IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. CURTIS DWAYNE MC CLURE, Defendant-Appellant Petitioner on Review.	Multnomah County Circuit Court Case No. 090850307 CA A143705 S061434

BRIEF ON THE MERITS OF PETITIONER ON REVIEW

Review of the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court
for Multnomah County
Honorable Leslie M. Roberts, Judge

Opinion Filed: April 17, 2013
Author of Opinion: Ortega, Presiding Judge
Concurring Judge: Edmonds, Senior Judge
Dissenting Judge: Sercombe, Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

This criminal case involves a question of statutory interpretation and the application of OEC 404(3), the "prior bad acts" evidence rule.

Defendant was charged by information with resisting arrest, ORS 162.315. At trial, defendant argued that a prior incident of resisting arrest was not admissible to prove his intent under OEC 404(3). The trial court denied defendant's motion, and the prior incident was admitted at trial. Defendant also argued that ORS 162.315 (resisting arrest) does not apply to resisting being taken into custody for a parole violation. The trial court disagreed, and a jury found defendant guilty.

Defendant appealed and argued that the trial court erred by (1) admitting evidence of prior bad acts, and (2) denying defendant's motion for judgment of acquittal for the charge of resisting arrest. In a divided opinion, the Court of Appeals affirmed defendant's conviction. *State v. McClure*, 256 Or App 200, 300 P3d 210 (2013). Defendant petitioned for review, and this court allowed review. *State v. McClure*, 354 Or 61, __ P3d __ (2013).

This appeal raises several questions. First, whether the resisting arrest statute applies when someone resists being taken into custody for a parole violation. Second, whether in the circumstances of this case a prior incident of resisting arrest was properly admitted under OEC 404(3) to show defendant's

intent with respect to the charged act of resisting arrest. Third, whether the Due Process Clause of the Fifth and Fourteenth Amendments requires balancing the probative value of other bad acts evidence against its prejudicial value.

Questions Presented and Proposed Rules of Law

First Question Presented:

For purposes of the crime of resisting arrest, ORS 162.315, does someone resist "arrest" if he resists being taken into custody for a parole violation?

Proposed Rule of Law:

A person resists arrest if he resists "a peace officer or parole and probation officer in making an arrest." ORS 162.315(1). An arrest occurs when the person is taken into custody for an "offense," which is "either a crime, as described in ORS 161.515, or a violation, as described in ORS 153.008." ORS 161.505. Because a parole violation is neither a crime nor a violation as described in ORS 153.008, a person does not resist arrest if he resists being taken into custody for a parole violation.

Second Question Presented:

Does a trial court properly admit evidence of a prior bad act under OEC 404(3) when it rules pretrial that the evidence is admissible to prove intent and does not instruct the jury that it must first find that the defendant committed the charged act before it can consider the prior bad act?

Proposed Rule of Law:

Evidence of a prior bad act is not properly admitted to show intent unless (1) the state introduces evidence at trial sufficient to allow a factfinder to conclude that the defendant committed the actus reus of the charged crime, and (2) the court subsequently instructs the jury that it cannot consider the evidence unless it first finds that the defendant committed the actus reus of the charged crime. Unless both of these requirements are satisfied, a trial court errs in admitting evidence of a prior bad act to show intent.

Third Question Presented:

Where a defendant is charged with resisting arrest for tightening his arms and refusing to go to the ground during an arrest, does OEC 404(3) allow the introduction of evidence of a prior incident of resisting arrest during which the defendant's resistance was much more forceful?

Proposed Rule of Law:

Under OEC 404(3), evidence of a prior bad act is only admissible if, *inter alia*, the physical elements of the prior act are sufficiently similar to the present act to be probative of intent. Where the charged crime involves resisting arrest in a manner that is not very forceful, a prior incident of forcefully resisting arrest is not sufficiently probative of intent to be admissible.

Fourth Question Presented:

Does federal due process require a trial court to balance the probative value of other bad acts evidence against its prejudicial value?

Proposed Rule of Law:

The Due Process Clause of the Fifth and Fourteenth Amendments requires balancing the probative value of other bad acts evidence against its prejudicial value.

Summary of Argument

1. The crime of resisting arrest occurs when someone resists a peace officer or parole and probation officer who is making an "arrest." ORS 162.315(1). An arrest, in turn, means to place a person "under actual or constructive restraint or to take a person into custody for the purpose of charging that person with an offense." ORS 133.005(1). An "offense," as the term is defined by statute and commonly used, refers to a crime or a violation, which also has a specific meaning.

A parole violation is neither a crime nor a violation within the meaning of ORS 153.008. It is not a crime because it is neither a felony nor a misdemeanor and does not result in a conviction. A parole violation is also not a "violation," as that term is used in the definition of "offense." A violation "offense" involves conduct that has been proscribed by law and can result in a fine, but not imprisonment. By contrast, a parole violation stems from engaging in

conduct that has been proscribed by individually tailored conditions from the parole board and can result in sanctions, such as imprisonment. Therefore, because a parole violation is neither a crime nor a violation for purposes of ORS 153.008, it is not an offense.

The arrest described in the resisting arrest statute only occurs when someone is being taken into custody to be charged with an offense. Because a parole violation is not an offense, the statutorily defined term of arrest does not apply when the police take someone into custody for a parole violation. Consequently, that person is not being "arrested" for purposes of the resisting arrest statute.

2. In *State v. Pitt*, 352 Or 566, 293 P3d 1002 (2012), this court identified two requirements prior to the admission of evidence of a prior bad act to show the defendant's intent. First, the state must introduce evidence at trial sufficient to allow a factfinder to conclude that the defendant committed the charged act. Second, the court must instruct the jury that it cannot consider the evidence unless it first finds that the defendant committed the charged act. When a court complies with neither of these steps, evidence of a prior bad act to show intent is not properly admitted.

In addition to the procedural prerequisites, OEC 404(3) also demands that the evidence be relevant for a noncharacter purpose. This court's prior opinions give guidance as to the required level of similarity between a prior bad

act and the charged crime before the prior bad act is properly admitted to show intent. A single prior act involving a simple series of steps is less likely to be relevant than multiple prior occurrences involving complex actions. As applied to this case, a prior incident of resisting arrest involving a heated altercation and very forceful resistance is too dissimilar to the charged crime involving more passive resistance to be admissible to show the defendant's intent.

Statement of Historical and Procedural Facts

The Court of Appeals described the historical facts as follows:

> "While on routine patrol, Portland Police Officers Shaw and Reister contacted defendant on the street. Shaw asked for defendant's name; defendant answered, asked if he was under arrest, and, when told that he was not, kept walking. Shaw conducted a warrant check that revealed that defendant had an outstanding warrant for arrest. The officers again contacted defendant about one block from the original contact and informed him of the warrant. When the officers attempted to take defendant into custody, he resisted by tightening his arms and grabbing Shaw's finger. Shaw attempted a 'hair hold takedown' to force defendant to the ground, but defendant, yelling and screaming, grabbed onto a light pole and refused to go to the ground. Defendant refused to comply with further instructions by the officers to 'give me your hand' and 'stop resisting.' Eventually, the officers, with the assistance of a private security guard, were able to take defendant into custody. Defendant was subsequently charged with one count of resisting arrest, and a jury convicted him."

McClure, 256 Or App at 202.

Prior to trial, the parties litigated whether the state could offer evidence of a prior incident of resisting arrest to show defendant's intent. *See* Tr 5

(prosecutor's statement that the evidence would be offered "to prove intent" and "would also be offered to prove absence of mistake"). The trial court ruled that the evidence was admissible, and the state offered the evidence at trial. *See* Tr 55-56 (trial court's pretrial ruling that the incident was admissible to show intent). The prior incident occurred in approximately the same location (Old Town in Portland), but happened about five years earlier (March of 2004) and involved different police officers. Tr 162. In that prior incident, police officers saw defendant, had reasonable suspicion to arrest him, and told him to stop. Tr 162-63. Defendant ran into a restaurant and the police caught up to him. Tr 163. Officer Castaneda testified about the details of the subsequent encounter:

> "[H]e's trying to get away. He gets to this glass door that swings. He tries going in and my partner's right behind him. I'm right behind my partner.
>
> "[Defendant] runs in there and closes – tries closing the door behind him. My partner was able to put his foot in the door, grab onto the handle, and grab onto [defendant]. It became a struggling match for a little while. They were struggling. He was trying to get him out. [Defendant] was pulling away.
>
> "I get there. I try pulling him out. We were having no luck. I ended up trying to get him to break free. My partner's arm is in the door, so I attempt to strike him a couple times. He then, right after that, pops out, either with our force or he was coming out. Hard to say.
>
> "But at that time, when he stepped out, the fight was on. He – he came up to us. First me, toe-to-toe like he's in a boxing stance, ready to fight. At this point, he wasn't trying to run. He was now swinging away. And so was I.

"My partner and I were both trying to take him into custody. Kept trying to grab him and take him down using as many bureau techniques we were taught. Nothing was working. It was one of those drag-out fights you don't want to be in.

"* * * * *

"He tossed – I got tossed once. My partner got tossed once. He – he was pulling away, swinging away. I mean, it was – we weren't able to control his arms. It took us a long time before we did so.

"* * * * *

"After a minute, two minutes of fighting, I mean full-on fighting, we were gassed. I mean, there was no energy left.

"* * * * *

"We couldn't take him down. I mean, it was – he was strong. And we ended up just being able to pin him up against the car where he was face – facing forward and we were kind of behind him.

"My partner ended up, after a little while, getting ahold of one arm and controlling it in a wristlock. And I was trying to do the same, and it took me a while to even do that.

"* * * * *

"* * * [M]y name is Randy. [My partner] said, Randy – we were gassed at this point. I mean, I had nothing in me. Neither did he. We were basically leaning on him. He said, Randy – something along the lines of, I can't go any further. I'm – I'm out of breath. I'm out of energy. He says, I'm going to shoot him.

"And just for a brief moment, I mean, maybe two seconds, he relaxed and we were able to get cuffs on him. And it – and it

> was right back to him tensing up again. But it was – he bluffed him just long enough to be able to control him."

Tr 164-67.[1]

Prior to releasing the jury to deliberate, the court instructed the jury in part:

> "You have heard testimony about the circumstances of the defendant's arrest on another occasion. You may consider such evidence in evaluating whether or not the defendant formed the required mental state in this case. You may not use the evidence for the purpose of drawing the inference – there's an error there. It should be for, not of. For the purpose of drawing the inference that because the defendant resisted arrest in the past, the defendant is guilty of the crime charged in this case."

Tr 238-39.

As previously noted, defendant was convicted, appealed, and raised two assignments of error, challenging the admission of the prior bad act and the denial of a motion for judgment of acquittal. On appeal, the Court of Appeals rejected defendant's argument regarding the prior bad acts without discussion. *McClure*, 256 Or App at 202. With respect to the motion for judgment of

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[1] The officer's description of the event during a pretrial hearing was substantially similar to the trial testimony. Tr 11-19. However, during the pretrial hearing, the officer explained the basis to arrest for a crime. Specifically, the officer and his partner responded to a robbery call from Old Town and a report that a person got into a fight in a store and left with some money, and the officers saw defendant running in the area with money in his hands. Tr 12-13.

acquittal, the court held that a person resists arrest under ORS 162.315 if he resists being taken into custody for a parole violation:

> "We agree with defendant that a parole violation is not an offense as the term is used in ORS 133.005(1). However, we conclude that the statutory text, when considered in context and in light of the applicable legislative history, indicates that the legislature intended an arrest by a peace officer or a parole and probation officer for a parole violation to qualify as an arrest under the resisting arrest statute. The 'unless the context requires otherwise' provision in ORS 133.005 and the legislative history of House Bill (HB) 3379 (2005) guide our conclusion that, in this context, a departure from the standard definition of 'arrest' in ORS 133.005(1) is required in order to avoid conflicting with the legislative intent. Our construction of the statute is also consistent with the legislative purpose of the resisting arrest statute to 'reduce challenges to arrest under color of law because such challenges foster civil disorder and disrespect for the law.' *State v. Brandon*, 35 Or App 661, 663, 582 P2d 52, *rev den*, 284 Or 235 (1978)."

Id. at 204.

In dissent, Judge Sercombe wrote, "The legislative history of a statute can be used to 'assist a court in its construction of a statute' under ORS 174.020(1)(b). That history, however, cannot be used to change the plain meaning of a statute." *Id.* at 209-10. After reviewing the legislative history of the resisting arrest statute, Judge Sercombe concluded that a person resists arrest only when being taken into custody for an offense, which is distinct from a parole violation:

> "The construction of ORS 162.315(1) as limited to arrests for an offense is consistent with the unambiguous text of the provision, its context, and its legislative history. Because defendant was not being arrested for an offense, the court erred in denying his motion

> for judgment of acquittal on the charge of resisting arrest under ORS 162.315."

Id. at 221.

Argument

This case presents two different issues. The first issue involves statutory interpretation of the resisting arrest statute, ORS 162.315, and whether the crime applies to someone who resists being taken into custody for a parole violation. The second issue is the admission of evidence of defendant's prior bad acts under OEC 404(3) to prove his intent to commit the charged offense. As argued below, the prior bad acts issue involves deciding whether the prior bad act was properly admitted under OEC 404(3) and whether OEC 404(4) violates the Due Process Clause of the United States Constitution.

I. The crime of resisting arrest, ORS 162.315, does not apply to someone who is being taken into custody for a parole violation.

The first issue in this case is whether someone resists arrest for purposes of 162.315 if he resists being taken into custody for a parole violation. Resolution of this issue requires interpreting the resisting arrest statute by applying the statutory interpretation methodology that this court has articulated in such cases as *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), and *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). When this court interprets a statute, it looks to the text and context of the statute, including

any helpful legislative history offered by the parties. *Gaines*, 346 Or at 171-72; *PGE*, 317 Or at 610-12.

In this case, the issue is resolved based on the text and context of the statutes. To the extent this court considers the legislative history helpful, it supports defendant's argument.

A. Relevant terminology

Defendant's argument relies on the precise interpretation of several different statutory provisions that appear in different chapters of the Oregon Revised Statutes. For the reader's convenience, defendant notes the proposed definitions in this section.[2]

Arrest – An arrest means to place a person under actual or constructive restraint or to take a person into custody, when such restraint or custody is for the purpose of charging that person with an offense.

Offense – An offense is conduct that has been proscribed by law or ordinance of a political subdivision of Oregon that is punishable by either imprisonment or a fine. An offense is either a crime or a violation.

Crime – A crime is an offense for which a sentence of imprisonment is authorized and can be either a felony or a misdemeanor.

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[2] For readability, the proposed definitions are presented without citation. However, defendant's support for the definitions appears in the following argument.

Violation – A violation is conduct that has been proscribed by a law or ordinance and satisfies the criteria of ORS 153.008, chiefly that the offense is designated as a "violation" or is punishable by a fine, but not time in jail or prison.

Parole violation – A parole violation is not a "violation" as defined above, but is rather conduct that has been proscribed by individually tailored conditions of parole and is punishable by a sanction, which can include either further incarceration or a modification of the conditions of supervision.

B. Text and context

ORS 162.315 provides, in part:

> "(1) A person commits the crime of resisting arrest if the person intentionally resists a person known by the person to be a peace officer or parole and probation officer in making an arrest.
>
> "(2) As used in this section:
>
> "(a) *'Arrest' has the meaning given that term in ORS 133.005* and includes, but is not limited to, the booking process.
>
> "(b) 'Parole and probation officer' has the meaning given that term in ORS 181.610."

(Emphasis added.)

ORS 133.005 provides, in relevant part:

> "As used in ORS 133.005 to 133.400 and 133.410 to 133.450, *unless the context requires otherwise*:
>
> "(1) 'Arrest' means to place a person under actual or constructive restraint or to take a person into custody *for the*

> *purpose of charging that person with an offense*. A 'stop' as authorized under ORS 131.605 to 131.625 is not an arrest."

(Emphasis added).

Defendant's argument relies on three propositions. First, a parole violation is not an offense. Second, an arrest only occurs when someone is being restrained for the purpose of charging him with an offense. Third, the term "arrest" in ORS 162.315 has one meaning, namely the exact meaning given in ORS 133.005(1). A plain text reading of ORS 162.315 and ORS 133.005 supports all three propositions. Therefore, because resisting arrest only applies to someone who resists being taken into custody for an offense, and because a parole violation is not an offense, the crime does not properly apply to someone who is being taken into custody for a parole violation.

1. A parole violation is not an offense.

As noted above, ORS 133.005(1) provides that an arrest occurs when someone is either restrained or taken into custody for the purpose of charging him with an "offense." The term "offense" is not defined in Chapter 133 or 162. However, the term is defined in Chapter 161 and is commonly used throughout the criminal code. *See Dept. of Transportation v. Stallcup*, 341 Or 93, 99, 138 P3d 93 (2006) ("We give 'words of common usage their plain, natural, and ordinary meaning[s],' and we give words that have well-defined

legal meanings those meanings.") (quoting *Norden v. Water Resources Dept.*, 329 Or 641, 645, 996 P2d 958 (2000)).

ORS 161.505 provides:

> "An offense is conduct for which a sentence to a term of imprisonment or to a fine is provided by any law of this state or by any law or ordinance of a political subdivision of this state. An offense is either a crime, as described in ORS 161.515, or a violation, as described in ORS 153.008."

Thus, for a parole violation to be an offense, it must qualify as either "a crime, as described in ORS 161.515, or a violation, as described in ORS 153.008." ORS 161.505.

A parole violation is not a crime. A "crime" is "an offense for which a sentence of imprisonment is authorized," and can be "either a felony or a misdemeanor." ORS 161.515(1)-(2). A crime is a felony "if it is so designated in any statute of this state or if a person convicted under a statute of this state may be sentenced to a maximum term of imprisonment of more than one year." ORS 161.525. A crime is a misdemeanor "if it is so designated in any statute of this state or if a person convicted thereof may be sentenced to a maximum term of imprisonment of not more than one year." ORS 161.545. A parole violation, however, is neither a felony nor a misdemeanor. No statute designates that parole violations are a felony or a misdemeanor. Further, the result of a parole violation is not a conviction, but instead the revocation of parole, ORS 144.345, and the imposition of sanctions, ORS 144.346.

A parole violation is also not a "violation," as described in ORS 153.008. Violations are described as follows:

> "(1) Except as provided in subsection (2) of this section, an offense is a violation if any of the following apply:
>
> "(a) The offense is designated as a violation in the statute defining the offense.
>
> "(b) The statute prescribing the penalty for the offense provides that the offense is punishable by a fine but does not provide that the offense is punishable by a term of imprisonment. The statute may provide for punishment in addition to a fine as long as the punishment does not include a term of imprisonment.
>
> "(c) The offense is created by an ordinance of a county, city, district or other political subdivision of this state with authority to create offenses, and the ordinance provides that violation of the ordinance is punishable by a fine but does not provide that the offense is punishable by a term of imprisonment. The ordinance may provide for punishment in addition to a fine as long as the punishment does not include a term of imprisonment.
>
> "(d) The prosecuting attorney has elected to treat the offense as a violation for purposes of a particular case in the manner provided by ORS 161.566.
>
> "(e) The court has elected to treat the offense as a violation for purposes of a particular case in the manner provided by ORS 161.568.
>
> "(2) Conviction of a violation does not give rise to any disability or legal disadvantage based on conviction of a crime."

ORS 153.008. A description of the parole statutory scheme demonstrates that a parole violation does not satisfy any of the criteria for a violation enumerated in ORS 153.008.

The parole board determines the conditions of parole. ORS 144.270(2) (providing that the board "shall determine, and may at any time modify, the conditions of parole"). The board can order a parolee's arrest if the board develops "reasonable grounds to believe" that he or she has violated the conditions of parole. ORS 144.331(1). If the board then finds that the parolee "has violated one or more conditions of parole and evidence offered in mitigation does not excuse or justify the violation, the board may revoke parole." ORS 144.345(1). When the board revokes parole, it imposes "sanctions" consistent with rules it has adopted. ORS 144.346. The board can reinstate parole, continue the parolee on parole, or "[r]evoke parole and require that the parole violator serve" a term of imprisonment. ORS 144.343(2). Thus, parole is a specifically tailored set of conditions that apply to one person, and a violation of those conditions leads to sanctions that are determined by the parole board.

A parole violation does not satisfy any of the statutory violation offense criteria under ORS 153.008. No statute designates a parole violation as a "violation." ORS 153.008(1)(a). No statute or ordinance limits the punishment for a parole violation such that imprisonment is not an option. ORS 153.008(1)(b), (c). To the contrary, imprisonment is authorized. *See* ORS 144.343(2). Finally, while ORS 161.566 and 161.568 allow a prosecuting attorney or trial court to treat a misdemeanor as a violation, neither statute

applies to a violation of parole. ORS 153.008(1)(d), (e).[3] Because a parole violation does not fall within any of the criteria of ORS 153.008, it is not a "violation" and therefore not an offense under ORS 161.505.

In other words, an "offense" is a proscription on conduct from a politically accountable body. ORS 161.505 (defining an offense as conduct for which a punishment is "provided by any law of this state or by any law or ordinance of a political subdivision of this state"). Crimes and violations are separate gradations of an offense, but they share the trait that a "law or ordinance of a political subdivision" has determined that the conduct at issue is unlawful. A violation of parole is a "violation" in name only, because as the statutory scheme as a whole demonstrates, parole violations operate under a different scheme than offenses and involve different punishments and consequences. *Cf. Enertrol Power Monitoring Corp. v. State*, 314 Or 78, 84, 836 P2d 123 (1992) ("The legislature's definition of a term made applicable to

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[3] This case only requires that this court determine whether a violation of parole qualifies as an offense for purposes of the resisting arrest statute. However, defendant notes that similar arguments could be made with respect to a violation of a condition of probation. That is, the probation statutes, ORS 137.520 to 137.630, do not describe a violation of probation as a "violation" under ORS 153.008. Probation conditions are individually tailored to the probationer. ORS 137.540. A violation of probation is punishable by further imprisonment. *See* ORS 137.595-137.596. Finally, the purpose of a probation revocation proceeding is not necessarily to determine whether someone has committed a new crime, but rather whether "the purposes of probation are not being served, or that the terms thereof have been violated." *Barker v. Ireland*, 238 Or 1, 4, 392 P2d 769 (1964).

one portion of the statutes does not control on the meaning of the term in another portion of the statutes.").

2. An arrest only occurs when someone is restrained for the purpose of charging him with an offense.

The legislature has defined arrest as follows: "'Arrest' means to place a person under actual or constructive restraint or to take a person into custody *for the purpose of charging that person with an offense*. A 'stop' as authorized under ORS 131.605 to 131.625 is not an arrest." ORS 133.005(1). Defendant's argument relies on the clause "for the purpose of charging that person with an offense" limiting both antecedent clauses, "to place a person under actual or constructive restraint" and "to take a person into custody." The state may argue that this court should apply the "last antecedent rule" to conclude that the clause applies only to the immediately preceding phrase, "to take a person into custody." However, the text of ORS 133.005 indicates that the rule does not properly apply in this case.

This court has explained the "last antecedent rule" as follows:

> "'Referential and qualifying words and phrases, *where no contrary intention appears*, refer solely to the last antecedent. The last antecedent is 'the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence.'"

State v. Webb, 324 Or 380, 386, 927 P2d 79 (1996) (quoting Norman J. Singer, 2A *Sutherland Statutory Construction* § 47.33, at 270 (5th ed 1992)) (emphasis added). As emphasized, the rule is not absolute and has no proper application

when a contrary intent appears in the statute at issue. *See State v. Johnson*, 339 Or 69, 93-94, 116 P3d 879 (2005) (concluding that the last antecedent rule did not require adopting the "permissible grammatical reading," when that reading was "implausible when viewed in the context of this court's case law and the general assumption that statutes are rational").

Here, a "contrary intention" appears in the statute itself. Strict adherence to the last antecedent rule would mean that any actual or constructive restraint, regardless of the purpose, would be an arrest. However, ORS 133.005(1) explicitly provides that a "stop" is not an "arrest." The context of ORS 133.005, specifically the statutory scheme regarding stops, ORS 131.605-131.625, illustrates that an arrest must be for the purpose of charging someone with an offense to give full effect to the words of the statute.

The statutes that authorize stops describe the police authority to restrain someone *without* arresting him. For example, a "stop" is "a temporary restraint of a person's liberty by a peace officer lawfully present in any place." ORS 131.605(6). A peace officer can stop someone when the officer "reasonably suspects that a person has committed or is about to commit a crime." ORS 131.615(1). In making a stop, a peace officer can use "the degree of force necessary to make the stop and ensure the safety of the peace officer, the person stopped or other persons who are present." ORS 131.615(5). Further, in certain

circumstances an officer can "frisk a stopped person for dangerous or deadly weapons." ORS 131.625.

Accordingly, a "stop" is a temporary restraint of a person based on reasonable suspicion, and the ensuing restraint may include the degree of force necessary to effectuate the stop. Yet, ORS 133.005(1) clearly indicates that the legislature did not intend every use of restraint to be an arrest. If actual or constructive restraint alone constituted an arrest, then every "stop" that involved some use of force to restrain a person during a weapons frisk would actually be an arrest, *not* a "stop." The statutory exemption of stops from the definition of arrest would be meaningless if every use of restraint was an arrest. *See* ORS 174.010 (in interpreting statutes, courts may not omit words that legislature has inserted). The only way to avoid that impermissible result is to recognize that the final clause of ORS 133.005(1) – "for the purpose of charging that person with an offense" – qualifies both "actual or constructive restraint" and "take a person into custody."

Contrary to defendant's argument, this court appears to have read "actual or constructive restraint" as being independent of the final clause. *See State v. Heintz*, 286 Or 239, 248, 594 P2d 385 (1979); *State v. Groda*, 285 Or 321, 325, 591 P2d 1354 (1979). However, those statements in *Heintz* and *Groda* are dicta and should not be controlling.

In *Groda*, the defendant walked into a house that the police were in the process of searching for amphetamines. 285 Or at 323-24. "The officers 'took' the defendant into the kitchen, advised him of his rights, 'patted him down,' and took his money and car keys from his pockets." *Id.* at 325. After police found drugs in the defendant's briefcase, he was "formally arrested for the purpose of 'charging him with an offense.'" *Id.*

The issue on appeal was whether the police had probable cause to search the defendant. In analyzing the issue, this court first concluded that "when the officers searched the defendant, they placed him 'under actual * * * restraint,'" and therefore arrested him for purposes of ORS 133.005. *Id.* However, this court then went on to hold that the search was lawful as a search incident to arrest because the officers had probable cause that the defendant was "engaging in a crime encompassing the possession of drugs." *Id.* at 326. In other words, because at the time of the search the police had probable cause that the defendant was committing a crime, the initial restraint could have been for the purpose of charging him with an offense. Therefore, it was immaterial to the analysis whether the "actual or constructive restraint" had to be "for the purpose of charging that person with an offense."

In *Heintz*, the defendant was convicted of manslaughter after a car accident. 286 Or at 241. When police found the defendant at the accident, the defendant emitted a moderate odor of alcohol and admitted he had been

drinking alcohol. *Id.* at 241-42. After the defendant was taken to the hospital, a police officer spoke with him and, based on his observations of the defendant, concluded the defendant had been driving under the influence. *Id.* at 242. The police then took a sample of the defendant's blood, before the defendant had been "formally placed under arrest." *Id.* On appeal, the defendant argued "that the taking of a blood sample without defendant's consent and not as an incident to his arrest was an unreasonable search and seizure." *Id.* at 241.

This court rejected the defendant's argument:

> "[I]n this case it is clear, in our opinion, that the police had sufficient probable cause both to arrest the defendant (if not for negligent homicide or DUII, at least for reckless driving) and to believe that a test of a sample of his blood would reveal alcohol. Further, since the time of [*Cupp v. Murphy*, 412 US 291, 93 S Ct 2000, 36 L Ed 2d 900 (1973)], the definition of 'arrest' has been changed in Oregon. ORS 133.005 (1) now provides that an arrest includes the placing of a person 'under actual or constructive restraint.' We believe that when the police officer in this case directed that the blood be taken from the defendant at the hospital after the fatal accident, defendant was 'under actual or constructive restraint' so as to be under arrest for purposes of ORS 133.005(1). *See State v. Groda*, 285 Or 321, 325-26, 591 P2d 1354 (1979), and cases cited therein."

Id. at 247-48 (footnote omitted). Like in *Groda*, the analysis in *Heintz* did not depend on whether actual or constructive restraint alone was sufficient to qualify as an arrest, because regardless of that distinction, the officers in *Heintz* had probable cause to arrest the defendant for several crimes. Because this court's statements in *Groda* and *Heintz* are dicta and were not necessary to

resolve the contested issues in those cases, they do not control the outcome in this case.

3. The term "arrest" in ORS 162.315 has the same meaning that is given in ORS 133.005(1).

The final proposition that supports defendant's argument requires interpreting the phrase "unless the context requires otherwise" in ORS 133.005. Again, the relevant statute reads:

> "As used in ORS 133.005 to 133.400 and 133.410 to 133.450, *unless the context requires otherwise*:
>
> "(1) 'Arrest' means to place a person under actual or constructive restraint or to take a person into custody for the purpose of charging that person with an offense. A 'stop' as authorized under ORS 131.605 to 131.625 is not an arrest."

ORS 133.005 (emphasis added).

If this court agrees with defendant's analysis thus far, then defendant here did not resist arrest under ORS 162.315 because he was being taken into custody for a parole violation, which is not an offense and therefore does not qualify as arrest under ORS 133.005(1). The only way to escape that conclusion is to modify the definition of arrest in ORS 133.005(1), which the Court of Appeals majority opinion accomplished through the phrase "unless the context requires otherwise." *See McClure*, 256 Or App at 204-05, 209. However, that phrase does not permit the definition to change in this case because it does not apply to the resisting arrest statute.

When construing a similar phrase in other statutes, this court has held that as part of the textual analysis, "we consider whether, in light of the factual context and the entire statutory scheme, the use of a particular statutory definition would be inappropriate because the result would conflict with one or more aspects of the legislature's intent." *Necanicum Inv. Co. v. Employment Dep't*, 345 Or 138, 143, 190 P3d 368 (2008) (citing *Astleford v. SAIF*, 319 Or 225, 233, 874 P2d 1329 (1994)). Applying that standard to this case, the term "arrest" should not be modified for two reasons. First, ORS 162.315 is not part of the "context" of ORS 133.005. Second, even if it were, that context does not "require" a different definition of arrest.

While ORS 133.005 provides that the "context" may require a different definition, ORS 133.005 also specifically delineates what that context is: "ORS 133.005 to 133.400 and 133.410 to 133.450." The question in this case is what arrest means for purposes of the resisting arrest statute, ORS 162.315. Because ORS 162.315 is outside the specifically noted "context" of ORS 133.005, the "unless the context requires otherwise" provision does not apply.

Even if the "unless the context requires otherwise" provision did apply to this case, there is nothing about the definition of "arrest" being unmodified that would be "inappropriate" because it would "conflict with one or more aspects of the legislature's intent." *Necanicum Inv. Co.*, 345 Or at 143. As this court has noted, "there is no more persuasive evidence of the intent of the legislature

than the words by which the legislature undertook to give expression to its wishes." *Gaines*, 346 Or at 171 (citations and quotation marks omitted). Here, the resisting arrest statute only provides for one definition of arrest, namely "the meaning given that term in ORS 133.005." ORS 162.315(2)(a). That statute, in turn, only provides for one meaning of arrest, "to place a person under actual or constructive restraint or to take a person into custody for the purpose of charging that person with an offense." ORS 133.005(1). Those specific definitions are "the best source from which to discern the legislature's intent." *Gaines*, 346 Or at 172. Thus, while the meaning of "arrest" may change when used in various parts of Chapter 133, no provision – either in the resisting arrest statute or in ORS 133.005 – allows for that meaning to change when applied to a statute outside the specifically delineated list of statutes in ORS 133.005.

C. Legislative history

The legislative history indicates that (1) the meaning of arrest in ORS 162.315 is consistent with the plain text, and (2) an arrest for purposes of ORS 133.005 is when a person is placed under some form of restraint for the purpose of charging him with an offense.

1. The legislative history of ORS 162.315 demonstrates that the legislature has not intended for "arrest" to be given a different meaning than the one provided in ORS 133.005.

The resisting arrest statute was originally adopted in 1971 as part of the Oregon Criminal Code. The crime occurred when someone "intentionally

resists a person known by him to be a peace officer in making an arrest." Or Laws 1971, ch 743, § 206.[4] The statute defined the term "resists," but provided no separate definition for arrest.

The legislature amended the statute in 1989 to expand on the definition of "resists."[5] In 1997, the legislature amended the statute to clarify the meaning of

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[4] The statute provided:

> "(1) A person commits the crime of resisting arrest if he intentionally resists a person known by him to be a peace officer in making an arrest.
>
> "(2) 'Resists,' as used in this section, means the use or threatened use of violence, physical force or any other means that creates a substantial risk of physical injury to any person.
>
> "(3) It is no defense to a prosecution under this section that the peace officer lacked legal authority to make the arrest, provided he was acting under color of his official authority.
>
> "(4) Resisting arrest is a Class A misdemeanor."

Or Laws 1971, ch 743, § 206.

[5] As amended, the statute provided:

> "(1) A person commits the crime of resisting arrest if the person intentionally resists a person known by the person to be a peace officer in making an arrest.
>
> "(2) 'Resists,' as used in this section, means the use or threatened use of violence, physical force or any other means that creates a substantial risk of physical injury to any person **and includes behavior clearly intended to prevent being taken into custody by overcoming the actions of the arresting officer. The**

footnote continued……

the term "arrest."[6] The purpose of the amendment was to extend the crime to situations that may arise during the booking process. Tape Recording, House

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> **behavior does not have to result in actual physical injury to the arresting officer. Passive resistance does not constitute behavior intended to prevent being taken into custody.**
>
> "(3) It is no defense to a prosecution under this section that the peace officer lacked legal authority to make the arrest, provided the peace officer was acting under color of official authority.
>
> "(4) Resisting arrest is a Class A misdemeanor."

Or Laws 1989, ch 877, § 1 (amendments in bold).

[6] As amended, the statute provided:

> "(1) A person commits the crime of resisting arrest if the person intentionally resists a person known by the person to be a peace officer in making an arrest.
>
> "(2) **As used in this section:**
>
> **"(a) 'Arrest' has the meaning given that term in ORS 133.005 and includes, but is not limited to, the booking process.**
>
> **"(b)** 'Resists[,]' [*as used in this section*,] means the use or threatened use of violence, physical force or any other means that creates a substantial risk of physical injury to any person and includes**, but is not limited to,** behavior clearly intended to prevent being taken into custody by overcoming the actions of the arresting officer. The behavior does not have to result in actual physical injury to [*the arresting*] **an** officer. Passive resistance does not constitute behavior intended to prevent being taken into custody.
>
> "(3) It is no defense to a prosecution under this section that the peace officer lacked legal authority to make the arrest **or book the**

footnote continued……

Judiciary Committee, SB 35A, June 13, 1989, Tape 59, Side A (statement of Rep. Floyd Prozanski). The legislative history of the 1989 and the 1997 amendments does not assist the analysis in this case.

The legislature amended the statute again in 2005 as part of House Bill (HB) 3379, which added new provisions to several statutes regarding parole and probation officers.[7] *See* App-1 (full text of HB 3379). The legislative history

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> **person**, provided the peace officer was acting under color of official authority.
>
> "(4) Resisting arrest is a Class A misdemeanor."

Or Laws 1997, ch 749, § 3 (amendments in bold, deletions in italics).

[7] As a result of the 2005 amendments, the statute provided:

> "(1) A person commits the crime of resisting arrest if the person intentionally resists a person known by the person to be a peace officer **or parole and probation officer** in making an arrest.
>
> "(2) As used in this section:
>
> "(a) 'Arrest has the meaning given that term in ORS 133.005 and includes, but is not limited to, the booking process.
>
> "**(b) 'Parole and probation officer' has the meaning given that term in ORS 181.610.**
>
> "[*(b)*] **(c)** 'Resists' means the use or threatened use of violence, physical force or any other means that creates a substantial risk of physical injury to any person and includes, but is not limited to, behavior clearly intended to prevent being taken into custody by overcoming the actions of the arresting officer. The behavior does not have to result in actual physical injury to an officer. Passive

footnote continued……

of HB 3379 shows (1) that the purpose of the bill was not to alter the meaning of arrest in ORS 133.005, and (2) that the aims of the bill can be accomplished without altering the meaning based on the "unless the context requires otherwise" provision.

When the bill was first discussed in the House, supporters identified two main reasons for the bill. First, the bill would "clarify parole and probation officer's scope of authority when related to the supervision of offenders and during situations PO's encounter during the performance of their duties," such as detaining people who have committed a crime in the officer's presence or expanding the authority to arrest based on a warrant. Testimony, House Judiciary Committee, Subcommittee on Criminal Law, HB 3379, May 10, 2005, Ex C (statement of Mary Botkin, American Federation of State, County, and Municipal Employees); *see also* Testimony, House Judiciary Committee, Subcommittee on Criminal Law, HB 3379, May 10, 2005, Ex B (statement of

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> resistance does not constitute behavior intended to prevent being taken into custody.
>
> "(3) It is no defense to a prosecution under this section that the peace officer **or parole and probation officer** lacked legal authority to make the arrest or book the person, provided the [*peace*] officer was acting under color of official authority.
>
> "(4) Resisting arrest is a Class A misdemeanor."

Or Laws 2005, ch 668, § 2 (amendments in bold, deletions in italics).

parole and probation officer Lisa Settell). Second, some prosecutors were not charging people with resisting arrest because they did not think that parole and probation officers came within the definition of "peace officer." Tape Recording, House Judiciary Committee, Subcommittee on Criminal Law, HB 3379, May 10, 2005, Tape 59, Side A (statements of parole and probation officers Brennan Mitchell, Lucinda Carroll, and Jennifer Cameron); Tape Recording, House Judiciary Committee, HB 3379, May 20, 2005, Tape 48, Side A (statement of Rep. Heidi Moawad). At that time, the bill sought to accomplish those goals by adding parole and probation officers to the definition of "peace officer" in ORS 161.015. Testimony, House Judiciary Committee, Subcommittee on Criminal Law, HB 3379, May 10, 2005, Ex B (statement of Lisa Settell).

When the bill went to the Senate, the Rules Committee considered alternative ways to accomplish those goals. One approach, like that before the House, would add parole and probation officers to the definition of "peace officer." Tape Recording, Senate Rules Committee, HB 3379, June 27, 2005, Tape 129, Side A (statement of Lucinda Carroll). Another approach, which produced several drafted amendments that the committee considered, would leave the definition of peace officer untouched, but would add parole and probation officers to the crimes of resisting arrest and interfering with a peace officer, ORS 162.247. Tape Recording, Senate Rules Committee, HB 3379,

July 1, 2005, Tape 145, Side A (statement of Brian DeLashmutt, Federation of Oregon Parole and Probation Officers). The interested parties in the bill – primarily parole and probation officers and the managers and directors of such officers – differed on the "breadth of arrest authority" for parole and probation officers. Tape Recording, Senate Rules Committee, HB 3379, July 1, 2005, Tape 145, Side A (statement of John Powell, Oregon State Sheriffs' Association).

The final bill accomplished three primary objectives. First, HB 3379 extended protection to parole and probation officers in the form of explicitly mentioning them in the crimes of resisting arrest and interfering with a peace officer, instead of amending the definition of peace officer. Or Laws 2005, ch 668, §§ 1-2.

Second, HB 3379 clarified the arrest authority of parole and probation officers. *See id.* at §§ 3-6. HB 3379 amended ORS 133.220 to provide:

> "An arrest may be effected by:
>
> "* * * * *
>
> "(3) A parole and probation officer under a warrant as provided in section 6 of this 2005 Act;
>
> "(4) A parole and probation officer without a warrant for violations of conditions of probation, parole or post-prison supervision[.]"

Or Laws 2005, ch 668, § 4. Parole and probation officers already had the authority to arrest a parolee or probationer who was on supervision and had

violated the conditions of supervision.[8] In those circumstances, the arrest may have been without a warrant or pursuant to the court- or board-issued warrant that is described in ORS 137.545(2) or ORS 144.33(1). Therefore, the

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[8] The authority to arrest for a probation violation is set forth in ORS 137.545(2), which provides, in part:

> "At any time during the probation period, *the court may issue a warrant* and cause a defendant to be arrested for violating any of the conditions of probation. Any parole and probation officer, police officer or other officer with power of arrest may arrest a probationer without a warrant for violating any condition of probation, and a statement by the parole and probation officer or arresting officer setting forth that the probationer has, in the judgment of the parole and probation officer or arresting officer, violated the conditions of probation is *sufficient warrant* for the detention of the probationer in the county jail * * *."

(Emphasis added.)

Similarly, the authority to arrest for a parole violation is set forth in ORS 144.331(1), which provides:

> "The State Board of Parole and Post-Prison Supervision may suspend the parole or post-prison supervision of any person under its jurisdiction upon being informed and having reasonable grounds to believe that the person has violated the conditions of parole or post-prison supervision and may order the arrest and detention of such person. *The written order of the board is sufficient warrant for any law enforcement officer to take into custody such person*. A sheriff, municipal police officer, constable, parole and probation officer, prison official or other peace officer shall execute the order."

(Emphasis added.)

provision in ORS 133.220(4) appears to merely clarify that already existing authority.

The authority to arrest someone "under a warrant" in ORS 133.220(3), however, allowed parole and probation officers to arrest someone for a crime, as opposed to a parole or probation violation. HB 3379 amended ORS 133.140, which describes the requirements of a "warrant of arrest," to provide that such warrants shall "[c]ommand any peace officer, *or any parole and probation officer for a person who is being supervised by the Department of Corrections or a county community corrections agency*, to arrest the person for whom the warrant was issued[.]" Or Laws 2005, ch 668, § 3 (amendments in italics). As mentioned above, HB 3379 also provided that an arrest may be effected by "[a] parole and probation officer under a warrant as provided in section 6 of this 2005 Act[.]" *Id.* at § 4. Finally, section 6 provided that "[a] parole and probation officer may arrest a person if the person is being supervised by the Department of Corrections or a county community corrections agency," and described the procedure to deliver the arrested person to a magistrate or peace officer. *Id.* at § 6. Read together, these provisions allowed parole and probation officers to arrest a person who was supervised by the Department of Corrections or a county community corrections agency when a "warrant of arrest" had been issued for that person. The warrant referred to in the HB 3379 amendments issues when someone is accused of a "crime." *See, e.g.*, ORS

133.110 (requiring probable cause of a "crime"); ORS 133.120 (providing the authority of certain judges to issue a warrant of arrest for "any crime"); ORS 133.140(3) (providing that a warrant of arrest shall "[s]tate the nature of the crime").

Thus, as a result of HB 3379, parole and probation officers had the authority to arrest one class of individual (specifically, someone who was under supervision by a court, the Department of Corrections, the Board of Parole, or a county community corrections agency), but in two distinct situations: when the person has committed a violation of the terms of supervision, or when a warrant has been issued for that person's arrest. That warrant, however, could be based on either a violation of the terms of supervision or the commission of a new crime.

The third objective accomplished by HB 3379 was to create a task force to study the issue of whether to further extend the arrest authority of parole and probation officers, and to report back to the legislature with its findings. *Id.* at § 7.

The final bill can be read as a whole to accomplish its objectives without also reading into the resisting arrest statute a change to the term "arrest." The bill gave new authority to parole and probation officers to arrest, envisioning situations in which the officers would be taking someone into custody based on a warrant for the commission of a "crime." To support the officers in achieving

this goal, the legislature made it a crime for people to resist or interfere with such arrests. Because an arrest based on a warrant described in Chapter 133 would be for the purpose of charging that person with an offense, the meaning of "arrest" does not need to change to accomplish the goal of dissuading people from resisting or interfering with such an arrest.

To be sure, in testimony before both the House and the Senate, witnesses in support of the bill referred to the situation of someone resisting being taken into custody for a parole or probation violation, suggesting the bill should be enacted to allow prosecutors to charge that person with a crime. Tape Recording, House Judiciary Committee, Subcommittee on Criminal Law, HB 3379, May 10, 2005, Tape 59, Side A (statement of Brennan Mitchell); Tape Recording, Senate Rules Committee, HB 3379, June 27, 2005, Tape 129, Side A (statement of Lucinda Carroll). However, there was no discussion of changing the definition of arrest to include situations of taking someone into custody for a parole or probation violation. The testimony was brief and not the primary focus of the committees' discussions. There was also no response from the legislators to these statements that indicated this particular situation was what they envisioned when enacting HB 3379. Further, that testimony was in support of a prior version of the bill that would have amended the definition of peace officer. In short, that testimony is not sufficient to overcome the plain

text of the statutes as amended, in which the meaning of arrest remained the same in both ORS 162.315 and ORS 133.005.

The legislative history supports defendant's argument for three reasons. First, the legislature did not clearly indicate that it intended to impliedly amend the definition of arrest. The legislature did not change the meaning of arrest in ORS 162.315. Instead, the legislature readopted that portion of the statute without amendment. The legislature also did not change the meaning of arrest in ORS 133.005. To read such an implied change into the statutes would be accomplishing what the legislature did not do.

Second, the bill does not "require" a different reading of "arrest" to accomplish its goals. Prior to 2005, resisting arrest occurred when a peace officer arrested someone for an offense. As a result of the 2005 amendments, resisting arrest occurs when a peace officer or parole or probation officer arrests someone for an offense. That limited expansion is consistent with the bill's granting of additional authority to parole and probation officers to arrest based on a warrant for the commission of a crime. In such situations, the parole and probation officers will be arresting someone for an offense. Therefore, the goals of amending the statute are accomplished without needing to change the meaning of arrest and expand the scope of the crime.

Third, in any event, even if the legislative history demonstrated the intent to criminalize the activity at issue in this case (which, as outlined above, it did

not), there is no textual mechanism in the statutes to import that change. As argued above, the plain text of the statutes does not allow for the term "arrest" to have a different meaning in ORS 162.315 based on the "unless the context requires otherwise" provision. The term has only one meaning for purposes of resisting arrest, and it does not apply to this case. *See Gaines*, 346 Or at 173 ("When the text of a statute is truly capable of having only one meaning, no weight can be given to legislative history that suggests—or even confirms—that legislators intended something different."). In other words, no amount of legislative history can overcome the plain words of a statute that do not allow for a contrary reading. If the meaning of a criminal statute could change based on the implicit suggestion of legislative history, such a construction would raise significant constitutional concerns and counsel against such an interpretation of the statute. *See State v. Plowman*, 314 Or 157, 161, 838 P2d 558 (1992) (noting that a criminal statute must "giv[e] fair notice of prohibited conduct" and "not be so vague as to allow a judge or jury unbridled discretion to decide what conduct to punish").

2. The legislative history of ORS 133.005 demonstrates that an "arrest" for purposes of that statute is when a person is placed under some form of restraint for the purpose of charging that person with an offense.

"Arrest" has been a term of art in Oregon since the Deady Code. The term was originally defined as follows: "Arrest is the taking of a person into custody so that he may be held to answer for a crime." General Laws of

Oregon, Crim Code, ch XXXVI, § 360, p 504 (Deady 1845-1864) (later codified as *former* ORS 133.210). Another Deady Code-era provision explained how an arrest was accomplished: "An arrest is made by an actual restraint of the person of the defendant or by his submission to the custody of the officer." General Laws of Oregon, Crim Code, ch XXXVI, § 364, p 504 (Deady 1845-1864) (later codified as *former* ORS 133.250). When read together, the statutes articulate one definition of arrest (taking someone into custody to charge him with a crime) and two different ways to accomplish that goal (actual restraint by the officer or submission by the arrested person).

The current definition of "arrest" was enacted as part of the 1973 revision of the Criminal Procedure Code. Or Laws 1973, ch 836, § 62. The statute has been amended several times since then, but principally to add other generally applicable definitions. *E.g.*, Or Laws 1979, ch 656, § 1 (modifying the definition of "peace officer"); Or Laws 1981, ch 808, § 1 (adding a definition for "federal officer"); Or Laws 1991, ch 67, § 25 (making a minor grammatical change in the definition of "peace officer"); Or Laws 1993, ch 254, § 1 (modifying the definition for "federal officer"); Or Laws 1995, ch 651, § 6

(modifying the definition for "peace officer").[9] Because the wording at issue in this case is essentially unchanged since the initial adoption of the statute, the 1973 legislative history is most relevant. *See State v. Glushko/Little*, 351 Or 297, 312, 266 P3d 50 (2011) (citing *Mastriano v. Board of Parole*, 342 Or 684, 693-96, 159 P3d 1151 (2007) for the proposition that "when amendments to a statute worked no change to wording at issue, legislative views about the portions not amended are not pertinent").

At a May 24, 1972 meeting of the subcommittee responsible for drafting the section of the code that defined arrests, the committee members discussed the meaning of arrest in response to the observation that 50 to 75 percent of misdemeanor arrests were by private citizens. Minutes, Criminal Law Revision Commission, Subcommittee No. 1, May 24, 1972, at 15. In response, Donald Paillette, who was the project director of the revision commission, explained that the current definitions of arrest were to be read together:

> "This particular area, Mr. Paillette observed, was one which was discussed at length by both the Commission and the 1971 legislature. The definition of arrest in ORS 133.210 is the taking of a person into custody so he may be held to answer for a crime. Mr. Paillette said this should also be read with ORS 133.250 which states, 'An arrest is made by the actual restraint of the person of the

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[9] The statute has also been amended 7 times since the incident at issue in this case, but defendant focuses only on the law as it stood on the date of defendant's crime of conviction. *E.g.*, Or Laws 2009, ch 11, § 8; Or Laws 2001, ch 644, § 13; Or Laws 2011, ch 506, § 7; Or Laws 2011, ch 641, § 1; Or Laws 2012, ch 54, § 6; Or Laws 2012, ch 67, § 3; Or Laws 2013, ch 154, § 4.

> defendant or by his submission to the custody of the officer.' Mr. Spaulding believed this implied that if the citizen has authority to arrest, he also has authority to hold him to answer for a crime.
>
> "Assuming that ORS 133.250 gives authority to use restraint to make an arrest, Mr. Carnese remarked, the arrest is complete at the time he is taken into custody. The clause in ORS 133.210, ' . . . so that he may be held to answer for a crime,' is only the reason for his being held in custody and is not a continuing arrest.
>
> "Mr. Paillette suggested some thought be given by the subcommittee to trying to redefine an arrest. This was agreeable to the members."

Minutes, Oregon Criminal Law Revision Commission, Subcommittee No. 1, May 24, 1972, at 15-16.

A preliminary draft of the Criminal Procedure Code combined the provisions and provided:

> "Section 2. Definitions. As used in this Article, unless the context requires otherwise:
>
> "* * * * *
>
> "(2) 'Arrest' means to place a person under actual or constructive restraint or to take a person into custody. A 'stop,' as authorized by Article 2, [Stopping of Persons], is not an arrest."

Criminal Law Revision Commission, Article 4, Preliminary Draft No. 1, June 1972, p. 2 ("Preliminary Draft No. 1"). The new draft was discussed at another meeting of the subcommittee on June 9, 1972. Paillette "advised that it was not his intent to change the substantive meaning of arrest but merely to set out the

definition in one statute rather than two." Minutes, Oregon Criminal Law Revision Commission, Subcommittee No. 1, June 9, 1972, at 2.

An exchange between Paillette and John Osburn, solicitor general of the Department of Justice, illustrates that an arrest was something more than a stop. Osburn asked about the significance of stopping someone for a reason other than charging that person with an offense: "Where a person was not stopped for the purpose of holding him to answer for a crime, Mr. Osburn said it made a great deal of difference whether that kind of stop was called an arrest because in an arrest situation *Miranda* warnings must be given as well as warnings about Fourth Amendment rights as to search, etc." Minutes, Oregon Criminal Law Revision Committee, Subcommittee No. 1, June 9, 1972, at 3. Paillette responded to Osburn's concern by noting that the "stop" statutes were specifically drafted in light of *Terry v. Ohio*, 392 US 1, 88 S Ct 1868, 20 L Ed 2d 889 (1968), and that "[t]he standard for a stop imposed a lesser requirement than for an arrest." Minutes, Oregon Criminal Law Revision Committee, Subcommittee No. 1, June 9, 1972, at 3.

When Osburn asked about the removal of the phrase "so that he may be held to answer for a crime," Paillette responded, in part:

> "[H]e thought it added nothing to the meaning of the statute because the following sections laid out the foundation for an arrest. *The person arrested had to be the subject of a reasonable cause arrest or a warrant involving an offense or a crime*. Were the clause to be retained, it should be changed to 'held to answer for an

> offense' because the draft contemplated an arrest for a violation as well as for a crime."

Minutes, Oregon Criminal Law Revision Committee, Subcommittee No. 1, June 9, 1972, at 3-4 (emphasis added).

Osburn continued to discuss the importance of distinguishing a *Terry*-style stop from an arrest:

> "He said he would be content if the statute said that the stopping of a person under Terry and Cloman circumstances did not constitute an arrest and that *stopping of a person did not constitute an arrest for the purposes of these sections unless the person was being held to answer for violation of law*."

Minutes, Oregon Criminal Law Revision Committee, Subcommittee No. 1, June 9, 1972, at 5 (emphasis added). In reply, Senator John Burns (a member of the subcommittee) "remarked that Mr. Osburn's proposal was the practical effect of the action already taken by the Commission in connection with the Stopping of Persons Article." *Id.*

The preceding exchanges between the lawmakers illustrate that the distinction between a stop and an arrest was a critical factor in the codification of the definition of arrest. Further, that distinction appeared to rest on the purpose of the restraint, that is, an arrest was essentially a stop that was no longer for an investigatory purpose, but was for the purpose of charging someone with an offense.

The preliminary draft was amended, however, at a meeting of the full committee on July 24, 1972. Paillette advised the lawmakers that the draft definition of arrest "was a boiled down version of the definition in the existing statutes," and that it also "indicated that a stop was not an arrest." Minutes, Criminal Law Revision Commission, Full Committee, July 24, 1972, at 27. Paillette further stated that "the subcommittee did not want to imply that the questioning of a witness at the scene of a crime was an arrest even though there was some restraint in detaining him for questioning." *Id.* The prior definitions of arrest contained the phrase "held to answer for a crime," but the subcommittee had deleted that provision in part because it was "used in connection with a bindover in the grand jury draft" and the subcommittee did not want to "use the same term in two different contexts." *Id.*

The committee then amended the definition to clarify that the substance of the prior arrest statutes remained and that a defining aspect of an arrest was that it was for the purpose of charging someone with an offense:

> "Charmain Yturri suggested that the commentary contain a statement that the intent of the definition of 'arrest' was the same as in ORS 133.210 and 133.250 but the Commission had not used 'held to answer for a crime' because it was used in connection with indictments. Mr. Blensly said that such an important issue was at stake that this should be made clear in the statute rather than in the commentary."

Id. at 27. The committee then approved an amendment to the draft that would add to the first sentence of subsection (2), "place a person under actual or

constructive restraint or to take a person into custody, for the purpose of charging him with an offense." *Id.* at 27-28.

After the motion carried and the definition was amended, the lawmakers made clear that the arrest authority extended to a "violation," and that a stop could occur when someone was not charged with an offense:

> "Mr. Paillette reported that he had received a number of inquiries from police officers who entertained some doubt as to whether they could arrest for a violation. The intent was to allow an arrest in that situation and the language just adopted, 'for the purpose of charging him with an offense,' would serve to make that point more clear.
>
> "Judge Crookham asked if the 'stop' exception in the second sentence of subsection (2) was necessary in view of the amendment just adopted. Chairman Yturri replied that the person was not necessarily being stopped for the purpose of charging him with an offense but that might be the case. Inclusion of that sentence would eliminate any question."

Id. at 28.

Ultimately, the proposed criminal procedure code included the definition of "arrest" that is found in current ORS 133.005(1). Criminal Law Revision Commission, Proposed Criminal Procedure Code, Final Draft and Report, November 1972, Article 4, § 89, p 52. The commentary notes:

> "'[A]rrest' is derived, in part, from ORS 133.210 and 133.250, but specifically includes 'constructive' restraint and, with respect to the purpose of custody, uses the phrase, 'charging him with an offense' in place of 'holding to answer for a crime.' The single definition of arrest should be easier to understand than the existing double definition found in the two separate statutes."

Commentary to Criminal Law Revision Commission Proposed Criminal Procedure Code, Final Draft and Report, § 89, at 52 (Nov 1972).

The legislative history of ORS 133.005 reveals that an overarching concern of the lawmakers was distinguishing an arrest from a stop. Ultimately, the code embodied that distinction by defining an arrest in terms of its purpose. An arrest was more than merely placing someone in actual or constructive restraint. Rather, a stop – which could be achieved by such restraint – was elevated to an arrest when the restraint was for the purpose of charging the person with an offense, as opposed to merely investigating a crime.

3. Conclusion

The legislative history supports defendant's proposed reading of both ORS 162.315 and ORS 133.005. In 2005, the legislature amended the resisting arrest statute to protect parole and probation officers, but the legislature did not evince the intent to change the meaning of arrest as it was currently used in the statute. The legislative history of ORS 133.005 also shows that an arrest occurs when someone is restrained or taken into custody and the officers have done so to charge the person with an offense. Both conclusions bolster defendant's argument that he did not resist arrest for purposes of ORS 162.315 because he was not being taken into custody for an offense at the time he resisted.

II. The evidence of a prior incident of resisting arrest was not properly admitted in this case under OEC 404(3).

The second issue in this case is whether the trial court properly admitted evidence of a prior incident of resisting arrest under OEC 404(3), as relevant to show defendant's intent with respect to the charged crime. This court only needs to reach this issue if it disagrees with defendant's argument regarding the motion for judgment of acquittal. In this case, the trial court erred in admitting the evidence because the court did not comply with the proper procedure that this court has articulated and because the prior bad act was not sufficiently similar to the charged crime to be probative of defendant's intent. In addition, the rule proscribing balancing under OEC 403 violates the Due Process Clause of the United States Constitution.

A. The trial court committed a procedural error in admitting the evidence because it did not comply with this court's opinion in *State v. Pitt*, 352 Or 566, 293 P3d 1002 (2012).

In *State v. Pitt*, 352 Or 566, 293 P3d 1002 (2012), this court discussed how a trial court can properly admit evidence of a prior bad act to show intent. In *Pitt*, the defendant was charged with sex offenses against a victim, A. 352 Or at 568. Prior to trial, the defendant moved to "exclude evidence of prior uncharged sexual misconduct involving the victim, A, and another individual, R." *Id.* The defendant argued that the evidence did not prove "intent" under OEC 404(3) because his defense was that he did not commit the criminal act.

Id. at 570. The trial court overruled the defendant's objection and admitted the evidence. *Id.* at 570-71. The defendant was convicted, and he appealed.

This court reversed the defendant's convictions. This court held that the evidence "was only conditionally relevant" because the trial court's ruling occurred "[b]efore trial, and in the absence of a stipulation by defendant" that he had committed the actus reus of the charged crime. *Id.* at 580. This court articulated two conditions that would have to be met in order for the evidence to be properly admitted as conditionally relevant:

> "First, in the absence of defendant's stipulation, the state would have to introduce evidence at trial sufficient to permit the factfinder to find beyond a reasonable doubt that, in fact, defendant had [committed the crime], as charged. Second, the court would have to instruct the jury that it could not consider the evidence of defendant's uncharged misconduct for any purpose unless it first found as a fact that defendant had [committed the actus reus of the crime], as charged."

Id. at 580-81 (footnote omitted).

Applying that standard to the case at hand, this court concluded that the trial court had erred in admitting the evidence "without conditions," as opposed to "the manner that [the Supreme Court] described above." *Id.* at 181.

This case is materially indistinguishable from *Pitt*. The evidence was offered to show intent, and neither of the two conditions for admission that this court articulated were satisfied. First, the trial court admitted the evidence pretrial, before the state had offered evidence sufficient to allow a factfinder to

conclude that the charged crime occurred. *See* Tr 55-56 (trial court's pretrial ruling that the evidence would be admissible at trial). Second, the court did not instruct the jury that it could only consider the evidence if it first concluded that the actus reus occurred. Instead, the court's limiting instruction merely told the jury that it may consider the prior incident "in evaluating whether or not the defendant formed the required mental state in this case," and cautioned that the jury should not consider it for "the purpose of drawing the inference that because the defendant resisted arrest in the past, the defendant is guilty of the crime charged in this case." Tr 238-39. That instruction did not inform the jury that before considering the evidence, it first had to conclude that the actus reus occurred.

Because *Pitt* specifically articulated two requirements for admission, and neither was satisfied in this case, the trial court erred in admitting the prior bad acts evidence. *See State v. Jury*, 185 Or App 132, 137, 57 P3d 970 (2002) ("The 'benchmark' for error is the law existing as of the time the appeal is decided.").

B. The physical elements of the prior incident of resisting arrest are too dissimilar to the charged crime to be admissible under OEC 404(3).

OEC 404(3) allows evidence of prior bad acts to be admitted if it is introduced for a relevant noncharacter purpose:

> "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

OEC 404(3). That rule "unquestionably forbids the admission of evidence solely to show propensity or that the defendant is a bad person." *State v. Johns*, 301 Or 535, 548-49, 725 P2d 312 (1986). The state, as the proponent of the evidence, bears the burden of proving that the prior bad act is admissible by showing that the evidence is both "relevant and probative of something other than a disposition to do evil." *State v. Pratt*, 309 Or 205, 210, 785 P2d 350 (1990).

When the state offers other bad acts character evidence to show a defendant's intent, the analysis is governed by *Johns*, in which this court established a multi-factor test to determine whether proffered "prior bad acts" evidence is relevant to a defendant's intent:

> "(1) Does the present charged act require proof of intent?
>
> "(2) Did the prior act require intent?
>
> "(3) Was the victim in the prior act the same victim or in the same class as the victim in the present case?
>
> "(4) Was the type of prior act the same or similar to the acts involved in the charged crime?
>
> "(5) Were the physical elements of the prior act and the present act similar?

> "(6) If these criteria are met, is the probative value of the prior act evidence substantially outweighed by the danger of unfair prejudice, confusion of issues or misleading the jury, undue delay or presentation of cumulative evidence?"

301 Or at 555-56. "[O]nly if the answer to each of the first five questions is yes—leading to the conclusion that the evidence is relevant for a noncharacter purpose—should the court proceed to the sixth question and weigh the probative value and the prejudicial effect of the evidence under OEC 403." *State v. Garrett*, 350 Or 1, 7, 248 P3d 965 (2011).

Though the issue requires a case-by-case determination and is necessarily fact-specific, this court's prior cases highlight a few guiding principles. First, a single prior incident is less likely to be relevant to intent than a repeated series of similar actions. *See Johns*, 301 Or at 555 ("A simple, unremarkable single instance of prior conduct probably will not qualify, but a complex act requiring several steps, particularly premeditated, may well qualify."). Second, the more complex and out of the ordinary the prior bad act, the more relevant it will be to a defendant's intent in the present case. *See State v. Leistiko*, 352 Or 172, 186, 282 P3d 857 (2012) (evidence that defendant used force on prior occasion to engage in intercourse does not qualify as a complex factual scenario probative of intent: "The fact that defendant resorted to force when a woman resisted his advances is not a complex factual scenario.").

This case involves analyzing the *Johns* factor regarding the physical similarity between the charged act and the prior bad act. In *Pratt*, 309 Or 205, this court described how when a court determines whether the physical elements of the prior act are sufficiently similar to the present act to be probative of intent, "[t]he dissimilarities must be as fully considered as the similarities in answering this question":

> "Determining what constitutes a significant similarity is a matter to be decided on a case-by-case basis. Some similarities are so common as to be trivial (for example, the offender spoke English during both crimes) while others may be so unusual as to be significant even standing along (for example, the offender spoke a foreign language when he intended to rape, but spoke English otherwise). Most often the significance of the similarities will arise out of their combination."

Id. at 214.

In *Pratt*, this court held that a prior incident of raping one victim was too dissimilar to the charged crime of raping and killing a different victim to be admissible under *Johns*. 309 Or at 214. In reaching that conclusion, this court emphasized the dissimilarities:

> "Lewis was publicly abducted at gunpoint by defendant, who had an accomplice. Love's murder involved no abduction, no gun, and no accomplice. Lewis was raped at a motel during a significant interruption of a trip. Love, if she was raped at all, was raped in a truck or by the side of a road. Lewis was raped, but not otherwise seriously injured. Love was brutally stabbed, asphyxiated, and run over. Even one of the similarities is questionable. In the Lewis abduction the witnesses were bound and gagged, not the victim herself as in the Love murder."

Id. Accordingly, this court held that "the Lewis abduction and rape is not probative of defendant's intent to rape Carrie Love." *Id.*

This court reached a similar conclusion in *Garrett*, in which the defendant was charged with murder. The victim was strangled with a lamp cord, stabbed with a knife, and "left naked from the waist down with her undergarments torn off," and nothing appeared to have been taken from her home. *Garrett*, 350 Or at 8. The state sought to admit evidence of a prior assault against a different victim that involved stealing the victim's purse and maybe some drugs, during which the defendant assaulted the victim with a three-pound dumbbell. *Id.*

This court concluded that the trial court properly excluded the evidence of the prior assault, and again this court emphasized the differences between the acts:

> "There is nothing in the record to establish that a robbery or burglary was committed during the Williams homicide. Instead, the record shows that nothing was missing from Williams's residence and that Williams's checkbook, cash, and jewelry were undisturbed. * * * In light of the evidence of sexual assault and the absence of any evidence of robbery or burglary, the state's claim that a robbery or burglary took place in furtherance of the Williams homicide is mere conjecture."

Id. at 9.

With those guideposts in mind, the prior incident of resisting arrest in this case was too dissimilar to the charged crime to be properly admissible under

Johns. In both incidents, defendant was in the Old Town section of Portland when he resisted arrest. However, the similarities end there. In the prior incident, defendant was running when the police initially encountered him, and he ran into a restaurant to flee. In this case, defendant was walking when the officers initially approached him, and defendant responded to their queries by giving his name and engaging them in conversation. In the prior incident, defendant fought back with a notable amount of resistance, leaving all the combatants winded after a few minutes and leading an officer to threaten to shoot defendant in an effort to end the encounter. In this case, defendant's acts of resistance – grabbing an officer's finger and a nearby light pole – were not nearly as threatening.

This court's case law dictates the outcome in this case. The prior bad act was a single occurrence and involved a simple series of actions. Further, the physical elements of the prior bad act are strikingly dissimilar to those of the charged crime. In those circumstances, like in *Pratt* and *Garrett*, the physical elements are not sufficiently similar to be admissible under *Johns* to prove intent.

C. The Due Process Clause required OEC 403 balancing and the exclusion of defendant's prior bad acts.

This court has previously held that OEC 404(4) does not violate due process.[10] *State v. Moore/Coen*, 349 Or 371, 387-92, 245 P3d 101 (2010). Defendant respectfully submits that this court's prior decision is incorrectly decided for the reasons stated in the argument section of the Appellant's Opening Brief. *See* App Br at 14-16. Further, under the required OEC 403 balancing, the trial court should have excluded the evidence for the reasons stated in the argument section of the Appellant's Opening Brief. *See* App Br at 13-14. Defendant herein adopts and incorporates those arguments by reference.

CONCLUSION

If this court agrees with defendant's first question presented, this court should reverse the decision of the Court of Appeals and remand to the trial

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[10] OEC 404(4) provides:

> "In criminal actions, evidence of other crimes, wrongs or acts by the defendant is admissible if relevant except as otherwise provided by:
>
> "(a) ORS 40.180, 40.185, 40.190, 40.195, 40.200, 40.205, 40.210 and, to the extent required by the United States Constitution or the Oregon Constitution, ORS 40.160;
>
> "(b) The rules of evidence relating to privilege and hearsay;
> "(c) The Oregon Constitution; and
> "(d) The United States Constitution."

court for entry of a judgment of acquittal. If this court agrees with defendant's second, third, or fourth questions presented, this court should reverse the decision of the Court of Appeals and remand to the trial court for further proceedings.

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 12,677 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 Opening Brief to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on October 3, 2013.

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

Respectfully submitted,

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_____

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