduct OEC 403 balancing. The result was the same—the trial court admitted the evidence without conducting the requisite balancing. Thus, the Court of Appeals has drawn an arbitrary distinction in its application of *Williams* based on whether the defendant preserved a futile OEC 403 objection.

2. The Court of Appeals conflated the determination of whether to exercise its discretion to correct an error under the plain error doctrine with asking whether an error had little likelihood of affecting the verdict or was harmless beyond a reasonable doubt.

Oregon’s plain error test is a two-step process. *State v. Vanornum*, 354 Or 614, 630, 317 P3d 889 (2013). First, the court determines whether the error is plain, that is, whether it satisfies the elements of plain error under ORAP 5.45(1). *Id.* Those elements are: (1) the error is one of law; (2) the error is apparent, meaning that the legal point is obvious and not reasonably in dispute; and (3) the error appears on the face of the record, that is, the court “need not go outside the record or choose between competing inferences to find it[.]” *State*

v. Brown, 310 Or 347, 355, 800 P2d 259 (1990). Then, if the error satisfies those elements, the reviewing court must determine whether to exercise its discretion to correct the error. *Vanornum*, 354 Or at 630.

Factors that the reviewing court considers in determining whether to exercise its discretion to correct an error include “the competing interests of the parties; the nature of the case; the gravity of the error; the ends of justice in the particular case; how the error came to the court’s attention; and whether the policies behind the general rule requiring preservation of error have been served in the case in another way, *i.e.*, whether the trial court was, in some manner, presented with both sides of the issue and given an opportunity to correct any error.” *Ailes v. Portland Meadows*, 312 Or 376, 382 n 6, 823 P2d 956 (1991). The gravity of the error, particularly if it involves a due process violation like in this case, weighs heavily in favor of the court exercising its discretion to correct the error. *See, e.g., State v. Reynolds*, 250 Or App 516, 522, 280 P3d 1046, *rev den*, 352 Or 666 (2012) (citing gravity of the error—due process violation of entry of a felony conviction based on insufficient evidence—as a reason to correct an unpreserved motion for judgment of acquittal error on appeal); *State v. Gibson*, 183 Or App 25, 33, 51 P3d 619 (2002) (same).

Once the appellate court concludes that an error constitutes plain error and decides to exercise its discretion to correct the error, then the court is in the same analytical place that it is when addressing a preserved error.

The final step before concluding that an error warrants reversal on appeal is to determine whether the error was “harmless.” If the error is one of state law, then the court applies Article VII (Amended), section 3, and if the error is a federal constitutional error, the court applies the federal harmless error test from *Chapman*. See, e.g., *F.C.L. v. Agustin*, 271 Or App 149, 155-60, 350 P3d 482 (2015) (court addressed due process violation as plain error, exercised discretion to correct the error, and applied *Chapman* harmless error test as final step for deciding whether reversal was warranted); *State v. Alne*, 219 Or App 583, 587-91, 184 P3d 1164 (2008), *rev den*, 347 Or 365 (2009) (court addressed violation of federal confrontation right as plain error, then assessed whether error was harmful under *Chapman* federal harmless error test). See also *State v. Lamar*, 180 Wash 2d 576, 585-89, 327 P3d 46 (2014) (reversing and remanding for new trial after first concluding that jury instruction error that violated federal constitutional right to an impartial jury to which the defendant did not object was “apparent,” and second that the error was not harmless beyond a reasonable doubt); *Adams v. State*, 261 P3d 758, 773-75 (Alaska 2011) (reversing after concluding that prosecutor’s comment on the defendant’s exercise of his constitutional right to remain silent amounted to plain error and that state had not shown that the comments were harmless beyond a reasonable doubt).

B. A correct application of Oregon’s plain error test and the federal harmless error test leads to the same remedy in cases with preserved and unpreserved *Williams* errors.

Under a correct application of Oregon’s plain error test and the *Chapman* federal harmless error test, the same remedy is required for preserved and unpreserved *Williams* errors for cases that were tried before *Williams*, but were on appeal when *Williams* was decided. The error is the admission of prior, uncharged acts evidence in the absence of OEC 403 balancing. Under *Williams*, that error violates due process. 357 Or at 18-19. Thus, the error is plain. *See State v. Jury*, 185 Or App 132, 57 P3d 970 (2002), *rev den*, 335 Or 504 (2003) (error is determined by application of law at the time the appeal is decided); *Johnson v. United States*, 520 US 461, 468, 117 S Ct 1544, 137 L Ed 2d 718 (1997) (holding for federal plain error, “where the law at the time of trial was settled and clearly contrary to the law at the time of appeal,” error was plain at the time appellate court considered it).

There are several reasons why an unpreserved *Williams* error warrants the Court of Appeals’ exercise of discretion to correct. First the ends of justice and the gravity of the error militate in favor of correcting the error. The admission of the evidence in the absence of balancing is a due process violation. As this court stated in *Williams*, “the only way that a court can ensure that the admission of ‘other acts’ evidence is not unfairly prejudicial and a violation of ‘fundamental concepts of justice’ is to conduct OEC 403

balancing.” *Id.* at 18. Second, correcting the error does not undermine the policies behind the preservation rule. Before *Williams*, trial courts were precluded from conducting OEC 403 balancing before admitting evidence of uncharged misconduct. Although some defendants still requested OEC 403 balancing, it was reasonable for a defendant not to request balancing and to posit other arguments to exclude the evidence. Thus, no penalty should be imposed upon a defendant for a failure to request that which was futile at the time. Similarly, defendants who did not seek OEC 403 balancing of uncharged misconduct evidence prior to *Williams* did not have a strategic reason for their failure to request balancing, nor did they encourage the error.

Once the Court of Appeals decides to exercise its discretion to correct an unpreserved *Williams* error, the final question is whether the error was harmless. Because the error is a violation of due process, the *Chapman* federal harmless error test applies. *See State v. Cook*, 340 Or 530, 544, 135 P3d 260 (2006) (“[V]iolations of federal constitutional rights must be analyzed under the federal harmless error test.”). Under that test, the reviewing court must reverse unless the *state* establishes that the error was harmless beyond a reasonable doubt. *Chapman*, 386 US at 24.

As the Court of Appeals has consistently concluded in cases in which the defendant preserved the *Williams* error, it is practically impossible for the state to satisfy that burden when one cannot tell whether the evidence would have

survived balancing. And there is no way to know the effect that the admission of evidence of uncharged misconduct evidence had on a factfinder's decision. Because the admission of uncharged misconduct evidence taints a trial in an immeasurable way, defendants whose cases present a *Williams* error are entitled to new trials.

This case is no exception. The state cannot show that the admission of the uncharged misconduct evidence in this case without the trial court first conducting the requisite OEC 403 balancing was harmless beyond a reasonable doubt. As is true with many sexual abuse cases, this case hinged on the factfinder's credibility determination. Defendant was charged with sexually abusing and The outcome turned on whether defendant touched the victims with a sexual purpose. The state offered no physical evidence of the abuse. Thus, the victims' credibility was the central component of the state's case.

Defendant's theory of the case was that the girls' mother was angry with him, and that she convinced the girls to falsify their accusations against defendant. Evidence that a state's witness, who was also a friend of the victims' mother, believed that she saw defendant touch and fondle one of the victims inappropriately was extremely prejudicial because it directly refuted defendant's theory of defense. Because it is impossible to know the impact that the erroneously admitted evidence had on the factfinder's credibility assessment

of the victims, the state cannot show that the error was harmless beyond a reasonable doubt. Defendant is entitled to a new trial.

C. Even a correct application of Oregon’s test for affirmance despite court error leads to the same remedy in cases with preserved and unpreserved *Williams* errors.

As noted above, the Court of Appeals concluded that, because defendant had not preserved the federal constitutional error, it “must apply our own state law rules for determining whether an unpreserved error requires reversal.”

Zavala, 276 Or App at 620. While defendant maintains that federal harmless error principles should apply here, the significance of the court’s misapplication of the state law rule—as well some subtlety (or potential disagreement) in identifying the ultimate foundation of the trial court’s error—requires that defendant demonstrate that the Oregon Constitution also demands reversal.

In *Davis*, this court explained the source and nature of what is often termed the “harmless error” analysis required by Article VII (Amended), section 3, of the Oregon Constitution:

“Article VII (Amended), section 3, of the Oregon Constitution states the standard that governs whether this court must affirm a conviction, despite the occurrence of legal error during the trial. That provision, which the voters adopted by initiative in 1910, provides, in part:

‘If the supreme court shall be of opinion, after consideration of all the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed, notwithstanding any error committed during the trial[.]’

“Under that provision, this court must affirm a judgment, despite any error committed at trial, if, after considering all the matters submitted, the court is of the opinion that the judgment ‘was such as should have been rendered in the case.’

Davis, 336 Or at 28. After noting some conflict in case law as to how it should make the determination required by Article VII (Amended), section 3, this court announced the proper means:

“Oregon’s constitutional test for affirmance despite error consists of a single inquiry: Is there little likelihood that the particular error affected the verdict? The correct focus of the inquiry regarding affirmance despite error is on the possible influence of the error on the verdict rendered, not whether this court, sitting as a fact-finder, would regard the evidence of guilt as substantial and compelling.”

Davis, 336 Or at 32.

If the reviewing court cannot conclude that there was little likelihood that the trial court’s error affected the verdict, the error affected the defendant’s substantial rights and the court should reverse the judgment of the trial court. *See, e.g., State v. Schiller-Munneman*, 359 Or 808, 819-21, __ P3d __ (2016) (conducting inquiry and reversing judgment of the trial court, because “[w]e cannot conclude that there was little likelihood that the trial court’s error in admitting the proffered evidence affected the verdict”); *see also State v. Miskell*, 351 Or 680, 699-702, 277 P3d 522 (2012) (conducting inquiry and reversing, because “we cannot conclude that there was ‘little likelihood’ that the admission of the recorded conversation affected the verdicts”). In other words, if—after considering the entire record—the court cannot answer the single

inquiry in the affirmative, the error cannot be deemed “harmless” and reversal is warranted.

Here, the Court of Appeals complained that it could not answer a different question. *See Zavala*, 276 Or App at 621 (complaining that it could not “determine whether a defendant has been *harmed* by the error in the manner that *permits* reversal under Article VII (Amended), section 3”). It was unsatisfied with its ready determination that it could *not* affirmatively determine that there was little likelihood that the trial court’s error affected the verdict. *Id.* (acknowledging possibility that the trial court “could and would have excluded the evidence, and the evidence likely affected the verdict”). Instead, the court held Article VII (Amended), section 3, precluded outright reversal, because it could not conclude that the error in failing to conduct OEC 403 balancing had any likelihood to affect the verdict:

“If the trial court, upon conducting the balancing required by *Williams*, could properly have admitted the challenged evidence, and would have done so, then the defendant suffered no prejudice from the admission of that evidence at trial, making it inappropriate to set aside the defendant’s conviction.”

Id. Because, as explained above, the court lacked a reasoned basis to conclude that the error complained had little likelihood to affect the verdict, the proper remedy was reversal.

III. For cases tried prior to *Williams*, but decided on appeal after *Williams*, 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 the Court of Appeals exercises its discretion to correct a *Williams* 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. In this case, the Court of Appeals cited the fact that it could order a limited remand for the trial court to determine whether the failure to conduct OEC 403 balancing was harmless as a reason to exercise its discretion to correct the error. But as discussed above, the Court of Appeals conflated the decision of whether to exercise its discretion to correct an error on appeal and the harmless error analysis, both of which are duties of the appellate court in the first instance. *See Vanorum* 354 Or at 630 (explaining that the decision to exercise discretion “entails making a prudential call” that is best exercised by the Court of Appeals because it is the error correcting court to which plain error “may be presented as a matter of right.”).

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 for the due process violation. Often times, the admissibility

of uncharged 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.

Uncharged misconduct evidence is not necessarily entirely admissible or entirely excludable. The Court of Appeals' 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 uncharged misconduct 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.

When the trial court is asked to conduct post-trial OEC 403 balancing, it will necessarily do so against the backdrop of a trial where the evidence was admitted. That type of retroactive balancing is not consistent with due process.

All of those factors distinguish a trial court's failure to conduct OEC 403 balancing under *Williams* 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 uncharged misconduct 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 sentenced the defendant—and especially one who became convinced of his guilt beyond a reasonable doubt—will be invested in the original result. Asking a judge to weigh the “unfair prejudice” suffered by a guilty defendant 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. 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 sentence. 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 2005) (Ripple, J., dissenting).

Because of the unique nature of a trial court’s ruling in the face of an OEC 403 objection, the Court of Appeals limited remand in this case was an inappropriate remedy. As outlined above, once the Court of Appeals decides to exercise its discretion to correct a *Williams* error under the plain error doctrine, defendants who did not preserve an objection to the error should be in the same position as defendants who did preserve the error. Thus, the proper remedy for *any* case with a *Williams* error that cannot be said to have had little likelihood to affect the verdict—much less is harmless beyond a reasonable doubt—is reversal and remand for a new trial.

CONCLUSION

Based on the foregoing, defendant respectfully requests that this court reverse the Court of Appeals decision to order a limited remand in this case and remand to the trial court for a new trial.

Respectfully submitted,

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

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 6,071 words.

Type size

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

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Appellant's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on August 22, 2016.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Appellant's Brief on the Merits will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Benjamin Gutman #160599, Solicitor General, attorney for Plaintiff-Respondent.

Respectfully submitted,

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