Chapter 5

# Appellate Update: 40 Years of Law in Oregon *What's Happening — 2019*

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**Issues Currently Before the Oregon Supreme Court**
May 23, 2019

*State v. Henderson*, 294 Or App 664, 432 P3d 388 (2018), *rev allowed*, 364 Or 409 (2019) (S066367).

Defendant broke into the home of his former girlfriend and damaged her property. He was charged with criminal mischief and first degree burglary, ORS 164.215(1), based on an allegation that he entered the home with intent to commit criminal mischief. At trial, he moved for a judgment of acquittal on the burglary charge, contending that the state did not prove that he had the intent to commit criminal mischief when he entered victim's home, citing *State v. J.N.S.*, 258 Or App 310 (2013). The trial court denied his motion, and the jury found him guilty. Defendant reiterated his claim on appeal. The Court of Appeals reversed and remanded for entry of a conviction for first degree criminal trespass and for resentencing: [1] "To establish that a person has committed burglary, the state must prove that the defendant committed a trespass with the intent to commit a particular crime in the building that he unlawfully entered"; the intent must exist at the time of the unlawful entry, and the state cannot prove burglary by establishing that the defendant formed the requisite intent while unlawfully remaining in the building. [2] The evidence in this case did not support an inference that defendant had formed the specific intent to damage the victim's property before he unlawfully entered her home.

The Supreme Court allowed the state's petition, and the issues are: (1) Under ORS 164.215(1), does a person commit the crime of burglary if he enters unlawfully without that intent but, while inside, forms that intent and remains for the purpose of committing a crime? (2) If the state must prove that the person has a criminal intent at the moment the unlawful trespass begins, can a rational trier of fact infer from evidence that defendant, who already was angry at the resident, broke down a door and damaged property inside the premises had formed the "intent to commit a crime therein" at the start of the criminal trespass? [On defendant's contingent petition:] (3) If the state presents evidence that would support multiple distinct factual occurrences of the same crime, does the trial court plainly err by not instructing the jury that it must concur on which occurrence constituted the crime? (Note: The state has filed an abscond motion, and the case is currently tolled pending the resolution of the motion to dismiss).
Counsel: Stephanie Hortsch
Argument: Not Scheduled

*State v. Andrews*, 295 Or App 194, 433 P3d 757 (2018), *rev allowed*, 364 Or 680 (2019) (S066479).

The defendant spit at and punched at the victim. The jury found him guilty of harassment but not guilty of assault. The state sought restitution for the cost of dental work. The defendant objected arguing that the jury had acquitted him, and that the trial court did not have the authority to impose restitution based on the jury verdict. The trial court held a restitution hearing, found that defendant caused the damage to the victim's dental bridge, and imposed restitution. The Court of Appeals affirmed. The Oregon

Supreme Court allowed the defendant's petition to decide the following: "Under ORS 137.106, does a trial court err if it imposes restitution for damages resulting from specific conduct if it is unclear from the jury's verdict whether the jury found the defendant guilty of that conduct?"
Counsel: Erin Severe
Argument: September 17, 2019

*State v. Hunter*, 294 Or App 205, 430 P3d 1093 (2018), *rev allowed*, 364 Or 723 (2019) (S066441).

The defendant raised *Lawson/James* challenges to witness identification evidence that was the only evidence linking him to the state's theory of the crime at trial. The Court of Appeals affirmed the defendant's conviction on harmless error grounds based on a new theory of the crime that the state raised for the first time on appeal. Does the holding in *Burgess* apply to harmless error review? Can a reviewing court consider alternative theories of guilt that were never raised at trial for purposes of assessing harmless error on appeal?
Counsel: Zack Mazer
Argument: September 16, 2019

*State v. Guzman*, 294 Or App 552, 432 P3d 387 (2018), *rev allowed*, 364 Or 407 (2019) (S066328)

Defendant was charged with felony DUII, ORS 813.011(1), and reckless driving; the DUII was a felony because he had two prior convictions for DUII within the preceding 10 years, one in Oregon and another in Kansas. He moved to exclude evidence of the Kansas conviction, arguing that Kansas's DUII statute is not a "statutory counterpart" to Oregon's DUII statute under ORS 813.011(1). The trial court denied the motion, and defendant was convicted of felony DUII. On appeal, he argued that, in light of *State v. Carlton*, 361 Or 29 (2017), a foreign state's DUII statute is a statutory counterpart to ORS 813.010 only when that statute is identical to ORS 813.010. He argued that *Carlton* implicitly overruled *State v. Mersman*, 216 Or App 194 (2007), *rev den*, (2008), which had held that a foreign DUII statute is a statutory counterpart to ORS 813.010 where that statute has the same use, role, or characteristics as ORS 813.010.

The Court of Appeals affirmed, holding that *Carlton* did not implicitly overrule *Mersman*, and the trial court correctly concluded that defendant's prior conviction for DUII in Kansas was a conviction under a statutory counterpart to ORS 813.010. The Supreme Court allowed defendant's petition for review raising the following issue: "Does the Colorado 'driving while ability impaired' statute qualify as a statutory counterpart to ORS 813.010?"

*State v. Heckler*, 294 Or App 142, 143, 430 P3d 224 (2018), *rev allowed*, 364 Or 407 (2019) (S066373)

Defendant was charged with felony DUII, ORS 813.011, based on allegation that he had two prior convictions in the preceding 10 years for "driving while ability impaired

(DWAI)" in Colorado, under Colo Rev Stat (CRS) § 42-4-1301(1)(b) (2006), (2010). He moved to exclude those prior convictions, arguing that the DWAI statute is not a "statutory counterpart [to Oregon's DUII statute] in another jurisdiction." ORS 813.011(1). The trial court disagreed and denied the motion. Defendant entered a conditional guilty plea. The Court of Appeals affirmed, ruling: Another state's statute constitutes a statutory counterpart to an Oregon statute if "the statutes are remarkably similar or have the same use, role, or characteristics." *State v. Mersman*, 216 Or App 194, 203 04, (2007), *rev den* (2008). Colorado's DWAI statute meets that standard. Both ORS 813.010 and the Colorado DWAI statute "share the common function of comprising the general DUII statute in each respective jurisdiction," and both statutes "share the same characteristic of prohibiting an individual from operating a vehicle while under the influence of alcohol or drugs."

The Supreme Court allowed defendant's petition, and the issue on review is: "Does the Colorado 'driving while ability impaired' statute qualify 'as a statutory counterpart' to ORS 813.010?"
Counsel: Kyle Krohn
Argument: June 6, 2019

*State v. Kreis*, 294 Or App 554, 432 P3d 245 (2018), *rev allowed*, 364 Or 407 (2019) (S066329).

Officers saw defendant standing near several parked cars in a restaurant parking lot that was known to be a frequent site of car thefts, at a time when the restaurant had been closed for 20 minutes. The officers investigated whether he was looking into vehicles or whether he was intoxicated and about to drive. Defendant refused to speak with the officers and walked towards a secluded patio at the back of the restaurant. The police followed to ask him what he was doing, telling him that he was not yet free to go. Defendant, who was displaying signs of intoxication, reacted angrily and continued to refuse to answer questions. As the encounter continued, defendant became angrier, balled his fists, and took a "bladed stance," shifting his weight back and forth as if he intended to lunge or flee. Through clenched teeth, he stated, in a slow, angry tone, "I am not going to be arrested." At that point, one of the officers ordered him to turn around to face the building and put his hands behind his back so that he could be handcuffed for officer safety. Defendant refused even after being told a second time, and the officers arrested him, after some struggle, "for interfering." He was charged with resisting arrest and interfering with a police officer, ORS 1642.247(1)(b) ("refuses to obey a lawful order"). At trial, defendant moved for a judgment of acquittal on both charges, arguing that the officers' order to him to turn around and place his hands behind his back was unlawful because they did not have reasonable suspicion that he had committed any offense that justified the stop. The trial court denied the motion. The jury found defendant guilty on the interfering charge but acquitted him of resisting arrest. At sentencing, the court ordered him to pay attorney fees for both offenses.

The Court of Appeals affirmed, ruling: [1] The officers' order for defendant to turn around and place his hands behind his back so that he could be handcuffed would

have effected a seizure. But even in the absence of a lawful initial seizure, an order may be justified by legally sufficient officer-safety concerns. [2] For purposes of ORS 1642.247(1)(b), the lawfulness of an order based on officer safety is to be judged independently of the validity of the initial police-citizen confrontation. The court explained that defendant is incorrect that the challenged order could not be lawful unless the officers had reasonable suspicion to stop him in the first place. So long as the officer-safety concerns were valid, an order based on those concerns is lawful. Furthermore, the Court of Appeals held that ORS 151.505, which allows imposition of costs for court-appointed counsel, does not require a judgment of conviction or limit the imposition of the money award to attorney fees related to charges on which the defendant was convicted. Even in the absence of a conviction, ORS 151.505 authorizes the imposition of the full amount of the court-appointed attorney fees for a defendant's representation. Further, when there has been a judgment of conviction, ORS 161.665(1) authorizes the inclusion, in the sentence, of a money award for the costs of attorney fees for court-appointed counsel, without limitation as to attorney fees related to charges on which the defendant was convicted.

The Supreme Court allowed defendant's petition, and the issues on review are: (1) For purposes of ORS 162.247, is an officer's order 'lawful' if the defendant has been stopped in violation of Art. I, § 9, but the order is based on valid officer-safety concerns? (2) If a defendant is convicted on one charge and acquitted of another, do ORS 151.505 and ORS 161.665 permit the court to require him to repay the costs of court-appointed counsel on both counts?"

Counsel: Marc Brown

Argument: June 6, 2019

*Ogle v. Nooth*, 292 Or App 387, 424 P3d 759 (2018), *rev allowed*, 364 Or 407 (2019) (S066175).

Petitioner filed a petition for post-conviction relief alleging that his trial counsel was inadequate for failing to "employ an investigator to investigate the charges" against him and to call two fact witnesses on his behalf. In his trial memo, petitioner raised a new claim—that his trial counsel failed to have an investigator interview before trial a witness, Parker, who testified at the trial. The superintendent responded that the claims in the petition did not encompass petitioner's new claim about Parker and, alternatively, that he could not prove that he had been prejudiced by his counsel's failure to have an investigator contact Parker. The post-conviction court granted relief on petitioner's claim regarding Parker. The superintendent appealed, arguing that the post-conviction court erred in granting relief on that claim because it was not alleged in the petition and, alternatively, that he had failed to establish inadequate assistance.

The Court of Appeals reversed and remanded: [1] The post-conviction statutes "'limit post-conviction relief to "only … claims that actually have been alleged in the petition or amended petition.'" (Quoting *Bowen v. Johnson*, 166 Or App 89, 93 (2000)). "As a result, a post-conviction court errs if it grants relief on a basis that the petitioner did not allege in the operative petition." [2] Petitioner's claim regarding Parker was not

within the scope of the pleaded ground for relief because it "required different proof and a different legal analysis than the ground relied on by the post-conviction court. Factually, the focus of the petition was on the alleged failure to investigate and potentially discover witnesses who could help substantiate petitioner's self-defense claim; the court's basis for relief, however, focused on how additional investigation—and, in particular, how having an investigator interview Parker, a known witness under subpoena—might have better prepared counsel for trial. And, as to whether the two bases for relief invoked different legal analyses, the obligation to conduct a proper investigation, on the one hand, and the obligation to properly prepare and strategize for trial, on the other, may to some extent overlap, but they are by no means coextensive; moreover, they do not inevitably flow from one to the other." [3] Petitioner's pleading obligation was not excused "because his trial memorandum put the superintendent on notice of the basis on which the court granted relief," because "the post-conviction hearing would not have been any different if he had amended the petition to include an allegation specific to Parker."

The Supreme Court allowed petitioner's petition, and the issues on review are: "(1) Did the legislature intend for ORCP 12 to apply in post-conviction proceedings? (2) If a post-conviction court grants relief to a petitioner based on a ground for relief that was pleaded, may an appellate court reverse the judgment on the ground that the pleading did not sufficiently allege the specification on which the court granted relief, if the state's substantial rights were not violated?"
Counsel: Jason Weber
Argument: June 4, 2019

*State v. Haji*, 293 Or App 202, 426 P3d 680, *rev allowed*, 364 Or 207 (2018) (S066254).

Based on a single incident involving a single victim, defendant was charged with first-degree robbery, first-degree burglary, unlawful use of a weapon, and FIP; the indictment did not expressly allege a basis for joinder under ORS 132.560(1)(b). After the Court of Appeals issued its opinion in *State v. Poston*, the state filed a motion to amend the indictment by interlineation to allege the basis for the joinder of the charges; the motion asserted that the amendment was authorized by Art VII (Am), § 5(6) (authorizing the district attorney to "file an amended indictment or information whenever, by ruling of the court, an indictment or information is held to be defective in form"). Defendant opposed the motion but the trial court granted it. Defendant was found guilty on some of the charges. The Court of Appeals affirmed, ruling: [1] For purposes of Art VII (Am), § 5(6), "a matter is one of 'form' if it is not one that is essential to show that an offense has been committed." [2] "The only thing that the amendments did was demonstrate that the charges met the statutory procedural standard for being tried as part of a single case, so as to obviate the need for multiple trials. The phrasing of the amendments did not change the "essential" nature of the indictment against defendant. The amendments also did not change what defenses to those charges might be available to defendant." [3] "Although, under *Poston*, the indictment was subject to demurrer for

failure to allege the basis for joinder, that the charges may have been misjoined was not a defense to the charges."

The Supreme Court allowed defendant's petition and the issue on review is: If a multi-count indictment fails to establish a basis for joinder and is thereby subject to demurrer under *State v. Poston*, may the trial court amend the indictment to cure that defect and avoid demurrer without requiring the state to resubmit the indictment to the grand jury?
Counsel: Ernest Lannet
Argument: May 7, 2019

*Martinez v. Cain*, 293 Or App 434, 428 P3d 976 (2018), *rev allowed*, 364 Or 294 (2019) (S066253).

Petitioner was convicted on charges of attempted aggravated felony murder and first-degree robbery. He filed a petition for post-conviction relief alleging that his trial counsel failed to provide constitutionally adequate assistance by not objecting to entry of a separate conviction on the robbery charge. The post-conviction court denied that claim based on *State v. Barrett*, 331 Or 27 (2000), and *State v. Wilson*, 216 Or App 226 (2008). The Court of Appeals affirmed, holding that the post-conviction court correctly granted summary judgment because the offenses do not merge. Under *Barrett*, a separate conviction on the felony charge that provides the basis for a conviction for felony murder is not an element of felony murder for purposes of merger under ORS 161.067(1). Moreover, petitioner was convicted on a charge of completed robbery, and so the conviction could not merge with his conviction for attempted aggravated felony murder.

The Supreme Court allowed the petitioner's petition, and the issue on review is: "Do the guilty verdicts for attempted aggravated felony murder and the felony that underlies that charge merge into a single criminal conviction?"
Counsel: Lindsey Burrows
Argument: May 7, 2019

*State v. Iseli*, 293 Or App 27, 426 P3d 238, *rev allowed*, 363 Or 815 (2018) (S066142).

Defendant was charged with several crimes of domestic violence against his former girlfriend. The victim feared defendant, who was a high-ranking member of the Mongols gang and made detailed threats to kill her and send members of the gang after her, and made comments about how the Mongols treat "snitches." For those reasons, she was afraid to testify against him at trial. To ensure her attendance at trial, the state served her with a subpoena, and the lead detective spoke with her on multiple occasions about the importance of her testimony. The district attorney spoke with her about that as well, and rented a hotel room for her on the night before trial. She declined that offer, but accepted the detective's offer to pick her up at an undisclosed location on the morning of trial and drive her to court. But on the morning of trial, she texted the detective and told him that she would not attend trial. The state asked the trial court to "go forward without her" and asked the court to make pretrial rulings on her unavailability and the admissibility of her out-of-court statements under OEC 804(3)(g), the "forfeiture by

wrongdoing" exception to the hearsay rule. The trial court found that the state "did everything that [it] possibly could short of [seeking] a material witness warrant for [the victim]" to secure her attendance, and that defendant had intended to discourage her from testifying and that his conduct is what caused her not to appear. Nevertheless, it denied the state's motion to admit the statements, concluding that, although the elements of OEC 804(3)(g) were met, the state failed to demonstrate that the victim was "unavailable" because the state had not sought a warrant for her arrest for contempt or a material-witness warrant. The state appealed.

The Court of Appeals reversed and remanded: [1] "For the victim's hearsay statements to be admissible under OEC 804(3)(g), the state had to show that (1) defendant engaged in wrongful conduct, (2) that wrongful conduct was intended (at least in part) to cause the victim to be unavailable as a witness, and (3) the wrongful conduct did, in fact, cause the victim to be unavailable." Defendant's intent is a question of fact for the trial court. The trial court correctly found that all of the elements of OEC 804(3)(g) were satisfied, but erred in concluding that the victim was unavailable. "In light of the trial court's findings, and that, by wrongfully procuring the victim's absence from trial, defendant largely controlled the circumstance to which he objected, we conclude that reasonableness did not require the state to seek a warrant for the victim's arrest in this case. Instead, the state exhausted all reasonable measures for securing the victim's attendance at trial." Thus, the court erred in denying the state's motion in limine to admit the victim's statements at trial.

The Supreme Court allowed defendant's petition, and the issues on review are: "(1) Under the forfeiture-by-wrongdoing rule, OEC 804(3)(g), is evidence that the defendant caused the witness to be unavailable a circumstance that the court considers in determining whether, under OEC 804(1)(e), the state has been unable to procure the witness's attendance 'by process or other reasonable means'? (2) Has the state failed to meet the requirements of OEC 804(1)(e) to locate a complaining witness who does not appear for trial if the state has served the witness with a valid subpoena, but the witness has been reluctant throughout the case, was in the jurisdiction the night before trial, and the state had other means of securing her attendance at trial?"
Counsel: Sara Werboff
Argument: May 3, 2019

*State v. Harrison*, 292 Or App 232, 423 P3d 736, *rev allowed*, 363 Or 728 (2018) (S066132).

Defendant's ex-boyfriend called 911 to report that she had come to his home in violation of a restraining order and had driven away in her car, possibly suicidal. He also told the 911 operator that she routinely carried a handgun in her car. An officer responded and initiated a high-risk stop of defendant's car. The officer got her out of the vehicle and, while the driver's side door was open, another officer saw the "handle and upper cylinder" of a handgun sticking out of the side pocket of the driver's side door; according to the officer, it would not have been visible when the door was closed and defendant was in the driver's seat, and it was readily accessible to the driver. Defendant

was charged with, among other things, unlawful possession of a concealed firearm, ORS 166.250(1)(b). At trial, she moved for a judgment of acquittal, arguing that the state had not presented evidence that the gun was concealed. The trial court denied the motion. Before the case went to the jury, defendant asked the court to give special instructions defining the terms "concealed" and "knowingly." The court declined to give those instructions, and the jury found defendant guilty.

The Court of Appeals affirmed the trial court. The court held that [1] A firearm is "concealed," for purposes of ORS 166.250(1)(b), when it is "hidden from view or placed out of sight"; it need not be completely hidden from view. [2] The question is whether the gun was concealed "at some point," regardless of whether or not it was visible at the time of the stop. Thus, the fact that the gun was visible during the course of the stop, after the car door was open, is not dispositive. [3] The evidence was sufficient to support a conclusion that the gun was "concealed, because the officers' testimony established that a person standing next to the closed car door would not have been able to see the gun." [4] The trial court did not err in refusing to give defendant's special instruction defining "concealed" because it was not completely correct—it defined "concealed" as meaning not readily identifiable as a handgun "or an attempt has been made to obscure the fact that there is a handgun in the vehicle." That latter clause "could have misled the jury into believing that the gun was not 'concealed' even if it was completely hidden from view." [5] For the same reason, the trial court did not err in refusing defendant's instruction defining "knowingly," because it incorporated the same misleading clause.

The Supreme Court allowed review. the issues are: "(1) Is a handgun concealed in a vehicle, for purposes of unlawful possession of a firearm, if it is stowed in an open door compartment? (2) Must a trial court provide a requested jury instruction that explicitly informs the jury that the requisite 'knowing' mental state for the crime of unlawful possession of a firearm applies to the possession of an object, the fact that the object is a gun, the fact that the gun is concealed, and the fact that the person has ready access to the gun?

Counsel: Sarah Laidlaw
Argument: March 7, 2019

*Laycelle White v. Premo*, 286 Or App 123, 399 P3d 1034 (2017), *rev allowed*, 363 Or 727 (2018) (S065223).
*Lydell White v. Premo*, 285 Or App 570, 397 P3d 504, (2017), *rev allowed*, 363 Or 727 (2018) (S065188).

In 1993, 15-year-old petitioners Lycelle and his brother Lydell murdered an elderly couple. Petitioners were waived into adult court and, on stipulated facts, found guilty of one count of aggravated murder and one count of murder. Additionally, Lydell was convicted of robbery. The trial court sentenced Lycelle to an indeterminate life sentence on the aggravated murder conviction, and a concurrent 800-month term of imprisonment on the murder conviction. The trial court sentenced Lydell to an indeterminate life sentence on the aggravated murder conviction and a concurrent 800 month term on the murder conviction, and a consecutive 36 month term on the robbery

conviction. Petitioners each filed a post-conviction petitions, neither of which resulted in relief for them. Following the decision in *Miller v. Alabama*, 567 US 460 (2012), petitioners filed second successive petitions in which they argued that their sentences constituted cruel and unusual punishment under the Eighth Amendment, and that the 800-month sentence was vertically disproportionate to the sentence for aggravated murder. Petitioners contended that their claims fell within the escape clauses of ORS 138.510 and 138.550, because they could not raise their Eighth Amendment claim prior to *Miller*, and could not raise their disproportionality argument prior to 2012 when the Board of Parole established their prison term for the aggravated murder sentence. They also raised a claim of ineffective assistance of trial counsel, arguing that previous post-conviction counsel, including appellate post-conviction counsel, were inadequate in failing to raise and preserve claims regarding the proportionality of their 800-month sentence. The post-conviction court granted defendant superintendent's motion for summary judgment after it concluded that petitioners were procedurally barred by ORS 138.550(3) from bringing their claims again. The Court of Appeals affirmed, ruling: [1] Where a ground for relief could have reasonably been—or was—raised on direct appeal or in an earlier post-conviction relief petition, ORS 138.550(2) and (3) bar that ground for relief from being raised in a later petition. [2] Petitioners raised their Eighth Amendment claim on direct appeal. Thus, their assertion that they could not have earlier challenged their sentence as cruel and unusual fails. [3] Petitioners' proportionality challenge was not dependent upon the Board setting their prison term. Petitioners were sentenced in 1995 and could have raised such a claim at that time when they knew the outer parameters of the sentences. [4] Under *Cunningham v. Premo*, 278 Or App 106, *rev den*, 360 Or 422 (2016), *cert den*, (2017), the adequacy of post-conviction counsel may not be challenged in a later post-conviction proceeding.

The Supreme Court granted petitioners' petitions, and the issues on review are: (1) Under ORS 138.550(3), may a petitioner asserting a ground for post-conviction relief based on *Miller v. Alabama*, 567 US 460 (2012), raise that ground for relief despite having previously raised a claim that his sentence was disproportionate and violated the Eighth Amendment? (2) Even if ORS 138.550(3) requires a comparison of the grounds for relief alleged in a prior petition with the grounds alleged in the current petition, may a court consider the merits of a ground for relief if it differs materially from the ground for relief in the prior petition but was based on the same constitutional provision? (3) Alternatively, does *Montgomery v. Louisiana*, 136 S Ct 718 (2016), require an Oregon court to reach the merits of a claim that a sentence violates the Eighth Amendment as interpreted in *Miller*, regardless of the meaning of ORS 138.550(3)? (4) May a post-conviction petitioner bring a successive petition based on grounds that were not raised in a prior state post-conviction proceeding because of ineffective assistance of post-conviction counsel? (5) If this court reaches the merits of petitioner's Art. I, § 16, or Eighth Amendment arguments, does the 800-month determinate sentence for murder violate Art. I, § 16, or the Eighth Amendment?

On petitioners' supplemental petitions for review: (6) Does the rule from *Miller* apply to a juvenile convicted of homicide and non-homicide offenses and sentenced to an

aggregate *de facto* sentence of life without parole? (7) When, if ever, does a term-of-years sentence imposed on a juvenile trigger the Eighth Amendment requirements from *Miller* and *Montgomery*? (8) What type of sentencing hearing satisfies Miller if a juvenile has been remanded to adult court and a court considers whether to impose a sentence of life without parole or a *de facto* life without parole sentence? (9) Does Art. I, § 16, prohibit an aggregate *de facto* life without parole sentence imposed on a juvenile convicted of homicide offenses?
Counsel Ryan O'Connor
Argument: March 7, 2019

*State v. Arreola-Botello*, 292 Or App 214, 418 P3d 785, *rev allowed*, 363 Or 727 (2018) (S066119).

An officer stopped defendant's car for a traffic violation. At some point, a second officer arrived in a second police car. Defendant was driving, and he had two passengers in the car. The officer asked defendant for his identification, driver's license, and proof of insurance. After defendant provided his identification card, he searched for "probably three, four minutes" for the other documents. While he searched, the officer asked defendant if he had any weapons or drugs and whether he would consent to a search of the car. Defendant consented. When the officer opened the door of the car, he found a bindle that contained methamphetamine. Defendant was charged with unlawfully possessing a controlled substance. He moved to suppress, arguing that the officer unlawfully extended the traffic stop in violation of Art. I, § 9, by asking about weapons or drugs rather than giving defendant an opportunity to continue searching for the documents requested as part of the traffic stop. The trial court denied the motion, and defendant was convicted. The Court of Appeals affirmed in a *per curiam* opinion that simply cited *State v. Hampton*, 247 Or App 147 (2011), and *State v. Gomes*, 236 Or App 364 (2010).

The Supreme Court granted defendant's petition, and the issue on review is: Does an officer violate Article I, section 9, of the Oregon Constitution by asking about guns and drugs during an officer-created lull in the investigation?
Counsel: Joshua Crowther
Argument: March 4, 2019

*Penn v. Board of Parole & Post-Prison Supervision*, 290 Or App 935, 415 P3d 597, *rev allowed*, 363 Or 677 (2018) (S065950).
*Tuckenberry v. Board of Parole & Post-Prison Supervision*, 291 Or App 843, 419 P3d 818, *rev allowed*, 364 Or 207 (2018) (S066213).

The board imposed a special condition of post-prison supervision that prohibits petitioners from entering into or participating in any intimate relationship or intimate encounters without prior written permission from his supervising officer. Petitioners challenged that condition on judicial review. The Court of Appeals affirmed both cases without opinion.

The Supreme Court granted the petitioners' petitions, and the issues on review are: (1) Is a PPS condition that prohibits a person from entering into or participating in any intimate relationship or intimate encounters without prior written permission from his supervising officer broader than necessary to achieve the goals of PPS? (2) Is a PPS condition that prohibits a person from entering into or participating in any intimate relationship or encounters without prior written permission from his parole officer unconstitutionally vague and overbroad? *Penn* presents the question of whether the issue is moot and *Tuckenberry* presents the question of whether the issue can be raised as plain error.
Counsel: Anna Belais (Penn) & Marc Brown/Stephanie Hortsch (Tuckenberry)
Argument: March 4, 2019

*State v. Hedgpeth*, 290 Or App 399, 415 P3d 1080 (2018), *rev allowed*, 363 Or 119 (2019) (S065921).

Defendant was stopped by a trooper for riding his motorcycle without a helmet. The trooper arrested him for DUII, transported him to the police station, and administered a breath test—an hour and 45 minutes after the stop—which showed that he had a blood-alcohol content of .09%. Defendant was charged with DUII, and the case was tried to the court. At trial, the state elected to rely solely on a *per se* theory of intoxication under ORS 813.010(1)(a)—*i.e.*, that he had a BAC of at least .08% when driving. The state offered no other evidence other than the BAC and the officer's testimony that defendant had not consumed any alcohol after the stop. Defendant argued that the evidence was legally insufficient to prove that his BAC was at least .08% at the time of driving. The trial court rejected that argument and found him guilty.

A divided Court of Appeals reversed and remanded, holding: [1] Even though the fact that alcohol in the blood dissipates over time is common knowledge, "that knowledge combined with the minimal evidence presented at trial in this case is not sufficient for a reasonable factfinder to find beyond a reasonable doubt that defendant's BAC was [at or] above .08 percent at the time he was driving." [2] "The line between reasonable inferences and impermissible speculation 'is drawn by the laws of logic.'" Thus, "the issue before us is whether mere logic renders probable that, when a person's BAC is .09 percent one hour and 45 minutes after he drove and he has not consumed alcohol over that period, that person's BAC was at least .08 at the time that he was driving." [3] Because alcohol must accumulate in the blood before it can dissipate, the mere fact that blood alcohol dissipates over time does not logically lead to any conclusion regarding a specific person's earlier BAC at a specific time. Without more, "a factfinder has no way to determine if defendant's BAC was still rising, but under .08, at the time he was driving and peaked later before falling to .09 at the time of the BAC test." [4] The problem in this case is that the state proceeded solely on a *per se* theory under ORS 813.010(1)(a) and did not present any other evidence regarding the presence of alcohol in defendant's body at the time of driving.

The Supreme Court allowed the state's petition, and the issue on review is: "In a DUII case where the state presents evidence that the defendant's BAC was .09 percent an

hour and 45 minutes after driving, and that the defendant did not consume any alcohol during that period of time, can a factfinder reasonably infer that his BAC was at least .08 percent at the time of driving?"
Counsel: Emily Seltzer
Argument: March 1, 2019

*State v. Koch*, 289 Or App 642, 412 P3d 1216 (2017), *rev allowed,* 363 Or 677 (2018) (S065694).

A police officer contacted defendant after witnesses called to report that he had driven to a county Work Release Center while impaired. When the officer arrived and met with defendant in a meeting room, he noticed defendant was extremely impaired. When the officer asked defendant if he had driven there, defendant admitted that he had driven, and admitted that he had taken a number of prescription drugs shortly before driving (but denied drinking alcohol). Although defendant was not under arrest at that point, an officer read defendant *Miranda* warnings before asking defendant to perform field sobriety tests. Defendant declined and said that he would like to speak with an attorney. The officer told him that he could not speak with an attorney at that point, but later he would be able to make a phone call to whomever he chose. The officer then read defendant the *Rohrs* admonishment and again asked him if he would submit to field sobriety tests, and defendant said that he would. He performed poorly on nontestimonial field sobriety tests, and made some incriminating statements. He also nodded off while an officer read him an implied consent form prior to a breath test. After defendant answered some additional questions, the officer asked him if he would be willing to undergo a DRE evaluation, and defendant agreed; as part of that evaluation, defendant provided a urine sample (which ultimately tested positive for multiple controlled substances). Defendant was charged with DUII and moved to suppress all evidence after he invoked his right to counsel, including the arguing that it derived from a *Miranda* violation. The trial court denied the motion to suppress the FST results and breath-test result (the urine test result and statements had already been suppressed and were the subject of an earlier appeal). Defendant was convicted of DUII. On appeal, defendant assigned error to the denial of the motion to suppress the FST and breath test results, arguing that they were unlawfully obtained in violation of Art. I, § 12. The Court of Appeals affirmed without opinion.

The Supreme Court granted defendant's petition, and the issues on review are: (1) Does asking a defendant to take a breath test constitute interrogation under Art. I, § 12? (2) Does asking a defendant to perform field sobriety tests constitute interrogation under Art. I, § 12? (3) Does asking either of those questions fall within an exception to interrogation—*i.e*., are those requests routine booking questions or words or actions normally attendant upon arrest and custody? (4) Does a suspect's consent to take a breath test and the resulting measure of his blood alcohol content derive from an Art. I, § 12, violation if the defendant unequivocally invoked his right to counsel but police subjected the defendant to interrogation immediately preceding the request to take a breath test?

Counsel: Kali Montague
Argument: March 1, 2019

*State v. Sperou*, 288 Or App 167, 403 P 3d 825 (2017), *rev allowed*, 362 Or 794 (2018) (S065471).

Defendant is the "spiritual leader" of the North Clackamas Bible Community, a small religious sect whose members live together in homes near Portland. He was charged with three counts of unlawful sexual penetration based on his repeated sexual abuse of a child who was living in the community during the 1990s. At trial, the state planned to call six witnesses to testify that defendant repeatedly sexually abused them when they were children living in the community, during the same time period. Before trial, defendant moved to exclude their testimony, arguing that the evidence was inadmissible "other acts" evidence. The trial court denied the motion, concluding that the evidence was admissible under OEC 404(3) to prove defendant's intent, plan, and absence of mistake or accident, and under OEC 404(4) as propensity evidence. Defendant also moved to prevent the prosecutor or other state's witnesses from referring to the complaint in this case, and the six witnesses who were to testify that defendant sexually abused them, as "victims." The trial court denied the motion, and defendant was convicted. The Court of Appeals affirmed without opinion.

The Supreme Court allowed defendant's petition, and the issues on review are: (1) Did the trial court err in admitting "other acts" evidence to prove defendant's intent, plan, and the absence of mistake or accident under OEC 404(3) and as propensity evidence under OEC 404(4); and (2) did the trial court err in denying defendant's motion in limine to prevent the complainant and the "other acts" witnesses from being repeatedly referred to by the prosecutor and the prosecution witnesses as "victims"?
Counsel: Steven Sherlag
Argument: January 15, 2019

*State v. Moreno-Hernandez*, 290 Or App 468, 415 P3d 1088 *rev allowed*, 363 Or 390 (S065930).
*State v. Toth*, 290 Or App 925, 417 P3d 479 (2018) *rev allowed*, 363 Or 390 (S065929).

Toth and codefendant, Moreno-Hernandez, conspired to have the 13-year-old victim dance nude in a strip club defendant managed and to perform sex acts for him and for the club's customers. After the abuse was discovered, DHS sent the victim to a residential treatment center in Arizona, which was paid for by the Oregon Health Plan. Defendant pleaded guilty to second-degree sodomy, first-degree sexual abuse, and compelling prostitution. At sentencing, the court imposed a $150,000 compensatory fine, citing the residential-treatment costs as proof of economic damages; the court additionally imposed a $200 punitive fine on each count of conviction. The Court of Appeals vacated the compensatory fine, ruling: Under *State v. Moore*, 239 Or App 30 (2010), "it is plain error for a trial court to impose a compensatory fine [under ORS 137.101] in addition to a punitive fine imposed under ORS 161.625(1)." But "we do not

remand for resentencing because … the record clearly demonstrates that a compensatory fine payable to [the victim] cannot be lawfully imposed." That is so because "the record contains no evidence that [the victim] ever incurred any objectively verifiable obligation for the [costs of her] treatment and, therefore, ever suffered economic damages as a result of defendant's crimes. The state produced no evidence from which a court could infer that [the victim], a child under the guardianship of DHS, could have been liable for the costs of the [residential] treatment."

The Supreme Court granted the state's petition. The issue on review is: For purposes of the statutes authorizing restitution and compensatory fines in criminal cases, does the term "economic damages" include the costs of treating the injuries of a person harmed by a defendant's crime when a third party (such as an insurer) pays those treatment costs?

Counsel: Mary Reese (Moreno Hernandez) & Raymond Tindell (Toth)
Argued: November 6, 2018

*State v. Riley*, 288 Or App 807, 407 P3d 946, (2017), *rev allowed*, 363 Or 224 (2018) (S065640).

Defendant and two accomplices conspired to commit, attempted to commit, and committed multiple offenses over a crime spree lasting several months. Those offenses occurred during five interrelated criminal "episodes," three of which were primarily at issue on appeal. In the first episode, defendant and his accomplices conspired, and then attempted, to rob and kidnap Johnson, the employee of a jewelry store. In the second episode, defendant and his accomplices conspired, and then attempted, to rob the employees of a T Mobile store. In the third episode, defendant and his accomplices burglarized Blumenthal's, a uniform supply store, and were apprehended by the police while fleeing from that burglary. The accomplices implicated defendant's involvement in the crimes. At trial, defendant moved for a judgment of acquittal on the counts charged in the "Johnson" and "T-Mobile" episodes, arguing that the state offered insufficient evidence to corroborate the testimony of his accomplices regarding his participation in crimes charged in those episodes. The trial court denied the motion.

The court of appeals reversed the denial of judgments of conviction on Counts 21 through 26. The court held that [1] Accomplice testimony must be "corroborated by other evidence that tends to connect the defendant with the commission of the offense." ORS 136.440(1). Such corroborating evidence must be independent of any testimony of the accomplices, and must corroborate both the fact that the crime occurred as well as the defendant's involvement. [2] The state adduced insufficient evidence corroborating the testimony of defendant's accomplices with respect to his involvement in the crimes charged in the "Johnson" and "T Mobile" episodes. [3] The fact that defendant was eventually apprehended in the company of his accomplices and in possession of several of the instrumentalities intended to be used in the T-Mobile and Johnson episodes (including firearms, walkie-talkies, an explosive, syringes, and a stolen jacket) was insufficient because such items may or may not be so incriminating on their own to give rise to a logical inference of involvement in some criminal activity, but they are not so

uniquely incriminating as to give rise to a logical inference that defendant was involved in the specific crimes charged. The Supreme Court allowed the state's petition for review. The Oregon Supreme Court allowed the state's petition for review to address two questions related to the issue of corroboration: "(1) Is evidence of a defendant's possession of criminal instrumentalities sufficient to satisfy the corroboration requirement in ORS 136.440(1) for convictions based upon accomplice testimony if some amount of accomplice testimony may be necessary to connect the defendant's possession of such instrumentalities to a crime? (2) If accomplices commit a series of crimes as part of a common criminal venture, does evidence corroborating the accomplice testimony about defendant's involvement in one offense tend circumstantially to connect the defendant with the commission of other offenses that are alleged to be part of the same criminal venture?"
Counsel: Andrew Robinson
Argued: November 5, 2018

*State v. McFerrin*, 362 Or 794, 416 P3d 1096 *rev allowed* 362 Or 794 (2018) (S065711). Defendant pleaded guilty to four counts of identity theft, and the court imposed an 18-month probationary sentence on each conviction. Later, the court revoked his probation, based on his admission that he violated two conditions. At sentencing, the court imposed a 20-month sentence on each conviction and, over defendant's objection, ordered him to serve three of those sentences consecutively, for a total sentence of 60 months. On appeal, defendant argued that, because the revocation was based on only two violations, OAR 213-012-0040(2)(b) limited the court to imposing only two consecutive terms.

The Court of Appeals affirmed, ruling: [1] OAR 213-012-0040(2)(b) "does not, by its express terms, prescribe the one-for-one rule that defendant contends that it does. Instead, by its terms, paragraph (b) gives the sentencing court the authority to impose either consecutive or concurrent incarceration sanctions any time that 'more than one term of probationary supervision is revoked for separate supervision violations.'" [2] "As long as the multiple supervision violations are truly 'separate' under the rule, the sentencing court may impose consecutive sentences for each term of probationary supervision that is revoked." [3] "In this case, the court revoked four terms of probationary supervision based on two 'separate supervision violations' and ordered three of the incarceration sanctions to be served consecutively. That sanction was within the court's authority under OAR 213-012-0040(2)(b) because defendant committed more than a single supervision violation."

The Supreme Court granted defendant's petition, and the issue on review is: "Must a sentencing court find a separate supervision violation for each consecutively imposed probation revocation sanction?" (Note: The Supreme Court has issued an opinion in the companion case, *State v. Sparks*, 364 Or 696, 439 P3d 980, 981 (2019)).
Counsel: Anne Munsey
Argued: November 1, 2018

*State v. Carpenter*, 287 Or App 720, 404 P3d 1135 (2017), *rev allowed*, 362 Or 545 (2018) (S065374).

Detective Gardiner went to a property that had only a garage on it, seeking to execute an arrest warrant for Haussler, who had been seen there. As he arrived, someone he thought might be Haussler came out of the garage and ran away. As he called for backup, he saw defendant on the property near the garage. The detective asked defendant about Haussler and warned him that he would be committing hindering if he was untruthful. Defendant denied knowing Haussler, having come with him onto the property, or knowing where he was. Haussler was soon found hiding on adjacent property. The detective arrested defendant; during the arrest, two straws with methamphetamine residue fell from his clothing. Defendant was charged with hindering prosecution, ORS 162.325(1)(a) (to conceal a wanted person), and PCS. He moved to suppress, arguing that officers lacked probable cause to arrest him; he argued that his lie about knowing Haussler was insufficient evidence to support a finding that he had "concealed" him. The trial court denied that motion. At trial, defendant moved for a judgment of acquittal on the hindering charge based on the same argument. The court denied that motion, and defendant was found guilty. On appeal, the Court of Appeals affirmed, ruling that defendant's denial that Haussler had very recently been present and likely was present nearby was sufficient to allow a jury to find—and to supply probable cause for the officer to believe—that he had committed hindering by concealing the location of a felon.

The Supreme Court allowed defendant's petition, and the issue on review is: "For purposes of ORS 162.325(1)(a), does a person 'conceal' a fugitive if he denies knowing or associating with the wanted person when asked questions by law enforcement aimed at locating the fugitive?"
Counsel: Rond Chadanudech
Argued: September 13, 2018

*State v. Gutierrez-Medina*, 287 Or App 240, 403 P3d 462 (2017), *rev allowed*, 362 Or 389 (2018) (S065297).

While driving one night, defendant struck a pedestrian "who had entered the roadway in an area that was dark and not marked for pedestrian crossing." Defendant pleaded guilty to DUII and third-degree assault. The state requested $154,827 in restitution for the victim's medical bills. At the restitution hearing, defendant presented evidence from an expert in forensic accident investigation who testified that, based on his analysis, "a sober driver would not have been able to avoid the collision with the victim, and the victim was in the best position to have avoided the collision." Defendant argued that the court should reduce the amount of restitution based on civil-law comparative fault principles. The court rejected that argument and ordered restitution in the full amount.

The Court of Appeals affirmed, ruling: [1] In civil law, comparative-fault principles are not a part of the causation analysis; the issue of apportionment of fault arises only after causation has been established. "And nothing in ORS 137.106, the

restitution statute, requires a court to apply such principles to the causation analysis. [2] To the extent that defendant argued that the court should apply the comparative-fault concept as a consideration separate from causation, that argument also fails. "ORS 137.106 expressly forecloses the court from engaging in the type of apportionment of damages that comparative fault contemplates—*viz.*, an apportionment that occurs only after the trier of fact determines the claimant's total damages caused by the tortfeasors—because, subject only to the victim's consent, the trial court is not permitted to award less than the full amount of the victim's economic damages that it determines was caused by the defendant's criminal activity."

The Supreme Court allowed defendant's petition, and the issue on review is: "In identifying economic damage that is compensable as restitution in cases involving negligent or reckless criminal conduct, must a sentencing court consider a victim's comparative fault?"

Counsel: Joshua Crowther

Argued: September 10, 2018

*State v. Gensitskiy*, 287 Or App 129, 401 P3d 1219 (2017), *rev allowed*, 362 Or 482 (2018) (S065317).

Defendant was arrested with stolen identities, checkbooks, credits cards, etc., of 27 separate victims. He was charged with one overarching count of aggravated identity theft (ORS 163.803(1)(d)), 27 counts of identity theft (ORS 165.800(1)), and some other, related crimes. He pleaded guilty to all the counts charging identity theft. At sentencing, defendant argued that the theft convictions had to merge into the conviction for aggravated identity theft. The court disagreed, holding that none of the counts merged. On appeal, defendant reiterated his argument that all of the 27 counts of identity theft should merge into the conviction for aggravated identity theft under ORS 161.067(1).

The Court of Appeals affirmed in part and reversed in part, ruling: [1] Under ORS 161.067(2), one of the counts of identity theft has to be merged into the conviction for aggravated identity theft. [2] But ORS 161.067(1) cannot be read in isolation, nor can ORS 161.067(2) be read to mean that because each of the 27 victims are represented in the count of aggravated identity theft that all of the lesser counts merge into that conviction. Under ORS 161.067(2), when the same or similar criminal conduct involves two or more victims, "there are as many separately punishable offenses as there are victims," and that one of the counts of identity theft had to be merged into the conviction for aggravated identity theft, under ORS 161.067(2), but the remainder of the identity theft offenses did not merge into the aggravated identity theft because, under ORS 161.067(2), when the same or similar criminal conduct involves two or more victims, "there are as many separately punishable offenses as there are victims."

The Supreme Court allowed defendant's petition, and the issue on review is: "When the legislature creates an aggravated theft offense based on there being multiple victims of a lesser-included theft offense, does ORS 161.067(2) prohibit merger of the individual guilty verdicts of the lesser-included offenses into the aggravated offense

when the victims of the lesser-included offenses are also victims of the aggravated offense?”
Counsel: Neil Byl
Argued: May 7, 2018

## Police Encounters and Stops

**General Trend**: The appellate courts are taking a more realistic (and defense friendly) view of when a police officer seizes a person through a show of authority.

**Representative Cases**

- *State v. Leiby*, 293 Or App 293 (2018)
  - Facts: A police officer drove next to the defendant and saw that the defendant had a panicked look. The defendant pulled off the road into a parking lot, and the officer circled the block to check out defendant. The defendant pulled out of the lot, the officer followed, and the defendant pulled into another parking lot and parked. The officer also parked in the lot without blocking the defendant's car or using his lights, approached defendant and said, "Is there any reason or do you want to tell me why you're trying to avoid me?"
  - Held: The officer seized the defendant. "Although framed as a question, it is confrontational in the context of this interaction. [Officer] Weaver testified that he always employs this phrase to 'make it a mere encounter.' *But a rising tone, or a question mark at the end of a sentence, is not a talisman that automatically transmutes a police-citizen interaction into a 'mere encounter*.' * * * The choice of the word 'avoid' would strongly imply to a reasonable person in defendant's situation that defendant had a duty or obligation to stop and interact with Weaver. The question implies that defendant is engaged in behavior that is nefarious and warrants explanation. The question makes it clear that Weaver had been following defendant, both parties knew defendant was aware he was being followed, and that defendant was now 'caught' and must stay to explain himself."
- *State v. Brown*, 293 Or App 772 (2018)
  - Facts: Officer saw the defendant's car parked outside of bar with two guys and a known drug dealer standing near car. As the car drove off, the officer turned around and followed, driving a few car lengths behind the

defendant's car. A backseat passenger repeatedly turned around and looked at the officer. The officer followed car for 10 to 15 minutes on a road out of town and kept following as defendant made a number of maneuvers. Eventually, the officer and a backup officer followed the defendant into an empty commercial nursery parking lot, where the defendant parked. The officer parked without blocking the defendant's car or using lights, got out, and approached the defendant and his passenger. The officer asked if they had permission to be there and questioned the defendant about drugs in the car.

- Held: The officer seized the defendant. "[W]e agree with the state that, viewing the interaction behind the nursery building in isolation, the officers' conduct would not constitute a stop. * * * But we disagree with the state that we may limit our consideration only to what happened after the officers arrived behind the nursery building. We must consider the 'totality of the circumstances' to determine if a seizure occurred."

- *State v. Nelson*, 294 Or App 793 (2018)
  - Facts: Officer is driving and sees the defendant walking and displaying "tweaking" type behavior consistent with methamphetamine use. The officer pulled over and parked near the defendant without using his lights or PA system. He conversed with the defendant about the "local fall festivities." The officer told the defendant that he was observing "certain signs" and believed she was under the influence of methamphetamine. He asked her if she had drugs on her, and she responded, "I don't appreciate you insinuating that I have drugs on me," and the officer said, "It would be easy to prove me wrong * * * by showing me that your purse doesn't contain drugs."
  - Held: The officer seized the defendant. "A reasonable person would understand that, at that point, Lillie was conducting a drug-possession investigation, and that defendant could not leave until she let Lillie look in her purse."
- *State v. Stevens*, 364 Or 91 (2018)
  - Facts: A police officer pulled over a van for a traffic violation. The officer approached the van and noticed

several passengers, including Shaw and the defendant in the back seat. Shaw was acting intoxicated, and the officer began questioning Shaw about his identity and came to believe that he was lying about his first name. The officer asked the defendant for her name and learned she was on parole. The officer threatened to report the defendant to her parole officer if she lied about Shaw's identity. The defendant revealed Shaw's true first name, and the officer called defendant's parole officer (who was also Shaw's parole officer) and reported the interaction. The officer returned to the van and asked the defendant if he could search her backpack. She consented, and the officer found drugs.

- Held: When police stop a car, they generally seize only the driver, and the passengers are not seized under Article I, section 9, without a further show of authority (rejecting federal rule). Thus, defendant was not seized by virtue of the traffic stop of the van.
- Held: The officer seized the defendant through a show of authority. "Under *Backstrand*, the mere fact that [Officer] Klopfenstein asked defendant to confirm Shaw's name did not constitute a seizure. As *Backstrand* explained, officers are free to ask citizens for information without mere conversation becoming a seizure. However, after that initial inquiry, Klopfenstein's questions and actions became increasingly coercive. Specifically, Shaw had been behaving oddly, and Klopfenstein asked Shaw for his identification. Even though Shaw's response (he could not spell Jonathan) raised questions, defendant told Klopfenstein that she had known Shaw for two years and confirmed that his name really was Jonathan Shaw. *She thus became enmeshed in Klopfenstein's extended inquiry of Shaw*." "By the time that Klopfenstein made [the threat to call defendant's parole officer], *Shaw and defendant had become inextricably interconnected*."
- Takeaway: When a defendant is with a companion, and an officer makes a show of authority against the companion, the court will consider the effect that that show of authority has on the defendant. Contrast that with *Ashbaugh*.

## DUII

**General Trend**: The Supreme Court is drawing back on the so-called "DUII exception" to the Oregon Constitution.

**Representative Cases**

- *State v. Swan*, 363 Or 121 (2018)
  - Held: Because defendant invoked his right to counsel upon receiving *Miranda* warnings, and had a right to refuse to submit to a breath test under former ORS 813.100 (2013), his later consent to take a breath test derived from a violation of Article I, section 12.
  - Held: Defendant's invocation of his right to counsel under Article I, section 12, tainted his later consent to submit to an alcohol breath test.
- *State v. Taylor*, 296 Or App 278 (2019)
  - Held: The trial court erred when it concluded that the BAC evidence did not derive from the officer's violation Article I, section 12. Applying the five factors identified in *State v. Jarnagin*, 351 Or 703 (2012), "the state failed to prove that defendant's decision to take the breath test did not derive from the preceding repeated violation of defendant's Article I, section 12, rights."
  - Held: The Court of Appeals cited *Swan* and rejected as insufficiently developed the state's argument that the BAC evidence was admissible despite the violation of Article I, section 12, because the officer lawfully could have seized a breath sample without a warrant based on probable cause and exigent circumstances.
- *State v. Banks*, 364 Or 332 (2019)
  - Held: Where officer, upon arresting defendant for DUII, gave him the implied-consent advice of rights and consequences and then asked him, "Will you take a breath test?," and he refused, admission at trial of evidence of that refusal pursuant to ORS 813.310, violated the defendant's rights under Article I, section 9. To admit the refusal, "[t]he state must demonstrate that

the officer's question could reasonably be understood only as a request to provide physical cooperation and not as a request for constitutionally-significant consent to search. If the state fails to establish that fact, then a driver's refusal cannot be admitted in evidence against the driver."

- Under review in the Supreme Court: *State v. Koch*
    - Does asking a person arrested for DUII to perform field sobriety tests and to take a breath test constitute "interrogation" for purposes of Article I, section 12?

## Technology

**General Trend**: Oregon and federal courts are recognizing that technological searches don't neatly fit within older search-and-seizure doctrines and are recognizing more privacy rights in the technological realm.

**Representative Cases**

- *State v. Mansor*, 363 Or 185 (2018)
    - Taking a new approach to search warrants when applied to electronic data. The court held that a warrant for a search of an electronic device will not be facially overbroad if probable cause supports it and it allows the executing officer to identify with "reasonable effort" the things to be seized for which the magistrate found probable cause. Investigators may liberally search device for evidence responsive to the warrant, because responsive data may be store in many different places on a hard drive. But if, during the course of the search, investigators find evidence that is not responsive to the warrant, Article I, section 9, bars the state from using that evidence.
    - The warrant in this case reasonable identified what was to be searched for: the internet search history from the day of the infant's death. Police were investigating the defendant after the death of his infant son through physical trauma. Instead of limiting themselves to searches from the date of the incident, police examined the defendant's complete internet history, including

deleted internet search records, which revealed several years of internet search history. Police discovered internet searches from the weeks and months prior to the death which revealed in brutal details the defendant's thoughts and struggles related to the abuse of infants.

- "Even a reasonable search authorized by a valid warrant necessarily may require examination of at least some information that is beyond the scope of the warrant. * * * Although such searches are lawful and appropriate, individual privacy interests preclude the state from benefiting from that necessity by being permitted to use that evidence at trial. We thus conclude that the state should not be permitted to use information obtained in a computer search if the warrant did not authorize the search for that information, unless some other warrant exception applies."
- Remaining question: How does the plain-view doctrine apply in this context? State did not make a plain-view argument, and the court did not reach it. But there is reason to believe that the traditional plain-error doctrine would not apply, because that would largely swallow the rule the court created in *Mansor*.

- *Carpenter v. United States*, 585 US __, 138 S Ct 2206 (2018)
  - Facts: Police investigating a string of robberies obtained the cell phone numbers of several suspects, including the defendant. The government applied for an order under federal statute for the wireless service providers to provide the "cell site location information" (CSLI) associated with those numbers. That data, which the wireless carriers collect and store for their own business purposes, consists of time-stamped records generated every time a phone connects to a cell site. Under the order obtained for the defendant's CSLI, the government obtained over 10,000 location points reflecting his movements for 127 days. Using that information, the government was able to place defendant near the scenes of several of the robberies
  - Held: The government violated defendant's Fourth Amendment right against unreasonable searches. Although a person generally "has no legitimate

expectation of privacy in information he voluntarily turns over to third parties," Smith v. Maryland, 442 US 735, 743-44 (1979), cell phone location records are different because the are "detailed, encyclopedic, and effortlessly compiled" and grant "near perfect surveillance." Given the "unique nature of cell phone location records," that the information was held by a third party did not overcome defendant's Fourth Amendment right, and the examination of the data invaded the defendant's reasonable expectation of privacy in his physical movements. The government must get a warrant to obtain this data.

**Other notable and upcoming cases**

- *State v. Lien/Wilverding*, 364 Or 750 (2019) – Garbage-pull searches violate Article I, section 9.
- *State v. Arreola-Botello* – The Court of Appeals is considering whether, during an unavoidable lull in a lawful traffic stop, a police officer's questions about guns and drugs, which are unrelated to the reasons for the stop, violate Article I, section 9?