IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. SHAWN GARY WILLIAMS, Defendant-Appellant, Respondent on Review.	Josephine County Circuit Court Case No. 08CR0707 Court of Appeals No. A145644 Supreme Court No. S061769

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 Josephine County
Honorable Pat Wolke, Judge

Opinion Filed: August 13, 2014
Author of Opinion: Nakamoto, Judge
Concurring Judges: Schuman, Presiding Judge, and Wollheim, Judge

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STATEMENT OF THE CASE

At issue in this case is the continued existence, in Oregon, of the centuries-old ban on the admissibility of propensity evidence. The state asks this court to construe OEC 404(4) to permit the introduction of uncharged misconduct evidence for the *sole* purpose of proving that the defendant acted in conformity with his character. That interpretation of OEC 404(4) would set Oregon far apart from every other state in the country in broadly permitting the introduction of propensity evidence. More significantly, that radical construction is inconsistent with the legislature's intent when it enacted OEC 404(4), which – contrary to the state's cursory analysis – was simply to eliminate balancing under OEC 403, *not* to abolish a rule of common law that dates back to the seventeenth century.

Defendant was charged with two counts of sexual abuse in the first degree for his conduct involving C, a five-year-old girl. At trial and over defendant's objection, the trial court admitted evidence that defendant's landlord discovered little girls' underwear in defendant's belongings. The court admitted that evidence to prove defendant's "sexual intent." A jury found defendant guilty of both counts, and he appealed. The Court of Appeals concluded that the trial court erroneously admitted the underwear evidence

because defendant had denied sexual contact with C, and his intent was therefore not truly at issue. *State v. Williams*, 258 Or App 106, 308 P3d 330 (2013). The state petitioned from the Court of Appeals decision, and this court allowed review. *State v. Williams*, 354 Or 699, 319 P3d 696 (2014).

In this court, the state has abandoned any argument that the underwear evidence was admissible for a non-character purpose under OEC 404(3). Rather, the state now argues that the evidence was admissible under OEC 404(4) to prove *both* the mental state and the occurrence of the act by way of previously-forbidden propensity reasoning. Yet, as will be elaborated below, the state's expansive construction of OEC 404(4) is unsupported by the text, context, and legislative history of the statute, and moreover, would violate federal principles of due process.

Question Presented and Proposed Rule of Law

Question Presented

Under OEC 404(4), "[i]n criminal actions, evidence of other crimes, wrongs or acts by the defendant is admissible if relevant" and cannot be excluded by OEC 403 unless the state or federal constitution requires it. When is evidence "relevant" under that rule?

Proposed Rule of Law

The first three subsections of OEC 404 define when character evidence is relevant under subsection (4). Under OEC 404(2) and (3), character evidence is generally not relevant to prove action in conformity with that character. OEC 404(1) and (2) contain exceptions to the general rule, describing the limited circumstances when character evidence *is* relevant to prove action in conformity with that character. And OEC 404(3) provides that uncharged misconduct evidence is relevant if used for any non-character purpose. Evidence of other crimes, wrongs or acts by the defendant is "relevant" under OEC 404(4), then, if it satisfies any of the relevancy standards for that class of evidence set forth in OEC 404(1)-(3).

Summary of Argument

Defendant was charged with two counts of sexual abuse in the first degree for inappropriately touching a five-year-old girl. At trial, the state sought to introduce evidence that defendant's landlord had discovered little girls' underwear hidden in defendant's belongings. The state contended that the evidence was relevant for a non-character purpose under OEC 404(3): to demonstrate defendant's sexual "intent." The trial court admitted the underwear evidence and a jury convicted defendant of both charged offenses.

In this court, the state no longer argues that the disputed evidence is relevant for a non-character purpose. Rather, it concedes that the only

relevance of defendant's possession of little girls' underwear is to demonstrate his sexual propensity for young girls. Pet BOM at 19 (underwear evidence "gave rise to a reasonable inference that [defendant] had a sexual interest in little girls"). The state argues that the evidence is nevertheless admissible for that propensity purpose because OEC 404(4) allows for the admission of propensity evidence against a criminal defendant. That construction of OEC 404(4) is not only inconsistent with three hundred years of common law, it is at odds with the legislature's intent when it enacted the statute, and would violate due process.

OEC 404(4) provides, in part, that, "In criminal actions, evidence of other crimes, wrong or acts by the defendant is admissible if relevant except[,] * * * to the extent required by the United States or the Oregon Constitution, [OEC 403.]" The word "relevant" is not defined in OEC 404(4); it has two possible meanings. The state argues that "relevant" as used in OEC 404(4) must mean "logically relevant" under OEC 401.

But it has another possible definition – it could mean relevant for a *permissible purpose* under OEC 404(1) to (3). Aside from specific exceptions in OEC 404(1) and (2), uncharged misconduct evidence is never relevant to prove character. But that evidence *is* relevant for any non-character purpose under OEC 404(3).

Although it is unclear from the plain text which definition of "relevant" applies, this court has consistently construed OEC 404(4) to incorporate the relevance requirements of OEC 404(1) to (3). In *State v. Moore/Coen*, *State v. Leistiko*, and *State v. Pitt*, the court addressed the admission of prior bad act evidence against a criminal defendant, and in each case, this court required the state to set forth a non-character theory of logical relevance. In doing so, the court implicitly interpreted OEC 404(4) as incorporating OEC 404(3)'s relevance requirement.

Further, an examination of the legislative history refutes the state's proposed interpretation. The legislature was emphatically told by a representative of the Attorney General's office – one of the parties involved in drafting what would become OEC 404(4) – that it would *not* "undo[] the Anglo-American tradition since 1695 as it relate[s] to the issue of other crimes and wrongs evidence." That statement flatly contradicts the position the state is now advocating in this court.

The final step in statutory construction is to apply any relevant maxims of statutory construction. One canon of construction is that this court will interpret a statute so as to avoid possible constitutional problems. The state's construction of OEC 404(4), which permits the introduction of propensity evidence against a criminal defendant while, at the same time, eliminating traditional OEC 403 balancing, violates the Due Process Clause.

In sum, the legislature's purpose in enacting the OEC 404(4) was simply to eliminate OEC 403 balancing in a certain class of cases, not to abolish the longstanding rule against propensity evidence and drastically alter the landscape of criminal trials in this state.

Argument

I. Introduction

A. It is a settled principle of Anglo-American jurisprudence that propensity evidence is inadmissible to prove guilt.

The general ban on propensity evidence[1] 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. *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 have 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). In that case, Justice Withins of

[1] Defendant uses the phrases "propensity evidence" and "character evidence" interchangeably. By those terms, he refers to evidence that is admitted for the sole purpose of demonstrating a defendant's character, and that he acted in conformity with that character on a particular occasion. That use is consistent with this court's use of "character evidence" in *State v. Johns*, 301 Or 535, 548, 725 P2d 312 (1986) (noting that "character" means a "disposition or propensity to commit certain crimes, wrongs, or acts."); *see also* Christopher B. Mueller & Laird C. Kirkpatrick, Modern Evidence § 4.11 (1995) (as used in federal rules, "character" means "a person's disposition or propensity to engage or not engage in various forms of conduct").

the King's Bench noted that in an earlier case, the King's Bench had excluded evidence of a defendant's prior forgeries during his trial for forgery. *Id.* at 1103. 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. For example, Massachusetts' highest court excluded evidence of a defendant's prior acts of lasciviousness to bolster the state's allegation that the defendant was operating a bawdy house. *Rex v. Doaks*, Quincy's Mass 90 (Mass Super Ct 1763). Subsequently, 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.[2]

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."

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[2] 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."

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.").

As the United States Supreme Court recognized in *Michelson v. United States*, 335 US 469, 69 S Ct 213, 93 L Ed 168 (1948), propensity evidence is rejected not because character is irrelevant. *Id.* at 475-76. Instead, "it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general character."

The rule generally forbidding the admission of character evidence to prove propensity has been codified in 38 states.[3] The remaining 12 states and

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[3] *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 §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; Minn R Evid 404; Miss R Evid 404; Mont R Evid 404; Neb Rev Stat § 27-404; Nev Rev Stat § 48.045; NH R Evid 404; NJ R Evid 47; NM Stat Ann § 11-404; NC Gen Stat § 8c-1, Rule 404; ND R Evid 404; Ohio R Evid 404; Okla Stat title § 12, 2404; RI R Evid 404, S 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.

It should be noted with respect to California's rule concerning prior bad acts, Cal Evid Code § 1101, that in 1982, California voters amended the state constitution to provide, in relevant part, that "Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding[.]" Cal Const Art I, § 28(d). In 1994, the California Supreme Court directly addressed that constitutional provision for the first time and held that a 1986 amendment to Cal Evid Code § 1101 constituted the required legislative override of Cal Const Art I, § 28(d). *People v. Ewoldt*, 867 P2d 757, 763 (Cal 1994). The general prohibition on propensity evidence therefore remained in effect. *Id.*

the District of Columbia have adopted the rule against the general admissibility of propensity evidence through case law.[4] While some jurisdictions have a narrow exception to the ban on propensity evidence and allow the admission of prior similar acts of sexual assault in a sexual assault prosecution[5], *no*

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[4] *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); *Commonwealth 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).

[5] 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). *footnote continued.……...*

jurisdiction permits the blanket admission of propensity evidence against a criminal defendant.

B. The state's use of the underwear evidence in this case was solely to demonstrate defendant's sexual propensity for little girls.

Against that historical pedigree, in 1981, the general ban on character evidence was codified in the newly revised Oregon Evidence Code at OEC 404(2) and (3). Those rules provide, in relevant part,

> "(2) Evidence of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, [subject to limited exceptions.]
>
> "(3) Evidence of other crimes, wrongs or acts it not admissible to prove the character of a person in order to show that the person acted

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Five more states passed similar legislation, but their state Supreme Court 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).

> 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."

As this court recognized in *State v. Pinnell*, 311 Or 98, 105 n 11, 806 P2d 110 (1991), OEC 404(3) does not list exceptions to the general rule against propensity evidence; rather, it delineates possible non-character uses of such evidence.

Here, in both the trial court and the Court of Appeals, the state appeared to contend that it was seeking admission of the underwear evidence for a *non-character purpose* – to show defendant's "intent." In the trial court, the state argued that the disputed evidence would demonstrate "defendant's interest in small children" and to show that "the touching was for a sexual purpose." Tr. 247. And before the Court of Appeals, the state renewed that argument as the basis for admissibility under OEC 404(3). *See* Resp Br at 6 (arguing that the evidence was admissible under OEC 404(3) to show that because defendant has a "heightened sexual interest" in young children, he touched the victim for a sexual purpose).

Before this court, however, the state implicitly recognizes that merely attaching an "intent" label to the underwear evidence does not necessarily make

it admissible under OEC 404(3).[6] Rather, to be admissible under OEC 404(3), the evidence must prove intent *by way of a non-propensity inference*. And here, the evidence was relevant to prove defendant's intent (and refute accident or mistake) only through propensity reasoning: If defendant touched C on a sexually intimate part, it must have been for a sexual purpose. And it must have been for a sexual purpose because he has a sexual propensity for young girls. In other words, he is a pedophile. That is precisely the type of propensity reasoning prohibited by OEC 404(3). *Cf., e.g., State v. Nelson*, 501 SE2d 716, 719 (SC 1998) (holding that the admission of a variety of items relating to

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[6] Imwinkelried criticizes as "intellectually dishonest" an approach that permits the introduction of propensity evidence to prove a defendant's *mens rea*, as opposed to the occurrence of the act:

> "Some have suggested that the character evidence prohibition does not apply at all when the ultimate inference is the defendant's mens rea rather than the defendant's physical conduct. * * * Under this theory, the prosecutor may employ the defendant's disposition toward a certain mens rea as an intermediate inference."

Edward Imwinkelried, *Uncharged Misconduct Evidence*, § 5:02, 4 (2004).

He goes on to argue that such a theory is unsound in principle and dubious as a matter of statutory construction. *Id.* at 4-5; *see also* Edward Imwinkelried, *The Use of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 Ohio St L J 575, 578 (1990) (arguing that case law holding that FRE 404(b) is inapplicable when the ultimate inference is mental state rather than physical conduct is "spurious"); 1 Charles McCormick, *Evidence* (5th Ed 1999) § 190 ("[E]vidence in any form – reputation, opinion from observation, or specific acts – generally will not be received to prove that a person engaged in certain conduct *or did so with a particular intent* on a specific occasion, so-called circumstantial use of character.") (emphasis added).

children found in the defendant's bedroom, such as stuffed animals, videos of children's television programs, and photo albums of young girls, violated the state ban on propensity evidence because "its only relevance is as it reflects on an aspect of [the defendant's] character, *i.e.* that he is a pedophile."); *Dyer v. Commonwealth*, 816 SW 2d 647, 652 (Ky 1991), *overruled on other grounds by Baker v. Commonwealth*, 973 SW2d 54 (1998) ("declar[ing], unqualifiedly, that citizens and residents of Kentucky are not subject to criminal conviction based upon the contents of their bookcase unless and until there is evidence linking it to the crime charged. * * * If this material is supposed to provide a picture of the appellant as a pedophile, such profile evidence is inadmissible in criminal cases to prove either guilt or innocence.").

Because the only relevance of the underwear evidence was to demonstrate defendant's sexual proclivity for young girls, the state is trying a new route for admission in this court: OEC 404(4). That subsection provides, in part, that, "In criminal actions, evidence of other crimes, wrong or acts by the defendant is admissible if relevant except[,] * * * to the extent required by the United States or the Oregon Constitution, [OEC 403.]" The state argues that because propensity evidence is logically relevant, OEC 404(4) permits the introduction of that historically-banned evidence against a criminal defendant. The underwear evidence was therefore admissible, according to the state, to prove both defendant's mental state and the occurrence of the charged act by

way of propensity reasoning. *See* Pet BOM at 25 n 6 (arguing that OEC 404(4) allows admission of propensity evidence to prove charged act).

To resolve the issue presented by this case, this court must determine what the legislature intended when it enacted OEC 404(4). To do so, the 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 meaning of the text, the context, the legislative history of the statute, and if necessary, resorts to general maxims of statutory construction. *PGE*, 317 Or at 610-12.[7]

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[7] As the *Gaines* court explained:

> "The first step remains an examination of text and context. * * * But, contrary to this court's pronouncement in *PGE*, we no longer will require an ambiguity in the text of a statute as a necessary predicate to the second step – consideration of pertinent legislative history that a party may proffer. Instead, a party is free to proffer legislative history to the court, and the court will consult it after examining text and context, even if the court does not perceive an ambiguity in the statute's text, where that legislative history appears useful to the court's analysis. However, the extent of the court's consideration of that history, and the evaluative weight that the court gives it, is for the court to determine. The third, and final step, of the interpretative methodology is unchanged. If the legislature's intent remains unclear after examining text, context, and legislative history, the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty."

346 Or at 171-72.

II. The legislature's purpose in enacting OEC 404(4) was to eliminate OEC 403 balancing; it was not to abolish the general rule against propensity evidence for criminal defendants.

A. "Relevant," as used in the text of OEC 404(4) and as interpreted by this court, means relevant as defined in OEC 404(1)-(3).

At the first level of statutory analysis, this court looks to the plain text of the statute. Here, the key portion of OEC 404(4) is the word "relevant."

OEC 404 reads, in full,

> "(1) Evidence of a person's character or trait of character is admissible when it is an essential element of a charge, claim or defense.
>
> "(2) Evidence of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:
>
> "(a) Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;
>
> "(b) Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same or evidence of a character trait of peacefulness of the victim offered by the prosecution to rebut evidence that the victim was the first aggressor;
>
> "(c) Evidence of the character of a witness, as provided in [OEC 607 to OEC 609[8]]; or
>
> "(d) Evidence of the character of a party for violent behavior offered in a civil assault and battery case when self-defense is pleaded and there is evidence to support such defense.

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[8] OEC 607 through 609 involve impeachment of a witness.

> "(3) 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.
>
> "(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[9]] 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 word "relevant," as used in OEC 404(4), is not defined. It has at two plausible meanings. The state posits (in the single paragraph of statutory construction contained in its brief) that "relevant," as used in OEC 404(4), must mean "logically relevant" under OEC 401.

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[9] OEC 407 provides that evidence of subsequent remedial measures is inadmissible; OEC 408 provides that evidence of compromise or offers to compromise is inadmissible; OEC 409 provides that evidence of payment of medical expenses is inadmissible; OEC 410 provides that evidence of a withdrawn plea is inadmissible; OEC 411 provides that evidence of liability insurance is inadmissible; and OEC 412 provides that in a sexual assault prosecution, evidence of the victim's past sexual behavior is generally inadmissible. 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 therefore puzzling.

OEC 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." That definition of logical relevance is a very low threshold to meet. *State v. Lyons*, 324 Or 256, 270, 924 P2d 802 (1996) (OEC 401 requires a "minimal threshold of logical relevance").

But the word "relevant," as used in OEC 404(4), has another possible meaning besides "logically relevant" as defined by OEC 401: it could mean relevant for a permissible purpose as defined by OEC 404(1) to (3). Relevant evidence is generally admissible. See OEC 402 ("All relevant evidence is admissible, *except as otherwise provided by the Oregon Evidence Code*, by the Constitutions of the United States and Oregon, or by Oregon statutory and decisional law.") (emphasis added). Propensity evidence is not relevant to prove a person's character except under narrow exceptions contained in OEC 404(1) and (2). That is, propensity evidence is relevant "when it is an essential element of a charge, claim or defense." OEC 404(1). It is relevant under specific circumstances when offered by the accused, or by the prosecution as rebuttal; as impeachment; and in certain civil assault and battery cases. OEC 404(2)(a)-(d). And uncharged misconduct evidence is relevant for *any* non-character purpose, such as to prove motive or opportunity. OEC 404(3). Aside from those specifically delineated exceptions, then, evidence used to prove

propensity has been declared irrelevant by the legislature in OEC 404(1), (2), and (3).

Based on the plain text of OEC 404(4), "relevant" could mean logically relevant under OEC 401 *or* relevant as defined by OEC 404(1)-(3). An examination of this court's prior construction of OEC 404, also a first-level consideration, points towards a relevance construction that specifically incorporates the requirements of OEC 404(1)-(3). *See Liberty Northwest Ins. Corp., Inc. v. Watkins*, 347 Or 687, 692, 227 P3d 1134 (2010) ("As part of that first level of analysis, this court considers its prior interpretation of the statute.").

This court has addressed the admission of prior bad act evidence against a criminal defendant a handful of times since the legislature added subsection (4) to OEC 404. And in every one of those cases, the court required the state to set forth a non-character theory of admissibility. By doing so, this court at least implicitly interpreted OEC 404(4) as incorporating OEC 404(3)'s relevance requirement. *See Stull v. Hoke*, 326 Or 72, 77, 948 P 2d 722 (1997) (recognizing that "[i]n construing a statute, this court is responsible for identifying the correct interpretation, whether or not asserted by the parties.") Had this court understood OEC 404(4) to mandate admission of prior bad act evidence against a criminal defendant if it was merely logically relevant under OEC 401, it would have been unnecessary to address, as the court did at length

in each opinion, whether the state set forth a valid non-character theory of relevancy.

For example, in *State v. Moore/Coen*, 349 Or 371, 245 P3d 101 (2010), *cert den*, 131 S Ct 2461 (2011), the state sought to admit evidence of the defendant's prior conviction for driving under the influence of intoxicants (DUII) in his trial for vehicular manslaughter and DUII. The state asserted that the evidence was relevant for a non-character purpose: it tended to prove defendant's reckless mental state because it demonstrated that he knew the risks of driving drunk. *Id.* at 387. The trial court excluded the evidence under OEC 403. *Id.* On appeal, this court addressed whether the trial court properly excluded the evidence under OEC 403, in light of OEC 404(4)'s general prohibition on OEC 403 balancing.

As an initial matter, this court observed that,

> "under OEC 404(4), *traditional standards of relevancy are preserved*, and in all events, no evidence may be admitted that would violate state and federal constitutional standards."

Id. at 389 (emphasis added). And under traditional standards of relevancy, prior bad act evidence is not relevant to prove propensity aside from specific exceptions in OEC 404(1)-(2); the proponent must generally have a valid non-character theory of relevancy. In accordance with that construction of OEC 404(4), the court recognized that the state had offered the evidence for a valid non-character theory of logical relevancy in that case – to prove the defendant's

reckless mental state. *Id.* at 391. This court went on to hold that the trial court had erred in excluding the evidence under OEC 403 because OEC 404(4) precludes such balancing (unless the admission of the evidence would be so unfairly prejudicial as to violate due process, a standard not met in that case). *Id.* at 391-92.

Significantly, this court pointed out that the defendant would be protected by a limiting instruction that prohibited the jury from using his DUII conviction as evidence of his propensity for driving while intoxicated. *Id.* at 391 (recognizing that the disputed evidence "is relevant for the purpose for which the state intends to offer it[,]" and noting that trial courts have the authority to give limiting instructions that require the jury "to consider evidence *only* for a particular purpose or in regard to a particular element[.]") (emphasis added). Although the *Moore/Coen* court did not explicitly hold that "relevant" under OEC 404(4) means "relevant" as defined by OEC 404(1)-(3), the discussion of a limiting instruction in particular makes that conclusion inescapable. That is because no limiting instruction would have been needed if OEC 404(4) required the state to demonstrate only bare logical relevance. Under that construction, a jury could use defendant's prior DUII conviction as propensity evidence: because he is a habitual drunk driver, he probably committed the charged offenses.

Likewise, the state's proffered interpretation of OEC 404(4) is inconsistent with two more recent decisions by this court involving uncharged misconduct evidence. In *State v. Leistiko*, 352 Or 172, 282 P3d 857 (2012), *adh'd to as modified on recons*, 353 Or 208, 297 P3d 480 (2013), this court reversed the defendant's rape convictions because the trial court had erroneously admitted evidence of an additional uncharged rape. The state had contended that uncharged rape was relevant for non-character purposes under OEC 404(3) – to show (1) that the victims had not consented, (2) that defendant intended to rape the victims, and (3) that defendant had a plan for obtaining access to the victims. *Id.* at 180-81. This court rejected each of those theories in turn, finally concluding that because the uncharged misconduct evidence lacked non-character relevancy under OEC 404(3), it should not have been admitted. *Id.* at 181-89. Again, if, as the state contends, OEC 404(4) directs the admission of uncharged misconduct evidence to show propensity, the result of *Leistiko* would have been different. This court would have affirmed the trial court's admission of the uncharged rape because it was logically relevant under

OEC 401 to show that the defendant was a sexual predator and therefore more likely to have committed the charged rapes. Yet it did not.[10]

Several months later, in *State v. Pitt*, 352 Or 566, 293 P3d 1002 (2012), this court again reversed the defendant's sexual abuse convictions because the trial court had erroneously permitted the state to introduce evidence of a defendant's uncharged sexual misconduct. In that case, the court rejected the state's two theories of non-character relevancy: to prove the defendant's identity and his intent. *Id.* at 578, 581. This court recognized that the prior bad

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[10] Defendant acknowledges that this court noted, in a footnote, that, "[t]he state does not argue that the propensity evidence is relevant and thus admissible under OEC 404(4). We express no opinion on that issue." *Leistiko*, 352 Or at 180 n 6.

Respectfully, this court's recognition of, but refusal to address, a possible interpretation of OEC 404 that would the render subsection (3), the subsection at issue in the case, a nullity as applied to criminal defendants, is at odds with this court's often-cited duty to ascertain the meaning of a statute regardless of the arguments advanced by the parties. *See Stull,* 326 Or at 77 (recognizing that duty); *see also Weldon v. Bd of Lic Pro Counselors and Therapists*, 353 Or 85, 91-92, 293 P3d 1023 (2012) (noting that although parties did not discuss potential conflict between two entirely different statutes, "we cannot ignore it[,]" and addressing whether the two statutes could be reconciled); *Dept of Human Services v. JRF,* 351 Or 570, 579, 273 P3d 87 (2012) (addressing this court's "obligation to interpret the statutes correctly, which includes an obligation to consider relevant context, regardless of whether it was cited by any party"); *Newport Church of the Nazarene v. Hensley*, 335 Or 1, 16, 56 P3d 386 (2002) (in construing a statute, "this court may be aided by the arguments of counsel" but "is not bound by them").

Notably, in neither *Moore/Coen* nor *State v. Pitt*, 352 Or 566, 293 P3d 1002 (2012), did this court explicitly decline to consider the reach of OEC 404(4).

act evidence was only relevant to prove the defendant's identity by way of impermissible character reasoning. *Id.* at 578. Likewise, the disputed evidence was not properly admitted to prove the defendant's intent and, as a result, its admission,

> "created a risk that the jury would use the uncharged misconduct evidence for an impermissible propensity purpose – *i.e.,* to decide that, because defendant had committed the uncharged acts, his character was such that he again would act in the same manner and commit the charged acts."

Id. at 582. That, of course, would have been an entirely *acceptable* inference if the state's interpretation of OEC 404(4) were correct.

Although, based on the plain text of OEC 404(4), "relevant" could mean either logically relevant under OEC 401, or relevant as defined by OEC 404(1)-(3), this court has consistently adhered to the latter standard of relevance when applying OEC 404. A thorough textual analysis of the statute, therefore, contradicts the state's interpretation. *See Martin v. Board of Parole*, 327 Or 147, 156, 957 P2d 1210 (1998) (although analysis of text provides no definitive answer to intent of legislature, an examination of pertinent case law resolves the issue).

B. An examination of context refutes the state's interpretation that OEC 404(4) permits the admission of uncharged misconduct evidence for the sole purpose of demonstrating a defendant's bad character.

In addition to the plain text and case law, there are several contextual clues that OEC 404(4) incorporates OEC 404(1)-(3)'s relevancy requirement – that is, the evidence must be relevant for a permissible character purpose under subsections (1) or (2), or a non-character purpose under subsection (3).

Under the doctrine of *noscitur a sociis*, "general words, found in a statute, may take the color and meaning of words of specific connotation." *White v. State Ind Acc Com*, 227 Or 306, 317, 362 P2d 302 (1961). In applying that maxim, a court must pay attention to the entire context, not simply one isolated passage. *Id.* For example, in *State v. Baker-Krofft*, 348 Or 655, 239 P3d 226 (2010), this court addressed the meaning of "physical care" in the criminal mistreatment statute. That phrase was grouped with the terms "food" and "medical attention." *Id.* at 663. Applying the maxim of *noscitur a sociis*, this court observed that "[g]rouping physical care together with food and medical attention suggests that the legislature understood that physical care was similarly limited to those essential physical services and attention that are necessary to provide for a dependent person's bodily needs."

Likewise, the legislature placed the text at issue in this case in a subsection of OEC 404; it was not codified as an entirely new statute. For that

reason, under *noscitur a sociis*, the term "relevant" in subsection (4) must take its meaning from the remaining provisions of OEC 404. And, as discussed above, the other subsections specifically delineate the relevant uses of character evidence. Subsection (4), therefore, provides that evidence of other crimes, wrongs or acts by the defendant is admissible if relevant under the remaining provisions of OEC 404, and it cannot be excluded under OEC 403 unless constitutionally required.

A second contextual clue supports defendant's construction of the statute. Again, OEC 404(4) provides that in criminal prosecutions, "evidence of other crimes, wrongs or acts by the defendant is admissible if relevant" and is not subject to OEC 403 balancing unless constitutionally required. Subsection (4) refers to admissibility, but is devoid of any reference to the *purpose* for which the evidence may be considered. That stands in contrast to nearly every other statute in Article IV of the Oregon Evidence Code, which expressly sets forth the permissible or impermissible use of the evidence.

For example, OEC 404(2) provides that "[e]vidence of a person's character is not admissible *for the purpose* of proving that the person acted in conformity therewith on a particular occasion[.]" (Emphasis added) OEC 404(3) repeats that same prohibition on using evidence of other wrongs "*to prove* the character of a person" to show he acted in conformity with that character. (Emphasis added). OEC 406 states that habit evidence "is relevant

to prove that the conduct of the person * * * on a particular occasion was in conformity with the habit." (Emphasis added). OEC 407 provides that evidence of subsequent remedial measures is "not admissible *to prove* negligence or culpable conduct in connection with the event." (Emphasis added). *See also* OEC 408 (evidence of offer to compromise "is not admissible to prove liability"); OEC 409 (payment of medical expenses "is not admissible to prove liability for the injury"); OEC 411 ("evidence that a person was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully").

OEC 404(4) is silent on the purposes for which the prior act evidence is admissible. It does not provide, for example, that "evidence of other crimes, wrongs or acts by the defendant is admissible to prove propensity." *Cf.* Utah R Evid 404(c) (in criminal case involving child molestation, evidence that defendant committed any other act of child molestation is admissible "to prove a propensity to commit the crime charged").

The presence of language specifying the permissible or impermissible use of evidence in nearly all of the provisions contained in Article IV of the evidence code, and the absence of such text in OEC 404(4), supports a construction of OEC 404(4) that does not alter the *purpose* for which prior bad evidence may be admitted. Uncharged misconduct evidence is still inadmissible unless relevant for a permissible purpose under OEC 404(1)-(3).

See Andrew C. Foltz*, Oregon's New Character Evidence Rule*, 78 Or L Rev 315, 327 (1999) ("By curtailing judicial balancing under Rule 403 in the context of criminal trials, Rule 404(4) relates only to the circumstances under which prior act evidence is admissible; it does not represent an *express* exception to the exclusion of propensity evidence.") (Emphasis in original).

Certainly, as demonstrated by the remaining provisions in Article IV, the legislature knows how to specify *what,* exactly, evidence may be used to prove. *See PGE*, 317 Or at 614 ("The legislature knows how to include qualifying language in a statute when it wants to do so."). That lack of any such text in OEC 404(4) must be given significance. *See State v. Hess*, 342 Or 647, 660, 159 P3d 309 (2007) ("[d]epending on the context, the legislature's silence can signify a variety of policy choices"). It seems improbable that the legislature intended to alter a more than three-hundred-year-old rule of common law and allow the admission of evidence to prove propensity, but neglected to specifically say so.

In light of its weighty historical context, OEC 404(4) must be interpreted to incorporate OEC 404(1)-(3)'s relevancy requirements. In *Baker v. City of Lakeside*, 343 Or 70, 76, 164 P3d 259 (2007), this court declined to construe a statute in a way that would depart from established practice when it was not otherwise clear that that was the legislature's intent:

> "Given that context, we are hesitant to conclude that, in a subsection otherwise devoted exclusively to stating the limitations period for tort claims against public bodies, the legislature intended that the notwithstanding clause would address a completely different issue—when an action will be commenced—and, in doing so, depart from a procedural rule that had been an accepted part of Oregon practice for more than 100 years."

The ban on propensity evidence is more than three times as old, and, like the statute at issue in *Baker*, the legislature did not clearly evince an intent to depart from that rule. *See also Comcast of Oregon II, Inc., v. City of Eugene*, 346 Or 238, 254, 209 P3d 800 (2009) ("We must be mindful of settled law as part of our analysis of statutory context."). Context, therefore, supports defendant's interpretation of OEC 404(4): evidence that is relevant under OEC 404(1)-(3) is admissible against a criminal defendant, and OEC 403 balancing is no longer an impediment to its admission.[11] OEC 404(4) does *not* abolish the common law

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[11] Defendant recognizes that under his interpretation of OEC 404(4), the legislature could have achieved the same result more succinctly. It could have, for instance, declared that OEC 403 is inapplicable to evidence sought to be admitted against a criminal defendant under OEC 404, unless constitutionally required, rather than re-stating OEC 404(1)-(3)'s relevancy requirement for character evidence. Nevertheless, as this court has recognized, "nothing prohibits the legislature from saying the same thing twice[.]" In fact, the legislature has already done just that in the same statute – OEC 404(2) and OEC 404(3) contain redundancies because both subsections declare that character evidence is inadmissible to prove action in conformity with that character. "[T]he fact that a proposed interpretation of a statute creates some measure of redundancy is not, by itself, necessarily fatal. Redundancy in communication is a fact of life and of law." *State v. Cloutier*, 351 Or 68, 97, 261 P3d 1234 (2011).

rule against propensity evidence by incorporating OEC 401's definition of "relevance."[12]

Defendant's construction of the statute is not only supported by both the text and context, it is also the only reasonable interpretation in light of the legislature's simultaneous elimination of OEC 403 balancing. As this court recognized in *Moore/Coen*, evidence of prior bad acts against a criminal defendant is not subject to OEC 403 balancing unless the evidence is so unduly prejudicial as to violate due process. 349 Or at 391-92. It cannot be excluded, therefore, on the grounds that its admission confuses the issue, misleads the

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[12] The state argues that this court should interpret "relevant," as used in OEC 404(4), identically to "relevant" as used in OEC 401 (defining logical relevance). The state cites *Tharp v. PSRB*, 338 Or 413, 422, 110 P3d 103 (2005), for the proposition that when the legislature uses the same term in related statutory provisions that were enacted as the part of the same law, this court should interpret the phrases to have the same meaning. Pet BOM at 10.

There are several reasons why that rule does not control this court's interpretation of OEC 404(4). First, as will be discussed below, OEC 404(4) was enacted 15 years after OEC 401; the two statutes were *not* enacted as part of the same law. Further, OEC 401 and OEC 404(4), though broadly related under Article IV of the evidence code, are entirely different statutes. The presumption of consistency has less force in that situation. *See, e.g., Enertol Power Monitoring Corp v. State of Oregon*, 314 Or 78, 84, 836 P2d 123 (1992) ("The legislature's definition of a term made applicable to one portion of the statutes does not control on the meaning of the term in another portion of the statutes.") Lastly, even assuming the rule of consistency was directly applicable here, this court is not bound by that rule "if an examination of the text and context of the statues reveals that the word, in fact, does have more than one meaning." *Mid-Century Ins. Co. v. Perkins*, 344 Or 196, 211-12, 179 P3d 633 (2008). And, as discussed above, an examination of text and context demonstrate that "relevant" has a different meaning in OEC 404(4) than it does in OEC 401.

jury, creates an undue delay, or is unnecessarily cumulative. *See* OEC 403 (grounds for exclusion of otherwise logically relevant evidence). Under the state's proposed construction of OEC 404(4), the trial court would be required to admit evidence of every single instance in which a criminal defendant violated the law (or even broke a rule) because, of course, a person who demonstrates a disregard for the law once, twice, or ten times, is increasingly more likely to break the law again. *See Regina v. Rowton*, 167 Eng Rep 1497 (Cr Cas Res 1865) (if propensity evidence were admissible, "upon a trial for murder you might begin by shewing that when a boy at school the prisoner had robbed an apple orchard, and so on through the whole of his life; and the result would be that the man on his trial might be overwhelmed by prejudice[.]") In a trial for misdemeanor theft, the trial court would have no discretion to exclude a defendant's convictions for sexual abuse or murder.

In fact, it is unclear to defendant why polygraph test results would not now be admissible in Oregon under the state's interpretation of OEC 404(4). *See State v. Lyon,* 304 Or 221, 744 P2d 231 (1987) (polygraph test results inadmissible under OEC 403). A failed test meets the minimal logical relevance requirement of OEC 401 and would not be subject to OEC 403 absent a constitutional requirement for balancing. And it does not appear that the admission of polygraph evidence violates the federal constitution. *See, e.g.,*

United States v. Cordoba, 104 F3d 225, 228 (9th Cir 1997), *cert den*, 529 US 1081 (2000) (unstipulated polygraph evidence no longer *per se* inadmissible).

This court should reject the state's construction of OEC 404(4). It will force trial courts to conduct countless mini-trials within trials; it will force trial courts to admit evidence that confuses the real issue the jury must decide; it will force trial courts to admit cumulative evidence of a defendant's prior misdeeds; and it will force trial courts to preside over trials that last weeks when they used to last days. It is unwarranted by the text and context, and, as discussed below, it is entirely unsupported by the legislative history.

C. The legislature was emphatically told that OEC 404(4) would *not* alter the three-hundred-year-old ban on propensity evidence.

The state cites no legislative history in support of its proffered interpretation of OEC 404(4). And there is plenty. OEC 404(4) 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. 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. Phillips' construction of Section 29 appears identical to the one the state is now advocating in this case.

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

> "First of all, there was a statement about SB 936 and BM 40 undoing the Anglo-American tradition since 1695 as it related to the issue of other crimes and wrongs evidence. *That is just absolutely, flat out, incorrect and wrong*. * * * Mr. Phillips should review his constitutional law because that 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. * * * But to say that somehow SB 936 or BM 40 undoes the Anglo-American tradition in establishment since 1695 is just not correct."

Id. at Tape 89, Side A (emphasis added); *see also 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).

The Assistant Attorney General's explanation to the legislature about how Section 29 would work – and his powerful rebuke to the Oregon State Bar's understanding of it – is consistent with defendant's proposed interpretation of OEC 404(4). The amendment would *not* alter a rule of common law from the 17th century. Although Mr. Gardner appeared to misapprehend which particular provision of the evidence code was the source of the ban on propensity evidence, he nevertheless recognized that propensity evidence would generally remain inadmissible, as it had been for hundreds of years.

What OEC 404(4) *did* alter was a trial court's ability to engage in OEC 403 balancing if the evidence was relevant under OEC 404(1)-(3). Notably, at no point does Gardner mention the other grounds on which a trial court could, before the enactment of OEC 404(4), exclude evidence under OEC 403 – it confuses the issues, misleads the jury, creates undue delay, or is unnecessarily cumulative. That is because a trial court would no longer have discretion to exclude, on those bases, evidence against a criminal defendant that satisfies OEC 404(3).

Perhaps even more importantly, Gardner's testimony to the legislature is one hundred percent in opposition to what the state is arguing in this court. If the state is correct in this case, and Section 29 made propensity evidence admissible against a criminal defendant to show his general bad character and disposition to commit crimes, then it did, in fact, "undo[] the Anglo-American tradition since 1695 as it relate[s] to the issue of other crimes and wrongs evidence[.]" The legislature was quite forcefully told otherwise, however, by a representative of the Attorney General's office.

D. This court should reject the state's proposed construction of OEC 404(4) because it raises serious constitutional concerns.

The text, context, and legislative history support defendant's construction of OEC 404(4). 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 the court will interpret a statute so as to avoid possible constitutional problems. *State v. Stoneman*, 323 Or 536, 540 n 5, 920 P2d 535 (1996). As will be discussed in greater detail in the following section, the state's construction of the statute, which permits the introduction of propensity evidence against a criminal defendant while, at the same time, eliminating traditional OEC 403 balancing, violates the Due Process Clause of the United States Constitution.[13]

In *McKinney v. Rees*, 993 F2d 1378 (9th Cir), *cert den*, 510 US 1020 (1993), the Ninth Circuit held that the admission of evidence having *no* purpose other than to demonstrate the defendant's propensity violated principles of due process. *See also Spencer v. Texas*, 385 US 554, 573-74, 575-76, 87 S Ct 648, 17 L Ed 2d 606 (1967) (Warren, CJ, dissenting) ("[O]ur 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[,]" and noting that the majority opinion does not conflict with that understanding) (internal footnotes omitted).

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[13] *See* US Const Amend XIV (no state shall "deprive any person of life, liberty, or property, without due process of law[.]").

Here, a construction of OEC 404(4) that permits the admission of evidence to prove not a thing but the defendant's criminal propensity violates due process. As the Ninth Circuit observed of the defendant in *McKinney*,

> "[h]is was not the trial by peers promised by the Constitution of the United States, conducted in accordance with centuries-old fundamental conceptions of justice. It is part of our community's sense of fair play that people are convicted because of what they have done, not who they are. * * * [H]is trial was so infused with irrelevant prejudicial evidence as to be fundamentally unfair[.]"

993 F2d at 1386. This court has rejected a proposed interpretation of a statute that "may well" be unconstitutional. *State v. Duggan*, 290 Or 369, 373, 622 P2d 316 (1981); *see also Westwood Homeowners Assn, Inc v. Lane County*, 318 Or 146, 160, 864 P2d 350 (1993), *adh'd to as modified on recons*, 318 Or 327, 866 P2d 463 (1994) (rejecting interpretation that would "arguably" infringe on a constitutional right). Here, the state's interpretation of OEC 404(4) violates due process. There is "no reason to assume that the legislature would wish to raise such questions." *Westwood Homeowners Assn*, 318 Or at 160.

III. A construction of OEC 404(4) that requires the admission of all propensity evidence, and the concurrent removal of any discretion to exclude the evidence under a traditional application of OEC 403, violates due process.

If this court disagrees with defendant's statutory interpretation of OEC 404(4), and instead agrees with the state that the provision allows for the admission of all propensity evidence against a criminal defendant without traditional OEC 403 balancing, then such a construction violates the Due

Process Clause of the United States Constitution. The United States Supreme Court has never directly addressed whether the admission of pure propensity evidence violates due process. Yet it appears almost certain that the state's proffered construction of OEC 404(4) would create an unconstitutional statute.

Federal due process is designed to protect those "fundamental conceptions of justice which lie at the base of our civil and political institutions." *Mooney v. Holohan*, 294 US 103, 112, 55 S Ct 340, 79 L Ed 791 (1935). The Supreme Court has held that historical practice is the primary guide for determining whether a principle is so fundamental as to be embodied in the constitution. *Patterson v. New York*, 432 US 197, 201-02, 97 S Ct 2319, 53 L Ed 2d 281 (1977).

The historical evidence supporting exclusion of propensity evidence is compelling: courts have demonstrated a steadfast commitment to its exclusion since the late 1600s. In *Michelson*, the Supreme Court observed that "[c]ourts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt." 335 US at 475-76. On that basis, "it seems clear that the general ban on propensity evidence has the requisite historical pedigree to qualify for constitutional status." *United States v. LeMay*, 260 F3d 1018, 1026 (9th Cir 2001), *cert den*, 534 US 1166 (2002). A construction of OEC 404(4), therefore, that mandates the admission of prior

bad act evidence solely to prove propensity, violates a rule of such longstanding historical practice that it offends due process.

In *LeMay*, the Ninth Circuit addressed whether FRE 414[14], which allows for the admission of a defendant's prior acts of child molestation in a trial for child molestation, violates the Due Process Clause. 260 F3d 1018. The court first observed that although the general ban on propensity evidence has such a protracted history as to qualify for due process protection, the history of character evidence involving a criminal defendant's sexual propensity is more

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[14] FRE 414 provides, in relevant part,

> "**(a) Permitted Uses**. In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other child molestation. The evidence may be considered on any matter to which it is relevant.
>
> "**(b) Disclosure to the Defendant**. If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses' statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause."

It appears that all circuit courts to address the issue have concluded that FRE 403 balancing still applies to evidence admitted under FRE 414. *See, e.g., Martinez v. Cui*, 608 F3d 54, 60 (1st Cir 2010); *Blind-Doan v. Sanders*, 291 F3d 1079, 1082 (9th Cir 2002); *Seeley v. Chase*, 443 F3d 1290, 1294-95 (10th Cir 2006).

ambiguous.[15] *Id.* at 1025-26. The *LeMay* court therefore looked beyond historical practice, eventually concluding that *but for* the protections of FRE 403, the statute would be unconstitutional. *Id.* at 1026. Other federal circuits have come to the same conclusion – FRE 403 saves the statute from unconstitutionality. *See, e.g.,United States v. Enjady*, 134 F3d 1427 (10th Cir), *cert den*, 525 US 887(1998) (noting that, "without the safeguards embodied in Rule 403, we would hold [FRE 413] unconstitutional"); *see also People v. Falsetta*, 986 P2d 182, 192 (Cal), *cert den*, 529 US 1089 (2000) (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.).

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[15] According to the historical "lustful disposition exception," the prosecution could prove the defendant's lustful disposition to commit sex crimes by proof of prior or later instances of sexual misconduct with the same victim or a different victim. Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 Am J Crim L 127, 168 (1993).

To the extent that Oregon has a "lustful disposition" exception, it appears limited to a defendant's prior sexual misconduct involving the same victim. *See, e.g., State v. Pace*, 187 Or 498, 507, 212 P2d 755 (1949) (in prosecution for rape, evidence of similar acts with the same child admissible to show the defendant's lustful disposition); *State v. McKay* 309 Or 305, 308, 787 P2d 479 (1990) (prior bad act evidence admissible "to demonstrate the sexual predisposition this defendant had for this particular victim, * * * not that he had a character trait or propensity to engage in sexual misconduct generally.").

Here, in contrast, if the state's construction of OEC 404(4) is accepted, Oregon will have effectively abolished the ban on propensity evidence against criminal defendants. This is not a rule of limited reach, like FRE 414. Rather, it would allow any and all propensity evidence to be admitted against a criminal defendant standing trial on any charge – all without traditional OEC 403 balancing. That *cannot* comport with due process. Professor Kirkpatrick has recognized as much:

> "If *Enjady* is correct that FRE 413 would be unconstitutional in absence of full application of FRE 403, OEC 404(4) would seem even more likely to be held unconstitutional in the absence of unrestricted OEC 403 balancing because OEC 404(4) is a more sweeping rule. It applies in all types of criminal prosecutions and allows evidence of all types of prior bad acts, whereas FRE 413 applies only in sexual assault prosecutions and allows in only evidence of prior sexual assaults."

Laird C. Kirkpatrick, *Oregon Evidence*, § 404.07[1] (5th ed 2007).

Further, the admission of character evidence for the sole purpose of proving propensity threatens three bedrock principles of due process. In *Spencer*, 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. He also 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 v. McGuire*, 502 US 62, 76, 112 S Ct 475, 116 L Ed 2d 385 (1991) (O'Connor, J, concurring in part and dissenting in part).

Lastly, the admission of pure propensity evidence threatens a third guarantee of due process – a defendant cannot be found guilty based on his criminal "status." *See Robinson v. California*, 370 US 660, 667, 82 S Ct 1417, 8 L Ed 2d 758 (1962). "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." *Spencer*, 385 US at 575.

The state's interpretation of OEC 404(4) unravels 300 years of common law and, in doing so, poses a serious threat to the guarantee of due process embodied in the federal constitution. It creates a likelihood that the jury will "generaliz[e] a defendant's earlier bad act into bad character and tak[e] that as raising the odds that he did the later bad act now charged (or, worse, as calling for preventive conviction even if he should happen to be innocent momentarily.)" *Old Chief v. United States*, 519 US 172, 180-81, 117 S Ct 644,

136 L Ed 2d 574 (1997). For that reason, this court should declare the state's interpretation unconstitutional.

IV. The underwear evidence was highly prejudicial and this court cannot say that its erroneous admission was harmless.

Here, the underwear evidence was admitted solely to prove defendant's propensity: he is a pedophile and was therefore more likely to have committed the act, and to have done so with the required mental state. That evidence is not relevant under OEC 404 and was therefore inadmissible. The trial court should have excluded it from defendant's trial.

The state makes no argument in this court that the introduction of the underwear evidence was harmless. 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). The jury had to resolve a credibility contest between defendant and C, *both* of whom made inconsistent statements concerning what had transpired. *See Williams*, 258 Or App at 116 n 4 (noting both C and defendant failed to provide entirely consistent accounts). There was no physical evidence or any other witnesses to the incident. Evidence that an adult man with no small children of his own had secreted away little girls' underwear is highly inflammatory. As

Wigmore recognized, it is an inherent aspect of human nature to ascribe undue weight to prior bad acts:

> "The deep tendency of human nature to punish not because the defendant is guilty this time but because he is a bad man and may as well be condemned now that he is caught is a tendency that cannot fail to operate with any jury in or out of court."

1 John H. Wigmore, *Wigmore on Evidence*, § 57, 1185 (Tillers rev 1983).

Because the trial court erroneously admitted the highly prejudicial evidence, defendant's sexual abuse convictions must be reversed.

CONCLUSION

This court should affirm the decision of the Court of Appeals.

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 11,332 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 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 June 5, 2014.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Respondent's Brief on the Merits will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Anna Joyce, #013112, Solicitor General, attorney for Plaintiff-Respondent.

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