Spring 2011

Oregon Constitutional Law Newsletter

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~In this Issue~

♦ The Section's longtime Legislative Correspondent, **Greg Chaimov**, reports on this session's pending bills in "*Constitutional Sausage-Making*" at page 8.

♦ Readers interested in the emerging legal standards for disclosure of trial exhibits and public records may turn to page 1 for **Roy Pulvers**' article, "*Two Pending Cases Test the Scope of the 'Open Courts' Provision of Article I, section 10*."

♦ In response to a recent Oregon Supreme Court free-expression case, **Bob Steringer** asks, "*Is a Lobbyist's Gift to a Public Official an Empty Gesture?*" at page 5.

♦ **Cody Hoesly** writes on the American Constitution Society-Oregon chapter's Justice Hans A. Linde Award, this year given to retired Justice Mick Gillette. See page 4.

♦ **Les Swanson** shares his analysis of two recent publications that likely will be of interest to readers in his "Book Reviews" at page 9.

♦ The appellate constitutional cases decided in Oregon between November 2009 and November 2010 are described in the chapter appended to this newsletter, beginning at page 16.

Please feel free to send any comments, articles, or letters to the editor at alycia.sykora@millernash.com or 541.383.5857.

We look forward to seeing you at our annual CLE this fall.

Alycia Sykora, editor

Two Pending Cases Test the Scope of the 'Open Courts' Provision of Article I, Section 10

Roy Pulvers

There are two pending cases of note in which the scope of the 'open courts' provision of Article I, section 10, of the Oregon Constitution is at issue. The Oregon Supreme Court heard argument in January 2011 in a mandamus action, *Jack Doe 1, et al. v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints*, S05860 (the "Boy Scouts" case). After judgment had been entered in a circuit court action based on claims of sexual abuse, media organizations sought release of trial exhibits that were submitted to the jury and that contained the names and identifying information of persons other than plaintiffs who also may have been victims. Multnomah County Circuit Judge John Wittmayer ordered the release of the exhibits, with the names and identifying information of the individuals redacted from disclosure. In the Boy Scouts case, both the media intervenors and BSA filed mandamus petitions, and the court granted them both. BSA contends that the exhibits should not be released at all, even in redacted form. The fundamental constitutional issue is whether Article I, section 10, which pertinently provides that "No court shall be secret," mandates unredacted disclosure of the trial exhibits.

In the other case, *The Oregonian* sought inspection and disclosure of a shelter hearing order in a pending juvenile dependency case. Multnomah County Circuit Judge Nan Waller, Presiding Judge of the Juvenile Court, denied the request, and *The Oregonian* filed a circuit court action asserting claims under the Oregon Public Records Law and the Declaratory Judgments Act, with Judge Waller and the State of Oregon Department of Human Services as defendants. *Oregonian Publishing Company LLC v. The Honorable Nan G. Waller and The State of Oregon*, Multnomah Co. No. 0911-16280. Judge Waller concluded that ORS 419A.255 prohibits disclosure and that Article I, section 10, of the Oregon Constitution does not mandate it. On behalf of the Department of Human Services, the Oregon Department

of Justice took the position that the juvenile court did have discretion to release juvenile court orders, so long as the juvenile court determined this was appropriate under the circumstances, and that the Oregon Constitution does not mandate disclosure. *The Oregonian* asserted that Article I, section 10, of the Oregon Constitution mandates disclosure under all circumstances. On cross motions for summary judgment, retired Multnomah County Circuit Judge Frank Bearden ruled that ORS 419A.255 (Juvenile Code) provides discretionary authority for disclosure and stated that if, however, the statute were an absolute bar to disclosure then it would violate Article I, section 10. The case is pending adjudication in the circuit court on whether *The Oregonian* is entitled to attorney fees on either claim, ultimate entry of judgment, and filing of a notice of appeal in the Court of Appeals.

The issues on appeal will include: 1) whether ORS 419A.255 (Juvenile Code) prohibits disclosure of the order or, rather, permits disclosure in the court's discretion; 2) whether, if disclosure is denied for whatever reason, Article I, section 10 mandates disclosure, including whether a historic exception exists to exempt juvenile court documents from the 'open courts' provision; 3) whether the public records law and declaratory judgment actions extend to include review by one circuit court judge of another circuit court judge's decision in a pending juvenile dependency action; and 4) whether separation of powers and the judicial power under the state constitution, and due process under the state and federal constitutions would permit entry of a judgment for *The Oregonian*'s attorney fees against Judge Waller if her decision to deny disclosure is reversed.

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Mr. Pulvers is counsel for Judge Waller in the case above, and he wants to note that the precise contours of Judge Bearden's decision remain at issue as of the date of this publication.

Justice Hans A. Linde Award

Cody Hoesly

On January 26, 2011, the Oregon Lawyer Chapter of the American Constitution Society hosted its annual dinner, this year featuring just-retired Oregon Supreme Court Justice Mick Gillette, who reflected on his 30+ years as an appellate judge and what exactly it means to be a judge at all. Approximately 70 ACS supporters, including several judges and state legislators, came to see Justice Gillette be honored with the Justice Hans A. Linde Award, bestowed by ACS Oregon upon those who dedicate their lives to promoting the values of individual rights and liberties, genuine equality, access to justice, democracy and the rule of law in Oregon. Justice Linde espoused those ideals in his 13 years on the Oregon Supreme Court and many years teaching at Oregon law schools.

Photo: Dick Sly, Harry Auerbach, Justice Mick Gillette, and Judge Robert Jones

Cody Hoesly, an attorney at Larkins Vacura in Portland, has been chair of the Oregon Lawyer Chapter of the American Constitution Society since 2005.

Vannatta v. OGEC (Vannatta II)

Is a lobbyist's gift to a public official an empty gesture?

Bob Steringer

In *Vannatta v. Or. Gov't Ethics Comm'n*, 347 Or 449, 222 P3d 1077 (2009), the Oregon Supreme Court decided a constitutional challenge to statutes regulating gifts to public officials. This article summarizes the court's decision and questions one of its key conclusions – that gifts from lobbyists to public officials are not expressive conduct.

Following the revelation of Oregon legislators accepting trips to Hawai'i from a prominent lobbyist, the Oregon legislature amended ORS chapter 244 in 2007 to prohibit a person from offering to give a public official a gift having a value of more than $50 if the person has a legislative or administrative interest in the agency in which the public official holds a position or over which the public official exercises any authority. ORS 244.025(2). Likewise, public officials were prohibited from soliciting or accepting such gifts. ORS 244.025(1). The legislation banned all offers, solicitations and receipts of gifts of entertainment where such a legislative or administrative interest is present. ORS 244.025(4).

Fred Vannatta, a lobbyist, and the "Center to Protect Free Speech, Inc.," a nonprofit organization, challenged the statutes on the grounds that they violated Article I, sections 8 (free speech) and 26 (right to instruct representatives and seek redress of grievances) of the Oregon Constitution and the First Amendment to the United States Constitution. Although the court addressed each of those constitutional provisions, its analysis focused almost entirely on Article I, section 8.

Starting with the prohibition against the receipt of gifts by public officials, the court decided that gift-giving – both the delivery and receipt of property – is non-expressive conduct and therefore entitled to no protection at all under any constitutional protection of free speech. The court rejected the plaintiffs' argument that a lobbyist's gift to a public official obviously communicates a political message, relying on earlier precedent holding that neither the reason for engaging in conduct nor the fact that speech accompanies conduct transforms conduct into expression under Article I, section 8. *Vannatta*, 347 Or at 461-62, citing *Huffman and Wright Logging Co. v. Wade*, 317 Or 445, 452, 857 P2d 101 (1993) (environmental activists were not entitled to

immunity from punitive damages for trespass to chattels on ground that their trespass was a constitutionally protected act of political expression).

The restriction on offering gifts did not fare as well. Analyzing that restriction under *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982), the court found it to be a restriction on speech without reference to prohibited effects that the legislature may proscribe (*Robertson*'s first category of restrictions). As such, the restriction was invalid under Article I, section 8, unless it "is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach." *Robertson*, 293 Or at 412. Finding no such historical exception, the court struck down the restriction on offering gifts. *Vannatta*, 347 Or at 468.

The court declined to rule on the validity of the restrictions on solicitation of gifts by public officials after determining that plaintiffs lacked standing to challenge those restrictions. According to the court, plaintiffs failed to show how those restrictions limited their ability to communicate freely with public officials. *Vannatta*, 347 Or at 470-71.

Taken together, *Vannatta* holds that a lobbyist has a constitutional right to offer a gift to a public official, but the legislature may outlaw the actual giving or receipt of such a gift without implicating free speech protections. The seemingly contradictory result was not lost on the court; it recognized that upholding the restrictions on receiving gifts essentially rendered nugatory any right to offer gifts, but decided that each category of restrictions under the statute deserved a separate constitutional analysis. *Vannatta*, 347 Or at 466.

The dissonance in the court's conclusions begs reconsideration of each. One might ask, for example, how the court could uphold the gift ban after recognizing that it "rendered nugatory" what it subsequently identified as a constitutionally protected right to offer gifts. Perhaps more glaring is the lynchpin of the court's decision to uphold the restriction on the receipt of gifts by public officials – its conclusion that a lobbyist does not engage in expressive conduct by giving a gift to a public official. Are such gifts the mere delivery of property from one person to another? The legislature presumably enacted ORS 244.025 not to prevent property transfers, but to eliminate the messages that are conveyed by such transfers.

The court's heavy reliance on its decision in *Huffman* to support its characterization of gift-giving is not particularly persuasive, especially when

considered in light of more recent precedent. *Huffman* held that a defendant found liable for trespass to chattels was not immune from an award of punitive damages because the defendant was attempting to communicate a political message through the trespass. In other words, unlawful conduct is not protected from sanction merely because the actor intends the conduct to convey a message. But as the court observed when it distinguished *Huffman* in *State v. Ciancanelli*, 339 Or 282, 320-21, 121 P3d 613 (2005), that principle loses its power when the state prohibits acts "only when they occur in an expressive context." The tort of trespass to chattels at issue in *Huffman* applies to all persons and in all contexts; it clearly is not intended to restrict expression. The gift restriction in ORS 244.025, on the other hand, appear to do exactly what the court found objectionable in *Ciancanelli* – banning a certain type of conduct by certain people out of the (admittedly understandable) concern that such conduct communicates a certain type of message to the recipient.[1]

This is not to say that *Vannatta*, in the end, was wrongly decided. Had the court concluded that gift giving and receiving between lobbyists and public officials was expressive conduct, it still would have had to the gift restrictions under the *Robertson* framework to determine whether they nevertheless were permissible under Article I, section 8. Perhaps the gift restrictions would survive that scrutiny, but that inquiry will be left for another day. The inquiry should begin, however, with the recognition that ORS 244.025 was intended to forbid the communication of a certain type of message to public officials and, accordingly, should be reviewed as a restraint on expressive conduct.

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[1] Of course, it also is possible that the court in *Ciancanelli* reached too far when it concluded that sexual conduct becomes expressive conduct when it occurs in a "live public show," 339 Or at 320-21, but the court has not backed away from that conclusion.

Constitutional Sausage-Making

Greg Chaimov

The Legislative Assembly is considering three measures that are generating a lot of constitutional buzz (or flack, depending on your perspective). All three measures have some chance of passage.

SJR 1 (and its counterpart in the House, HJR 25) would offer voters an amendment to Article I, section 9, to permit law enforcement officers to use sobriety roadblocks. In 1987, the Oregon Supreme Court ruled that Article I, section 9, did not permit the then prevalent practice of stopping all motorists at roadblocks to check for alcohol consumption. (Those of us of a certain age can recall needing to pay the babysitter for an additional half hour's time because you unexpectedly found yourself sitting in a line of cars and waiting for an officer to smell you.) This measure would give voters the opportunity to reinstate the practice of using roadblocks to randomly check for drivers under the influence. Presumably, the babysitter lobby favors the measure.

HJR 35 would give voters the opportunity to replace the current free speech provision of the Oregon Constitution, Article I, section 8, with the language of the First Amendment to the United States Constitution. Because the United States Supreme Court interprets the First Amendment to permit greater government regulation of speech than the Oregon Supreme Court does under Article I, section 8, the intent of proponents appears to be to allow governments in Oregon to decide that some kinds of speech are better than others. An interesting ancillary question is whether, on questions of free speech rights, the measure would essentially replace the Oregon Supreme Court with the United States Supreme Court.

HB 3421 would make it a crime to picket (or otherwise be "disruptive") within 300 feet of a funeral from one hour before the funeral to one hour after the funeral. In the past when the Legislative Assembly has addressed the perceived problem of people demonstrating at funerals, the Legislative Assembly has proposed to amend the constitution. For reasons that escape your correspondent, the current Legislative Assembly appears to believe that the Oregon Constitution permits the adoption of a law criminalizing protests.

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Book Reviews

Justice For Hedgehogs by Ronald Dworkin, Harvard University Press (2011)

Legality by Scott J. Shapiro, Harvard University Press (2011)

Les Swanson

David Hume famously claimed that one cannot logically derive an "ought" statement from an "is" statement. Ronald Dworkin, the legal and political philosopher, refers to this as "Hume's Law" in his new book, *Justice for Hedgehogs*, Harvard University Press (2011). Consider the following three propositions:

1) Stalin's collectivization program in 1931-32 resulted in starvation and cannibalism and three million deaths in the Ukraine.

2) Stalin could have released grain from storage facilities, relaxed the extraction of grain from Ukrainian peasants, and saved almost three million lives.

3) Therefore, Stalin was a cruel, killer. (I take these facts from *Bloodlands: Europe Between Hitler and Stalin* by Timothy Snyder, Basic Books, New York (2010), an excellent history of the tragic killing of the many millions of civilians and soldiers in the area between Berlin and Moscow preceding and during WW II)

One can argue that statements 1 and 2 are descriptive – they state facts – and that the conclusion 3 is a normative statement – that Stalin was a cruel killer and ought not to have done what he did. Or, is 3 a descriptive statement? Sure, Stalin was a cruel, killer, but maybe that doesn't mean that he should not have done what he did, because, perhaps, it was justified as a means to the higher purpose of industrializing Soviet society, etc., etc. Or, one can argue that statements 1 and 2 are really normative statements with the implicit, but unstated, assumptions that one ought not to commit acts that result in starvation and cannibalism and one ought to release grain, etc., to save lives.

Hume's law presents a difficult issue, perhaps even an un-resolvable conundrum, about the relationship between facts and values. Dworkin takes a strong position that Hume's law is true and that normative statements constitute a category logically separated from descriptive

statements. He believes that the truth or falsity of value statements can be established only by interpretive arguments based on other value statements.

Furthermore, Dworkin argues that morality, ethics, politics, law, and aesthetics are all part of the universe of values such that resolution of a case like *Roe v. Wade* will require interpretive arguments that involve moral, ethical, political, legal, and perhaps even aesthetic concepts. The best decision, will in most cases, at least in theory, be the one right decision where the arguments about the various normative concepts will place them in a coherent whole that also provides the best fit with the legal precedents.

This is a tall order, but Dworkin does not shrink from making his case for his hedgehog version of justice. The hedgehog, as Isaiah Berlin, famously repeated, believes in one big idea that can create and encompass a theory or philosophy, whereas the fox believes in many smaller ideas and accepts that some may contradict others. Hegel was a hedgehog. Nietzsche was a fox.

Another recent book on the philosophy of law, Scott Shapiro's *Legality,* Harvard University Press (2011) takes a very different approach from Dworkin's to the relationship between law and morality. Shapiro is a legal positivist, a theorist who believes that law is best explained and understood as an area of human concern that stands more or less independent of the moral worth of its various contents.

Shapiro believes that moral purposes and aims are very much related to the law; they are what cause us to create law. In fact, Shapiro argues, it is precisely because we disagree about many moral issues, that we need law to provide us with planning that gives us order and stability without the need to resolve all of our moral differences. Dworkin, Shapiro argues, by making politics a subdivision of morality, and law a subdivision of politics, and then insisting that we can reach the moral truth on many legal issues, undermines the very purpose of law which is to provide plans for us to live together without resolving many of the important moral disputes.

Take, for example, *Roe v. Wade* and its progeny. Shapiro's argument is that law provides us a way to plan for a future that actually avoids the issue of whether the fetus is a person, or has a soul, or is God's creation. Instead, the law can plan based on deciding what rights a woman has and which she does not. The ultimate moral or religious question(s) need not be answered.

But, we can still plan to deal with the many practical issues by legislation, executive orders, and judicial decisions. We can decide that the mother's own life is paramount if continuing a pregnancy seriously threatens the woman's life. And, we can decide to place significant restraints on the use of public money to carry out abortions where the life of the mother is not seriously threatened by the continuation of the pregnancy, etc., etc.

Shapiro argues that Dworkin's hedgehog theory requires us to go all the way down to moral bedrock and decide the ultimate moral issues at stake. He also argues that few of us are well equipped to do that. Moral philosophy is a difficult subject matter, broad and deep, both in its participants over the centuries and in the complexity of its methods. Perhaps, Dworkin, because of his lifetime of work in this area, has the skill, patience, and judgment to do this on legal issues, but, argues Shapiro, most of us clearly don't. And, even if we did, it would take endless amounts of argumentation and time to arrive at answers to even the most basic questions. For example, how will we decide preliminary but foundational issues like whether Hume's Law is valid or whether it is only trivially true and has been misinterpreted and misunderstood?

Hume, himself, makes numerous arguments in his *Treatise of Human Nature* that our nature, our family, our economic, and our social circumstances, have great influence on the sentiments that constitute our moral responses of generosity, affection, compassion and their opposites. Of course, as the great skeptic, who was also known to be warm and companionable, Hume made the point that one cannot derive an "ought" from an "is" with logical certainty. But, that does not mean that he believed that we cannot make reasonable inferences from facts about the natural world to reasonable conclusions about how we should act in that world.

Certainty, is not the test in deciding moral and legal issues. In the law, the test usually is which answer, by reasonable inferences from fact and law, is most persuasive. We use reasoning in the form of what is more probable than not, and probabilities or reasonable estimates are a far cry from logical certainty. Wasn't it Holmes that said that the life of the life of the law is experience and not logic?

Hume also claimed that reason is the slave of the passions. Perhaps so, but Hume himself is the most relentless of all in

marshalling arguments that are meant to appeal to our reason, not our passions, in accepting his premises. Still, Dworkin takes Hume's law literally as requiring a divorce between descriptive and normative statements. Dworkin concludes that fact statements cannot help us arrive at true normative statements; our moral and legal arguments need to be made in normative terms that lead us to normative conclusions.

Dworkin uses his understanding of Hume's Law as the foundation for his theory that interpretive normative arguments "all the way down" are how we arrive at the best answers to moral and to legal issues. Dworkin has an unusual understanding of moral, ethical, political, legal, and aesthetic statements. They are all related in a potentially coherent whole and they are the basic tools we have to decide normative issues. He does not make much use of facts from history, sociology, anthropology, or economics to advance his arguments. He is much more likely to use imagined and hypothetical examples to illustrate his points. He is also a masterful user of attractive metaphors.

Shapiro, in a chapter devoted to arguing against Dworkin's theory, relies heavily on American history, as developed by the historians Bernard Bailyn, J.A. Pocock, and Gordon S. Wood. Shapiro wants to show that after initial infatuation with state legislatures, and then with direct democracy, it was finally the framers' conclusion that people, in general, were not well equipped to decide important and complex issues.

Instead, they decided it was best to have a system of dual sovereignty with a strong federal government having supremacy over the states, with both the states and the federal government having some checks against the other. The federal government would be held in check by its division into three branches, each with various checks on the others. History shows, Shapiro claims, that the nation was not founded on a premise that each citizen is a natural moral philosopher or even trainable to be one, as Dworkin seems to demand of us by his hedgehog theory of justice.

Shapiro argues, further, that Dworkin's focus on "best light analysis" makes sense only in a community "…that roughly shares the same interests, beliefs, and values. In pluralistic societies, however, where diversity and competition are the norm, Dworkian meta-interpreters would rarely converge on common methodologies and hence would be at odds about the proper

way to interpret their law." (*Legality*, at pp. 329-330)

Ronald Dworkin is seventy-nine and he has been writing books on legal philosophy and writing essays in the New York Review of Books on matters of public interest for over fifty years. He is a strong liberal with a strong bent toward greater equality and equality of opportunity in our society as well as being a strong advocate for human rights.

I admire Dworkin's idealism, but I am skeptical that his relentless pursuits of a theory of justice that will justify his own strongly held political positions on moral, political, and legal issues in our society can actually succeed. Making a coherent, defensible and comprehensive theory out of our most strongly held beliefs can be instructive and illuminating in both its successes and its failures, but in the end, I question whether the strongly held beliefs of any person are susceptible to obtaining perfection in a single theory. And, Dworkin seems to want perfection. He wants a theory that can yield the right answers and not put important questions aside.

In the preface to his *Justice for Hedgehogs* Dworkin writes: "It has been my unmatched good fortune to have as my closest friends three of the greatest philosophers of our time: Thomas Nagel, Thomas Scanlon, and the late Bernard Williams. Their impact on this book is most quickly demonstrated by its index, but I hope it is evident in every page as well." (P. xi) Nagel and Williams, contrary to Dworkin, place a high value on the importance of history, psychology, anthropology, and sociology in examining and deciding the important moral questions of our day. They do not accept Hume's law to mean that fact and value are such separate categories that descriptive statements cannot rationally inform us about we ought to do. Williams has argued:

"'The only things that are definable are those that have no history.' [Nietzsche] This seems to me profoundly true. The values that we are concerned with here – values such as liberty, equality, and justice – all have a very significant history, and that history stands in the way of their simply having a definition." *The Legacy of Isaiah Berlin*, New York Review Books (2001) at p. 91.

Dworkin, Nagel claims, would attempt to transcend the opposition between "liberty" and "equality", for example, by a reinterpretation of the two concepts that would fit them together without conflict.

Dworkin believes he can accomplish this by using his interpretive method. Nagel says:

"Like Bernard Williams", I am somewhat skeptical about Dworkin's proposal to solve this problem [the opposition between liberty and equality] by introducing the conception of liberty as doing what you like with what is rightfully yours, because I think the problem will just arise again. That is, the conflict between the values of liberty and equality will arise again in any answer to the question, "What is rightfully yours?" *The Legacy of Isaiah Berlin*, New York Review Books, New York (2011) at p. 108)

At the same symposium, reduced to writing in *The Legacy of Isaiah Berlin*, supra, Bernard Williams said:

"Politics provides a dimension which can be governed by values as well as by interests, and to that extent it is a principled space, but one in which a decision going against you does not have to mean that you were wrong. It may merely mean that you lost. That is what politics is about." (P. 102)

This is also Shapiro's objection to Dworkin's hedgehog theory of justice. It demands too much of law and of politics. Better that the goals of law and of politics be more modest and that we plan for the future in furthering our interests and our moral goals, but that we leave many of the most important moral issues unanswered and in the private sphere where individuals can make their own decisions.

Dworkin's response to Nagel and to Williams, as it would be to Shapiro, was:

"I see no reason that we can't fight our way to attractive conceptions that capture what we actually value and that do not produce conflicts of the kind Berlin thought persuasive…We might find that we cannot respect our convictions and have integrity too. In that case we would have to concede conflict. But I think we have a pretty good shot at having them both, and we should aim in that direction…We shouldn't buy failure in advance; we should aim at integrity in an optimistic spirit. Nice goal if you can get it." (P. 127)

I highly recommend these two books. Dworkin's contains an Olympics of philosophical argument, very well written, clearly his most comprehensive and probably final positions, culminating a life-time of important work. Shapiro's book is that of a younger man, who details the successes, but ultimately the failures of John Austin, Hans Kelsen, H.L.A. Hart, and Ronald Dworkin to provide an adequate theory of law, and who offers his own theory of "law as planning" as a better

alternative. He too, is an excellent writer, and the book is directed to the general reader and not just to a specialized audience of lawyers and philosophers.

In arguing cases to both juries and judges, lawyers are well advised to support their arguments with Dworkin-like appeals to fundamental values. Such appeals, in many cases, can move our basic feelings and intuitions, especially where the law and facts of the case are somewhat vague, ambiguous, and open to interpretation (most cases are like this). Of course, such an appeal needs to be conveyed subtly through metaphor, story (there are stories within cited cases), and examples, rather than as a direct, moral sermon.

And, likewise, lawyers are well advised to sometimes support their arguments with Shapiro-like appeals that the law is limited in its ability to right all moral and societal wrongs. And, to argue that it is better to leave many such issues to the private sphere of our lives; it would be a misuse of legitimate legal authority for a judge or a jury to force a decision just because it seems attractive to them. In fact, a good lawyer may use both forms of argument in the same case. Some issues call for immediate and affirmative solutions and others for reasonable restraint.

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CONSTITUTIONAL CASES IN OREGON 2010

Alycia Sykora
December 3, 2010
Oregon State Bar CLE
Constitutional Law 2010: Courts in Transition

CONSTITUTIONAL CASES IN OREGON 2010

TABLE OF CONTENTS

CASE LAW 2010

I. DISTRIBUTION OF POWER UNDER THE OREGON CONSTITUTION

"The powers of the Government shall be divided into three separate [sic] departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided." -- Article III, section 1, Or Const

"[N]or shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution." – Article I, section 21, Or Const

A. Judicial Power and Justiciability

"The judicial power of the state shall be vested in one supreme court and in other such courts as may from time to time be created * * *." – Article VII (Amended), section 1, Or Const

1. Subject Matter Jurisdiction

"All judicial power, authority, and jurisdiction not vested by this Constitution, or by laws consistent therewith, exclusively in some other Court shall belong to the Circuit Courts" – Article VII (Original), section 9, Or Const

"The courts, jurisdiction, and judicial system of Oregon, except so far as expressly changed by this amendment, shall remain as at present constituted until otherwise provided by law. But the supreme court may, in its own discretion, take original jurisdiction in mandamus, quo warranto and habeas corpus proceedings." – Article VII (Amended), section 2, Or Const

Longstreet v Liberty Northwest Insurance Corp, 238 Or App 396 (11/03/10) (Wollheim, Brewer, Sercombe) Plaintiff was injured in a car accident, obtained workers' comp benefits from defendant (Liberty), and accepted UIM benefits. Plaintiff then filed this declaratory judgment action, seeking a declaration that he is not required to reimburse Liberty from UIM benefits he received. Liberty

responded that the trial court lacked subject matter jurisdiction to grant that relief. Trial court rejected that jurisdictional argument and ruled for plaintiff.

Court of Appeals affirmed: Under Article VII (Original), section 9, and Article VII (Amended), section 2, of the Oregon Constitution, circuit courts have subject matter jurisdiction over all actions unless some statute or other source of law divests them of jurisdiction. *State v Terry*, 333 Or 163, 186, *cert den*, 536 US 910 (2002). Under the declaratory judgment statutes, the legislature also has given circuit courts jurisdiction to declare rights. But although a trial court has broad power to provide declaratory relief, it lacks subject matter jurisdiction under the declaratory judgment statutes if some other exclusive remedy exists, see *League of Oregon Cities v State of Oregon*, 334 Or 645, 652 (2002). Liberty contended that the issue of reimbursement for UIM benefits should be decided first by the Workers' Comp Board, as *SAIF v Wright*, 312 Or 132 (1991) seemed to require. Here, however, unlike *Wright*, nothing in the record indicates that any party or employer requested an order from the Workers' Comp Board that would redistribute or reduce any of plaintiff's workers' comp benefits. Rather, plaintiff initiated a dec action asking the court to declare the parties' relationship under a UIM statute. Nothing divests the trial court of its general authority to declare the parties' legal rights and obligations under an insurance statute.

2. Ripeness

> "The judicial department may not exercise any of the functions of one of the other departments [legislative and executive], unless the constitution expressly authorizes it to do so." *Yancy v Shatzer*, 337 Or 345, 352 (2004).
>
> The judicial power under Article VII, section 1, is limited to resolving existing judiciable controversies. It does not extend to advisory opinions. *Kerr v Bradbury*, 340 Or 241, 244 (2006).
>
> To be ripe, a controversy must involve present facts as opposed to a dispute which is based on hypothetical future events. *McIntire v Forbes*, 322 Or 426, 434 (1996) (quoting *Brown v Oregon State Bar*, 293 Or 446, 449 (1982)).

Menasha Forest Products Corp v Curry County Title, Inc. and Transnation Title Ins. Co., 234 Or App 115 (3/03/10) (Schuman, Landau, Ortega), ***rev allowed*** 348 Or 669 (8/19/10) Plaintiff sought a declaration that it would not be liable to defendant title company if defendant sued plaintiff. Trial court granted defendant's motion for judgment on the pleadings, dismissing plaintiff's declaratory judgment action as unripe. Court of Appeals affirmed: "Ripeness is one aspect of justiciability, and, for that reason, a constitutional prerequisite for adjudication." Here, whether plaintiff would face any obligation (such as the duty to defend) depends not only on the interpretation of a document, but on whether interpretation of the document would even become necessary. No real and present duty to defend has arisen that wouldn't be contingent on a future event. "Ripeness is often a matter of degree."

Dep't of Human Services v KLR, 235 Or App 1 (4/21/10) (Brewer, Haselton, Armstrong) A juvenile court ordered a mother to complete a polygraph exam to determine if she'd injured her child or if she knew who had. The answers to those questions could expose her to criminal liability. The court stated that if she refused the polygraph exam, the court could draw an adverse interest to her parental rights. Court of Appeals concluded that Mother's appeal is ripe, because that order had "put her to the Hobson's choice of waiving her rights against self-incrimination or suffering adverse consequences in her quest to preserve her parental rights." See discussion under Polygraph Testing, *post*.

See ***State v Ehrensing,*** 232 Or App 511 (12/16/09), under **Mootness**, *post*, discussing Ripeness.

3. Mootness

Mootness "is a species of justiciability, and a court of law exercising the judicial power of the state has authority to decide only justiciable controversies." *First Commerce v Nimbus Ctr Assoc*, 329 Or 199, 206 (1999).

A case is not justiciable if it becomes moot during judicial proceedings. *Yancy v Shatzer*, 337 Or 345, 349 (2004). A case remains justiciable, however, if the court's decision in the matter will have some practical effect on the rights of the parties to the controversy. *Brumnett v PSRB*, 315 Or 402, 405 (1993).

In Oregon, mootness is a constitutional matter, not just prudential: "The judicial power under [Article VI (Amended), §1 of] the Oregon Constitution does not extend to moot cases that are 'capable of repetition, yet evading review.'" *Yancy v Shatzer*, 337 Or 345, 363 (2004) (overruling *Perry v Oregon Liquor Comm'n*, 180 Or 495, 498-99 (1947)). But see concurrence: The "majority's decision that Oregon courts are barred by the Oregon Constitution from deciding [cases that became moot 'simply by the passage of time'] significantly diminishes the 'judicial power' of Oregon courts and ensures that important issues . . . will remain undecided." *Yancy*, 337 Or at 372 (Balmer, J., specially concurring).

Contrast with federal standard: ***Mashburn v Yamhill County***, 698 F Supp 2d 1233 (D Or 3/11/10) (Mosman) (Discussed under Jails, *post*). Yamhill County's juvenile detention policy on strip searching "gives rise to conduct 'capable of repetition, yet evading review.' . . . Accordingly, plaintiffs have standing to seek injunctive and declaratory relief" in federal court for claims of Fourth Amendment violations.

State v Ehrensing, 232 Or App 511 (12/16/09) (Wollheim; Sercombe concurring; Edmonds dissenting) Defendant was a grower for Oregon Medical Marijuana Act cardholders. Sheriff seized a substantial amount of marijuana from him and he was indicted for possessing

order, requesting that the Court of Appeals "vacate the Order for Return and remand this case with directions for the trial court to deny defendant's motion for release of the marijuana to the cardholders."

On appeal, the state conceded that an order by the Court of Appeals would not grant relief regarding that released marijuana, which it could not get back from cardholders. The two-judge majority (Wollheim, Sercombe) agreed that "any controversy about the released marijuana is moot." And unripe: the cardholders here had not indicated that they intended to make any applications for future disbursements of marijuana that remains in the sheriff's possession. Appeal dismissed.

Edmonds dissenting: "The majority's reasoning effectively denies the state a statutory right to appeal because it obeyed the trial court's order." Under "the majority's reasoning, the state's right to appeal is frustrated and rendered meaningless." Dissent is "aware of no precedent from either appellate court in this state that has determined mootness based on the loss of evidence due to obedience of a court order."

Charles Wiper, Inc. v City of Eugene, 235 Or App 382 (6/02/10) (Schuman, Armstrong, Ortega) Wiper is the relator in this Measure 37-mandamus petition. The circuit court allowed the alternative writ. On November 30, 2007, the circuit court held a hearing on the mandamus petition, and signed an order stating "Writ to issue" but did not sign or enter a judgment that date. The circuit court signed the writ and general judgment on December 26, 2007 and the general judgment was entered on January 4, 2008. The circuit court and awarded Wiper its attorney fees via supplemental judgment in February 2008.

Meanwhile, on November 6, 2007, the voters had passed Measure 49 in the general election. Measure 49 was intended to "extinguish and replace the benefits and procedures that Measure 37 granted to landowners." Measure 49 became effective on December 6, 2007.

City appealed both judgments, arguing that when the trial court entered both the January and February 2008 judgments, the action already was moot, because Measure 49 had passed on November 6, 2007, and had become effective on December 6, 2007.

Court of Appeals agreed with the City, vacating both judgments and remanding for entry of judgment dismissing Wiper's petition as moot. Court of Appeals concluded that this "case was already moot when the circuit court entered the general judgment that is now before us." The mootness debate on the effect of Measure 49 on pending Measure 37 claims has been resolved in prior Oregon cases, see *Corey v DLCD*, 344 Or 457, 466 (2008). Court of Appeals rejected Wiper's argument that the date of the order, rather than the judgment, determines whether the case is moot. Citing the mandamus statute and case law, the Court of Appeals explained that "regardless of whether the action was moot at the time of the November order, the court did not have authority to later enter the general judgment and issue the writ

when, by that time, there was no longer any live controversy between the parties." ("We conclude that the court was fully aware of the city's mootness argument and that a renewed and updated motion was not necessary in order to preserve its claim of error; and in any event, the issue is one of justiciability."). Court of Appeals also rejected Wiper's claim that its attorney fee award renders the case justiciable, because the circuit court did not have authority to enter the supplemental judgment. "The issue is not whether the appeal is moot; the question is whether the circuit court should have dismissed the proceedings once Measure 49 went into effect, because the issuance of the writ would no longer have had any practical effect on the rights of the parties." *See Kay v David Douglas School District No. 40*, 303 Or 574 (1987), *cert denied* 484 US 1032 (1988).

Reid v DCBS, 235 Or App 397 (6/02/10) (Schuman, Landau, Ortega) Director of the workers' compensation division adopted a temporary rule dealing with the rates that insurers could pay to medical providers. Three days later, petitioners filed a direct challenge to that rule contending, *inter alia*, that it violates administrative rules and the Due Process Clause because it applied retroactively. That temporary rule ceased to be effective on January 1, 2009, while this case was being briefed. In responding to petitioners' challenge, the DCBS did not address mootness.

Court of Appeals dismissed the claim as moot: "Because we are not constitutionally empowered to decide moot cases, we must determine mootness even if it is not raised by the parties. . . . That obligation obtains even when a case becomes moot during litigation; when that occurs, the proper disposition is to dismiss the claim." Here, the claim is moot because the Court's decision will have no practical effect on the rights of the parties. The Court's "decision would merely resolve an abstract question without practical effect." Even if the temporary rule has been applied "to some disputed fee agreements, nothing in the record discloses that *these petitioners* are involved in such a dispute so that our resolution would have a practical effect on *their* rights." (Emphasis in original). Their remedy is a challenge to an agency order in a contested case, not a direct facial challenge seeking a declaration that the already-lapsed rule must be retroactively invalidated.

See ***State v Blanchard***, 236 Or App 472 (8/04/10) (Landau, Schuman, Ortega), discussed under Right to Self-Representation, *post*. Although defendant served his prison time, he owes money to the state for his post-prison supervision, and that is a potential economic liability that keeps the case from being moot.

4. Standing

A controversy is not justiciable under the Oregon Constitution if the party bringing the claim has only an abstract interest in the correct application of the law. "A party must demonstrate that a decision in the case will have a practical effect on its rights." *Utsey v Coos County*, 176 Or App 524, 542 (2001), *rev dismissed*, 335 Or 217 (2003).

Contrast with Article III standing, See *Mayfield v United States*, 599 F3d 964 (9th Cir 3/24/10), *cert denied* 2010 WL 2537353 (11/01/10).

Unlike the concepts of ripeness and mootness, which inquire about "when" litigation has occurred (too soon or too late), standing asks "who." Justice Scalia has commented that standing is an answer to the question: "What's it to you?" *Kellas v Dept of Corrections*, 341 Or 471, 477 n 3 (2006) (quoting Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U L REV 881, 882 (1983)).

Vannatta v Oregon Gov't Ethics Comm'n, 348 Or 117 (12/31/09), *cert denied* 130 S Ct 3313 (5/17/10) (De Muniz) Oregon statute restricts solicitation and receipt of gifts by public officials or candidates. Its purpose is to "deter violation of the legislative policy of safeguarding the public trust inherent in holding a public office." The statute restricts the *receipt* or *offering* or *solicitation* of specific gifts for entertainment.

Plaintiffs are a lobbyist and a nonprofit corporation that intended to violate that statute. Granting summary judgment for the state, trial court declared that the statute is valid and enforceable. On certified appeal to the Oregon Supreme Court, plaintiff challenged the statute under Article I, sections 8 and 26, and the First Amendment. See discussion under Politicking, Campaigning, and Lobbying, *post*.

The statutes (ORS 244.025(1) and 244.042) also prohibit a public official from soliciting gifts or honoraria greater than $50, or payment in any amount for entertainment from a lobbyist. The state conceded that that solicitation is protected expression under Article I, section 8. But the Supreme Court concluded that plaintiffs do not have standing to seek declaratory relief as to the restrictions on solicitation because they are not affected by it: they are not public officials, candidates for public office, or a relative or household member of a public official or candidate for public office. The trial court should have dismissed plaintiffs' complaint on that claim.

The Supreme Court footnoted: "We have recognized that the legislature has constitutional authority to confer standing on 'any party' in an agency proceeding to seek judicial review of the agency's final order without a further showing of interest. *Marbet v Portland Gen Electric*, 277 Or 447, 453 (1997). No such conferral has occurred here. We also have recognized that the legislature may deputize its citizens to challenge governmental action in the public interest, even though the particular plaintiff may have no personal stake in the proceeding. *Kellas v Dep't of Corrections*, 341 Or 471, 484 (2006). In contrast to the statute reviewed in *Kellas*, no statute deputizes the entire public, or any smaller group that might include plaintiffs, to challenge the solicitation restrictions at issue here."

B. **Legislative Power**

"The legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly, consisting of a Senate and a House of Representatives." -- Article IV, section 1(1), Or Const

State v Davilla, 234 Or App 637 (4/14/10) (Wollheim, Brewer, Sercombe) Defendant convicted of murder when he was 16. This is the sixth time his sentence has been before the Court of Appeals. In the present appeal, the trial court determined that the sentencing guidelines (which are administrative rules, not statutes) that allow the Sentencing Guidelines Board to approve an upward departure sentence are the product of an unconstitutional delegation of authority by the legislature to the executive. (See ORS 136.765(2) (1989)). On state's appeal, Court of Appeals reversed: the sentencing guidelines are not invalid on that basis. Court of Appeals reviewed three provisions of the Oregon Constitution that prohibit the delegation of legislative power: Article IV, § 1(1); Article III, § 1; and Article I, § 21. That no-delegation prohibition is not absolute, however. It depends on the "presence or absence of adequate legislative standards and whether the legislative policy has been followed." *State v Lon*g, 315 Or 95, 102 (1992).

Here, the legislature set forth standards and also reserved its power to disapprove the guidelines before they became effective. No unconstitutional delegation of the legislative power to the executive is present here. The sentencing guidelines also limit the trial court's discretion to impose an upward departure sentence, as the Court of Appeals already held in a prior appeal by this defendant, thus there is no unlawful delegation of power from the legislature to the judiciary. Also, the statute, which authorizes a court to impose a sentence outside the sentencing range only if it finds "substantial and compelling reasons," is not void for vagueness. A rule provides a nonexclusive list of aggravating factors that a court may consider when determining whether "substantial and compelling reasons" for departure exist. Two of the four aggravating facts that the state alleged in this case are specifically in that list. Thus, defendant has failed to show that no departure sentence under the guidelines could be constitutionally applied against him, therefore his void-for-vagueness challenge fails as well. Remanded for the trial court to impose the sentence in accordance with the sentencing guidelines.

C. **Municipalities ("Home Rule")**

"The Legislative Assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town. The legal voters of every city and town are hereby granted power to enact and amend their municipal charter, subject to the Constitution and criminal laws of the State of Oregon . . ." -- Article XI, section 2, Or Const

"The initiative and referendum powers reserved to the people . . . are further reserved to the qualified voters of each municipality and district as to all local, special and municipal legislation of every character in or for their municipality or district. . . ." -- Article IV, section 1(5), Or Const

Thunderbird Mobile Club, LLC v City of Wilsonville, 234 Or App 457 (3/24/10) (Sercombe, Wollheim, Brewer) *rev denied* 348 Or 524 (7/08/10) In 2005, mobile home park owner notified its tenants that it would be selling the Thunderbird Mobile Home Club, a 270-space mobile home park. A "hue and cry ensued that led to hearings before the city counsel". Thereafter, the City adopted ordinances that required, *inter alia*, a park owner to obtain a closure permit before closing the park, along with a closure impact report and a relocation plan. Park owner didn't apply for a permit, but instead filed a declaratory judgment action against the City to invalidate the ordinance that regulates the conversion of mobile home parks to other uses.

Trial court declared that state law (the Residential Landlord and Tenant Act, the "RLTA") preempts the ordinance, and the ordinance violates the Due Process Clause of the Fourteenth Amendment. Trial court awarded attorney fees to the park owner. City appealed, contending that the issue is not justiciable, the ordinance is not preempted, and it does not violate substantive due process rights. Court of Appeals held that the issues are justiciable, the ordinances are not preempted, and are not facially unconstitutional under the Due Process Clause, and the trial court erred in awarding attorney fees to plaintiff.

Court of Appeals noted that this case is about the park owner's ability to sell its property. ORS 28.020 – the dec action statute – provides that any person whose rights, status or other legal relations are affected by a constitution, statute, municipal charter, ordinance, contract, or franchise may bring a dec action to determine any question of construction or validity arising under such laws. This city ordinance "presently affects the marketability and value of plaintiff's property. Plaintiff's requested relief for a declaration that the ordinance is unlawful would, if granted, appear to have an immediate effect on plaintiff's legal interests." The Court of Appeals concluded that because "the facts in this case demonstrate that plaintiff has already reached the point at which his legal interests 'are affected' by the ordinance, we conclude that the trial court did not err in holding plaintiff's preemption claim to be justiciable and that jurisdiction exists to determine both the preemption and due process clause claims on appeal."

As to preemption, the Court of Appeals concluded that the trial court erred in ruling that the RLTA preempted the city's ordinance. Adoption of the ordinance was within the city's authority under Article XI, section 2, of the Oregon Constitution ("home rule"), and the ordinance is not preempted by the RLTA. That constitutional provision was enacted in 1906, and it grants the voters of every city and town the power to enact and amend their municipal charters. Another part of the Oregon Constitution reserves the right of voters of each municipality for legislation in their municipality. "The primary purpose of the home rule amendments [to the Constitution] was 'to allow the people of the locality to decide upon the organization of their government and the scope of its powers under its charter without having to obtain statutory authorization from the legislature, as was the case before the amendments.'" *LaGrande/Astoria v PERB*, 281 Or 137, 142, *aff'd on reh'g*, 284 Or 173 (1978). The RLTA does not explicitly limit the applicability of municipal law. The RLTA also does not implicitly preempt the city's ordinance: "We have consistently held that a civil regulation of a chartered city will not be displaced under Article XI, section 2, merely because state law regulates less extensively in the same area." Just because the ordinance imposes greater requirements on park owners than the RLTA does not create an implicit preemption. There is no "conflict" between the RLTA and the ordinance; the cases the park owner here asserts such as *Ashland Drilling, Inc. v Jackson County*, 168 Or App 624, *rev denied* 331 Or 429 (2000)) involve conflicting criminal laws. The Court of Appeals stated: "We . . . disavow the dictum in A*shland Drilling, Inc.*, that suggests the application of the *Jackson* test for preemption of local criminal laws to municipal civil regulations and conclude that, here, the city's authority to regulate mobile home park conversions was not preempted by state law."

As to substantive due process, the Court of Appeals held that the trial court erred in concluding that the ordinances violate the Due Process Clause. Although the parties here disagree as to whether this is a facial or an as-applied challenge, the Court of Appeals interpreted it as a facial challenge, because there has been no executive action against the park owner and the only government action that occurred was the enactment of the ordinances. Court of Appeals assumed without deciding that the park owner had identified a protected property interest, and concluded "that the ordinances in no sense are arbitrary or irrational so as to violate substantive due process," citing *City of Cuyahoga Falls v Buckeye Community Hope Foundation*, 538 US 188, 198 (2003) and *County of Sacramento v Lewis,* 523 US 833, 845-46 (1998) and *Concrete Pipe v Construction Laborers*, 508 US 602, 637 (1993). The burden is on the party complaining of a due process violation relating to economic life. *Concrete Pipe*, 508 US at 637. Rational basis review governs the analysis. *Washington v Glucksberg*, 521 US 702, 722 (1997). Here, the ordinances afford owners relief if they demonstrate how application of the ordinance is unduly oppressive under the circumstances then and there existing. Court of Appeals concluded that that relief provided is sufficient for the ordinances to withstand a facial challenge on the grounds of undue oppression. General judgment reversed and remanded.

D. **Initiative and Referendum**

"Notwithstanding section 1, Article XVII of this Constitution, an initiative or referendum measure becomes effective 30 days after the day on which it is enacted or approved by a majority of the votes cast thereon. . . ." Article IV, section 1(4)(d), Or Const

Portland General Electric Company v Mead, 235 Or App 673 (6/16/10) (Sercombe, Wollheim, Brewer) In 2006, Oregon voters approved Ballot Measure 39. Measure 39 changed condemnation law in response to *Kelo v City of New London*, 545 US 469 (2005) and changed the law regarding costs. Trial court concluded that Measure 39 applied to all prospective cost awards in eminent domain cases whether the cases were pending when the statute went into effect or not. Trial court awarded costs and attorney fees. Court of Appeals affirmed, observing that "Measure 39 lacked any provision that specified whether it applied to pending condemnation cases" and that under the Oregon Constitution, it "became effective" 30 days after the day on which it was enacted or approved by a majority of the votes. Measure 39 applies retroactively because it is not a "substantive" law (defined as a law that impairs existing rights, creates new obligations, or imposes additional duties regarding past transactions) that presumptively applies prospectively only, but instead Measure 39 is a "remedial" law (defined as a law that pertains to or affects a remedy) that presumptively applies retroactively.

II. POLITICKING, CAMPAIGNING, AND LOBBYING

"No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." – Article I, section 8, Or Const

Article I, section 8, forecloses the enactment of any law written in terms directed to the substance of any "opinion" or any "subject" of communication, unless the scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach. Examples are perjury, solicitation or verbal assistance in crime, some forms of theft, forgery and fraud and their contemporary variants. Only if a law passes that test is it open to a narrowing construction to avoid "overbreadth" or to scrutiny of its application to particular facts. *State v Robertson*, 293 Or 402, 412 (1982).

Robertson identified three categories of cases that may implicate Article I, section 8: (1) cases involving laws that focus on the content of speech and

writing; (2) cases involving laws that focus on proscribing the pursuit or accomplishment of forbidden results by expressly prohibiting expression to achieve those results; and (3) cases involving laws that focus on proscribing the pursuit or accomplishment of forbidden results without referencing expression at all, but where a person is accused of causing such results by language or gestures. *See Robertson*, 293 Or at 416-18.

" Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." – First Amendment, US Const

A. Campaign Contribution Reporting

- Article I, section 8:

> "[B]oth campaign contributions and expenditures are forms of expression for the purposes of Article I, section 8." *Vannatta v Keisling*, 324 Or 514, 524 (1997).

- First Amendment:

> In *Buckley v Valeo*, the US Supreme Court upheld campaign contribution limitations and also struck down campaign expenditure limitations, reasoning that expenditure limitations "represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech," while contribution limitations entail "only a marginal restriction upon the contributor's ability to engage in free communication." *Buckley*, 424 US 1, 19-21 (1976) (*per curiam*)
>
> "Speech has the power to inspire volunteers to perform a multitude of tasks on a campaign trail, on a battleground, or even on a football field. Money, meanwhile, has the power to pay hired laborers to perform the same tasks. It does not follow, however, that the First Amendment provides the same measure of protection to the use of money to accomplish such goals as it provides to the use of ideas to achieve the same results. . . . . The right to use one's own money to hire gladiators, or to fund 'speech by proxy,' certainly merits significant constitutional protection. These property rights, however, are not entitled to the same protection as the right to say what one pleases." *Nixon v Shrink Missouri Government PAC*, 528 US 377, 398-99 (2000) (Stevens, J., concurring).
>
> A "decision to contribute money to a campaign is a matter of First Amendment concern – not because money *is* speech (it is not); but because it *enables* speech. . . . . *Buckley v Valeo*, 424 US 1, 24-25 (1976) (per curiam). Both political association and political communication are at stake." *Nixon v*

> *Shrink Missouri Government PAC*, 528 US 377, 400 (1976) (Breyer, J., concurring) (emphasis in original).
>
> In *Buckley*, the US Supreme Court "told us, in effect, that money is speech. This, in my view, misconceives the First Amendment." J. Skelly Wright, "*Politics and the Constitution: Is Money Speech?*", 85 YALE LJ 1001, 1005 (1976).

State v Moyer, 348 Or 220 (4/29/10) (De Muniz), *cert denied* __ S Ct __ (10/04/10) Defendants were indicted for making "a contribution to any other person, relating to a nomination or election of any candidate or the support or opposition to any measure, in any name other than that of the person who in truth provides the contribution" which ORS 260.410 (2003) prohibits. Trial court sustained defendants' demurrer on grounds that that statute violates state and federal free-expression guarantees. A fractured Court of Appeals reversed.

Supreme Court affirmed the Court of Appeals majority. The statute does not violate Article I, section 8. This is a first-level *Robertson* law the falsity that the law prohibits can only be achieved through expression – by communicating a falsehood to another person. It is, however, constitutionally permissible as a historical exception, whether it traces back to laws prohibiting misleading the electorate or common-law fraud. Supreme Court reached that conclusion based on Blackstone's *Commentaries*, which recognized that lying about one's identity in court or to a public official was a "public inconvenience" - a felony. Also, it was an offense against public justice to "personate any other person" in court – also a felony. Oregon's criminal code of 1864 (5 years after the constitution was adopted) prohibited knowingly making various forms of false communication. Additionally, the Supreme Court already upheld campaign laws creating sanctions for political candidates who mislead the public or engage in fraud, see *Vannatta v Keisling*, 324 Or 514, 523 (1997) (a statute that prohibits fraud on the electorate need not include an intent element to come within a historical exception). "Because the restriction on making a contribution using another person's name in ORS 260.402 falls within a historical exception, the statute does not violate Article I, section 8, of the Oregon Constitution."

The statute also does not violate the First Amendment, under *Buckley v Valeo*, 424 US 1 (1976) and *Citizens United v Federal Elections Comm'n*, 130 S Ct 876 (2010). The Oregon Supreme Court here reasoned that, in *Buckley*, the US Supreme Court held that a federal law requiring campaign contributors to disclose their identities did not violate the First Amendment, because when balancing the interests, the disclosure requirement was narrowly tailored to those situations where the information sought had a substantial connection with the governmental interests to be advanced (that interest is that disclosure helps voters define the candidates' constituencies and opening the basic processes of the election system to public view). In the recent *Citizens United* case, the US Supreme Court held that campaign expenditure disclosure and disclaimer requirements do not unconstitutionally restrain speech, that such requirements provide the electorate with information and "insure that the voters are fully informed as to who is speaking." Thus, in the present case, a "law that forbids making a contribution using another person's name is not, in our view,

more burdensome than a law like the one at issue in *Buckley*, requiring disclosure of the identity of the contributor in the first instance."

The law also survives the vagueness challenge defendants made under Article I, sections 20 and 21, and under the First and Fourteenth Amendments, on grounds that it (1) provides insufficient notice of the criminalized conduct; (2) delegates too much discretion to law enforcement; and (3) has a chilling effect on protected speech.

B. Lobbying and Gifts to Public Officials

> "**No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.**" – Article I, section 8, Or Const
>
> "**No law shall be passed restraining any of the inhabitants of the State from assembling together in a peaceable manner to consult for their common good; nor from instructing their Representatives; nor from applying to the Legislature for redress of greviances** [sic]."– Article I, section 26, Or Const

Vannatta and Center to Protect Free Speech, Inc. v Oregon Gov't Ethics Comm'n, 348 Or 117 (12/31/09), *cert denied* 130 S Ct 3313 (5/17/10) (De Muniz) Oregon statute restricts solicitation and receipt of gifts by public officials or candidates. Its purpose is to "deter violation of the legislative policy of safeguarding the public trust inherent in holding a public office." The statute restricts the *receipt* or *offering* or *solicitation* of specific gifts for entertainment. In 2007, the legislature lowered the monetary limit on certain gifts to $50 (from $100).

Plaintiffs are a lobbyist and a nonprofit corporation that intended to violate that statute. Granting summary judgment for the state, trial court declared that the statute is valid and enforceable. On certified appeal to the Oregon Supreme Court, plaintiff challenged the statute under Article I, sections 8 and 26, and the First Amendment.

As to the restrictions on receiving gifts, plaintiffs claim that gifts are "lobbying" and "lobbying is political speech" under *Findanque v Oregon Gov't Standards and Practices*, 328 Or 1, 8 (1998), and thus the "gift receipt" restrictions are first-category *Robertson* restrictions. Supreme Court, however, concluded that the "gift receipt" restrictions do not focus on the content of speech or writing, or on the expression of any opinion. The Supreme Court concluded, based on its precedent, that "the terms of the gift receipt restrictions limit nonexpressive conduct – not expression. . . . the act of delivering property to a public official is nonexpressive conduct. Lobbyists may regularly convey political messages to public officials at or near the occasions of their gift giving. Lobbyists also may intend their gift-giving to communicate political support or goodwill toward the recipients . . . But something more is required to

elevate mere purposive human activity into protected expression. To the extent that the gift receipt restrictions interfere with gift-*giving* by lobbyists, they impede only nonexpressive conduct." (Emphasis in *Vannatta*). Moreover, gift-giving by lobbyists to public officials is not the same as giving political *contributions* to candidates and campaigns. "Giving a gift to a public official is not inextricably linked with a public official's ability to carry out official functions." The trial court correctly granted summary judgment to the state regarding gift-receipt restrictions in the statute.

As to statutory restrictions that prohibit a lobbyist from *offering* gifts in excess of $50, the Supreme Court distinguished "offering" from "receiving." The "restrictions on 'offering' gifts, when examined under the *Robertson* methodology, are a type of law that focuses on the content of speaking or writing: *offering* a gift. The restrictions on offering a gift are not aimed at the pursuit or accomplishment of some forbidden results, such as, perhaps, the regulation of conflicts of interest involving government officials. Rather, they focus on every utterance of an offer, of the kind described in the statute, whether or not such an offer produces any invidious effect." (Citing *City of Portland v Tidyman*, 306 Or 174, 183-84 (1988)) (Emphasis in *Vannatta*). The "restrictions on 'offering' gifts do not focus on the pursuit or accomplishment of forbidden results." Moreover, the Supreme Court concluded that "the restrictions on offering gifts also do not qualify as limitations on the time, place, and manner of speech. The restrictions apply to every offer of a gift that meets the statutory criteria, regardless of when, where, and in what manner it is made." In short, the statutory restrictions on "offering a gift" to a public official or candidate (or relative) "impermissibly restrict the right of free expression protected by Article I, section 8." "Plaintiffs are entitled to a declaratory judgment that the restrictions on offering gifts and entertainment violated plaintiffs' free speech right under Article I, section 8." The trial court erred in granting summary judgment to the state; it should have entered a declaratory judgment in plaintiffs' favor regarding "offering" gifts.

The statutes (ORS 244.025(1) and 244.042) also prohibit a public official from soliciting gifts or honoraria greater than $50, or payment in any amount for entertainment from a lobbyist. The state conceded that that solicitation is protected expression. But the Supreme Court concluded that plaintiffs do not have standing to seek declaratory relief as to the restrictions on solicitation because they are not affected by it: they are not public officials, candidates for public office, or a relative or household member of a public official or candidate for public office. The trial court should have dismissed plaintiffs' complaint on that claim. *See* discussion under Standing, *ante*.

The Supreme Court thus concluded that the "receipt of gift and entertainment restrictions do not abridge the right of free expression under Oregon's constitution because . . . they regulate nonexpressive conduct, not expression." As to the First Amendment, plaintiffs "fail to demonstrate that the United States Supreme Court would construe and apply the First Amendment to those restrictions, yet reach a different conclusion under federal law."

As to Article I, section 26, plaintiffs argued that the statute's restrictions on gifts, entertainment, and honoraria violated Article I, section 26, because "by prohibiting . . . expenditures to inform or persuade legislators regarding legislative matters, the lobbying restrictions impermissibly restrain Oregon inhabitants from 'instructing their Representatives' or 'applying to the Legislature for redress' of grievances." But the Supreme Court observed that plaintiffs "failed to support their assertions with any case analysis of the origins, the historic concerns, or the drafters' political theories that underlie Article I, section 26." The Supreme Court stated that it did not see how rights protected in Article I, section 26, "necessarily must include a constitutional right for pubic officials to receive gifts, entertainment, and honoraria, or for lobbyists to give restricted gifts to public officials. The fact that gifts may be 'helpful' in creating goodwill with public officials does not mean that Article I, section 26, protects the delivery of gifts to them."

C. **Petition Circulation: First Amendment**

"**Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.**" – First Amendment, US Const

Petition circulation involves direct interactive communication concerning political change. *Meyer v Grant*, 486 US 414, 422 (1988). Limitations on political expression are subject to exacting scrutiny under the First Amendment. *Id.* at 420 (citing *Buckley v Valeo*, 424 US 1, 45 (1976)).

"The First Amendment protects [paid petition circulators'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer*, 486 US at 424.

"Petition circulation . . . is 'core political speech,' because it involves 'interactive communication concerning political change.'" *Buckely v American Constitutional Law Foundation, Inc.*, 525 US 182, 186-86 (1999) (quoting *Meyer*, 486 US at 422).

Walker v State of Oregon, 2010 WL 1224235 (D Or 3/23/10) (Hogan) (This case does not address the Oregon Constitution.). ORS 250.048 *et seq* prohibits a person from paying or receiving money for obtaining signatures of electors on a state initiative, referendum, or recall petition, unless the person obtaining the signatures registers with the Secretary of State and completes a specific training program. A registered person "shall carry evidence of registration with the person while the person is obtaining signatures", including a photograph and registration number. ORS 250.052 requires, among other things, signature sheets used by paid signature gatherers to be different colors from sheets used by unpaid signature gatherers.

Plaintiffs were chief petitioners who tried to place initiatives on Oregon's 2008 ballots. The Oregon Secretary of State suspended their rights to obtain signatures needed to place initiatives on the ballot after plaintiffs had failed to produce and complete "accounts" as the statute requires.

Plaintiffs sought declarations that the statutes violated their First Amendment rights to engage in core political speech, deprived them of those rights without due process, deprived them of equal protection of the law, and authorized unreasonable search and seizure. Both sides moved for summary judgment.

The district court granted the state's motion and denied plaintiff's motion, and dismissed the case with prejudice. The court considered the legal framework of *Citizens United v Federal Elections Comm'n*, 130 S Ct 876 (2010) and *Buckley v American Constitutional Law Foundation, Inc.*, 525 US 182 (1999). The court recited the applicable legal standards:

> "Restrictions on petition circulation that significantly inhibit communication with voters about proposed political change impose severe burdens on core political speech and are not warranted by the state's interest in administrative efficiency, fraud detection and informed voters. *Buckley*, 525 US at 192. However, restrictions that do not severely burden protected speech generally trigger a less exacting review under which reasonable, nondiscriminatory restrictions will be upheld if serving a state's important regulatory interest, such as administrative efficiency and fraud detection. . . *Buckley*, 525 US at 204-05."

Plaintiffs first argued that the circulator registration and training requirement is slow and subject to abuse. (The statute requires the Secretary to process the application within 2 days). The court explained that that is "irrelevant to plaintiffs' facial challenge." A delay is not attributable to the statute itself. The statute's registration and training requirements do not reduce the number of available circulators any more than the affidavit requirement upheld in *Buckley*. The court reasoned that "the registration and training requirements impose less than severe burdens on core political speech." Further, "the lesser burden is justified by Oregon's interest in ensuring compliance with the Oregon Constitution's prohibition against payment of petition circulators on a per-signature basis."

Plaintiffs next argued that requiring paid circulators to register, carry proof of registration, and use signature sheets in different colors discouraged paid circulators and enabled opponents to harass paid circulators. The court noted that "the statute does not require paid circulators to carry identification badges, rather, it requires paid circulators to carry and produce to certain state officials, proof of registration. I therefore find that requiring paid circulators to provide identifying information to the state – information that is already available by public records request – does not so restrict speech as to violate the First Amendment. *Buckley*, 525 US at 200." Plaintiffs did not explain how different-colored signature sheets might impermissibly burden speech.

Plaintiffs then argued that the state, by suspending their ability to obtain signatures because they produced insufficient accounts, violated Oregon's constitutional prohibition against paying circulators per signature. The court concluded that the Secretary of State's power to suspend plaintiffs' rights does not violate the First Amendment, under *Thomas v Chicago Park District*, 534 US 316, 322 (2002). Moreover, the account-keeping requirement does not severely burden speech and serves the substantial state purpose of determining compliance with the Oregon constitution's legitimate prohibition against paying circulators on a per-signature basis.

Plaintiffs further argued that the statute permits deprivation of fundamental liberty interests (core political speech) without due process because plaintiffs were suspended for their inadequate accounts, which lacked process and pre-deprivation notice. The district court, however, noted that due process does not always require a pre-deprivation hearing, rather, due process requirements are flexible and call for procedural safeguards based on each situation. The statute at issue does not contain well-defined details about "accounting," but plaintiffs were given the opportunity to explain and correct theirs. And they can appeal under the APA. The "state interests in maintaining the integrity of the petitioning process are significant and outweigh the burden" that the statute places on plaintiffs. Due process rights are not sufficiently burdened, especially in light of "case law disfavoring statutory facial challenges on grounds outside the First Amendment."

The district court also rejected plaintiffs' equal protection theory because the Secretary of State's authority for suspension results not from what plaintiffs deem an irrebuttable presumption, but from the alleged failure of plaintiff to produce detailed accounts.

Finally, the court also rejected plaintiffs' claim that the statute's requirement that petitioners must produce payroll records and private contracts to the state is an unreasonable search. Plaintiffs cited no case. There was no evidence in the record as to the content of the records that plaintiffs produced, thus the district court was unable to determine the reasonable expectations of privacy in the records. Actoin dismissed with prejudice.

III. OTHER FREE EXPRESSION

"No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." – Article I, section 8, Or Const

A. Unwanted Contacts (Stalking)

A "claim for civil stalking is not 'of like nature' to the common-law claims of assault or battery" thus there is no constitutional right to a trial by jury in stalking cases. *Foster v Miramontes*, 236 Or App 381 (2010).

To obtain a Stalking Protective Order (an SPO), the petitioner must meet the statutory requirements and "if the contact involves speech, Article I, section 8, of the Oregon Constitution requires proof that the contact constitutes a threat. A threat 'is a communication that instills in the addressee a fear of imminent and serious personal violence from the speaker, is unequivocal, and is objectively likely to be followed by unlawful acts.' *State v Rangel*, 328 Or 294, 303 (1999). But a threat does not include 'the kind of hyperbole, rhetorical excesses, and impotent expressions of anger or frustration that in some contexts can be privileged even if they alarm the addressee.' *State v Moyle*, 299 Or 691, 705 (1985)." *Swarringim v Olson*, 234 Or App 309, 311-12 (2010).

Van Buskirk v Ryan, 233 Or App 170 (1/6/10), *rev dismissed* 348 Or 218 (2010) (Landau, Schuman, Ortega) Trial court entered a statutory stalking protective order (SPO) against a man for stalking a Portland Tribune writer. The SPO was based on the stalker's communicative and noncommunicative acts. Court of Appeals affirmed the SPO based on the noncommunicative acts but explained that his communicative acts did not provide a basis for the SPO. If an SPO is based on speech, Article I, section 8 requires proof that a "threat" was communicated, under *State v Rangel*, 328 Or 294 (1999) and *State v Moyle*, 299 Or 691 (1985). A "threat" is "a communication that instills in the addressee a fear of imminent and serious personal violence from the speaker, is unequivocal, and is objectively likely to be followed by unlawful acts." Here, the record does not show that the stalker's communicative contact instilled in the writer "a fear of imminent and serious personal violence," or that it was an "unequivocal" threat, or that the threat was objectively likely to be followed by unlawful acts. But those communications provide context for the stalker's actions, such as his continual contact with the writer at her workplace and at her parents' house after she told him not to, which caused the her to become "extremely frightened" for her safety. Trial court did not err in entering the SPO for that reason.

State v Ryan, 237 Or App 317 (9/22/10) (Brewer, Rosenblum, Deits SJ) A trial court issued the SPO on facts described in *Van Buskirk v Ryan*, *ante*. After the SPO issued, defendant mailed a letter to the writer's father, showing irrational and delusional thoughts about the writer, incomprehensible statements, an obsession with the writer, but no threats. Defendant later mailed a package to the writer's father with a blank Mother's Day card, a music CD, and a letter saying he would like to get to know the writer better but without any threats. The state prosecuted him for violating the SPO for those two contacts. Defendant moved for a judgment of acquittal on grounds that his contacts were constitutionally protected under Article I, section 8. Trial court denied the motion and the jury convicted defendant.

Court of Appeals reversed. There is no suggestion that defendant's communications with the writer contained any sort of threat, as Article I, section 8, interpreted by *State v Rangel*, 328 Or 294 (1999), requires. To "survive an Article I, section 8, challenge, an expressive 'prohibited contact,' for purposes of [the crime of violating an SPO], must contain an unequivocal threat that instills a 'fear of imminent and serious personal violence * * * and is objectively likely to be followed by unlawful acts.' *Rangel*, 328 Or at 303."

Rangel and Article I, section 8, apply to prosecutions for violations of SPOs, contrary to the state's argument that they do not, in "light of the interrelationship among the statutes setting out the various prohibitions on stalking, as described in ORS 30.866, ORS 163.732, ORS 163.738, and ORS 163.750."

Rosenblum concurred: "*Rangel* is too restrictive of the protection offered by the stalking statutes. To the extent that they limit speech, those statutes are aimed at preventing reasonable fear of physical violence." Here, for two years, a total stranger sent more than two dozen letters to the writer under the delusional belief that they were Romeo and Juliet. Defendant went to the writer's parents' house, the writer's workplace, and referenced the writer's son, all despite the writer's requests that he leave her alone. "I do not believe that Article I, section 8, limits the legislature's ability to protect Oregonians from fear of physical violence to the extent that the Supreme Court has held."

Swarringim v Olson, 234 Or App 309 (3/17/10) (Landau, Schuman, Ortega) Trial court issued a Stalking Protective Order (SPO) against a father and teenage son who had been bullying their new neighbors. Court of Appeals reversed that order.

An SPO may be granted if, among other things, a person recklessly engages in repeated and unwanted contact with another person that objectively and subjectively causes the other person to be alarmed or coerced. "If the contact involves speech, Article I, section 8, of the Oregon Constitution requires proof that the contact constitutes a threat. A threat 'is a communication that instills in the addressee a fear of imminent and serious personal violence from the speaker, is unequivocal, and is objectively likely to be followed by unlawful acts.' *State v Rangel*."

Here, at issue are three unwanted contacts by a teenager: (1) he threatened to have someone beat up the petitioner's son or slit his throat; (2) he cursed at the petitioner's young daughter; and (3) he pushed the petitioner's son to the ground and refused to let him enter a park. The first two contacts involved only speech, thus "the more stringent standard" of Article I, section 8, applies. There is no evidence that the speaker himself would act violently; rather that he would have someone else act violently. There is no evidence that petitioner, her husband, or her daughter feared that imminent violence from the teenager would result. Thus, the first two communications do not meet the statutory or constitutional requirements for an SPO. As for the third contact (pushing the son), that was only one contact and the statute requires "repeated" contact. "In short, we find the evidence insufficient to satisfy the requirements of the statute." (There also was unwanted "obnoxious"

contact by that teenager's father, but the petitioner did not testify that she or family members actually feared for their personal safety, and there is no evidence from which that finding can be inferred.). Reversed.

McGinnis-Aitken v Bronson, 235 Or App 189 (5/5/10) (Schuman, Landau, Ortega) Trial court entered a Stalking Protective Order (SPO) against a man who wanted to have a relationship with the petitioner, who did not share that goal. The man wrote her a letter, and knocked her office door and left her book outside her office. Quoting extensively from *Swarringim v Olson* [discussed *post*], the Court of Appeals reversed: "Petitioner did not testify that she was in fear of serious, personal violence that she believed was likely to occur imminently, and, if she had so testified, her fear would not have been objectively reasonable." The written communication from the man "contains no threats, it was not delivered in person, and it conveys no intimations of imminent violence (or any violence at all)." There "is no evidence in the record that petitioner was alarmed or concerned by the door knocking – or by anything else respondent did – so as to cause he alarm or concern for her safety or the safety of her family." At most, the man engaged in one contact that possibly be considered alarming, but conviction takes two such contacts. Reversed.

Pike v Knight, 234 Or App 128 (3/3/10) (Landau, Schuman, Ortega) A man and a woman had been friends for several years. The woman worked at a restaurant that the man patronized daily. The man told the woman he had made her a beneficiary in his will. The man began to persistently allege that the woman was having an affair with someone, he hired a private investigator to follow her, and he began following her. The woman said she wanted to end their friendship. The man said he would sue her for slander and defamation of character. The woman received a permanent stalking protective order (SPO). Court of Appeals reversed: the "evidence in this case falls far short of what the relevant statutes require. None of the verbal contacts communicated an unequivocal threat of violence" and more significantly, the woman "testified that she was annoyed and irritated, but she never testified that she felt alarmed or coerced." For those reasons, the contact here, which involved speech, fails to meet the constitutional and statutory standards for an SPO.

Falkenstein v Falkenstein, 236 Or App 445 (7/28/10) (Duncan, Haselton, Armstrong) Trial court entered a temporary stalking protective order (SPO) to protect an ex-wife against her ex-husband. Both exes appeared *pro se* at a hearing where the trial court entered a final SPO of unlimited duration. At that hearing, the trial court read the petition and appeared to (erroneously) assume that the facts recited in that petition were evidence. The actual evidence – testimony by the ex-wife – is that after the temporary SPO was entered: (1) ex-husband sat outside his house while ex-wife visited her mother (ex-husband lives a few houses away from ex-wife's mother); and (2) ex-husband sent ex-wife a text message and telephoned her but the content of those communications is not part of the record. The evidence – testimony by the ex-husband – is that ex-husband denies any unwanted contact with ex-wife, that he agreed with ex-wife that neither of them wanted anything to do with each other, and that he had written down ex-wife's boyfriend's license plate number. Ex-wife's boyfriend testified that ex-husband had made numerous unwanted phone calls to ex-wife, and had come over uninvited, and that the text message from ex-

husband just said the letter "T" as if he started to text something, then decided not to, but the message went through anyway. Boyfriend and ex-wife testified that ex-wife was frightened of ex-husband.

Court of Appeals reversed. First, the petition for an SPO itself is not evidence under the ORCP and case law. The petition here was not offered or received into evidence, and ex-wife did not adopt the allegations. As to the evidence in this record, it is insufficient to warrant an SPO. Speech can serve as a predicate contact for an SPO only if it is a threat (otherwise, the SPO statute may be overbroad as applied, thus colliding with Article I, section 8). Under the SPO statute, texts and calls can be predicate contacts for an SPO. If the texts or calls involve speech, they can serve as predicate contacts if they are unequivocal threats of imminent serious personal violence that are likely to be carried out. If, in contrast, the texts or calls do not involve speech (such as just causing the phone to ring), they are treated the same way as other nonexpressive contacts; that means they can be predicate contacts if they cause the petitioner objectively reasonable alarm, coercion, or apprehension, see *State v Rangel*, 328 Or 294 (1999) and *State v Moyle*, 299 Or 691 (1985). Here, the Court of Appeals concluded that it did "not need to decide whether the text message and telephone calls were expressive contacts because, even under the less stringent standard for nonexpressive contacts, the evidence is insufficient." Ex-husband's "message and calls may well have been unwanted and annoying, but more is required." And the "same is true regarding respondent's other actions." There is no evidence that ex-husband made threats of violence. On this record, there is no evidence that the actions would have caused petitioner objectively reasonable alarm, coercion, or apprehension.

See ***Foster v Miramontes***, 236 Or App 381 (7/28/10) under **Civil Jury Trial**, *post*.

State v Sierzega, 236 Or App 630 (8/18/10) (Brewer, Wollheim, Sercombe) Defendant is mentally ill and obsessed with a woman who worked in a county courthouse. He purchased copies of court records from her every day for a month, she was then reassigned to clerk for a judge. Defendant had a hearing in court and saw victim in court. He gasped, waved at her, and kept looking at her during his hearing. He then called the judge's chambers to find out who worked there. Victim answered the phone, told him her name, then defendant hung up. Victim received a handwritten anonymous letter, addressed to her nickname. Defendant made multiple calls to various people, trying to obtain the names and photos of victim's family, including her father, who worked for the sheriff's department. Defendant thought victim's father was tracking him through unmanned spacecrafts and through a tooth filling. Defendant called victim's sister, claiming to be the father's former wrestling teammate. A detective spoke with defendant in the county law library, and asked defendant to leave victim alone. Defendant reiterated his belief about the unmanned space ships. Defendant then wrote a fax to victim's judge, who was the judge assigned to another case in which defendant was a party. Several weeks later, victim was clerking for another judge in an anteroom of the judge's chambers. She heard someone use her name and ask if that judge was in the office. Victim looked up and saw defendant standing at the door. Victim ran into an interior office, and

was very frightened. Another police officer spoke to defendant, and defendant said the police did not have authority to tell him to stay away from victim. Victim transferred to another department, but several months later, defendant began calling again. A fax arrived to victim's office that stated: "[Victim], will you marry me? I'm still in love with you, and I guess I always will be. I promise I won't try to call [your father] 'dad.' I'm not crazy about your father, but you are just too bad! Gimme some sugar, [victim], I need it." Defendant called the court several times, asking if victim had received it.

Defendant was found guilty of the crime of stalking. Trial court denied defendant's motion for a judgment of acquittal. Court of Appeals reversed. The stalking statute contains an element -- "knowingly alarms or coerces" – and to not be overbroad, that element requires the state to prove that expressive (written or oral) communications are unambiguous, unequivocal, and specific to the addressee, instill in the addressee a fear of imminent and serious personal violence from the speaker, and are objectively likely to be followed by unlawful acts, see *State v Rangel*, 328 Or 294, 303-06 (1999). Thus, if a contact is purely communicative (not physical, but words or writing), it must qualify as a threat under *Rangel* (as opposed to contact without words or writing, such as physically approaching the victim, or telephoning someone and remaining silent on the line).

Defendant's face-to-face physical contact with the victim in the judge's chambers was not purely communicative, so it does not have to be a "threat" under *Rangel*. But the letter and fax are pure expression, thus they needed to satisfy the threat requirement, but they do not. Defendant's telephone call to the judge's chambers was communicative -- it involved a conversation rather than silence or a hang up, which is not expressive -- and thus needed to satisfy the "threat" element from *Rangel*. Defendant made no threats in his writings and oral communications. Thus, those contacts provided value as context for establish that the other contacts satisfied the statutory elements but did not establish the elements themselves.

A trier of fact court have found that defendant made a single unwanted contact with the victim that included nonexpressive conduct that alarmed her and instilled in her a reasonable apprehension for her personal safety. The remaining contacts do not qualify as repeated unlawful contacts or those that threatened her. Although defendant is mentally unstable and obsessed with the victim, "in the absence of a qualifying threat, defendant's communications with [victim] did not cross the threshold beyond which expression loses its constitutional protection." Conviction reversed.

Travis v Strubel, 238 Or App 254 (10/27/10) (Schuman, Wollheim, Rosenblum) Petitioner and respondent live across the street from each other and have a conflicted relationship. Petitioner had accused respondent of looking in her windows, mowing her lawn without her permission, appearing at her workplace, and appearing in her driveway. Trial juror (pro tem) heard the neighbors' pro se arguments and granted an SPO against respondent. Court of Appeals reversed. Petitioner did not present evidence to show that when respondent made the contacts, he knew or should have known they were unwanted. She did post a "No

Trespassing" sign with respondent's name, but the record is unclear whether more than one unwanted contact occurred. Moreover, even if two unwanted contacts occurred, there is no evidence that the court could infer than any contacts were coercive or caused petitioner any alarm.

State v Koenig, 238 Or App 297 (10/27/10) (Sercombe, Brewer, Wollheim) Defendant kept calling various Washington County public offices. Finally county counsel wrote a letter forbidding him from calling various offices for 3 years, and the sheriff's department wrote the same type of letter for the sheriff's department. Both letters stated that defendant could continue to communicate in writing, but the telephone calls were disruptive, time-consuming, and rude and had to stop. Defendant said he was not trying to vex, annoy, or harass, but rather he called to discuss state law and communicate his views. Despite the letters, he kept calling. He was charged with and convicted of five counts of telephonic harassment. Defendant contended that his right to free expression was violated because the jury was allowed to consider the content of his calls to determine if he had the requisite mens rea element for telephonic harassment.

Court of Appeals affirmed those judgments of conviction. Under *State v Plowman*, 314 Or 157, 167 (1992) and *State v Allison*, 325 Or 585, 589 (1997), "the content of a person's speech may be used to prove a mental element of a crime." Criminal laws are not unconstitutional under Article I, section 8, simply because that culpable mental state might be proved by expressive conduct. For further discussion of this case, see Fourteenth Amendment, *post*.

B. **Commercial Sex Performances**

City of Salem v Lawrow, 233 Or App 32 (12/20/09) (Schuman, Landau, Ortega) City code provided: "It shall be unlawful for any person to pay a fee, or to receive a fee, directly or indirectly, for touching or offering to touch the clothed or unclothed body of another for the purpose of arousing sexual excitement in himself or any other person." Municipal court convicted defendant under that law. On appeal, the circuit court dismissed the conviction because the code provision violated Article I, section 8.

Court of Appeals affirmed: that statute is facially overbroad. *State v Ciancanelli*, 399 Or 282 (2005) held that "even live sex shows were a form of protected expression." Here, this statute restrains expression because an "act that is intended to [sexually] arouse an audience is expression." It also criminalizes "'offering' to touch, and an offer necessarily involves expression." But it is not directed at speech, because the crime can be committed by "performing sexual acts, without an audience," which is not protected expression under Article I, section 8. Thus it is a second-category speech law under *Robertson* (law proscribes a harm but prohibits expression in so doing). It is "clearly" and "fatally" overbroad, reaching a significant amount of privileged expression. It imposes criminal sanctions for live sex shows, which under *Ciancanelli*, it cannot do. It also imposes criminal sanctions for acts in movies or plays where actors may be paid to engage in some kind of sexual contact. Finally, "judicial surgery is not possible in this situation" because there is "a sharp distinction

between judicial interpretation, which is permissible, and redrafting, which is not." Under ORS 174.010, omitting or adding a word (such as "*any* other person" to "*the* other person") is not the role of the court. If "the city wants to narrow it, that is the city's prerogative and not ours."

City of Salem v Guillen, 233 Or App 133 (12/20/09) (Per Curiam – Landau, Schuman, Ortega) Affirmed; see *City of Salem v Lawrow*.

C. Profanity in Court

> "One man's vulgarity is another's lyric." *Cohen v California*, 403 US 15, 25 (1971).

State v Phillips, 234 Or App 676 (4/14/10), *adhered to as modified on recons.*, 236 Or App 465 (7/28/10) (Schuman, Brewer, Riggs SJ) In open court, defendant instructed the trial judge that "the first thing we're going to talk about today [is representation by counsel]." The judge said, "Great. All right." Defendant said, "We're talking about appointment of counsel right now. I don't appreciate the fact that these motions aren't filed." The judge said, "No. Motions don't get filed when you have a lawyer. We left here last –". Defendant interrupted, stating: "So, we don't have a fucking lawyer." The judge then stated that defendant would be held in contempt. Defendant said, "All right. That's good." Defendant said, "I got more to say if you've got more time." The judge said, "No. You're excused from this right now. You don't swear at me. You're done." Defendant said, "All right. And I don't have counsel." Defendant was convicted of two counts of contempt for "Using profanity in the presence of the court and directed at the court." Defendant appealed and contended that the Court of Appeals must vacate both contempt convictions because the contempt statutes are unconstitutionally vague and enforcing the contempt statutes against him violates his freedom of expression rights under Article I, section 8. Court of Appeals rejected that claim without discussion in a footnote.

D. First Amendment and the Workplace

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." -- First Amendment, US Const

1. Free Speech

Huber v Oregon Dep't of Education et al, 235 Or App 230 (5/5/10) (Rosenblum, Haselton, Armstrong) A licensed practical nurse was employed at the Oregon School for the Blind. He made a complaint to the federal Dep't of Health & Human Services about what he said was a HIPAA violation (a clipboard with student

names and medical information was left hanging in an area where nonmedical personnel had access) rather than try to resolve the matter internally. He also threatened to make a complaint to the Oregon State Board of Nursing (OSBN) for what he said he said was substandard nursing practices. He was placed on leave. He sued his employer, alleging, *inter alia*, that his First Amendment rights were violated. Trial court granted defendants summary judgment on the First Amendment claim. Court of Appeals affirmed on that claim. "The First Amendment protects a public employee's free speech rights when the speech is made as a private citizen on a matter of public concern. *Garcetti v Ceballos*, 547 US 410, 415-16 (2006). Accordingly, as defendant argues, for plaintiff to prevail, he must have spoken 'as a citizen.' *See id.* (so stating). In this case, plaintiff's complaint to the DHHS and threat to complaint to the OSBN were not made as a private citizen." Comparing this case to a Seventh Circuit case, the court concluded that, here, "plaintiff's speech was not constitutionally protected by the First Amendment as a matter of law."

2. Free Exercise

Tubra v Cooke, Swor, and the Internat'l Church of the Foursquare Gospel, 233 Or App 339 (1/27/10) (Armstrong, Wollheim, Riggs SJ) Court of Appeals reversed a trial court's entry of a JNOV in favor of defendant church in a defamation action brought by a former pastor/employee. Court of Appeals concluded that the Free Exercise Clause of the First Amendment does not provide an absolute bar to a pastor's defamation claim against his church.

Defendant Cooke was a senior pastor and supervisor. Defendant Swor was the district supervisor. Pastor considered his employment to be temporary and eventually gave notice of his intent to leave. Cooke and Swor wrote a letter, and read it to the congregation, stating that pastor had misappropriated church funds. Swor also wrote an email stating that pastor had demonstrated a willingness to lie and steal. Pastor sued Cooke, Swor, and the church for defamation for the letter and the email. Trial court denied defendants' motion for summary judgment and for a directed verdict, but after the jury found for pastor, the court granted their motion for a JNOV on grounds that the Free Exercise Clause of the First Amendment deprived the court of jurisdiction to adjudicate the dispute.

Court of Appeals reversed and remanded to reinstate the jury verdict. The Court of Appeals interpreted defendants' argument to be "not whether civil courts confronted with such torts have jurisdiction" but rather "that the First Amendment . . . operates to create an absolute privilege to plaintiff's claim of defamation."

Court of Appeals observed that no United States Supreme Court case, nor Oregon appellate case, has addressed whether the Free Exercise Clause protects churches defending against defamation claims by pastors.

Court of Appeals noted that the Free Exercise Clause "severely" restricts the authority of civil courts to adjudicate disputes "on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law" citing *Serbian Orthodox*

Diocese v Milivojevich, 426 US 696, 713 (1976) and *Watson v Jones*, 80 US 679 (1871). On the other hand, the Court of Appeals noted that the First Amendment does not completely bar relief against a church in a civil action, including employment-related suits, citing numerous cases. The Court of Appeals observed that "civil courts have jurisdiction to adjudicate torts involving religious organizations."

In *Christofferson v Church of Scientology*, 57 Or App 203, *rev den* 293 Or 456 (1982), *cert denied* 459 US 1206 (1983), the Court of Appeals considered a fraud claim by a church member. Citing *Wisconson v Yoder*, 406 US 205, 215 (1972), the *Christofferson* court determined that the "fundamental qualification for protection based on the Free Exercise Clause of the First Amendment is that that which is sought to be protected must be 'religious.'" To determine whether a representation is purely religious as a matter of law, the *Christofferson* court asked three questions: (1) is the defendant organization of a religious nature? (2) do the statements themselves relate to the religious beliefs and practices of the organization? (3) even if the statements are made on behalf of a religious organization and have a religious character, are they nonetheless made for a wholly secular purpose?

The Court of Appeals here adopted the 3-part test in *Christofferson* for fraud to this case for defamation. "If the organization is of a religious character, and the alleged defamatory statements relate to the organization's religious beliefs and practices and are of a kind that can only be classified as religious, then the statements are purely religious as a matter of law, and the Free Exercise Clause bars the plaintiff's claim, In defamation law terms, those statements enjoy an absolute privilege." If, however, statements made by a religious organization do not concern the organization's religious beliefs and practices or are made for a nonreligious purpose (in other words, they would not always and in every context be considered religious) then the First Amendment does not necessarily prevent adjudication of the defamation claim, but the statements may nonetheless be qualifiedly privileged under established Oregon law.

Here, the statements (that pastor had misappropriated money and demonstrated a willingness to lie) would not always be religious in nature. "Thus, even thought the statements related to plaintiff's conduct as a pastor of the church, that fact does not render those statements absolutely privileged" under the Free Exercise Clause. Rather, it gives rise to a qualified privilege. The burden falls on the plaintiff to prove that the qualified privilege was abused: that defendant did not believe the statement to be true or lacked reasonable grounds for believing that it was true, or that the statement was made for a purpose outside the scope of the privilege. Here, that determination "can be resolved without requiring the court to delve into the ecclesiastical concerns of the church." At trial on their JNOV motion, defendants argued solely that the First Amendment provides an absolute bar to plaintiff's defamation action. The trial court granted defendants' motion on that basis. It "follows that the court erred."

IV. SEARCH OR SEIZURE AND WARRANTS

"No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized." - Article I, section 9, Or Const

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." – Fourth Amendment, US Const

Article I, section 9, of Oregon's Constitution "is copied from the fourth amendment to the constitution of the United States, and was placed there on account of a well-known controversy concerning the legality of general warrants in England, shortly before the revolution, not so much to introduce new principles as to guard private rights already recognized by the common law. 2 Story, Const. 1902; Conk. Treat. 615. . . . . The law . . . was put beyond controversy, as to the government of the Union, by this fourth amendment, and from there transferred to the constitution of the states." *Sprigg v Stump*, 8 F 207, 213 (1881) (Deady, J.).

"Reflect, for a moment, on the fact that the Fourth Amendment actually contains two different commands. First, all government searches and seizures must be reasonable. Second, no warrants shall issue without probable cause. The modern Supreme Court has intentionally collapsed the two requirements, treating all unwarranted searches and seizures – with various exceptions, such as exigent circumstances – as per se unreasonable." Akhil Amar, THE BILL OF RIGHTS at 68 (1998).

It is "at least debatable whether the framers [of Oregon's Constitution] would have regarded all warrantless searches to be presumptively unreasonable, even in criminal cases. Historians and legal scholars of the Fourth Amendment – after which Article I, section 9, was patterned – debate whether the meaning of the first clause, which requires that searches and seizures be reasonable, is dependent upon the second clause, which requires that warrants be issued only upon probable cause." *Weber v Oakridge School District 76*, 184 Or App 415, 429 n 3 (2002).

A. State Action Requirement

> A privacy or possessory interest under Article I, section 9, is an interest against the state; it is not an interest against private parties. *State v Tanner*, 304 Or 312, 321 (1987).

State v Davis, 234 Or App 106 (3/03/10) (Wollheim, Brewer, Sercombe) Defendant was being investigated for raping and sodomizing his stepdaughter. Detective knew that defendant had invoked his right to counsel and right to remain silent via a letter sent from defense counsel to the detective. Detective set up instant-message software on his office computer, and had the stepdaughter instant-message defendant from detective's office. Detective directed the stepdaughter to say certain things to try to obtain statements from defendant through this "pretext communication." Defendant made incriminating statements to his stepdaughter. Trial court suppressed all of the statements made during the pretext communications. Court of Appeals affirmed: detective "recruited the stepdaughter to make the 'pretext communications' with defendant. The stepdaughter agreed and acted as the detective's agent." The exclusionary remedy applies, see *State v Smith*, 310 Or 1, 13 (1990). See discussion under False Pretext Communications, *post*.

State v Luman, 347 Or 487 (12/31/09) (Gillette; De Muniz, Durham, and Walters dissenting) Defendant owned a restaurant. He instructed employees not to turn on the kitchen television. Restaurant employees turned on the kitchen television. A video in the VCR, labeled "master," showed partially nude women using the restaurant's bathroom. Employees found more videos and wires leading to the bathroom. Employees contacted sheriff and gave sheriff the videos. Four days later, a deputy watched the videos – the master and the others – without obtaining a warrant. Defendant charged with 48 counts of invasion of personal privacy. Trial court suppressed all videos except the master that showed 11 women using the restroom, because the contents of that master video were "apparent" by the time the police had viewed it. Defendant convicted of 11 counts of invasion of personal privacy.

Defendant appealed, contending that the trial court erred by allowing the "master" tape into evidence. Court of Appeals reversed, holding that the trial court should have suppressed the video because the mere fact that private parties knew of the video's contents did not mean defendant lost his privacy interest in it.

Oregon Supreme Court reversed the Court of Appeals' decision, and affirmed the trial court's decision to allow the video into evidence. This was not a "search." The sheriff's office lawfully possessed the video, because

> "private parties, not state actors, first viewed the videotape and then, on their own initiative, brought it to the sheriff's office. It is axiomatic that Article I, section 9, applies only to government-conducted or – directed searches and seizures, not those of private parties. *State v Tucker*, 330 Or 85,89 (2000). . . . The foregoing principle applies even if the private parties acted unlawfully in

> conducting the search and seizure that ultimately led to police possession of the evidence. . . . Therefore, because the deputy's receipt of the videotape (from the private citizens who had taken it) was constitutionally lawful, defendant no longer retained a protected possessory interest in the videotape or a privacy interest in its exterior."

Because defendant had no protected privacy interest in the contents, the deputy's view the images was not a search:

> "In this case, defendant's employees seized the videotape, viewed it, handed it over to the deputy, and told him exactly what was on it. . . . At that point, defendant no longer retained a protected possessory or privacy interest in the piece of evidence; those interests were destroyed by the private conduct."

Dissent appears to agree with majority that the videotape was lawfully in sheriff's possession. As discussed under Protected Privacy Interest, *post*, the dissent would hold that a protected privacy interest was retained despite the private actors. Also from a separation of powers and policy standpoint, courts encourage the use of warrants by the police before they act.

State v Stokke, 235 Or App 477 (6/9/10) (Armstrong, Brewer, Carson SJ) Hotel employees found a key in defendant's hotel room and opened a locked safe in his room. Drugs, sexual materials, and checkbooks in several people's names were in the safe. Employees called the police and told the police what they found. Officer examined the evidence and took it. Trial court denied defendant's motion to suppress, on grounds that the evidence had been in plain view. Court of Appeals affirmed, under *State v Luman*, which is "materially indistinguishable" from this case, in that there was no privacy interest after the private actors took, examined, and delivered the items to the police. (See discussion under of Privacy Interest, *post*). Court of Appeals "reject[ed] without discussion defendant's argument that there was sufficient government involvement in the hotel employees' opening and inspection of the contents of the safe to transform that private search into state action. *See Luman*, 347 Or at 492. ('It is axiomatic that Article I, section 9, applies only to government-conducted or –directed searches and seizures, not those of private parties.')." No Fourth Amendment violation, either.

***State v Everett*,** 237 Or App 556 (9/29/10) (Edmonds, SJ, Brewer) (This case only addressed the Fourth Amendment, not Article I, section 9). Defendant was shot in the arm by a police officer. Magistrate issued arrest and search warrants commanding the police to search defendant and to seize bullets and bullet fragments. Defendant was arrested, and brought to an unidentified "a local hospital" (Court of Appeals did not state whether it was a private or public hospital). Defendant refused to consent to the bullet's removal, but medical staff removed it anyway. The Court of Appeals footnoted that the state and defendant appeared to accept an implicit premise that the bullet-removal surgery constituted "state action" and was not a part of defendant's medical treatment.

See ***United States v Ahrndt***, 2010 WL 373994 (D Or 1/28/10) (08-468-KI) (Fourth Amendment).

B. Protected Interests

1. Privacy Rights – Searches

The government conducts a "search" for Article I, section 9, purposes, when it invades a protected privacy interest. *State v Brown*, 348 Or 293 (2010). A protected privacy interest "is not the privacy that one reasonably expects but the privacy to which one has a right." *Id.* (quoting *State v Campbell*, 306 Or 419, 426 (1988). A "privacy interest" is an interest in "freedom from particular forms of scrutiny." *Campbell*, 306 Or at 170.

"[S]ocietal expectations do not necessarily translate into a protected privacy interest under Article I, section 9. . . . . Nonetheless, . . . societal norms are enmeshed with the determination whether a privacy interest exists under Article I, section 9." *State v Cromb*, 220 Or App 315, 320-27 (2008), *rev denied* 345 Or 381 (2009).

If government conduct did not invade a privacy interest, then no search occurred and Article I, section 9, is not implicated, and the inquiry ends. *State v Meredith*, 337 Or 299, 303 (2004).

See ***State v Brown***, 348 Or 293 (5/27/10) (De Muniz), under **Abandonment**, *post*.

State v Heckathorne, 347 Or 474 (12/31/09) (De Muniz) Officers had arrested two people in a car. During their inventory of the car, they found a syringe, tools, pipe fittings, and a metal gas cylinder with blue discoloration around a valve. An officer testified that: the car "smelled like a meth lab;" it smelled of ammonia; ammonia is used to produce meth; and brass fittings turn turquoise or blue when in contact with anhydrous ammonia. Later, state police shot the cylinder to "vent" it. An officer smelled ammonia after venting the cylinder. The officer then tested the contents of the cylinder for ammonia, which resulted in the highest possible measurement for ammonia. That evidence was used against defendants at trial. Defendants challenged only the testing – not the seizure or venting of the cylinder – as an unconstitutional search.

The Supreme Court concluded that testing the cylinder did not violate Article I, section 9, because defendants had no privacy interest in the cylinder's contents after the venting. When vented, the contents became discernable to the officer (the ammonia smell). Because the smell was discernable, defendants had no privacy interest in the contents. Thus, the testing "did not infringe on any privacy interest protected by the Oregon Constitution."

State v Luman, 347 Or 487, 495-96 (2009) (Gillette; with De Muniz, Durham, and Walters dissenting) (See discussion under State Action, *ante*). Defendant's employees discovered videotapes that defendant had made of women using a restaurant bathroom, and turned the videos over to the sheriff. Oregon Supreme Court concluded that the sheriff's warrantless possession of the videotapes did not violate Article I, section 9. The sheriff's warrantless viewing of the contents of the videos also did not violate Article I, section 9:

> "Once private parties have seized a piece of evidence, examined it, and delivered it to a police officer (thereby giving the police officer lawful possession of that evidence for criminal investigatory purpose, the police officer's subsequent, confirmatory examination of that evidence involves no additional injury to any privacy interest of the property owner; any privacy interest that the property owner may have had in that piece of evidence is destroyed, at least to the extent of the scope of the private search."

In so concluding, the Oregon Supreme Court quoted heavily from Fourth Amendment cases, but differentiated the analysis under the Oregon Constitution from the US Constitution as follows:

> "We recognize that the foregoing analysis differs from the approach that this court would take under Article I, section 9, to the extent that the question whether a person's Fourth Amendment right to be free from unreasonable searches and seizures is violated turns on whether the person has a 'reasonable expectation' of privacy, rather than a 'right' to that privacy as under Article I, section 9. However, that distinction does not render the federal analysis inapposite to the situation before us. Rather, we conclude that a private search frustrates a person's *right* to privacy under Oregon's Constitution exactly to the same extent that it frustrates a person's *expectation* of privacy under the federal constitution." (Emphasis in *Luman*).

Dissent would that viewing the images was a search and would "hold that defendant retained a privacy interest in the images on the videotape and that the police violated defendant's privacy right protected by Article I, section 9, when they viewed the images on the videotape without first securing a warrant." The cassette is an "effect" and its contents are the images. Those images were not in plain view. "Article I, section 9, requires that a police officer have probable cause *and* either a valid warrant or a justification under an exception to the warrant requirement, to conduct a lawful search." (Emphasis in original). Courts resolve marginal cases in favor of the preference for warrants to encourage the use of warrants. That preference originates in separation of powers (warrant involves two branches, but warrantless search involves one, unchecked). The employees told police what was on the videotapes -- that was probable cause to believe what was on the tapes. Employees did not *show* police what was on the images. And defendant told employees they could not watch the television. Thus, because the images on the videotape were not visible, defendant retained a privacy interest in the images on the videotape even though he had lost his possessory interest when [employee] gave the video cassette to the police. In the absence of some exception to the warrant requirement or an exigency

that would require the police to proceed quickly to preserve evidence, the police were required to secure a warrant to view the images on the videotape. . . . the warrant requirement under Article I, section 9, is not a mere formality that can be so casually cast aside, as the majority does here."

State v Stokke, 235 Or App 477 (6/9/10) (Armstrong, Brewer, Carson SJ) Hotel employees found a key in defendant's hotel room and opened a locked safe in his room. Drugs, sexual materials, and checkbooks in several people's names were in the safe. Employees called the police and told the police what they found. Officer examined the evidence and took it. Trial court denied defendant's motion to suppress, on grounds that the evidence had been in plain view. Court of Appeals affirmed, under *State v Luman*, which is "materially indistinguishable" from this case, in that there was no privacy interest after the private actors took, examined, and delivered the items to the police. After the hotel employees made the open safe available to the police and told him what was in it, "any protected privacy interest that defendant had in the contents of the safe had been extinguished. . . . It follows that the officer's subsequent examination of the items in the safe was not a search for purposes of Article I, section 9." Same conclusion under Fourth Amendment.

State v Davis, 237 Or App 351 (9/22/10) (Wollheim, Brewer, Haselton, Rosenblum for majority; with Sercombe and Landau concurring; with Schuman, Ortega, Armstrong, Breithaupt pro tem concurring and dissenting) Defendant drove past a deputy. Without any suspicion that defendant was engaged in any unlawful activity, the deputy randomly entered defendant's license plate number into the DMV database. Defendant's license had been suspended, so the officer stopped defendant for that reason. Defendant moved to suppress all evidence from officer's access of his DMV records, under Article I, section 9 (as an unreasonable search) and Article I, section 20 (as an unequal and standardless burden on defendant). The trial court denied his motion to dismiss and defendant was convicted of driving while suspended.

Court of Appeals affirmed. Its members unanimously agreed that that there was no "search" for Article I, section 9, purposes: defendant does not have an inherent privacy interest in his DMV driving records. The state created defendant's driver's license and car registration records for its own purposes, and the state has substantial administrative interest in confirming that only licensed persons drive registered vehicles on public roads, as required under various statutes. "The state can access a person's driving records by observing a driver's registration plate that is displayed in plain view and looking up that registration plate number in the state's own records." Moreover, although the DMV is prohibited by statute from disclosing personal information in DMV records, an exception to that prohibition allows a deputy to access driving records under his "function of investigating to detect illegal activity." Defendant has no cognizable privacy interest in DMV records concerning him or vehicles registered to him.

Court of Appeals then affirmed on the Article I, section 20, issue, with a 4-2-2 fractured opinion. See **Privileges and Immunities**, *post*, for discussion.

State v Clark, 238 Or App 211 (10/27/10) (Haselton, Armstrong, Duncan) Similar facts as in *State v Davis*, 237 Or App 351 (9/22/10), affirmed for the same reasons under Article I, section 9 (and the Article I, section 20 issue was unpreserved).

See ***United States v Ahrndt***, 2010 WL 373994 (D Or 1/28/10) (08-468-KI)(Fourth Amendment), under Fourth Amendment, *post*, holding that a "defendant's conduct in operating his iTunes software with the preferences set to share, in conjunction with maintaining an unsecured wireless network router, diminished his reasonable expectation of privacy to the point that society would not recognize it as reasonable. . . . Having failed to demonstrate either a reasonable objective or subjective expectation of privacy, defendant cannot invoke the protections of the Fourth Amendment. When [a neighbor and a police officer] accessed the child pornography in defendant's iTunes library, no search occurred."

2. Possessory Rights – Seizures

> "[P]roperty is 'seized' for the purposes of Article I, section 9, when the police significantly interfere with a person's ownership and possessory interests in the property." *State v Smith*, 327 Or 366, 376 (1998).
>
> A person also has a possessory right to the contents of his body. "The extraction of human bodily fluids generally is a search of the person and a seizure of the fluid itself." *Weber v Oakdridge School District*, 184 Or App 415, 426 (2002).

State v Allen, 234 Or App 363 (3/17/10) (Brewer, Sercombe, Deits SJ) (per curiam) Court of Appeals affirmed the trial court's holding that "the warrantless seizure of defendant's breath sample was constitutional under Article I, section 9, of the Oregon Constitution because exigent circumstances justified the seizure" and due to the evanescent nature of alcohol in the body, see *State v Machuca*, 347 Or 644, 657 (2010).

State v Machuca, 347 Or 644, 657 (02/11/10) (De Muniz) A warrantless search of a person's body and the seizure of his blood at a hospital after a car crash does not violate Article I, section 9, when police had probable cause to arrest for a crime involving the blood alcohol evidence in the suspect's body. The "evanescent nature of a suspect's blood alcohol content is an exigent circumstance that will ordinarily permit a warrantless blood draw of the kind taken here [after a car crash, defendant taken to a hospital, Mirandized, advised of the statutory implied consent rights and consequences, and he consented to a nurse drawing his blood]."

C. Context of Search or Seizure

What is a search?

Under Article I, section 9: The government conducts a "search" for Article I, section 9, purposes, when it invades a protected privacy interest. *State v Brown*, 348 Or 293 (2010). A protected privacy interest "is not the privacy that one reasonably expects but the privacy to which one has a right." *Id.* (quoting *State v Campbell*, 306 Or 419, 426 (1988).

Under the Fourth Amendment: "In every-day talk, as of 1789 or now, a man 'searches' when he looks or listens." *United States v On Lee*, 193 F 2d 306, 313 (2d Cir 1951) (Frank, J. dissenting) (mechanical aids to see or hear are "searches").

What is a seizure?

1. Property.

Under Article I, section 9: "Property is seized for purposes of Article I, section 9, when there is a significant interference, even a temporary one, with a person's possessory or ownership interests in the property." *State v Juarez-Godinez*, 326 Or 1 (1997).

Under the Fourth Amendment: Under the Fourth Amendment, a "seizure" of property occurs when there is some meaningful interference with an individual's possessory interests in that property. *United States v Jacobsen*, 466 US 109, 113 (1984). "Stopping a vehicle and detaining its occupants is a 'seizure' of the person within the meaning of the Fourth Amendment to the Constitution of the United States, 'even though the purpose of the stop is limited and the resulting detention quite brief.' *Delaware v Prouse* __ US __, 59 L Ed 2d 660, 667 (1979)." *State v Tucker*, 286 Or 485, 492 (1979).

2. Persons.

Under Article I, section 9: An encounter between a police officer and a citizen is a "seizure" of a person under Article I, section 9, "(a) if a law enforcement officer intentionally and significantly restricts, interferes with, or otherwise deprives an individual of that individual's liberty or freedom of movement; or (b) whenever an individual believes that (a), above, has occurred and such belief is objectively reasonable in the circumstances." *State v Holmes*, 311 Or 400, 407-10 (1991). An encounter is a seizure of a person only if the officer engages in conduct significantly beyond that accepted in ordinary social intercourse. *Id.* at 410.

Further, under *State v Hall*, 339 Or 7, 16-17 (2005), *State v Amaya*, 336 Or 616, 627 (2004), and *Holmes*, 311 Or at 410, there are three general categories of "encounters" that may implicate Article I, section 9:

(a). Mere conversations, in the street or a public place, between an officer and a citizen, that are free from coercion or interference with a citizen's

liberty are not "seizures" and thus do not require justification (reasonable suspicion of anything is not necessary).

(b). "Temporary restraints" of a person's liberty for investigatory purposes ("**stops**") are seizures that must be justified by a **reasonable suspicion** of criminal activity. "A 'stop' is a temporary restraint on a person's liberty for the purposes of a criminal investigation; to be lawful under Article I, section 9, of the Oregon Constitution it must be justified by reasonable suspicion of criminal activity. *State v Rodgers/Kirkeby*, 347 Or 610, 621, *rev dismissed*, 348 Or 71 (2010)." *State v Gant*, 237 Or App 74 (9/01/10).

During the course of a **nontraffic stop** that is supported by reasonable suspicion or probable cause, an officer may inquire whether the stopped person is carrying weapons or contraband. *State v Simcox*, 231 Or App 399, 403 (2009) (stop in a city park). See also ORS 131.615(1) ("A peace officer who reasonably suspects that a person has committed or about to commit a crime may stop the person and, after informing the person that the peace officer is a peace officer, make a reasonable inquiry.") See also *State v Hemenway*, 232 Or App 407 (2009), where the Court of Appeals required the state to prove that deputies had "reasonable suspicion of criminal activities" to block defendant's truck with their cars.

(c). Arrests are another type of seizure. Arrests must be justified by probable cause to believe the person has committed a crime.

1. Public Roadways

(a) Traffic Stops

What is a traffic stop?

A traffic stop is a temporary seizure that occurs when an officer restrains an individual's liberty or freedom of movement. *State v Hendon*, 222 Or App 97, 102 (2008).

A traffic stop is not an ordinary police-citizen encounter because, in contrast to a person on the street who can end the encounter at any time, a motorist stopped for an infraction is not free to end the encounter when he chooses. *State v Rodgers/Kirkeby*, 347 Or 610, 623 (2010). Police inquiries during a traffic stop are neither searches nor seizures, thus police inquiries in and of themselves require no justification and do not necessarily implicate Article I, section 9. *Id.* at 624.

The Supreme Court extended *State v Hall*, 339 Or 7, 37 (2005) into the arena of traffic stops in *State v Rodgers/Kirkeby*, 347 Or 610, 631 (2010).

What level of suspicion is required for a traffic stop? Oregon case law is inconsistent:

Reasonable suspicion required in some cases, for example:

To be reasonable, traffic stops must be supported by reasonable suspicion that the individual stopped has committed a traffic infraction. *State v Amaya*, 176 Or App 35, 43 (2001), *aff'd on other grounds*, 336 Or 616 (2004). Questioning during a lawful stop on a matter unrelated to the basis for that stop does not require independent reasonable suspicion regarding the unrelated matter. *Id.* at 44. Questioning that detains a defendant beyond a completed traffic stop must be supported by reasonable suspicion that the defendant is engaged in criminal activity. *Id.* *Amaya* is not limited to traffic stops. *State v Hendon*, 222 Or App 97, 102 (2008).

"Traffic stops must be supported by reasonable suspicion that the person stopped has committed a traffic infraction." *State v Broughton*, 221 Or App 580, 587 (2008).

Defendant, a passenger in a car stopped for speeding, "was seized in violation of Article I, section 9, of the Oregon Constitution, when [the officer] took and retained defendant's identification without reasonable suspicion of criminal activity." *State v Ayles*, 348 Or 622, 628 (8/12/10).

Probable cause required in other cases, for example:

An "officer who stops and detains a person for a traffic infraction must have probable cause to do so, *i.e.*, the officer must believe that the infraction occurred, and that belief must be objectively reasonable under the circumstances." *State v. Matthews*, 320 Or 398, 403 (1994) (*held*: ORS 810.410(3)(b) requires that "a traffic stop must be based on probable cause" which has been defined in cases interpreting Article I, section 9).

"In order to stop and detain a person for a traffic violation, an officer must have probable cause to believe that the person committed a violation. ORS 810.410; *State v. Matthews*, 320 Or 398, 403, 884 P2d 1224 (1994)." *State v Nguyen*, 223 Or App 286, 289 (2008) (statutory case).

"To stop and detain a person lawfully for a traffic infraction, an officer must have probable cause to believe that an infraction has been committed. *State v Matthews*, 320 Or 398, 403 (1994)." *State v Isley*, 182 Or App 186, 190 (2002).

"An officer may lawfully stop and detain a person for a traffic infraction if the officer has 'probable cause to believe that an infraction has been committed.' *State v Isley*". *State v Tiffin*, 202 Or App 199, 203 (2005).

"Article I, section 9, requires that an officer who stops a person for a traffic infraction have probable cause to believe that the person has committed the

infraction. *State v. Matthews*, 320 Or 398, 403, 884 P2d 1224 (1994). Probable cause has two components: the officer must subjectively believe that the violation has occurred, and that belief must be objectively reasonable. *Id."* *State v Rosa*, 228 Or App 666, 671 (2009).

"Oregon statutes require probable cause to stop a person for a traffic infraction. *State v Matthews*". *State v McBroom*, 179 Or App 120, 123 (2002).

"Police can conduct a stop for violation of a traffic offenses if they have probable cause to believe that the offense has occurred and that belief is reasonable. *State v Matthews*, 320 Or 398, 402 (1984)." *State v Hall*, 238 Or App 75 (10/20/10).

And compare with the Fourth Amendment:

"Stopping a vehicle and detaining its occupants is a 'seizure' of the person within the meaning of the Fourth Amendment to the Constitution of the United States, 'even though the purpose of the stop is limited and the resulting detention quite brief.' *Delaware v Prouse* __ US __, 59 L Ed 2d 660, 667 (1979)." *State v Tucker*, 286 Or 485, 492 (1979).

State v Alvarez, 235 Or App 402 (3/31/10) (Schuman, Brewer, Riggs SJ) Defendant stopped for driving without license plates. Officer ran defendant's information through dispatch. A second officer arrived. The information check came back clear. First officer returned defendant's documents, gave him a warning for not having license plates, and told him he was free to leave. A few seconds later, that officer asked defendant for consent to search his car and if he had anything the officer needed to know about. Defendant asked why a search was necessary. Second officer then "took over" and calmly stated that there was a high incidence of drug use and trafficking, that defendant had no plates and it was dark, and that's why they wanted to search his vehicle. Defendant consented. Meth pipe with considerable meth residue was found. He moved to suppress, testifying that he did not feel free to leave. Both officers testified that they did not feel there was a safety risk and they did not have reasonable suspicion of criminal activity beyond the traffic violation. Trial court denied the motion without relevant findings.

Court of Appeals reversed: This case is like *State v Toevs*, 327 Or 525 (1998), where a "continuous show of police authority" constitutes conduct "significantly beyond that accepted in ordinary social intercourse" and negates officers' statements that the defendant was free to leave. Moreover, under *State v Rodgers/Kirkeby*, 347 Or 610, 623 (2010), a person's belief that he is not free to leave the scene of a traffic stop is inherently more reasonable than it is in other types of citizen-police encounters. In short, defendant here was stopped. Defendant also has shown the "but for" connection (but for the unlawful seizure, neither officer would have been in a position to request consent). "Because the unlawful seizure and defendant's consent occurred contemporaneously, and because no intervening or mitigating factors exist, we agree with defendant that his consent derived from the officers' unlawful seizure and that the evidence should have been suppressed."

State v Berry, 232 Or App 612 (12/23/09), *rev dismissed* 348 Or 71 (3/09/10) (Schuman, Brewer, Deits SJ) At 2:30 a.m., defendant turned into a closed restaurant's parking lot. She failed to signal 100 feet before turning. Officer stopped her. She made "furtive movements," appeared nervous, but did not appear to be under the influence of intoxicants. She provided her license and registration. She told the officer she was picking up a banner and had driven from another restaurant, which the officer said has a high frequency of drug activity. Officer became suspicious of "maybe some type of illegal activity." He told defendant of his suspicions and asked if she had anything illegal on her She said no. He asked to search her car. She consented. He found meth. Trial court denied her motion to suppress on grounds that the officer had been conducting a search before the citation was written.

Court of Appeals reversed. The state bears the burden of proving that the questioning occurred during an unavoidable lull in the investigation of the traffic infraction. Here the state put on no evidence that, when he began questioning defendant about matters unrelated to the infraction, the officer had not already received all of the information he needed to process the ticket. "Thus, the questioning and the request for consent to search were unlawful unless [the officer] had reasonable suspicion of further criminal activity." For the officer's belief to be objectively reasonable, his suspicion needed to be based on specific and articulable facts. Furtive movements, alone, do not justify suspicion. One's presence in a place where drugs are used does not, alone, justify suspicion. Driving at 2:30 am or being pulled over by a police officer, alone, also does not justify suspicion. Here, the only evidence supporting reasonable suspicion is the furtive movements and the improbability of defendant's story for being in the lot so late. Those facts do not establish reasonable suspicion. Remanded.

State v Gomes, 236 Or App 364 (7/28/10) (Schuman, Landau, Ortega) Officer stopped defendant for a traffic infraction. Officer saw a backseat passenger sit up, and a butane cigarette lighter (a "torch") on the backseat floor. Officer testified that a torch is used to smoke cocaine and meth. Officer asked both defendant and the backseat passenger for ID. Passenger owned the car. While the passenger was retrieving documents, officer saw an open, hinged, empty, hard cigarette pack, which he knew from experience was often used to store drugs. At that point, officer developed a suspicion that illegal drugs were in the car. Officer asked the passenger for the cigarette pack. He dumped its contents, and a pill fell out. Passenger said it was Cialis that a friend had given him. Officer knew that Cialis is a prescription drug, so he knew that the passenger had violated the law prohibiting possession of drugs without authorization. Officer asked passenger for consent to search the car; passenger declined consent. Officer said he would impound the car until he could get a warrant. Passenger then consented. Defendant (who had been driving), reached to get her purse and shielded it. Officer asked for permission to search the purse. Defendant declined consent. Officer asked her to zip it and leave it on the seat, and asked if she had weapons in the purse. She said no. Defendant asked, "Don't you need a warrant?" Officer said he did not need a warrant if passenger consented. Defendant and passenger stepped out, and were patted down. Officer found a bottle cap with a liquid-soaked cotton ball. Officer testified that cotton is

used to siphon drugs so granules are not "sucked" into the syringe and injected into the user's vein. Officer read defendant and passenger *Miranda* rights, asked if defendant had injection tracks on her arms, and she admitted that she did. Officer questioned defendant further, and she answered that she had drugs in her purse. She consented to a purse-search, and cocaine was inside. Trial court denied her motion to suppress the cocaine and her statements. Trial court concluded that officer had reasonable suspicion of criminal activity based on his observations of the lighter and empty cigarette pack.

Court of Appeals affirmed, noting that it may - and here does - affirm when the trial court makes a correct ruling admitting evidence but has articulated an erroneous reason. The state conceded that the trial court erred by concluding that the officer had a reasonable suspicion of drug use, based on the lighter and empty cigarette pack. The legality of a traffic stop depends on the facts. Questioning that is "unrelated to the initial basis for a traffic stop is unlawful in two types of factual situations." First, it is illegal if the officer concludes the stop then initiates a second stop with questions "about unrelated matters without reasonable suspicion." Second, it is illegal if the officer detains the person beyond the reasonable time to investigate the initial stop and issue a citation, without letting the person know that he is free to go. The Court of Appeals analyzed the Oregon Supreme Court's decision in *State v Rodgers/Kirkeby*, 347 Or 610, 623-24 (2010), particularly the supreme court's statement that "Because police inquiries during a traffic stop are neither searches nor seizures, police inquiries in and of themselves require no justification and do not necessarily implicate Article I, section 9." The Court of Appeals concluded that "there are no Article I, section 9, implications if an inquiry unrelated to the traffic stop occurs during a routine stop but does not delay it." Here, the officer began inquiring about the cigarette pack while defendant and the passenger were obtaining and giving their IDs to police. "The relevant fact is that the inquiry that transformed the encounter from a routine traffic stop into a more extended criminal investigation occurred during the time that [the officer] was lawfully and expeditiously conducting the traffic stop and, unlike the inquiries in [*State v Klein*, 234 Or App 523 (2010)], did not result in any extension of that stop." The officer here did not exploit an illegality.

State v Moreno-Rosales, 234 Or App 89 (3/3/10) (Landau, Schuman, Ortega) (This is a statutory case; the Court of Appeals did not mention the Oregon Constitution.) Officer was driving behind defendant, and without any reason, ran defendant's license plate through DMV records. Officer learned that the insurance had expired and the vehicle had been sold to a new owner. Officer stopped defendant for expired insurance. Defendant stated that his insurance was current. Officer requested defendant's driver's license, and defendant produced his Oregon Identification Card, which showed that he had an outstanding arrest warrant and that his license was suspended. He was charged with driving while suspended. Trial court denied his motion to suppress.

Court of Appeals reversed. On appeal defendant argued (1) "that it is impermissible for a police officer, without probable cause and an exception to the warrant requirement, to search the personal information in a driver's DMV record" and

alternatively (2) "even if doing so is permissible, the officer in this case lacked objective probable cause to stop the vehicle for expired insurance because any cause that the officer had to believe that the vehicle was uninsured dissipated once the officer became aware that the vehicle had been sold." The state "fully disputes" the first argument but "concedes" the second, that is "the record does not establish that the officer in this case had objective probable cause to stop defendant's vehicle for expired insurance." The court did not decide whether accessing DMV records constituted a search. The Court accepted the state's concession, and stated the legal standard:

> "A police officer may stop a vehicle or person for a traffic infraction if the officer subjectively believes that the infraction occurred and that belief is objectively reasonable under the circumstances. *State v Matthews*, 320 Or 398, 403 91994); *see also* ORS 810.410(3)(b). It is the state's burden to establish that a traffic stop is supported by probable cause. *Matthews*, 320 Or at 404 n 7."

State v Morgan, 348 Or 283 (5/13/10), see **Officer Safety** exception to the warrant requirement.

State v Phillips, 232 Or App 547 (12/16/09) (Schuman, Brewer, Deits SJ) Defendant was driving slowly through a restaurant parking lot where several break-ins had occurred. Officer saw defendant glance at him then quickly look away, behaving in a "very odd" manner. Defendant drove away and officer followed. Defendant drove into the Intel campus, stopped at a gated barrier, got out of his car, retrieved a box from his backseat, and approached the security guard. Officer drove behind him and blocked his car. Officer told defendant that there had been a rash of break-ins, defendant had looked at him, and defendant's cruising made him rather suspicious. Defendant laughed and said he worked at Jiffy Lube across the street and was distributing promotional coupons. Officer asked for his name and birth date. Defendant gave it to him, officer wrote the information down, and backed out from behind defendant's car and parked 30-40 feet away, while defendant continued to talk to the security guard. Defendant's license was suspended and he was on parole. Officer then believed he had probable cause to stop defendant for driving while suspended. Officer waved defendant over, defendant got out of his car and walked to the officer's car. Officer asked him if he had anything that didn't belong to him or guns in the car. Defendant allowed defendant to search his vehicle. Officer found methadone. Defendant charged with possession of a controlled substance. Trial court denied his motion to suppress the methadone, concluding that no stop had occurred.

Court of Appeals affirmed on other grounds. The Court of Appeals rejected the state's argument that defendant was not stopped when the officer blocked his car, because defendant was not in his car at that time and could have abandoned his car: "That argument strains the concept of freedom beyond its breaking point." Officer intentionally and significantly restrained defendant's liberty, see *Holmes*. But for the unlawful stop, the officer would not have discovered the methadone. However, suppression was not required here because "Defendant's unprompted offer to allow

[the officer] to search his vehicle severed the causal connection between the unlawful police conduct and the discovery of the evidence. It follows that the unlawful police conduct cannot properly be viewed as the source of that evidence." An attenuated connection exists where a defendant spontaneously volunteers to allow a search without any police prompting, see *State v Rodriguez*, 317 Or 27, 29-30 (1993).

State v Rivera-Negrete, 233 Or App 96 (12/30/09) (Ortega, Landau, Riggs SJ) Defendant was a passenger in a car. Defendant saw officer in another car and leaned back quickly in his seat. Officer, driving alongside the car, saw that defendant had tattoos and wore gang clothing. Officer pulled the car over for a traffic infraction and asked the driver for ID. Defendant was pretending to be asleep. He had clothing and tattoos indicating membership in the "13th Street" gang, also known as the Surenos gang, which had armed members. Officer told defendant he knew he was asleep and asked him to sit up. Defendant continued to feign sleep. Officer said, "Hey, dude, I know you're awake. Look over [at] me and talk to me." Defendant sat up and looked at officer with "a thousand-yard stare" that the officer interpreted as a "very menacing look." Officer then noticed that defendant had other Surenos tattoos. Defendant's hands were moving toward the car's center console. Officer believed there was a weapon in the car, and ordered him to put his hands on the dash. He gave his ID to the officer. Officer stepped away from the car to run a warrant check, and saw that defendant was looking at him in the rearview mirror and his hands were moving as if he was trying to conceal something. Officer asked defendant to get out of the car. Defendant did not place his hands behind his back, but put one hand in his pants pocket. Defendant put his hand on the police officer's hand, when the police officer reached defendant's waistband, and a physical altercation ensued. A gun fell from defendant's waistband to the ground. He also had ammunition, a forged social security card, and a glass pipe. Trial court granted his motion to suppress, because rather than focus on the traffic stop and issue the citation, the officer focused on defendant; defendant was stopped (when the officer told him to look at him and sit up) and the officer did not have reasonable suspicion that a crime had occurred when he made the stop; and there also was no threat to the officer until after defendant was ordered out of the car.

Court of Appeals affirmed because the "state has not challenged the trial court's conclusion that defendant was stopped, without reasonable suspicion, when the officer told him to 'look over [at] me and talk to me.' That unchallenged conclusion is an independent basis for affirmance because, absent a showing of attenuation or independence from the illegal stop, the officer's post-stop observations that informed his safety concerns must be suppressed. *See State v Hall*".

State v Rodgers/Kirkeby, 347 Or 610 (2/11/10) (De Muniz; with Gillette concurring; Durham and Linder dissenting) Defendant Rodgers was stopped for driving with a burned-out tail light. Officer noticed a container of blue liquid in the car (used for, among other things, manufacturing meth). Rodgers had open sores on his face (consistent with, among other things, meth use). Rodgers' records check came back clear. Officer had sufficient evidence only to issue a traffic ticket to Rodgers. Two officers nevertheless sidled over to the driver's and passenger's side windows, and began asking about the liquid, another container in the car, and asked

Rodgers for consent to search the car, and they found acid, foil, pseudoephedrine, and other meth-manufacturing materials. He moved to suppress the evidence in his car. Trial court denied the motion. Court of Appeals reversed, concluding that the officer extended the traffic stop without "reasonable suspicion to extend the stop" and asked questions unrelated to the traffic infraction.

Defendant Kirkeby was driving with a suspended license. He had no outstanding warrants. The officer and Kirkeby got out of their cars and walked toward each other. Kirkeby gave officer his license and was businesslike. Officer patted him down, two other officers arrived, and the officers were confident that Kirkeby did not have any weapons on him, but something was in his pocket. He was not free to leave; he consented when the officer asked to search him. Two ziplock bags were inside a small cylindrical container. Meth residue was in the ziplocks. Kirkeby moved to suppress the evidence from the patdown search. Trial court granted Kirkeby's motion. Court of Appeals affirmed, concluding that *Rodgers* controlled the outcome.

The Oregon Supreme Court affirmed the Court of Appeals' decisions, stating the legal principles as follows:

> "Article I, section 9, protects persons and effects from unreasonable searches and seizures by requiring a judicially authorized warrant supported by probable cause authorizing a search or seizure. There are, however, certain limited exceptions to the warrant and probable cause requirements. One such exception permits the police to stop and briefly detain motorists for investigation of noncriminal traffic violations. Police conduct during a noncriminal traffic stop does not further implicate Article I, section 9, so long as the detention is limited and the police conduct is reasonably related to the investigation of the noncriminal traffic violation. However, a police search of an individual or a vehicle during the investigation of a noncriminal traffic violation, without probable cause and either a warrant or an exception to the warrant requirement, violates Article I, section 9. Because police inquiries during a traffic stop are neither searches nor seizures, police inquiries in and of themselves require no justification and do not necessarily implicate Article I, section 9. However, police inquiries unrelated to a traffic violation, when combined with physical restraint or a police show of authority, may result in a restriction of personal freedom that violates Article I, section 9."

Applying that statement of legal principles to the case at hand, Rodgers' freedom of movement was significantly restricted when the officers tag-teamed him from the driver's and passenger's side windows, with questions unrelated to the stop, regarding items in the car. The officers "did not have a reasonable suspicion of criminal activity that justified defendant Rodgers's' continued detention" and "Rodgers was unlawfully seized in violation of Article I, section 9."

Applying that statement of legal principles to Kirkeby's case, the Supreme Court concluded that the officer's show of authority that accompanied his request to

consent to a patdown and subsequent request that Kirkeby consent to an examination of the contents of his pockets happened after the citation should have been issued (or defendant be sent on his way). The further detention limited Kirkeby's freedom of movement "and was not justified by reasonable suspicion of criminal activity." Kirkeby was unlawfully seized in violation of Article I, section 9.

Supreme Court majority interpreted Article I, section 9, as both including and excluding brief traffic-infraction investigations. In one part of the opinion, the Supreme Court considered brief stops of motorists for the "investigation of noncriminal traffic violations" to be an exception to the warrant requirement, stating that there are:

> "certain limited exceptions to the warrant and probable cause requirements. One such exception permits police to stop and briefly detain motorists *for investigation of noncriminal traffic violations*." (Emphasis in original; no citation in opinion).

The Supreme Court implied that that traffic stops do implicate Article I, section 9, by stating that such stops do not "further" implicate Article I, section 9, when the detention is limited as follows:

> "Police conduct during a noncriminal traffic stop does not further implicate Article I, section 9, so long as the detention is limited and the police conduct is reasonably related to the investigation of the noncriminal traffic violation."

But contrary to its point that such stops are "an exception" to the warrant and probable cause requirement, the Supreme Court also stated that police inquiries during a traffic stop do not implicate Article I, section 9, if the investigations are related to the traffic infraction:

> "Because police inquiries during a traffic stop are neither searches nor seizures, police inquiries in and of themselves require no justification and do not necessarily implicate Article I, section 9. * * * [W]e agree that police inquiries during the course of a traffic stop (including requests to search a person or vehicle) are not searches and seizures and thus by themselves ordinarily do not implicate Article I, section 9." (Emphasis added).

Dissent appeared to concur with the majority's conclusion that investigations during a traffic stop, within the scope of the infraction and ticketing process, are not "seizures":

> "A traffic stop may rise to the level of a constitutional seizure if the officer detains the driver, including through questioning, without reasonable grounds." (Durham, dissenting).

Justice Gillette concurred (*stare decisis*, *State v Hall*, 339 Or 7 (2005)). Justices Durham and Linder dissented (defendants consented to the searches and consent is a recognized exception to the warrant requirement; *Hall* requires reconsideration).

(*Note*: The phrase "noncriminal traffic violations" does not appear to have been used in any prior reported Oregon decision. The Supreme Court used it four times in this opinion.)

(*Note*: If Article I, section 9, protects people when they are stopped for traffic infractions, but an exception to the warrant requirement allows state actors to investigate people for "noncriminal traffic violations," then the state bears the burden of proving that the exception is met. In contrast, if Article I, section 9, does not protect people when they are stopped and investigated for "noncriminal traffic violations," then, as *Rogers/Kirkeby* states, "no justification" is required.).

State v Salvador, 237 Or App 424 (9/29/10) (Landau, Schuman, Ortega) Defendant's van weaved in its lane. Officer pulled defendant over, assessed his condition (not impaired), and took his license to check for warrants. Officer turned off his overhead lights. Defendant's license came back with no warrants. Officer decided to ask defendant for consent to search without reasonable suspicion of anything, and without a relationship to the reason for the traffic stop. Officer returned defendant's license, gave him a warning, and said that everything was fine. Officer asked if anyone else was in the vehicle, defendant said "just us, no one else." Defendant explained that the blankets in his car were gifts to friends. Officer said, "great, good enough" and turned back to the police car. Defendant testified that at that point, he felt "100% free to leave." A few seconds, officer came back and asked to search the vehicle. Defendant said "no problem" and signed a consent form. The search revealed several forged resident alien forms. Defendant moved to suppress the forms. Trial court denied the motion on grounds that consent was freely granted.

Court of Appeals affirmed. The request for consent to search was not a *Holmes* type (a) stop, contrary to defendant's claim. The officer had returned defendant's license to him, gave him a warning, and walked away. Defendant said he felt 100% free to leave. No other officer was present, there was no physical restraint, and the officer's car's overhead lights weren't activated. And "a request for consent is not by itself a show of authority" under *Rodgers/Kirkeby*. The Court of Appeals dissected *Rodgers/Kirkeby* to determine if, and when, inquiries during a traffic stop implicate Article I, section 9. The Court of Appeals concluded that police inquiries during a traffic stop, including requests to search a person or vehicle, do not implicate Article I, section 9, but if police conduct involves a physical restraint or show of authority that restricts a person's freedom of movement, that does implicate Article I, section 9. Affirmed.

State v Smith, 236 Or App 5 (6/23/10) (Brewer, Rosenblum, Deits SJ) Defendant was a passenger in a car that Officers stopped for an infraction. The driver's license was suspended, so the car would be towed. Officer asked for defendant's name. Officer wrote out citation to driver, handed it to the other officer, then approached defendant's side of the car. Officer asked defendant to step out (without stating any

reason), and asked him: "Do you have anything on you that you shouldn't have, do you have any weapons, anything like that?" Defendant said he had a pipe and several rocks of crack. Officer arrested defendant. Trial court denied his motion to suppress, although the trial court found that defendant subjectively did not feel free to leave when officer asked him to step out.

Court of Appeals reversed and remanded, explaining that *State v Amaya*, 336 Or 616 (2004), on which the state and trial court relied, "is not pertinent to any issue in this case: there is no suggestion that officer safety concerns justified what occurred here."

Instead, under *Holmes*, the test to determine if a person is "seized" is whether, under the totality of the circumstances, the person believed that the officer intentionally and significantly interfered with his or her liberty or freedom of movement and such belief was objectively reasonable in the circumstances. "There is no bright-line rule as to whether an officer's request that a person step out of a vehicle in the context of a traffic stop constitutes a seizure for purposes of Article I, section 9. Such a request is merely one of the factors that is part of the totality of the circumstances that must be evaluated." Here, the "'totality' of those circumstances differs significantly from a situation where a vehicle's occupant is asked to step out in order to allow the officer to do something with the vehicle that is legitimately related to the traffic stop, or was consented to by the driver." This case is similar to *State v Lantzsch*, 229 Or App 505 (2009) as follows: First, officer here did not tell defendant why he asked him to step out, thus the officer's thoughts and reason cannot inform a court as to what a reasonable person in defendant's situation would have thought, as explained in *Lantzsch*. Also, in both this case and *Lantzsch*, there were two officers and neither told defendants they were free to leave. And in both cases, officers immediately questioned defendants about contraband, rather than taking action related to the stop. Defendant's subjective belief that he was not free to leave is objectively reasonable; he was seized. Trial court erred.

State v Zaccone, 234 Or App 267 (3/10/10) (Armstrong, Haselton, Rosenblum) Defendant was a passenger in a car stopped for a violation. He told the officer he didn't have ID. He gave the officer what sounded like a fake name. The driver had a suspended license. Officer decided to impound the car. No records matched the fake name defendant gave her. Defendant appeared to be trying to hide something under the seat. It was a wallet. He said he had given a false name. After running his true name, officer learned that he was on probation for identity theft. Officer asked the driver and defendant to step out of the car and stand there. She inventoried the car, got defendant's consent to search his backpack and fanny pack, which contained a box of burglary tools and papers with personal information on different people, such as their Social Security numbers, including information on the fake name defendant had given the officer. He also had meth and a pipe. Trial court denied his motion to suppress all of the burglary, identity theft, and meth evidence. Trial court concluded that although the officers did not have reasonable suspicion of criminal activity, he was not unlawfully stopped because he should have felt free to leave.

Court of Appeals vacated and remanded. The relevant inquiry is whether defendant was seized when the officer asked him for consent to search his backpack and fanny

pack. A *Holmes* type (b) seizure occurs when a person subjectively believes his liberty or freedom to move is restricted and that belief is objectively reasonable. The state can prevail on "a *Holmes* type (b) motion to suppress" by proving that either defendant did not believe the officer restrained him or that such a belief was not objectively reasonable, see *State v Lantzsch*, 229 Or App 505, 515 (2009). Objectively, a person in defendant's position would have believed his freedom of movement was significantly restricted when he was asked to go stand in front of the patrol car and then asked for consent to search. He knew officers were investigating him and that the officer knew he had lied about his identity. He was not told that he was free to leave but instead was direct to stand in a specific place. Remanded for trial court to find whether defendant subjectively believed that to the case. If he believed he was not free to leave, then the evidence is to be suppressed. If the court finds that he did not believe he wasn't free to leave, then the judgment should be reinstated.

(b) Parked Vehicles

State v Hemenway, 232 Or App 407 (12/09/09) (Sercombe, Edmonds, Carson SJ) (Truck parked in private driveway) A stop is a temporary restraint of a person's liberty. *State v Holmes*, 311 Or 400, 406-07 (1991). A stop can occur when a person believes his liberty has been restrained and that belief is objectively reasonable in the circumstances. *Id.* at 409-10. But a defendant's belief is irrelevant if reasonable suspicion of criminal activities justified the stop. *State v Ashbaugh*, 225 Or App 16, 28 (2008) *rev allowed* 346 Or 257 (6/04/09); *State v Zamora-Martinez*, 229 Or App 397, 404 (2009).

State v Maxie, 235 Or App 49 (4/21/10) (Armstrong, Haselton, Deits SJ) Defendant was slumped in a parked car with its engine running on a residential street in a high-crime area. Officer parked his car down the street, out of defendant's sight. He walked to her car and asked her, through her partially open window, if everything was okay. She said she had been in a fight with her husband and was trying to talk to a friend. Officer told her she was in an area with drugs and prostitution and he wanted to make sure that nothing illegal was occurring. She said nothing illegal was occurring. Officer asked for her driver's license. She could not produce one. She gave him her name and date of birth. Officer wrote it in his notebook, thanked her, and walked away. Officer found that her license was suspended. He returned to her car, with its engine still running, and asked her to get out. She did. He asked if she had any illegal items. She said she did not. She gave him consent to search her pockets, which contained a meth pipe, and consent to search her car, which contained a morphine pill and two baggies with meth residue. Trial court denied her motion to suppress.

Court of Appeals affirmed: the interaction was "mere conversation" under *State v Hall* because these facts are insufficient to create an objectively reasonable belief that defendant's liberty had been restricted when the officer asked her for her name and date of birth. The officer received that information, closed his notebook, thanked her, and walked away. Officer did not instruct her to remain where she was, he did

not run the warrant check in her presence, and he did not communicate to her any intent to make any use of her information.

Sivik v DMV, 235 Or App 358 (5/19/10) (Schuman, Landau, Ortega) Officer observed defendant drive a van into a parking lot, kicking up gravel, then pull into a driveway of a closed coffee kiosk. Defendant turned off his headlights and slumped behind the steering wheel. Officer drover toward the van, and saw defendant jump into the back seat. Engine was off, driver-side window was down. Officer called out, but received no response. Officer shined his spotlight into the window and could see defendant lying immobile on the back seat. Officer knocked, defendant eventually responded. His speech was slurred and incoherent, a strong odor of alcohol emanated, defendant's eyes were watery and bloodshot. "At that point, [officer] believed that [defendant] had driven while intoxicated, although that belief had not yet ripened into probable cause." Defendant told officer he was sleeping, he was fine, and had had one beer. Officer asked defendant to step out. Defendant was swaying side-to-side, and could not keep his balance. "At that point, [officer] developed the belief that, more likely than not, [defendant] had been driving under the influence of alcohol." Defendant refused field sobriety tests, officer arrested him, and while in custody, defendant refused a breath test.

The DMV suspended defendant's license. He requested a hearing, and the ALJ agreed with the DMV, reasoning that the officer legitimately perceived a possible emergency: "the driver could have been ill or disoriented and was moving to the backseat in order to lie down or harm himself. In fact, the officer's concern was arguably heightened when he called out to the driver and knocked on the vehicle and did not receive an immediate response. Based on the totality of the circumstances, the officer's initial contact with petitioner, to check on his welfare, was for a valid [statutory] 'community caretaking' purpose and did not require legal justification as a stop." The circuit court affirmed.

Court of Appeals affirmed, but clarified and reiterated that compliance with community caretaking statute is not a substitute for compliance with Article I, section 9: "The community caretaking statute is not an exception to the warrant requirement. . . . It is the statutory expression of the well-settled precept that the actions of law enforcement officers, like all other government actors' actions, must be traceable to some grant of authority from a politically accountable body. *State v Bridewell*, 306 Or 231, 239 (1988). ORS 133.033 [the community caretaking statute] is such a grant of authority. . . . a 'community caretaking' search or seizure (as distinct from a search or seizure for purposes of law enforcement) must fall within the ambit of ORS 133.033 and it must also meet constitutional standards. The statute provides the predicate grant of authority, and the constitution specifies limitations on that grant."

Court of Appeals also clarified that the "emergency aid" exception to the warrant requirement as described in *State v Follett*, 115 Or App 672, 680, *rev den* 317 Or 163 (1993), is inapplicable to this case. This case is about a seizure, not a search. By its terms, the emergency aid exception "is an exception that can justify warrantless *searches*." The Court declined to address whether that exception can justify

warrantless stops, "because the stop un the present case was lawful in any event." By the time the interaction between the officer and defendant became a constitutionally significant seizure, the officer had reasonable suspicion that defendant had driven while intoxicated." (Emphasis added). (The Court also footnoted that in *State v Wood*, 210 Or App 126 (2006), it noted that the community caretaking statute and the emergency aid exception to the warrant requirement were "analogous.").

Turning to the Article I, section 9, analysis, the Court observed that it "is frequently a daunting task to determine when, exactly, a constitutionally insignificant encounter, 'mere conversation,' becomes a seizure triggering constitutional protections." Here, when the officer awakened defendant and asked him if he was in distress, "the encounter was mere conversation by anybody's standard." When the officer interfered with defendant's freedom of movement (by asking him to step out of the van), he had "developed a suspicion" that defendant had been drunk driving, "and that suspicion was reasonable" because of he drove into the lot kicking up gravel, then stopped and slumped over the steering wheel. The officer testified that he did not develop probable cause to believe defendant was drunk driving until after defendant stepped out of the van (when he smelled alcohol), the officer "also testified that he had developed a suspicion before making contact. The stop was lawful, and the ALJ did not err in rejecting [defendant's] argument to the contrary."

State v Towai, 234 Or App 292 (3/17/10) (Brewer, Schuman, Riggs SJ) Defendant was a passenger in a car parked on the roadside. Defendant and the driver – his girlfriend – were arguing. Officer saw the car, did not observe any traffic violation, and did not suspect any criminal activity. He observed that defendant and the girlfriend looked upset. Officer asked defendant to step out of the car and if he had ID. Defendant got out and said his ID was in the trunk in his backpack. Officer asked if he could get the ID and defendant consented. No ID was found, but two glass cylinders were in the backpack. Defendant said he worked at a glass company. Second officer arrived. In defendant's presence, the first officer asked the second officer to run defendant's name and birthdate for "wants and warrants." That check showed that his girlfriend had a restraining order against him. Officer arrested defendant, handcuffed him, *Mirandized* him, and put him in the police car. Officer did not suspect the girlfriend of any crime but asked if he could search her car. She consented. A bag of meth was in the center console. Girlfriend said it wasn't hers, officer handcuffed her, then freed her, and asked defendant if the meth was his. He denied it. Officer asked why he was getting the girlfriend in trouble if the meth was not hers. Defendant admitted the meth was his. Defendant moved to suppress the glass in his backpack, the meth in the car, and his statements. Trial court concluded that when officer searched defendant's backpack for ID, defendant had been stopped and officer did not have reasonable suspicion for a stop, but the girlfriend's consent to search the car was valid. Trial court suppressed the glass in the backpack for allowed into evidence the meth and defendant's statements.

Court of Appeals reversed. First, the trial court correctly determined that defendant was unlawfully stopped when the evidence was found, because evidence that an officer radioed for "wants" in the presence of a defendant, in the absence of any contradictory evidence, does not support the conclusion that the defendant didn't

know the officer was investigating him, see *State v Khoshnaw*, 234 Or App 24 __ (2010). Second, the state conceded that if defendant was unlawfully stopped, then the girlfriend's consent was obtained through exploitation of the illegality, but argued that giving *Miranda* warnings to defendant provided an intervening circumstance to render the evidence admissible. The court stated: we "have rejected in numerous cases the state's proposition that *Miranda* warnings serve as a 'universal solvent' that renders unimportant the existence of a prior illegality, citing *State v Ayles*, 220 Or App 606, 615, *rev allowed*, 345 Or 460 (2008) [Oregon Supreme Court affirmed, see **Attenuation** as Exception to Suppression, *post*]. The officer released the girlfriend because he believed that defendant owned the drugs – and the reasons for that belief derived from the unlawful stop. Officer also questioned defendant, while defendant was unlawfully detained, and pressured him to admit that the drugs belonged to him to exonerate his girlfriend. "Under the totality of the circumstances, defendant's statements cannot be viewed as 'volunteered' in a manner that is unrelated to the prior illegality."

See ***State v Kurokawa-Lasciak***, 237 Or App 492 (9/29/10) (Schuman, Landau, Ortega), under **Mobile Automobiles** exception to the warrant requirement, *post*.

State v Hall, 238 Or App 75 (10/20/10) (Schuman, Landau, Ortega) Officer received a dispatch call reporting a suspicious vehicle. He saw a car that matched the one in the report. It was parked 2-3 feet from the curb, which violates a statute mandating that wheels must be within one foot from the curb. Defendant was asleep at the wheel. Officers tapped on the window, defendant woke up, asked for ID, and defendant gave it to them. Neither officer had any evidence of any offense other than the wheels being more than one foot from the curb. While running defendant's record, officers asked if he had drugs or weapons. Defendant said he didn't think so, as to the drugs. Officers asked for consent to search defendant for weapons, he consented and got out of the car. Officer patted him down and found nothing. Then officer asked to search his car, defendant consented, and officers found a glass pipe. Officers asked if he had meth, and defendant said yes, in the center console. Officers found it, handcuffed him, Mirandized him, and put him in the patrol car, and then that defendant's license was suspended. Defendant moved to suppress the meth on grounds that "the deputies lacked probable cause to stop him" or that they obtained consent unlawfully. Trial court denied the motion.

Court of Appeals affirmed. "Police can conduct a stop for violation of a traffic offenses if they have probable cause to believe that the offense has occurred and that belief is reasonable. *State v Matthews*, 320 Or 398, 402 (1984)." Here, the officers believed defendant had committed a traffic infraction, and that belief was undeniably reasonable: his car was not parked within 12 inches of the curb. The detention did not violate Article I, section 9. The consent to search occurred during an unavoidable lull in the investigation while the officers were waiting the result of a records check, thus contrary to defendant's argument, the officer's questioning did not unreasonably extend the duration of the stop or exceed the scope of the stop. As to "unavoidable lulls" in a traffic stop, "*Rodgers/Kirkeby* provides no authority for the proposition that police inquiries during an unavoidable lull in a traffic stop must be justified by independent reasonable suspicion." Affirmed.

(c) On Foot

State v Khoshnaw, 234 Or App 24 (3/3/10) (Brewer, Wolllheim, Breithaupt pro tem) Defendant walked into a 7-Eleven parking lot at 1:00 a.m. He paused before entering and fiddled with the front of his pants for about 10 seconds, but his hands were empty when he entered the store. He walked out with a soda and chips and went on his way up the road. Officer thought maybe defendant was casing the 7-Eleven and then might rob it. So after defendant had walked a block and half up the road with his soda and chips, officer parked his car on the road close to defendant. Defendant stopped walking. Officer asked him where he was going and what he was doing, and asked for his name and birthdate, which defendant provided. Officer called in that personal information from his shoulder radio while defendant was present a couple of feet from him. Officer asked if he could check defendant for weapons. Defendant said "if you want to." Defendant had a concealed pistol and was charged for being a felon in possession of a firearm. Trial court denied the motion to suppress the pistol, concluding that defendant was not stopped (subjective prong of *Holmes* type (b) analysis is not met), but even if he was, reasonable suspicion supported the stop.

Court of Appeals reversed. State had acknowledged at trial that the officer writing down defendant's information then calling it in on his radio provides the basis for a person's belief that his freedom of movement had been restrained. Defendant testified that he did not feel free to leave during the conversation with the officer. No evidence supports the trial court's finding that defendant was not aware that the officer had called in a name – the evidence is to the contrary. Thus this is "one of the rare cases" where a key finding by the trial court is not supported by evidence in the record. As to reasonable suspicion, an officer can stop someone if he reasonably suspects that the person has committed or is about to commit a crime, which statutorily requires "unusual conduct" leading the officer to believe "criminal activity may be afoot." But here, whatever suspicion the officer may have had about defendant preparing to rob the 7-Eleven by fiddling with his pants, it was insufficient to justify a stop at the point that the officer stopped him. "We agree that fiddling around with the front of one's pants for ten seconds while standing a short distance away from the entrance of a convenience store is somewhat 'unusual conduct.'" And it could have been consistent with someone preparing to rob a store – if he had drawn out a mask, a gun, or gloves. But here, he bought soda and chips and walked away.

State v Lovell, 233 Or App 381 (1/27/10) (Rosenblum, Brewer, Riggs SJ) Defendant was in a trailer park's parking lot at 1:15 am. Officer observing knew that the area was known to have high drug traffic and that defendant associated with meth traffickers. Defendant approached a man that the officer knew was a drug dealer; he saw the two reach toward each other with their hands for a 10-20 second contact. Defendant had her back to officer, so officer did not see her touch the man or exchange anything. Officer suspected a drug deal, so he drove into the parking lot while defendant walked away. Officer, armed and uniformed, got out of his car and

said, "Shari, can I talk to you for a minute?" Officer was 10-20 feet from her. She turned around, and said "sure" and walked over to him. Another armed and uniformed officer got out of his patrol car and just stood nearby, watching. First officer asked where she'd been. She said using someone's phone. Officer did not believe that. He asked if she had anything illegal. She said no. He asked if he could check. She said, "sure, I don't have anything." Officer patted her down and found nothing. He then asked if he could check her backpack. She said, "Fine. Knock yourself out." Before opening the pack, he asked if there was anything sharp in there. She said she had hypodermic needles. Officer looked, found several needles, and meth. She moved to suppress the evidence, and the trial court denied her motion.

Court of Appeals vacated and remanded. Issue is whether defendant was stopped when the officer asked for her consent to search her backpack. "To justify a stop, a police officer must subjectively believe that the person stopped has committed a crime, and that belief must be objectively reasonable under the totality of the circumstances." *State v Kusaj*, 174 Or App 575, 578 (2001) rev den 333 Or 400 (2002). Here, officer lacked reasonable suspicion once the patdown revealed nothing. Officer no longer had that reason to believe defendant had been handed drugs. "It follows that he lacked reasonable suspicion to detain defendant when she consented to the search of the backpack." (Emphasis added).

Court of Appeals determined that this is not a *Holmes* type (a) stop. It may be a *Holmes* type (b) stop. An encounter can become a stop if the person reasonably believes he is subject to a criminal investigation and his liberty of movement has been significantly restricted. The state can prevail against a *Holmes* type (b) motion if it disproves either the objective or subjective components (either defendant did not feel significantly restrained or such a belief would not be objectively reasonable). Here, objectively, a reasonable person would infer from the officer that she was not allowed to walk away when the officer asked to search her pack. Two armed, uniformed officers approached her in two patrol cars at 1:15 a.m., asked her to speak, asked where she'd been, and if she had anything illegal. There are no trial court findings as to her subjective belief. "Remanded for further proceedings."

See ***State v Medinger***, 235 Or App 88 (4/28/10), discussed under Probable Cause to Arrest, *post*.

(d) On Bicycles

(*Note*: A bicycle stop may be a "traffic stop" if it occurs on a public way. ORS 814.400).

State v Deneen, 234 Or App 582 (3/31/10) (Ortega, Landau, Carson SJ) Defendant biking at night without a light. Officer yelled out the window that defendant needed a light, asked for defendant's name, and ran a records check, which showed that defendant had a meth-related arrest. Officer told defendant he was free to go. Defendant got on his bike and pedaled away. But before defendant got far, officer asked if he could speak with defendant again. Defendant said ok.

Officer asked why defendant appeared nervous and that this was a high-crime area. Defendant said he had a marijuana pipe. Defendant also pulled out a bag of meth from his pants pocket. Trial court denied his motion to suppress, concluding that the officer had engaged in "mere conversation" after telling defendant he was free to leave. Court of Appeals affirmed: defendant was not "stopped" under *Holmes*. There was no continuous show of authority, no physical control, only one officer, no repeated requests for consent, and officer was low-key and casual, similar to *State v Bretches*, 225 Or App 602, 604, *rev den* 346 Or 361 (2009). Same result under Fourth Amendment.

State v Klein, 234 Or App 582 (3/31/10) (Armstrong, Haselton, Rosenblum) Defendant biking at night without a light or reflectors. He turned without using his arm to signal. Officer followed defendant and approached him. Defendant was "fidgeting" with a red light on the back of his bike. A second officer arrived. Defendant apologized for not having a light. Officer lectured him about that. Officer requested his ID. Defendant ran a records check, found no warrants, but that defendant was being supervised for burglary. Officer noticed a key ring with a lot of keys and believed that keys could be burglary tools. Rather than asking about the keys, though, officer asked if defendant had drugs. Defendant said no. Officer asked to search him. Defendant said he'd rather not be searched. Officer said, what would your probation officer think about the keys? Defendant said he didn't know and explained where the keys were from. Officer asked if defendant had anything on his person he didn't want the officer to know about. Defendant said "not really." Officer asked defendant if he had a large or small amount of meth on him. Defendant said he had a little marijuana and "a little bit of shit," meaning meth. Officer asked if it was for personal use or to sell. Defendant said about a gram, for personal use only. He became upset and said all he wanted was to go to the Plaid Pantry to buy a Coke. He had a dollar. Officer took his dollar and bought a Coke for defendant. Defendant drank the Coke. Officer asked if he could get the meth. Defendant held his arms up. Officer searched him and found the marijuana and meth. The trial court denied defendant's motion to suppress the drug evidence.

Court of Appeals reversed. All parties agree that the initial stop was valid and that officer was entitled to question him about the keys. But, although the officer had a sufficient basis to question defendant about the keys, he did not have justification to question him about drug possession. As *State v Rodgers/Kirkeby*, 347 Or 610 (2010) describes, inquiries during the course of a traffic stop "are not searches and seizures and thus by themselves ordinarily do not implicate Article I, section 9." That changes, however, when the investigation related to the infraction is completed (or should be). Further questions must be justified by some basis other than the infraction. Here, that justification was not present when officer inquired about matters unrelated to the stop. He could have questioned defendant about the keys, but not about the drugs without a reasonable suspicion that defendant possessed them.

State v Thorpe, 236 Or App 459 (7/28/10) (Per Curiam – Wollheim, Brewer, Rosenblum) Officer stopped defendant for bike-riding at night without a light. State concedes that, without reasonable suspicion, officer began questioning

defendant about drugs, and repeatedly asked for consent to search. Trial court denied his motion to suppress. Court of Appeals reversed and remanded in accordance with *State v Rodgers/Kirkeby*, 347 Or 610 (2010).

State v Gant , 237 Or App 74 (9/01/10) (Landau, Ortega, Sercombe) Officer observed defendant biking at night without a light. Defendant turned into the front yard of a private residence and held a loud verbal altercation with the home owner, who was ordering defendant off of his property. Officer asked defendant, "Hey, can I talk to you for a second? What's going on?" Defendant came over to the squad car, officer asked for ID, and officer called in a records check. While waiting for the results of the check, officer asked if defendant had any weapons. Defendant said no. Officer asked for consent to pat him down. Defendant consented. Officer found meth and a pipe on him. Defendant moved to suppress that evidence, contending that although the stop was supported by reasonable suspicion of a traffic infraction, disorderly conduct, or criminal trespass, the officer's query about weapons was unrelated. Trial court denied the motion. Court of Appeals affirmed: a stop is a temporary restraint of a person's liberty for a criminal investigation; it must be justified by reasonable suspicion of criminal activity, under *Rodgers/Kirkeby*, 347 Or 610, 621 (2010). Reasonable suspicion requires that a police officer subjectively believe that a person has committed a crime and that the belief be objectively reasonable under the totality of circumstances, see *State v Huggett*, 228 Or App 569, 575 (2009). Here, the officer's request for consent to pat down defendant was not an unlawful extension of the stop, due to the reasonable suspicion of disorderly conduct.

2. Other Public or Nonprivate Places

(a) Public Parks

State v Ashbaugh, 225 Or App 16 (2008), *rev allowed* 346 Or 257 (6/04/09).

(b) Hospitals

Hospital emergency room, even a curtained-off portion of it, is open to the public and is not a private place; officers' observations of a defendant therein do not constitute a search for Article I, section 9, purposes. *State v Cromb*, 220 Or App 315, 320-27 (2008), *rev denied* 345 Or 381 (2009).

State v Machuca, 347 Or 644 (02/11/10) (De Muniz) The evanescent nature of a suspect's blood alcohol content is an exigent circumstances that will ordinarily permit a warrantless seizure of blood, in these circumstances. This warrantless search of defendant's body and the seizure of his blood occurred in a hospital room by a nurse at a police officer's direction, after defendant had been involved in an car accident, had been Mirandized, and had his statutory implied rights and consequences read to him. Supreme Court here declined to address whether police officers needed a warrant or consent before entering a criminal suspect's hospital room (defendant raised that issue in his response to the state's petition for review).

State v Hays, 234 Or App 713 (4/14/10) (Sercombe, Wollheim, Brewer) Defendant, suspected of drunk driving and taken to a hospital, consented to a warrantless breath test in a hospital, then moved to suppress the results. Trial court denied the motion. Court of Appeals affirmed under *State v Machuca* and *California v Schmerber*. See Exigent Circumstances, *post*.

***State v Everett*,** 237 Or App 556 (9/29/10) (Edmonds, SJ, Brewer (no third judge) See Warrants, *post*. This case only addressed the Fourth Amendment, not Article I, section 9, of the Oregon Constitution. Defendant was shot in the arm by a police officer. Magistrate issued arrest and search warrants commanding the police to search defendant and to seize bullets and bullet fragments. Defendant was arrested, and brought to an unidentified "a local hospital." Surgeons removed the bullet from defendant's arm at a hospital, pursuant to a warrant, against his wishes. Court of Appeals affirmed the trial court's ruling that the bullet-removal procedure did not violate defendant's constitutional rights: the search warrant authorized it, and that warrant did not lack particularity. It authorized a search of defendant's person for bullets and bullet fragments and indicated that defendant had been wounded by a police bullet.

(c) Public Schools

See **Public School** searches, under Exceptions to Warrant requirement, *post*.

SER Juvenile Dep't of Clackamas County v M.A.D., 348 Or 381 (6/10/10) (Balmer) The juvenile court concluded that although public school officials did not have probable cause to search a student's jacket pocket for marijuana, the federal standard from *New Jersey v TLO*, 469 US 325 (1985), should determine whether the school violated the student's Article I, section 9, rights. (The Fourth Amendment, applicable to the states through the Fourteenth, allows a public school official to search a public school student for contraband if the school official has reasonable grounds – a lower standard of suspicion than probable cause -- to suspect that the search will reveal evidence of a violation of law or school rules). The juvenile court here concluded that, under that federal standard, school officials had "reasonable grounds" to search Youth and the search was reasonable in scope. Juvenile court denied Youth's motion to suppress. Court of Appeals reversed in a divided opinion.

State conceded that the school did not have probable cause to search. State did not argue that any existing exception to the warrant requirement applied here. Specifically, the state did not contend that the "statutorily authorized administrative program" exception applied or that Youth consented to the search. Instead it argued that the Supreme Court should import *TLO*'s "reasonable suspicion" standard into Article I, section 9.

The Supreme Court did. The Supreme Court reversed the Court of Appeals, apparently creating a new exception to the warrant requirement in Article I, section 9. The Court held:

> "when school officials at a public high school have a reasonable suspicion, based on specific and articulable facts, that an individual student possesses illegal drugs on school grounds, they may respond to the immediate risk of harm created by the student's possession of the drugs by searching the student without first obtaining a warrant."

The Supreme Court created the lower-suspicion standard by describing what it views "as the closest analogy" to schools: the "officer-safety exception." That exception allows a police officer to conduct a limited search:

> "to protect the officer or others if 'during the course of a lawful encounter with a citizen, the officer develops a reasonable suspicion, based upon specific and articulable facts, that the citizen might pose an immediate threat of serious physical injury to the officer or to others present."

The Supreme Court reasoned that the officer-safety exception applies to

> "unique circumstances" where a "police officer in the field frequently must make life-or-death decisions in a matter of seconds. There may be little or no time in which to weigh the magnitude of a potential safety risk against the intrusiveness of protective measures."

The Supreme Court reasoned that school settings are both similar to and different from street encounters with law enforcement:

> - The "unique context of the school setting distinguishes school searches from searches conducted by law enforcement officers in other settings."
>
> - The "school context is sufficiently different from the setting in which ordinary police-citizen interactions occur to justify an exception to the warrant requirement in certain circumstances".
>
> - The "concerns underlying the officer-safety exception also apply to some searches conducted by school officials".
>
> - "For the same reasons that we have applied the less exacting 'reasonable suspicion' standard, rather than the probable cause standard, to determine whether a limited officer-safety search is permissible under Article I, section 9, we conclude that the reasonable suspicion standard should apply to a search . . . for illegal drugs that is conducted on school property by school officials acting in their official capacity."

The Supreme Court reasoned that school searches for marijuana are sufficiently similar to ordinary police-citizen interactions where there is an "immediate threat of serious harm" to dispense with the Oregon Constitution's warrant requirement in the school setting:

> As "with an officer-safety search, when a school official develops a 'reasonable suspicion,' based on 'specific and articulable facts,' that a particular individual on school property either personally poses or is in the possession of some item that poses an 'immediate threat' to the safety of the student, the official, or others at the school, the school official 'must be allowed considerable latitude to take safety precautions.'" (Quoting *State v Foster*, 347 Or 1, 8 (2009) on the officer-safety exception).

The Supreme Court did not address the text of Article I, section 9, except to recite it in a footnote. The Supreme Court did not address the history of Article I, section 9, such as founders' intent or early case law. It did not cite any law review articles or books. It did not cite any statistics or data. It did not discuss or distinguish an idea that noncriminal administrative searches in public schools could be justified by a lower standard. It did not cite (or credit) the "special needs" doctrine that Justice Blackmun posited in *TLO*, see 469 US at 351-53 (Blackmun, J., concurring). Instead, the Supreme Court recited some state statutes on public schools' authority and purpose.

Greene v Camreta and Deschutes County, et al, 588 F3d 1011 (9th Cir 12/09/10) (Berzon, Bea, Gutierrez), *cert allowed*, __ S Ct __ (10/12/10) (Federal court, federal constitution) Ninth Circuit held that an investigation of a child at her elementary school in Bend, by a child caseworker and deputy sheriff, and the removal and examination by the caseworker, for two hours, and without a warrant, probable cause, or parental consent, violated two young girls' and their mother's Fourth Amendment rights. The US Supreme Court has granted certiorari.

Nimrod Greene was arrested for suspected sex abuse of a child. That child's mother told police that Nimrod's wife, Sarah, told her she didn't like how Nimrod acted when their young girls sat on Nimrod's lap and how he slept with them when he was drunk. A state caseworker heard about those allegations a week after Nimrod was arrested and had been released. Three days after hearing that Nimrod was released, the state caseworker visited Nimrod's daughter's elementary school to interview her. Sarah, her mother, was not informed of this interview, and the state caseworker did not obtain a warrant or a court order. A deputy sheriff was with the caseworker. The child was interviewed for 1-2 hours, and it was not recorded. (The child said it was 2 hours, the caseworker and deputy stated it was one hour). The child stated that Nimrod had been touching her private parts since she was three, and that he tried to do it while drinking. The child told her mother that night about the interview. The caseworker and deputy visited the Greenes' home and spoke with Sarah and Nimrod, who both denied the sex abuse. Nimrod was indicted on six counts of felony sexual assault on two children. He was released, and that same day the Greenes' attorney informed the caseworker that all family members had been advised of their Fifth Amendment rights to remain silent and invoked that right. Caseworker went to the Greene home the next day; Sarah and the caseworker had different versions of what happened. The children were placed in temporary custody of the state. The jury did not reach a verdict on the sex abuse charges.

Sarah filed the present section 1983 action on her own behalf, and on her two children's behalf, contending that the in-school interview of the child violated her Fourth Amendment rights. The district court granted summary judgment to all defendants.

The Ninth Circuit reversed in part. In a detailed and lengthy opinion, the Ninth Circuit panel rejected defendants' reliance on *T.L.O.*, reasoning that *New Jersey v T.L.O.* is "at best tangentially related to this case." The US Supreme Court, in *T.L.O.*, noted that it was only addressing searches by a teacher or school official, not by law enforcement. Here, the child was "seized" by a state caseworker and deputy sheriff. The Ninth Circuit panel here also rejected a "special needs" analysis, which neither the US Supreme Court nor the Ninth Circuit has applied to searches or seizures during a child abuse investigation, but noted that the federal district and circuit courts are split on the applicability of the "special needs" doctrine to child abuse investigations. Law enforcement was too "deeply involved in the seizure" of this child to justify deploying the "special needs" doctrine. The Ninth Circuit panel held that "the general law of search warrants applies to child abuse investigations." The panel concluded:

> "In short, applying the traditional Fourth Amendment requirements, the decision to seize and interrogate [the child] in the absence of a warrant, a court order, exigent circumstances, or parental consent was unconstitutional." The Ninth Circuit also held that defendants in this case are entitled to qualified immunity (affirming the district court in that regard).

Plaintiffs also alleged that their Fourteenth Amendment rights were violated because, they allege, the caseworker lied. The Ninth Circuit panel held that the caseworker is not entitled to qualified immunity on plaintiffs' claim that the caseworker lied to obtain a court order to remove the children from Sarah and Nimrod's home (the district court's grant of summary judgment to the caseworker on the Greenes' Fourteenth Amendment claims stemming from the children's removal from the home is reversed).

(d) Jails and Detention

See **Jails and Juvenile Detention,** under Exceptions to Warrant Requirement, *post*.

(e) **Internet** – Fourth Amendment

United States v Ahrndt, 2010 WL 373994 (D Or 1/28/10) (08-468-KI) (This case addressed the Fourth Amendment, not the Oregon Constitution). Defendant used his unsecured (non-password-protected) wireless network router and his iTunes software was set to "share" so that the general public could access them with a wireless-enabled computer. The router's range was about 400 feet in a doughnut shape around defendant's house. Defendant's neighbor, using her wireless access, picked up defendant's wireless network and began using iTunes. Neighbor noticed that another user's iTunes library was open to share. Neighbor opened the shared library (titled "Dad's Limewire Tunes") and found files with four-letter words for

sexual acts and body parts, references to 5 and 8 year old children, and other child-porn titles. Neighbor did not open any, but called the police. Officer duplicated her steps to access Dad's Limewire Tunes, and found the same file names, along with words like "getting raped." Officer asked neighbor to open one, she did, and saw a photo of a child engaged in sexually explicit conduct.

Officers interviewed the neighbor thereafter, and ran the plates of a car in defendant's driveway, which showed that defendant, a convicted sex offender, lived there with a friend. US Magistrate granted a search warrant to access defendant's Belkin54g wireless network to determine the internet protocol (IP) address of the router, which would allow investigators to determine from the ISP who owned that wireless network. After obtaining the warrant, an agent accessed the network, got the IP address, and through the American Registry for Internet Numbers, agent learned that the IP address belonged to Comcast. Agent served a summons on Comcast and learned that defendant was the Comcast subscriber for the IP address in question. Agent obtained a second search warrant from the magistrate, allowing him to search the house for routers, computers, and files and storage media containing child porn. Officers seized those items and interviewed defendant, who gave "a candid and lengthy account of his child pornography addiction." He told officer, among other things, that they'd find child porn and that no one else uses his computer except his live-in friend shares the wireless network. Defendant moved to suppress all evidence seized after the officer initially accessed defendant's files through neighbor's computer, on grounds that that initial access was a warrantless search violating the Fourth Amendment.

Judge King held that a "defendant's conduct in operating his iTunes software with the preferences set to share, in conjunction with maintaining an unsecured wireless network router, diminished his reasonable expectation of privacy to the point that society would not recognize it as reasonable. . . . Having failed to demonstrate either a reasonable objective or subjective expectation of privacy, defendant cannot invoke the protections of the Fourth Amendment. When [a neighbor and a police officer] accessed the child pornography in defendant's iTunes library, no search occurred." Judge King analogized the expectation of privacy in a wireless network to cordless phones, and concluded that as "a result of the ease and frequency with which people use others' wireless networks . . . society recognizes a lower expectation of privacy in information broadcast via an unsecured wireless network router than in information transmitted through a hardwired network or password-protected network." Judge King further analogized LimeWire and iTunes as follows: "When a person shares files on LimeWire, it is like leaving one's document sin a box marked 'free' on a busy city street. When a person shares files on iTunes over an unsecured wireless network, it is like leaving one's documents in a box marked 'take a look' at the end of a cul-de-sac" and concluded that iTunes "lesser reach on file distribution does not reneder it unlike LimeWire in terms of its user's reasonable expectation of privacy." Motion to suppress denied: no search occurred.

3. Houses, Rooms, and Curtilages

Physical entry into the home is "the chief evil against which the working of the Fourth Amendment is directed." *United States v U.S. District Court*, 407 US 297, 313 (1972).

"The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion. *Entick* v. *Carrington*, 19 Howell's State Trials 1029, 1066; *Boyd* v. *United States*, 116 U.S. 616, 626-630." *Silverman v United States*, 365 US 505, 511 (1961). "With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo v United States*, 533 US 27, 31 (2001) (citing *Silverman*).

"The famous maxim about an 'Englishman's house is his castle,' was perhaps a concept quite foreign to common law. . . . the true origin of the . . . idea lies in the Roman law where the maxim was honored in practice as well as theory: No Roman citizen could be dragged from his home by any law enforcement official. . . . The idea . . . appears first in Gaius's Commentaries on the Twelve Tables, and was later picked up by Cicerio, De Doma Sua . . . the idea of the inviolability of the house was also part of German and French law . . . lawyers in the colonies were well acquainted with Roman and Continental legal writings." *United States v On Lee*, 193 F3d 306, 316 n 19 (Frank, J. dissenting) (citations to textbook omitted).

"Absent consent, a warrantless entry can be supported only by exigent circumstances, *i.e.*, where prompt responsive action by police officers is demanded. Such circumstances have been found, for example, to justify entry in the case of hot pursuit, *United States v Santana*, 427 US 38 (1976), the destruction of evidence, *United States v Kulcsar*, 586 F2d 1283 (8th Cir 1978), flight, *Johnson v United States*, 333 US 10 (1948), and where emergency aid was required by someone within, *United States v Goldenstein*, 456 F2d 1006 (8th Cir 1972)." *State v Davis*, 295 Or 227, 237-38 (1983).

See ***State v Brown***, 348 Or 293 (5/27/10), under **Abandonment** as an exception to the warrant requirement, *post*. Defendant disclaimed any possessory or privacy interest in her bags that she'd left in someone else's motel room.

State v Fair, 233 Or App 298 (1/27/10) (Brewer, Rosenblum, Riggs SJ) 911 call received: a female caller saying "stop it" and "get off of me" and a male voice yelling in the background before the line went dead. 911 operator called back but no one answered. Officers dispatched to the address. They circled the house on foot, saw an angry-looking man through the glass door. One officer yelled for the man to keep his hands visible; he did not respond. Officer knocked on the front door, prepared to force entry. Defendant and her husband (the angry man) answered.

Defendant had a swelling over her eye. Officer ordered both outside. Officer handcuffed defendant on the front porch. Officer instructed defendant to stay on the porch. He questioned her about the 911 call. She said it was an accidental call. Officer asked for her married and then her maiden name and DOB, to run a warrant check, and her record came back clear under both names. Defendant had never had a driver license, but when the officer asked her if she'd been arrested, she said she had for drug possession. Defendant said she had injured her eye while moving furniture. Then an orange plastic syringe cap fell out of her pants leg. She asked the officer not to tell her husband, then said she had injected meth weeks earlier. Then she consented when officer asked to search her person. Officer found a broken glass pipe with drug residue. Officer arrested her. Trial court denied her motion to suppress the evidence, reasoning that the initial contact was not a stop and she consented to the search.

Court of Appeals reversed and remanded. Defendant was seized when she was ordered to come out of the house and remain on the porch. Officer safety was not an issue here: officer "testified that he did *not* have safety concerns". Court of Appeals rejected "the state's suggestion that generalized safety concerns authorized the officer to order defendant, a potential crime victim, from her home and detain her outside under circumstances such as these."

The state next argued that the officers' detention of defendant was "reasonable and insignificant because defendant herself" had called 911. The Court of Appeals rejected that theory as well. A basic principle of *State v Holmes* is that "a police-citizen encounter without any restraint of liberty (*e.g.*, mere conversation, a non-coercive encounter) is not a 'seizure' and, therefore, requires no justification." This case is not like cases involving encounters that occur on public streets where officers flag down motorists. The "test for determining whether a contact exceeded mere conversation is whether the officer engaged 'in conduct significantly beyond that accepted in ordinary social intercourse.'" *Holmes*.

> "The 'mere encounters' in *Holmes* and the cases underlying it occurred in streets or other public places. There is a significant difference between the typical circumstances of a police officer approaching a person on a public street – for example by flagging down a motorist in order to conduct a brief exchange of information, as was the case in *Holmes* . . . – and a police officer going to the door of a person's home, ordering the person out of the home, and instructing the person to remain with the police officer, which is what occurred in this case." (Emphasis added).

In short, defendant was unlawfully seized before the officer observed the syringe cap. Trial court erred in denying defendant's motion to suppress.

See ***State v Baker***, 237 Or App 342 (9/22/10) (Armstrong, Haselton, Rosenblum), discussed under Emergency Aid Exception, *post*. Officers received a report only of yelling in a home, and a code word being used, with no evidence of a physical altercation, and did not knock on any doors before entering the home. By the time the officers entered the house, their belief that there was a life-threatening

emergency requiring their intervention was not objectively reasonable. The officers looked in to a window before entering the back door, and did not see any intoxicated persons, no upset furniture, no seemingly upset victim, no "indicia of prior and potential violence." Held: officers' entry here was unlawful, evidence seized as a result of that entry should have been suppressed.

State v Caster, 236 Or App 214 (7/6/10) (Rosenblum, Haselton, Armstrong) (Fourth Amendment only). Defendant is a felon who is prohibited from carrying firearms. Officers were called to defendant's house on a report that defendant was carrying a firearm. Defendant and his girlfriend lived together in the house. They were standing in their driveway when officers encountered them. They had been target shooting, they said, but defendant said he only carried the rifle case, not the rifle. Officer asked where the rifle was. Defendant and his girlfriend said they were in the house. Officers learned that there was a warrant out for defendant's arrest and that he was a felon. Officer asked both defendant and girlfriend for permission to search the house and to seize the firearms. Defendant said "No, get a warrant" and told girlfriend to call an attorney. She did. Officers arrested defendant and removed him. Girlfriend gave consent for officers to "take the guns" from inside the house. They entered the house, girlfriend opened a gun cabinet, and 7 guns were seized from the cabinet. Officers were in the house for 6-7 minutes.

Defendant charged with multiple counts of being a felon in possession of a firearm. He moved to suppress the firearms, contending that the Fourth Amendment prohibits police from entering his home over his objections without a warrant, citing *Georgia v Randolph*, 547 US 103 (2006). Trial court denied his motion to suppress.

Court of Appeals reversed and remanded: the police entry into defendant's home violated the Fourth Amendment and the trial court erred in denying his motion to suppress. Defendant's arrest did not affect his prior objection to the search of his home. His cotenant's subsequent consent was ineffective to prevail over defendant's objection to the request for consent. Court of Appeals quoted *Payton v New York,* 445 US 573, 589-90 (1980): "In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." Since *Randolph*, three circuits had split (7th, 8th, and 9th) on whether a cotenant's consent to a search or seizure of a home overrides an arrested defendant's prior refusal to consent to that search. The Oregon Court of Appeals here concluded that the "sanctity of the home is the rule, and co-tenant consent the exception." A search or seizure does not become a "reasonable" action when police ignore a tenant's earlier objection after that tenant is arrested.

State v Guggenmos, 225 Or App 641, *rev allowed* 347 Or 258 (2009).

State v Zamora, 237 Or App 514 (9/29/10) (Ortega, Landau, Sercombe) Officers received a report that "Tony" at defendant's residence had a stolen computer. Defendant answered the door, officers asked to speak with defendant, and he consented to their entry. Officers asked for and received defendant's ID and returned it without running a warrant check. Defendant said he was Tony. Officers

said they thought defendant may have bought a stolen computer. Defendant said he had two computers and showed them the one in his living room. Officers asked to see the other one. Defendant consented but asked if they had a "good reason" for talking to him. Officer replied, "I wouldn't be there if I didn't." Defendant led officer to his bedroom, where officer saw two computers. Defendant and officers checked the serial numbers on the computers; none were reported stolen. While talking in the bedroom, officer noticed an open bag containing "dime baggies" and a glass pipe. Officer asked to search the bag, defendant agreed and moved the bag onto the bed. A golf-ball-sized bag of white crystal was in the bag. Defendant said it was "cut" which means MSM, a chemical to cut meth. Officer asked where the drugs were, defendant said he smoked them and they usually were on his person. He consented to a search of his person; no drugs were found. Officer asked to bring a drug dog to search; defendant consented. Officers asked to search a suitcase; defendant consented. Officers found a gun case under the bed and asked to search it; defendant consented. He told officers he had two AK-47s inside it. Defendant then stated that he had a prior felony and there were guns under the mattress; officers found two pistols. Officer *Mirandized* defendant and arrested him. Those events took place in about 20-30 minutes. Defendant described officers as "pushy" but "nice" and they used "good words." No threats or promises were made. Defendant never asked them to leave or said he was done talking. After *Miranda* warnings, defendant made more incriminating statements and more meth and MSM was found.

Defendant moved to suppress all evidence. Trial court granted the motion in part, concluding that after the officers ran checks of the bedroom computers and found that there was no evidence that those were stolen, "the officers needed to leave." There was "no reason for the encounter" after finding that the computers were not reported as stolen.

Court of Appeals reversed: defendant consented to the searches. There was no coercion and no revocation of consent. "Whether the deputies had a 'reason for the encounter' is not the pertinent inquiry. Because defendant voluntarily consented to each component part of the search, the search was lawful."

> (<u>*Note*</u>: Court of Appeals cited *State v Holmes*, 311 Or 400, 407 (1991) ("a police-citizen encounter without any restraint of liberty (e.g., mere conversation, a non-coercive encounter) is not a 'seizure' and, therefore, requires no justification") to frame this consent-search of a man's bedroom).

United States v Eggleston, 2010 WL 2854682 (D Or 7/19/10) (Haggerty) (Fourth Amendment, federal court, no state constitutional issue) Defendant had been communicating online with a US Immigration and Customs Enforcement (ICE) special agent, who was posing as the father of two young boys offering to allow defendant to engage in sex acts with the boys. ICE agent, wearing a body wire, met with defendant at a NE Portland motel lounge. Then the agent and defendant went to defendant's hotel room. As soon as defendant used his key card to enter the room (but he had not entered), ICE agents arrested him, frisked him, and questioned him. Agents then guided him into his room, without ever asking for permission to

enter his room. Defendant was informed of his rights, he signed a consent form allowing agents to search his room, then he was transported downtown, and signed three more consent forms authorizing a search of his computer and his home. He then moved to suppress all evidence obtained as a result of the entry to his motel room, on grounds that it violated his Fourth Amendment rights. Judge Haggerty stated: "ICE agents entered defendant's motel room without a warrant and without his permission. As such, their entrance into his motel room was violative of the Fourth Amendment's protections."

As to the exclusionary rule (see *Wong Sun v United States*, 371 US 471, 487-78 (1963)), Judge Haggerty noted that "[s]ubsequently tainted evidence may be admitted if the evidence is sufficiently attenuated from the illegal activity." There is a three-part test to determine attenuation: (1) the temporal proximity between the illegality and the discovery of evidence; (2) the presence of any intervening circumstances; and (3) the purpose and flagrancy of the official misconduct." Judge Haggerty then noted that the "search of defendant's room appears to have been inevitable" and defendant signed several consent forms. But because the government bears the burden to establish admissibility of the evidence, Judge Haggerty ordered further briefing.

See ***State v Walker***, 234 Or App 596 (4/07/10), discussed under **Warrants**, *post*.

State v Sanders, 233 Or App 373 (1/27/10) (Ortega, Haselton, Armstrong) (See discussion under **Exigent Circumstances**, *post)*. An exception to the warrant requirement is for probable cause plus exigent circumstances. "An exigent circumstances is a situation that requires the police to act swiftly to prevent danger to life or serious damage to property, or to forestall a suspect's escape of the destruction of evidence." Here, that exception is met because officers could not set up surveillance of a house within the time it would take to get a search warrant, and the drug dealer being monitored was about to move that very morning.

State v Mazzola, 238 Or App 201 and 238 Or App 340 (10/27/10) (Haselton, Armstrong, Edmonds SJ), discussed under **Emergency Aid** Exception, *post*. No evidence suggested anything other than a verbal argument that had already ended by the time officers arrived at a residence. The *Follett* elements necessary for the emergency aid exception to the warrant requirement are not met.

State v Fredricks, 238 Or App 349 (11/03/10) (Brewer, Edmonds SJ), discussed under **Emergency Aid** Exception, *post*. The *Follett* elements for the emergency aid exception to the warrant requirement are not met because there is evidence only of a loud argument, not any physical altercation.

D. Warrants

"[N]o warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized." -- Article I, section 9, Or Const

1. Probable Cause

The "probable cause" necessary to conduct a warrantless search and to obtain a warrant to search is the same standard. *See* ORS 131.007(11) (probable cause to arrest); ORS 133.555 (probable cause to issue a search warrant). "'Probably' means 'more likely than not.'" "Those basic requirements for objective probable cause are equally applicable in the context of warrantless and warranted searches." *State v Foster*, 233 Or App 135, *rev allowed*, 348 Or 13 (5/04/10).

State v Daniels, 234 Or App 533 (3/31/10) (Schuman, Landau, Brewer) A police chief received a tip from a detective that, 20 years earlier, defendant had sexually abused his daughters and he now was living with a female child. Police chief interviewed defendant's now-adult daughters and confirmed that he had raped and sexually abused them for years. Neither daughter could confirm that defendant had created or possessed pornographic videos, but one recalled that defendant had tried to videotape a sex act with her. Police chief also interviewed the brother of the female child who'd been living with defendant, who confirmed that explicit sexual activity had occurred.

Police chief applied for a warrant, supported with his affidavit that contained very little information regarding defendant's creation or possession of pornographic videotapes, only the uncorroborated 20-year old recollection by defendant's daughter that he had once tried unsuccessfully to videotape them in a sex act. Police chief attached transcripts of his interviews with defendant's children. He also attested to his "training and experience" that included his 24 years' experience as an officer and 35 hours of training in investigating child sex abuse, and that pedophiles retain photos and movies of their crimes and rarely dispose of such material.

Trial court issued the warrant to search defendant's residence for DNA evidence, photos, videos, or recordings of child sex abuse. The search of the residence produced explicit videos, among other evidence. Defendant moved to suppress all the evidence of child sex abuse found as a result of that warrant, arguing that the police chief's affidavit and exhibits did not state sufficient facts to establish probable cause for the warrant. Trial court denied the motion.

Court of Appeals affirmed. The sole issue on appeal was the search and seizure of the videotapes. To determine the requisite "probable cause" under ORS

133.555(2) and Article I, section 9, the trial judge may rely on reasonable inferences from facts in the affidavit, and the appellate court reviews in a commonsense and realistic fashion. "Doubtful cases should be resolved in favor of allowing the warrant."

In this case, "without the information derived from [the chief's] training and experience, the affidavit is undeniably deficient with respect to the videotapes. * * * To link defendant to the inculpatory videotapes, an additional fact is necessary: that people who have at some point engaged in sexual abuse of children possess and retain videotapes of live children, unclothed or engaging in sexual acts. Without that fact, the affidavit creates at most a tenuous suspicion that defendant might possess illegal videotapes. * * * mere suspicion is not enough." Court of Appeals concluded that under "the precept that searches under warrant are favored by the law," officer's explanation of his training and experience was sufficient to justify the magistrate's reliance on the facts in his affidavit.

See ***State v Foster***, under section on **Mobile Automobiles**, for discussion of "probable cause."

State v Duarte/Knull-Dunagan, 237 Or App 13 (8/25/10) (Haselton, Armstrong, Edmonds SJ) An OSP detective filed an affidavit supporting his application for a search warrant to search a home for an indoor marijuana grow operation. The detective recited his training and experience, explained the distinctive odor of fresh marijuana, and explained the structural modifications often made to homes with indoor grow operations. Detective also recounted three communications (likely from the same anonymous man) about the skunky odor near the backdoor, the estimated 50-100 plants in the basement, and that 3 months earlier, the informant had seen the operation that could be reached through a trapdoor. Detective described in detail his corroboration efforts: a sheriff who lived near the house confirmed that electricity for the water bill had been unusually high, confirmed the trapdoor leading to the basement, and confirmed that defendants had undertaken renovations after moving in, and defendant Duarte told the sheriff he had expanded the basement by knocking out a wall. Detective also obtained the power records of the home and nearby homes, and that the defendants' home used substantially more power during the year regardless of temperature and in comparison to comparable homes. Detective also checked defendant Duarte's criminal history and that that defendant did not have medical marijuana permit and the property was not listed as a valid grow location.

A magistrate issued a search warrant. The ensuing search produced extensive evidence of marijuana manufacturing. Defendants moved to suppress evidence (statements and observations), contending that the affidavit did not establish probable cause for issuance of the warrant. Trial court granted the motion to suppress, stating that if "anonymous tips are credited, the affidavit establishes probable cause. If not, it does not." Trial court applied the "*Aguilar/Spinelli*" test (which, the Court of Appeals noted, the US Supreme Court had discarded in

1983 in favor of a "totality of the circumstances" test in *Illinois v Gates*, 462 US 213 (1983)).

On state's appeal, Court of Appeals reversed and remanded. Quoting *State v Castilleja*, 345 Or 255, 264-66, *adh'd to on recons*, 345 Or 473 (2008), the Court of Appeals explained the different standards of an *issuing* magistrate versus a *reviewing* court. After a magistrate has issued a warrant, the "reviewing court asks whether, based on the facts showing by the affidavit, a neutral and detached magistrate could conclude (1) that there is reason to believe that the facts stated are true; and (2) that the facts and circumstances disclosed by the affidavit are sufficient to establish probable cause to justify the search requested." Court of Appeals explained the reviewing circuit and appellate courts' "discrete" and "limited" function when a defendant seeks to suppress evidence from a search authorized by a warrant, contending that the information in the warrant did not establish probable cause: The "court's function is limited to determining whether, given the uncontroverted facts in the affidavit and reasonably derived inferences, the issuing magistrate reasonably could have concluded that the affidavit (excluding the excised parts) established probable cause to search." Moreover, the reviewing court considers the affidavit in a "'commonsense, nontechnical and realistic fashion, with doubtful cases . . . to be resolved by deferring to an issuing magistrate's determination of probable cause."

Court of Appeals concluded under that standard that the magistrate (who granted the warrant) did not err. The trial court erred in granting defendants' motions to suppress. Court of Appeals also corrected the trial court's misunderstanding that an unidentified informant is deemed unreliable unless it describes the informant's familiarity or experience with the subject. Rather, "the determination of reliability [of an informant] must be based on the totality of the information set out in the warrant application."

State v Tropeano, 238 Or App 16 (10/20/10) (Brewer and Edmonds SJ). Officer submitted an affidavit stating that defendant was a registered sex offender who told a deputy that he subscribed to porn magazines from Denmark (where apparently child porn is legal) and also defendant had forbidden hotel staff from entering his room without giving 15 minutes' notice in advance so he could "clean up first." Magistrate issued a search warrant for defendant's hotel room, which resulted in the seizure of a laptop with child porn. Defendant moved to suppress on grounds that the officer's affidavit was insufficient to establish probable cause. Trial court denied defendant's motion to suppress.

Court of Appeals affirmed. To determine "probable cause" to issue a warrant, the magistrate may rely on facts in the affidavit plus reasonable inferences drawn from the facts. A court, reviewing the magistrate's issuance of a search warrant for probable cause, examines the affidavit in a "commonsense and realistic fashion." Doubtful cases are resolved in favor of allowing the warrant.

Defendant argued that "pornography" is vague and the people could have been partially clothed. The Court of Appeals noted that other factors established

probable cause: defendant is a registered convicted sex offender, defendant obtained the porn from a country that apparently allows child porn, the officer knew that defendant had a laptop in his room which would allow access to porn, and the 15-minutes notice to hotel staff indicated that defendant had "something to hide." Finally, the fact that the information in the affidavit may reasonable give rise to *other* inferences does not mean that the affidavit is insufficient." Trial court did not err.

2. Scope

State v Walker, 234 Or App 596 (4/07/10) (Haselton, Armstrong, Rhoades pro tem) Defendant was a guest at someone else's residence. Police had a warrant to search for evidence of burglary at that residence, but the warrant did not authorize the search of persons. Defendant consented to a search of her purse; a meth-positive pipe was in her purse. Trial court denied her motion to suppress. Court of Appeals affirmed, but explained that defendant did not cogently develop and preserve the "very substantial question of first impression under Article I, section 9;" that is, whether a warrant to search a *premises* authorizes a search of a nonresident's *personal effects*. Although the state did not urge nonpreservation, the court will, and here did, address it, from considerations of jurisprudential comity and procedural fairness. Affirmed because the issue (whether the search was within the scope of the warrant) is unreviewable.

State v Everett, 237 Or App 556 (9/29/10) (Edmonds SJ, Brewer) This case only addressed the Fourth Amendment, not Article I, section 9, of the Oregon Constitution. A police officer shot defendant in the arm when he attempted to drive his car at her. Magistrate then issued arrest and search warrants stating: "You are hereby commanded to search . . . The person of [defendant] . . . And seize the following described property: Bullets and bullet fragments. DNA in the forms of oral swabs, blood samples, head hair samples, [p]hotographic images, and any other indicators of his having been shot or involved in this incident." Officers arrested defendant and an ambulance transported him to "a local hospital." He refused to consent to surgery to remove the bullet, but medical staff removed it anyway. He moved to suppress all evidence from that surgery, arguing that the removal of the bullet was an unauthorized search that exceeded the warrant's scope, in the absence of a specific request or authorization for that search, that violated the Fourth Amendment and Article I, section 9. Trial court denied the motion.

Court of Appeals affirmed: the warrant comports with the statutory requirements (ORS 133.565) and the Fourth Amendment. The statute requires the warrant to state the searched person's name, or the location of the premises or places, and the things constituting the object of the search. Under *State v Ingram*, 313 Or 139, 143 (1992), if the scope of a search complies with the statute, it also comports with the Fourth Amendment. The warrant directs a search of defendant's person for bullets and bullet fragments. Also the warrant's terms make it apparent that the police had probable cause to believe defendant had

been wounded by a bullet. A "common-sense reading of the affidavit and the terms of the warrant in this case implicitly authorized the extraction of the bullet that lay just underneath defendant's skin," as it expressly authorized blood, hair, and oral samples. Court of Appeals disagreed with defendant's argument that the Fourth Amendment requires "a second search warrant that specifically authorized the bullet's surgical removal." The procedural safeguards of probable cause, the suppression remedy for violations, and the balancing test in *Winston v Lee*, 470 US 753 (1985) (balancing risks and intrusion of surgery against the state's need for evidence) protect privacy interests and provides court oversight. No Fourth Amendment violation.

E. Exceptions to Warrant Requirement

"No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized." - Article I, section 9, Or Const

"[W]arrantless entries and searches are *per se* unreasonable unless falling within one of the few 'specifically established and well-delineated exceptions' to the warrant requirement." *State v Davis*, 295 Or 227, 237 (1983) (quoting *Katz v United States*, 389 US 347 (1967) and *State v Matsen/Wilson*, 287 Or 581 (1979)).

"Warrantless searches and seizures are *per se* unreasonable unless the state proves an exception to the warrant requirement." *State v. Bridewell*, 306 Or 231, 235 (1988).

Article I, section 9, speaks to both searches (privacy rights) and seizures (possessory rights), and with a few well-recognized exceptions, a warrant is required even when only possessory rights are implicated. *State v Smith*, 327 Or 366, 376-77 (1998).

1. Probable Cause to Arrest

"A warrantless arrest is appropriate if a police officer has probable cause to believe that a person has committed a felony. ORS 133.310(1)(a)." *State v Pollack*, 337 Or 618, 622-23 (2004).

State v Medinger, 235 Or App 88 (4/28/10) (Wollheim, Brewer, Sercombe) A motel guest awakened after hearing a loud bang. Without putting on his glasses, he saw a knocked-over vending machine and the back of a person wearing a gray hooded sweatshirt walking away northward. Officer was called and 4 minutes after the call, he saw one person, defendant, walking southward in a gray hooded sweatshirt, about 1/3 of a mile south of the motel. Officer ordered defendant to

stop and frisked him. Defendant was drunk. Officer put him into his patrol car and took him to the motel (rather than to an alcohol detox facility). The vision-impaired guest saw defendant handcuffed in the patrol car and said that was who he saw. Officer arrested him, searched his pockets, and found paystubs belonging to different people in his pockets. Defendant charged with criminal mischief, burglary , identity theft, and third-degree theft. Defendant moved to suppress the guest's identification of him, the paystubs, and all other evidence taken after the officer stopped him. Trial court suppressed evidence on grounds that officer did not have probable cause to arrest and inevitable discovery exception did not have merit here. State appealed.

Court of Appeals affirmed. Probable cause (to arrest) means (1) a law enforcement officer subjectively believes that the person has committed a crime and (2) the officer's belief is objectively reasonable under the circumstances. Under the totality of the circumstances, here, the officer did not have objective probable cause to arrest defendant. First, defendant's "strange and furtive behavior" is irrelevant. Second, a person's assertion of a constitutional right (not to answer questions), plays no role in the probable cause analysis. The other circumstances do not establish objective probable cause: the same gray hooded sweatshirt, defendant's presence 1/3 of a mile from the crime scene, defendant being the only person in the vicinity, and defendant's intoxication do not give rise to probable cause, particularly because the defendant's description was given by a person not wearing his glasses and when compared to *State v Vasquez-Villagomez*, 346 Or 12 (2009) (where probable cause to arrest was established). Evidence properly suppressed. (See discussion on Inevitable Discovery as an exception to the remedy of suppression for violations of Article I, section 9).

2. Search Incident to Lawful Arrest

A search incident to arrest is one of the few specifically established exceptions to the warrant requirement. *State v Hite*, 198 Or App 1, 6 (2005).

Under Article I, section 9, there are three valid justifications for a warrantless search incident to lawful arrest: to protect the officer's safety, to prevent the destruction of evidence, and to discover evidence relevant to the crime for which the defendant was arrested. *State v Hoskinson*, 320 Or 83, 86 (1994).

State v Nix, 236 Or App 32 (6/23/10) (Haselton, Armstrong, Deits SJ) Officer was watching a car in which defendant was a passenger. Defendant was being investigated for drug crimes and had arrest warrants out. Earlier that day, an investigating officer had observed defendant engage in a "hand-to-hand" drug transaction. Officer initiated a lawful traffic stop. Defendant fled on foot. Officer caught him, arrested him, patted him down, and found 22 small plastic baggies, $370 cash, and a cell phone, which rang continually while officer counted the cash. Officer believed he had probable cause to arrest defendant for delivery of drugs. Officer contacted the investigating officer, who told officer at the scene to deliver the cell phone to a crime analyst who had special training in cell-phone examinations.

Officer at the scene arrested defendant, brought him to a holding cell where he had access to a phone, and brought the cell phone directly to the crime analyst. The crime analyst searched the phone and found texts and images that he believed were drug-related. The crime analyst completed the search within 40 minutes of defendant's arrest.

Defendant moved to suppress the cell-phone evidence and any oral statements he had made, based on the state constitution (with an "unadorned citation" to the Fourth Amendment). The trial court heard testimony from the officers, who testified that cell phones are often used by drug dealers, and evidence of such crimes is discovered in cell-phone searches "well over 90 percent of the time." Officers testified that a warrant would have taken 3-4 hours to obtain. But only minimal evidence was offered regarding the specific cell phone used in this case. No evidence was offered regarding the storage capacity of this phone, or of cell phones generally, or how cell phones store information compared to books, briefcases, or computers. Officers testified that defendant could "fry the chip" in his phone by calling his service provider and erasing all information. State contended that the warrantless search had been justified under the exception for exigent circumstances or as a search incident to lawful arrest. The trial court disagreed with the state on both exceptions, and suppressed the evidence of the cell-phone search. State appealed.

Court of Appeals reversed, concluding that the warrantless search was lawful as a search incident to arrest (and did not address the exigent-circumstances theory). Under Article I, section 9, if "an officer arrests a person based on an arrest warrant, but also has probable cause to arrest that person for a new crime, the officer may conduct a search for evidence of that new crime so long as the search his reasonable under the circumstances. . . . In all events, to be valid, a search incident to arrest must be reasonable in its time, place, and intensity in light of the relevant circumstances. *Owens*, 302 Or at 205" The search in this case was reasonable in its time: it occurred within 40 minutes of defendant's arrest, that delay was necessary and appropriate to ensure that the phone could be expertly searched and to protect against inadvertent destruction of evidence, and there was no inadvertent delay. The search did not need to relate to the crime that defendant was arrested for, as long as it related to another crime for which the officer also had probable cause, which he did. The cell phone could contain evidence of drug crimes. "Because there was probable cause to arrest defendant for the delivery of a controlled substance, the officers could conduct a 'meticulous investigation' of those personal effects found on defendant's person that could reasonably conceal evidence of that crime. See *Owens*, 302 Or at 202." Reversed and remanded.

State v Nell, 237 Or App 331 (9/22/10) (Haselton, Armstrong, Edmonds) Defendant arrested on an outstanding warrant. She was about 6-10' from her parked car. She was holding a wallet about 4-5" tall. Officer asked her to place the wallet on the hood, but she did not comply. She moved to put her wallet in her car. Officers put their hands on her to prevent her from getting into the vehicle. They testified that they did so because they didn't know if there were weapons, contraband, or means of escape in the wallet. She put her wallet on the hood.

Officer opened it, handcuffed her, searched her wallet, and found a bag of meth. Officer Mirandized her, and she said it was "a twenty sack," worth about $20, and that she eats meth. Trial court denied her motion to suppress the meth and her statements, under the search incident to arrest exception to the warrant requirement (for officer safety), and also under the inevitable discovery doctrine because the wallet would have been inventoried at the jail.

Court of Appeals reversed. *State v Hite*, 198 Or App 1, 6 (2005) identifies three justifications for a search incident to arrest: safety, to prevent destruction of evidence or escape, and to discover evidence relevant to the crime for which the defendant is being arrested. Only officer safety is at issue in this case. The Supreme Court addressed a similar case in *State v Hoskinson*, 320 Or 83 (1994). Here, as in that case, nothing in the record suggests that the officer "had a *reasonable* suspicion that [the handcuffed] defendant posed an immediate threat of escape or harm." (Emphasis in *Hoskinson*). The search violated Article I, section 9. Trial court erred in denying defendant's motion to suppress because the minimal factual nexus between the unlawful search and defendant's incriminating statements is patent. Under *State v Ayles*, 348 Or 622 (2010), the *Miranda* warnings did not attenuate the taint of the illegality (it is not a universal solvent to break the causal chain).

3. Exigent Circumstances + Probable Cause

> Warrantless entries and searches are per se unreasonable unless the state proves an exception to the warrant requirement, such as the existence of exigent circumstances when the officers have probable cause to arrest a suspect. *State v Bridewell*, 306 Or 231, 235 (1988).
>
> An exigent circumstance is a situation that requires police to act swiftly to prevent danger to life or serious damage to property, or to forestall a suspect's escape or the destruction of evidence. *State v Stevens*, 311 Or 119, 126 (1991). If the warrantless search is undertaken to prevent destruction of evidence or escape, the state must prove that the destruction or escape was imminent. *State v Matsen/Wilson*, 287 Or 581, 587 (1979).

State v Machuca, 347 Or 644 (2010) (2/11/10) (De Muniz) A hospitalized drunk driver agreed to allow his blood to be drawn in the ER, without a warrant, but only after an officer warned him of the legal consequences of refusing the blood draw. The trial court denied the drunk driver's motion to suppress the blood alcohol test results. The state's scientist testified that the average blood-alcohol dissipation rate is .015% per hour. The state put on no evidence of the time it takes to obtain a warrant for a blood draw. The trial court concluded that the state failed to prove probable cause and exigent circumstances (an exception to the warrant requirement); specifically, the state had failed to prove that the blood alcohol content "would have been sacrificed by the time it would take the officers to obtain a search warrant." But the trial court allowed the evidence of defendant's blood alcohol content on grounds that the driver had consented to the blood draw.

A divided Court of Appeals had held that the drunk driver's consent was not voluntary, because the driver had permitted the blood draw only after being warned (as the legislature requires) that he would suffer a substantial penalty if he refused.

The Supreme Court reversed, "declar[ing] that, for purposes of the Oregon Constitution, the evanescent nature of a suspect's blood alcohol content is an exigent circumstance that will ordinarily permit a warrantless blood draw of the kind taken here." In so declaring, the Supreme Court considered two of its conflicting cases that Justice Gillette had written: *State v Milligan* (1988) and *State v Moylett* (1992). Both involved blood-alcohol evidence taken without a warrant from hospitalized drunk drivers. Both had evidence of blood-alcohol dissipation rates in the trial record. The significant difference between the two cases is that, to establish exigent circumstances, *Moylett* required evidence of the time it takes to obtain a warrant, but *Milligan* did not.

The *Machuca* court agreed with the *Milligan* court's reasoning. It explained that *Milligan* illustrates how obtaining a warrant takes too long in most cases where blood alcohol is unquestionably dissipating. The *Machuca* court "disavowed" *Moylett,* explaining that the *Moylett* court had "unnecessarily deviated from this court's established case law" by shifting the "focus away from the blood alcohol exigency itself and onto the speed with which a warrant presumably could have been issued." The *Machuca* court concluded that, in this case, "the state's evidence was sufficient to establish an exigency justifying the warrantless seizure." That evidence was an expert's testimony on dissipation rates, without any evidence of the time it takes to obtain a warrant.

State v Hays, 234 Or App 713 (4/15/10) (Sercombe, Wollheim, Brewer) Defendant crashed a truck and horse trailer, smashed his face, stumbled out of his truck, and smelled of alcohol. Suspected of drunk driving, at first he refused breath, urine, and blood tests. After conferring with a friend in private, he consented to a breath test at the hospital, which showed a .09% BAC. Trial court denied his motion to suppress that breath test, concluding that he had consented without coercion. The trial court concluded that there was no need to determine exigent circumstances. Court of Appeals affirmed per *State v Machuca*, 347 Or 644 (2010) (Article I, section 9) and *Schmerber v California*, 384 US 757, 771 (1966) (Fourth Amendment). "Probable cause to arrest defendant for DUII, combined with the undisputed evanescent nature of alcohol in the blood, excused the need for a search warrant".

State v Allen, 234 Or App 363 (3/17/10) (Brewer, Sercombe, Deits SJ) (per curiam) Court of Appeals affirmed the trial court's holding that "the warrantless seizure of defendant's breath sample was constitutional under Article I, section 9, of the Oregon Constitution because exigent circumstances justified the seizure" and due to the evanescent nature of alcohol in the body, see *State v Machuca*, 347 Or 644, 657 (2010), *ante*.

State v Sanders, 233 Or App 373 (1/27/10), discussed under Houses, Rooms, and Curtilage, *ante*. State established sufficient evidence of exigent circumstances to support a warrantless search of a house. Police were investigating a renter (a drug

dealer) in that house and were nearly complete with their affidavit for a search warrant, when a confidential informant told them the dealer was being evicted and was moving that morning. Fearing destruction of drug evidence or loss of the dealer, officers entered the house and found drugs in defendant's bedroom. The extra 90 minutes it would have taken to get a search warrant risked that the dealer would have moved away by then. Court of Appeals affirmed trial court's denial of defendant's motion to suppress.

4. Search Based on Emergency Aid

Oregon Constitution:
"Emergency Aid" exception to the warrant requirement may exist if (1) police have reasonable grounds to believe there is an emergency and an immediate need for their assistance to protect life; (2) the emergency is a true emergency – a good-faith belief is not enough; (3) search is not primarily motivated by intent to arrest or seize evidence; and (4) officer reasonably suspects the area to be searched is associated with the emergency and by making the entry, the officer will discover something to alleviate the emergency. *State v Follett*, 115 Or App 672, 680 (1992), *rev den* 317 Or 163 (1993). To justify entering a residence because of an emergency, "the state must make a strong showing that exceptional emergency circumstances truly existed." *State v Miller*, 300 Or 203, 229 (1985), *cert denied*, 475 US 1141 (1986) (citing *Vale v Louisiana*, 399 US 30, 34 (1970)).

This exception can justify warrantless searches, but Oregon appellate courts have never applied it to justify warrantless stops. *Sivik v DMV*, 235 Or App 358 (2010).

Fourth Amendment (a.k.a. "Community Caretaking")
Under the Fourth Amendment, the emergency doctrine applies when police officers reasonably believe entry is necessary to protect or preserve life or avoid serious injury. *Mincey v Arizona*, 437 US 385, 392 (1978).

Sivik v DMV, 235 Or App 358 (5/19/10) (Schuman, Landau, Ortega) By its terms, *Follett* "is an exception that can justify warrantless *searches*. We have never held that it can justify warrantless *stops*." (Emphasis in original). See *Sivik v DMV* under Parked Vehicles, *ante*.

State v Baker, 237 Or App 342 (9/22/10) (Armstrong, Haselton, Rosenblum) Police received a 911 call from a person saying that people were yelling in the neighbor's house, the neighbor had used a prearranged code word to tell the caller that she was in trouble, and that possibly a 2-1/2 year old child was in the house. Police sped in a patrol car with sirens and lights activated. Two officers arrived. At the house, a man and a woman sat on the front porch while yelling was going on inside. The pair on the porch said they'd been inside the house and that an argument was occurring. They said nothing about weapons, injuries, threats, etc. Officers tried to enter by the front door but it was locked. They did not knock or ring the

bell. Instead, they asked the pair how to get in. The pair said they could use the back door. Officers went to the back door. They could see a woman and defendant yelling. The woman saw the officers and yelled, "Cops!" Defendant quickly began taking buds off of a marijuana plant. Officers entered. They separated the woman and defendant and questioned them. There was no assault, they concluded, only a heated verbal argument. They focused on the several marijuana plants. Defendant was charged with 5 marijuana-related crimes. He moved to dismiss all evidence of marijuana under Article 1, section 9, but the trial court denied the motion on grounds that the officers entered the home under the emergency aid exception to the warrant requirement.

Court of Appeals reversed. The elements of the emergency aid doctrine, when used to enter a residence, require the state to prove: (1) police have reasonable grounds to believe there is an immediate need for their assistance for the protection of life; (2) there is a "true emergency" in that the circumstances actually exist that gave rise to the police's belief that action is necessary (objective reasonableness); (3) the search is not primarily motivated to arrest or to seize evidence; (4) the police reasonably believe that by making the warrantless entry they will discover something that will alleviate the emergency. *State v Bentz*, 211 Or App 129, 135 (2007); *State v Martin*, 222 Or App 138, 148 (2008), *rev denied* 345 Or 690 (2009). To justify a warrantless entry into a home, "the state must make a strong showing that exceptional emergency circumstances truly existed" under *State v Miller,* 300 Or 203, 229 (1985), *cert denied* 475 US 1141 (1986). Here, officers received a report only of yelling and a code word (no evidence of a physical altercation) and they did not knock on any doors before entering. By the time the officers entered the house, their belief that there was a life-threatening emergency requiring their intervention was not objectively reasonable. The officers looked in to a window before entering the back door, and did not see any intoxicated persons, no upset furniture, no seemingly upset victim, no "indicia of prior and potential violence," as there was in *State v Agnes*, 118 Or App 675 (1993) (held: officers' entry into a house was a reasonable response to a true emergency). Held: officers' entry here was unlawful, evidence seized as a result of that entry should have been suppressed.

State v Mazzola, 238 Or App 201 and 238 Or App 340 (10/27/10) (Haselton, Armstrong, Edmonds SJ) Officers received a 911 call that there was "yelling" and "door slamming" at a couple's log cabin, and that there was "a history of guns" and "possible drug use" and children present. Officers went to the cabin, saw codefendant-wife, outside the cabin with 2 children. She was calm and cooperative, and said she had a verbal disagreement with her husband (codefendant-husband). No signs of injury were present on anyone. She said a third child was at a birthday party, and husband was in a mobile home that was 15 feet from the cabin. Officers went to the mobile home to make sure he had not been "shot and left to die." Loud music was blaring, a tray of wilted marijuana plants was on the porch, and the smell of marijuana emanated from the door that was ajar. Officers rapped on the door, no one answered, so officers just entered. A lot of marijuana was present in rooms, with grow lights and other evidence of cultivation. Husband said he was an Oregon medical marijuana cardholder. Officers continued inspecting and said that he was way over the limit, handcuffed him, and called detectives to the scene. Detectives

Mirandized him and obtained his consent to search. At trial, both defendants moved to suppress the marijuana evidence. Trial court denied the motion on grounds that there was a "legitimate emergency" and also "valid consent" justifying the warrantless search.

Court of Appeals reversed. The state conceded that the officers' warrantless entry was unlawful. The emergency aid doctrine does not justify the entry. Under the four elements set out in State v Follett, the first two require that the officers' believe that a "true emergency" exists and that must be substantiated by "objective indicia of a particular individual being in distress or of the presence of a potentially dangerous individual," suggesting that immediate action was required to protect life. Here, however "well-meaning the officers' motivation, their concerns were not objectively corroborated" because no evidence suggested anything other than a verbal argument that had already ended by the time they arrived.

The state argued that intervening circumstances – the *Miranda* warnings – so attenuated defendant's consent to the search, so that the evidence need not be suppressed. The problem with that argument, the Court of Appeals wrote, is that most or all of the marijuana evidence was discovered before defendant gave consent. Remanded.

State v Fredricks, 238 Or App 349 (11/03/10) (Brewer, Edmonds SJ) Officers received a 911 call that a "loud argument" was going on in a motel room. Officer arrived, spoke with three neighbors who said they heard a loud disturbance in the room. Officer stood outside defendant's door for 2-3 minutes, and he could hear a male and a female voice in a loud argument. Officer said it wasn't "deescalating" and he "had no clue at that point if anybody was injured". A second officer arrives, they knocked, defendant opened the door, and officer said he needed to enter the room to make sure everybody was ok. Defendant appeared "fairly calm" and officer asked him to step outside of the hotel room. Defendant's female companion was in the room, not injured, and the room smelled of marijuana. Officer asked the female if defendant had assaulted her, she said no, and officer told her that they needed to keep it down. Officer asked if they had narcotics in the room, the female said no, officer asked for consent to search the room, and defendant (outside the room) said "go ahead." Meth and cocaine and other drugs were found. Defendant moved to suppress all the evidence. State argued that the entry was justified under the community caretaking statute. Trial court denied the motion to suppress on grounds that defendant consented to the search.

Court of Appeals reversed and remanded. First, the community caretaking statute does not create an exception to the warrant requirement. *State v Martin*, 222 Or App 138, 146 (2008), *rev den* 345 Or 690 (2009). Even if the state is able to satisfy the requirements of the community caretaking statute, it must also satisfy the requirements of the emergency aid exception to the warrant requirement. *State v Salisbury*, 223 Or App 516, 523 (2008). Here, the four *Follett* conditions for the emergency aid exception to apply are not met, because the second condition (a "true emergency") is not present. A "true emergency" exists if there are reliable, objective indicia of a potential victim of a dangerous circumstance or potential perpetrator of a

dangerous act. Suspicious circumstances or 'gut instinct' are insufficient." *State v Burdick*, 209 Or App 575, 581 (2006). In this case, the officer overheard a loud argument that was not deescalating. There is no evidence of any other objective indicial of a potential victim of a dangerous circumstance or a potential perpetrator of a dangerous act. A loud argument – in the absence of any sounds of a physical struggle or violence – does not justify a warrantless entry to a residence.

5. Officer Safety

Article I, section 9, does not forbid an officer from taking reasonable steps to protect himself and others if, during the course of a lawful encounter with a citizen, the officer develops a reasonable suspicion based on specific and articulable facts that the citizen might pose an immediate threat of serious physical injury to the other officer or to others then present. *State v Bates*, 304 Or 519, 524 (1987).

(a) Closed Containers

State v Morgan, 348 Or 283 (5/13/10) (Gillette) Defendant was a passenger in her car. The car was lawfully stopped. Driver's license was suspended and he had an outstanding arrest warrant. Officer placed driver in his patrol car. Officer asked for defendant's license and registration, because he could release the car to her, rather than tow it. Officer asked defendant if he could look in the car and make sure he wasn't leaving her with any contraband. Defendant consented to that search, but she spontaneously got out of the car and picked up her tote bag that was on the front seat. Officer told her he'd have to search the bag for weapons if she brought it with her. Officer told her she could just leave the bag in the car and he would not search it. But defendant's demeanor then changed from "relaxed and cordial" to "agitated and nervous." She clutched the bag to her chest, giving reasons why the officer could not look in the bag. Officer said she could just leave the bag in the car. She backed away from him, shaking her head. She reached into the bag. Officer seized the bag, concerned that she had a weapon. The bag was open, and he saw drugs (heroin) and drug items. Trial court denied defendant's motion to suppress under the officer safety exception to the warrant requirement. Court of Appeals affirmed in a divided opinion.

Supreme Court affirmed under the officer safety exception: Defendant's "sudden exit from her car was unexpected. Her swift change of demeanor . . . understandably surprised the officer. What tipped the scales, however, was *defendant's act of reaching into the purse*." (Emphasis in *Morgan*). "Once defendant began to reach into the purse, [the officer] could reasonably suspect that she might pose an immediate threat of serious physical injury to him, and Article I, section 9, of the Oregon Constitution did not forbid him from taking reasonable steps to protect himself – including seizing the purse." *Accord State v Amaya*, 336 Or 616 (2004); *State v Ehly*, 317 Or 66 (1993).

(b) Patdowns

State v Coffer, 236 Or App 173 (6/30/10) (Ortega, Landau, Carson SJ) Officers executed an arrest warrant at a residence. Defendant was a visitor at that residence. Officers entered the residence, told defendant she was being detained but not arrested, and handcuffed her hands behind her back. Defendant wore cowboy boots with pantlegs outside of and over the boots. Officer lifted pant leg to look inside the boots for weapons. Defendant had a meth pipe in the boot. The trial court denied her motion to suppress the pipe, concluding that the officer lifting the pant leg and looking into the boot did not exceed the scope of a reasonable frisk for officer safety concerns. Court of Appeals reversed: officer's search went beyond an ordinary patdown for officer safety when officer intruded into defendant's clothing (by lifting the pantleg and looking into the boot). Defendant was handcuffed and thus did not have access to anything hidden under the pant leg inside the boot. Quoting from *State v Rudder*, 347 Or 14, 25 (2009), Court of Appeals here restated: "A patdown, because of its limited intrusiveness, is constitutionally permissible if it is based on a reasonable suspicion of a threat to officer safety. But intrusion *into* a suspect's clothing requires something more – either probable cause or some greater justification than was present here." (Emphasis in original). Remanded.

(c) Lethal Force – Fourth Amendment

Glenn v Washington County, 2010 WL 2365672 (D Or 6/08/10) (Mosman) Two county deputies shot and killed an 18 year old outside his home. His mother had called 911. The teenager had a knife to his own neck and yelled to the officers: "You kill me or I kill me." He had a .18% blood-alcohol content, he had broken windows in his family's house and on neighbors' cars, and he did not drop the knife after an officer fired several lead-pellet-filled bean bags that hit his body. When he moved to re-enter his home, deputies fired 11 gunshots, 8 of which hit him. He died on the scene.

His mother filed a section 1983 action against the deputies and the county, alleging that her son's Fourth Amendment rights were violated. Judge Mosman granted defendants' motion for summary judgment, concluding that "the Constitution does not prohibit officers from using less-lethal or lethal force when a suspect holds a knife and the officers reasonably believe he poses an immediate threat to nearby potential victims." Stated another way, Judge Mosman reasoned that because the undisputed facts show that the teenager "was armed with a deadly weapon and posed an immediate threat to himself, officers, and nearby bystanders when the officers used less-lethal [lead pellet bags], and then, lethal, force, I find that the officers' use of force did not violate Lukas Glenn's Fourth Amendment rights."

In so concluding, Judge Mosman applied the factors listed in *Graham v Connor*, 490 US 386, 396 (1986): An officer's use of force must be objectively reasonable in light of the facts and circumstances confronting him (including the severity of the crime at issue), whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by

flight. Here, the officers' response was not objectively unreasonable. Also, under *Monell v Dep't of Social Services*, 436 US 658 (1978), because the officers did not violate the teenager's constitutional rights, the county is not liable for their conduct.

6. Inventories (administrative searches)

Under Article I, section 9, police may inventory the contents of a lawfully impounded vehicle or the personal effects of a person being taken into custody if a valid statute, ordinance, or policy authorizes them to do so, and the inventory is designed and systematically administered to involve no exercise of discretion by the officer conducting the inventory. *State v Atkinson*, 298 Or 1 (1984). The state has the burden of proving the lawfulness of an inventory. *State v Marsh*, 78 Or 290, 293 (1986).

Under the Fourth Amendment, an inventory search is valid if conducted according to "standard police procedures." *South Dakota v Opperman*, 428 US 364, 372 (1976).

State v Keady, 236 Or App 530 (8/11/10) (Haselton, Armstrong, Duncan) Defendant was arrested and his car set to be towed. Officer inventoried the car per City of Salem policy. A bottle labeled "fish oil capsule container" was under the seat. Officer shook it, it thunked, he opened it, and found a prescription drug bottle with marijuana and a roach clip inside. Defendant moved to suppress because the opening of the fish oil bottle, and inspection of its contents, violated the City of Salem inventory policy, which provided that "The inventory will include opening of closed containers in the vehicle that are *designed to hold valuables*, including backpacks, fanny packs, briefcases, purses, consoles, glove box, trunk, and checking under seats." (Emphasis in *Keady*). Trial court denied the motion because the fish oil bottle was under the seat and officer believed the fish oil bottle might contain something valuable.

Court of Appeals reversed and remanded: "Generally, police officers cannot open closed, opaque containers to inventory their contents," but such closed containers may be opened if the containers are "designed for carrying money or valuables, if the applicable inventory policy so directs." See *State v Guerrero*, 214 Or App 14, 19 (2007). The "dispositive inquiry" is whether the container "was *designed* to contain valuables and not whether such items were often used to hold valuables," see *State v Swanson*, 187 Or App 477, 480 (2003). (Emphasis in *Keady*). The inventory policy here authorized the officer to open containers designed to hold valuables, and a "fish oil capsule container" "most assuredly is not 'designed to hold valuables.'" The "officer's belief that the container *might contain* valuables is inapposite to whether it was *designed* to do so." (Emphasis by court). Trial court erred.

State v Stone, 232 Or App 358 (12/09/09) (Wollheim, Edmonds, Sercombe) Vehicle lawfully impounded. Beaverton's inventory ordinance requires officers to open closed containers if officers reasonably believe the closed container holds valuable or dangerous personal property. Here, officer opened a drawstring bag

because he reasonably believed it contained such property. That bag was large and tucked under the passenger seat. The officer did not open all closed containers, only those large enough and in good condition to indicate valuables inside. Meth was inside the bag. Trial court suppressed the meth on grounds that the inventory policy gave officers too much discretion. Court of Appeals reversed, following *Atkinson*'s 3-part test. "An inventory ordinance is valid if it eliminates an officer's discretion in conducting the inventory. By requiring an officer to open all closed containers that the officer reasonably believes hold dangerous or valuable personal property, the Beaverton ordinance eliminates officer discretion." Also, the Court of Appeals rejected defendant's suggestion that the officer should have "squeezed" the bag: the officer found numerous hypodermic needles during the inventory. "[W]e do not impose such a requirement."

See ***United States v Brunick***, 374 Fed Appx 714 (9th Cir 3/22/10) (Farris, DW Nelson, Berzon) (unpublished), *cert denied* __ S Ct __ (10/04/10) (Not an Oregon Constitution case. Fourth Amendment, federal court). Defendant was a passenger in a car in Beaverton. Driver was arrested for driving without a license. Officers handcuffed the driver and defendant, placed them in the squad car, then searched the car without a warrant. Officers saw a closed red duffel bag and acetylene torches. Apparently in the bag, officers found a weapon. District Court Judge Mosman denied defendant's motion to suppress on grounds that the search was valid either as a search incident to arrest or as an inventory search. He was convicted of being a felon in possession of a firearm and appealed.

Ninth Circuit panel noted that after the trial in this case, the US Supreme Court decided *Arizona v Gant*, 129 S Ct 1710, 1718 (2009), which allows police to "search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment of the search" or "when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." Neither of those two *Gant* factors is present here.

However, as to the inventory search, "such a search is valid if conducted according to "standard police procedures" under *South Dakota v Opperman*, 428 US 364, 372 (1976). Here, the Beaverton vehicle inventory ordinance requires the opening of closed containers if the officer conducting the search reasonably believes that the closed container contains valuable or dangerous property. When the officer felt the weight of the red duffel bag and saw the acetylene torches, he reasonable believed the bag could contain weapons or tools, thus under Beaverton's inventory policy, he was required to open it. The Ninth Circuit panel cited *State v Stone*, 232 Or App 358, 361 (2009) (which did not address Beaverton's inventory policy under the Fourth Amendment but rather under Article I, section 9). Affirmed.

State v Joseph, __ Or App __ (10/20/10) (Sercombe, Ortega, Sercombe) Defendant was booked in the Marion County jail. A small coin purse was found in her pocket. Officer opened it, and found a folded piece of paper. He opened the paper and found two baggies containing meth. The jail's inventory policy requires all personal property including jewelry and money to be taken and inventoried. Defendant moved to suppress the evidence. Trial court denied the motion,

concluding that the officer was authorized to open the coin purse and the paper. Court of Appeals affirmed on its precedent, and also because defendant's argument (that opening the paper violated Article I, section 9) was unpreserved

7. Statutorily Authorized Noncriminal Administrative Searches

Atkinson held that "an administrative search conducted without individualized suspicion of wrongdoing could be valid if it were permitted by a 'source of the authority,' that is, a law or ordinance providing sufficient indications of the purposes and limits of executive authority, and if it were carried out pursuant to a 'properly authorized administrative program, designed and systematically administered' to control the discretion of non-supervisory officers." *Nelson v Lane County*, 304 Or 97, 104-05 (1987) (Carson, J, for plurality) (police sobriety checkpoints not conducted per recognized source of authority, thus they violated Article I, section 9).

"An 'administrative' search is one conducted 'for a purpose other than the enforcement of laws by means of criminal sanctions.' *State v Anderson*, 304 Or 139, 141 (1987). . . . If those intended consequences are criminal prosecution, then the search is not administrative in nature. *Id.* at 104-05." *Weber v Oakridge School Dist.*, 184 Or App 415, 433-34 (2002).

Clackamas County v M.A.D., 348 Or 381, 389 (2010) A search conducted pursuant to a "statutorily authorized administrative program…may justify a search without a warrant and without any individualized suspicion at all." (citing *State v Atkinson*, 298 Or 1, 8-10 (1984)).

8. Consent

Ordinarily a search must be conducted pursuant to a search warrant. *State v Paulson*, 313 Or 346, 351 (1992). A warrantless search is reasonable under Article I, section 9, if it falls into a recognized exception to the warrant requirement. Consent is one such exception. *Id.* The state must prove by a preponderance of the evidence that someone with authority to consent voluntarily gave consent for the police to search the person or property and that officials complied with any limits to the scope of consent. *State v Weaver*, 319 Or 212, 219 (1994).

"[E]vidence discovered in a consent search after an unlawful police detention need not be suppressed unless the consent was involuntary or it resulted from police exploitation of the unlawful detention." *State v Wood*, 188 Or App 89, 95 (2003) (citing *State v Rodriguez*, 317 Or 27, 38-40 (1993)).

Traffic stops: "ORS 810.410(3)(e) authorizes police to request consent to search during a lawful traffic stop even with no individualized suspicion and . . . neither Article I, section 9, nor the Fourth Amendment prohibits such a request." *State v Wood*, 188 Or App 89, 93-94 (2003).

Nontraffic stops: "[O]ther than certain appellate court decisions involving the application of ORS 810.410 to traffic stops (and not applicable to [stops of persons on foot in a public park]), no authority supports the proposition than an officer cannot, during the course of a stop that is supported by reasonable suspicion or probable cause, inquire whether the stopped person is carrying weapons or contraband. *State v Simcox*, 231 Or App 399, 403 (2009).

State v Baker/Jay, 232 Or App 112 (11/18/09), *rev denied* 348 Or 280 (4/29/10) (Ortega, Landau, Carson SJ) Officer was investigating a menacing incident by a person who had pointed a gun at a mixed-race couple, and made racist remarks (including ordering them to leave the neighborhood), while the couple stood in front of their home. That person (defendant) was linked to a particular car. Officer stopped that particular car and told the driver that he'd been investigating an incident with a gun, the car been linked to that incident, and defendant was linked to the car. Driver consented when officer asked to search the car. Inculpatory evidence found in the glove box. Trial court concluded that the search of a car's glove box exceeded the scope of driver's consent and thus suppressed the evidence. Court of Appeals reversed. Nothing in the record shows that driver placed any limit on her consent. Here, a reasonable person would have understood that the officer's request for consent to search the car was a request to search for a gun or other evidence relevant to the menacing incident. Scope of driver's consent extended to any place that could contain a gun or other evidence that connected defendant to the car. Court of Appeals also rejected defendants' claims that, even if driver's consent extended to the glove box, the state, which bore the burden, failed to prove that driver was authorized to consent to that search. Here, evidence shows that driver was in lawful possession of the car. "Defendants do not explain, and we do not understand, why a person who is lawfully operating a car with the owner's consent and who is authorized to consent to a search of the car nevertheless lacks authority to consent to a search of constituent parts of the car to which the driver normally has access."

See ***State v Caster***, 236 Or App 214 (2010) on cotenant consent to search or seizure in a shared home after defendant's objection, under Fourth Amendment, *post*.

See ***State v Ayles***, 348 Or App 622 (8/12/10) (Gillette, with Durham concurring, and with Kistler, Balmer, and Linder dissenting), discussed under Attenuation as Exception to Suppression, *post*.

See ***State v Zamora***, 237 Or App 514 (9/29/10) (Ortega, Landau, Sercombe), discussed under searches of Homes, Curtilage, and Rooms. Without a warrant, without evidence of any suspicion of crime, but with defendant's consent, officers searched defendant's bedroom and found drugs and guns. Court of Appeals cited *State v Holmes*, 311 Or 400, 407 (1991) for the proposition that: "It is well-settled that 'a police-citizen encounter without any restraint of liberty (e.g., mere conversation, a non-coercive encounter) is not a "seizure" and, therefore, requires no justification.'" This case is not about a street encounter, or an encounter in a public place, but rather a private bedroom.

9. Abandonment

(*Note*: Abandoning something does not necessarily allow it to be searched or seized as an exception to the warrant requirement, but rather abandonment may relinquish a protected privacy interest in the item.)

If a person gives up all rights to control the disposition of property, that person also gives up his privacy interest in the property in the same way that he would if the property had been abandoned. *State v Howard/Dawson*, 342 Or 635, 642-43 (2007).

State v Brown, 348 Or 293 (5/27/10) (De Muniz) Motel clerk called police to check a room. In the room, officer found four people including defendant, a meth pipe, and various bags. The people said they had not rented the room, someone else not present had. Officer asked if anyone had personal property in the room. Defendant claimed only sandals. Officer asked if two particular bags were defendant's. She denied owning either bag. Officer asked everyone if they'd retrieved all of their belongings, because the manager was kicking them out and locking the room. No one claimed anything else in the room. Manager locked the room. Later, the persons who rented the room returned, and gave officer permission to search whatever she wanted. The renters said the two bags (that defendant denied owning) belonged to Sheena Brown. The bags both contained evidence of identity theft. Defendant moved to suppress the evidence from the two bags that were searched without a warrant. Trial court granted her motion to suppress, rejecting the state's argument that she had abandoned the bags, because the evidence did not demonstrate that defendant intended to permanently relinquish possession of the bags. Court of Appeals affirmed under *State v Cook*, 332 Or 601 (2001) and its own precedent.

Supreme Court reversed: "The government conducts a 'search' for purposes of Article I, section 9, when it invades a protected privacy interest. . . . A protected privacy interest 'is not the privacy that one reasonably *expects* but the privacy to which one has a *right*.' . . . Accordingly, a defendant's subjective expectation of privacy does not necessarily determine whether a privacy interest has been violated. . . . Article I, section 9, protects 'the general privacy interests of "the people" rather than * * * the privacy interests of particular individuals.' *State v Tanner*, 304 Or 312, 320 (1987). . . . However, it is not enough that police may have violated Article I, section 9, in some abstract sense. As *Tanner* explains, courts will suppress evidence only when a defendant's rights under Article I, section 9, have been violated."

Here, "[b]oth the trial court and the Court of Appeals concluded that defendant must be shown to have intended to relinquish permanently all constitutionally protected interests." "We do not read *Cook* to require *permanent* relinquishment. . . . The word 'permanently' occurs only once in the *Cook* opinion . . . In context the court used the word 'permanently only to emphasize the transient nature of the defendant's relinquishment of possession of the property. . . . In all events, if *Cook*

implied such a requirement, doing so was unnecessary to our holding in that case, and we disavow that requirement now."

Supreme Court concluded that defendant had disclaimed ownership of the bags and voluntarily gave up possession of them, having left the bags in a locked room rented by someone she knew. She abandoned her bags in a locked room to which she would not have access. "Because defendant had relinquished her possessory rights, she also had relinquished her privacy interests in the bags." The persons who rented the room, controlled it, and held the only remaining possessory and privacy interest in the two bags. The renters' consent to a search relinquished the remaining privacy interest in the room and its contents. The officer, by searching the bags, did not violate any constitutionally protected privacy interest held by defendant.

Defendant's Fourth Amendment rights were not violated: she had no reasonable expectation of privacy after disclaiming ownership and voluntarily leaving the items behind. Reversed.

10. Mobile Automobiles

> Automobiles may be searched and seized without a warrant, under Article I, section 9, if the automobile is mobile when police stop it and if probable cause exists for the search. *State v Brown*, 301 Or 268, 274 (1986) (creating the exception as a subset of the exigent circumstances exception). A vehicle remains mobile even when blocked by a police car and the driver is under arrest because such a vehicle could be moved after officers relinquish control of it. *State v Meharry*, 342 Or 173, 181 (2006). An auto is mobile if it is parked, immobile, and unoccupied when police first encounter it. *State v Kock*, 302 Or 29 (1986). An auto ceases to be mobile when it is impounded and a warrant is required for a search after impoundment. *State v Kruchek*, 156 Or App 617, 624 (1998).
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> "That mobility requirement is specific to the Oregon Constitution." Under the Fourth Amendment, the police may search a stationary vehicle solely on the basis of probable cause. *Meharry*, 342 Or at 178 n 1.

State v Foster, 233 Or App 135 (1/6/10), *rev allowed,* 348 Or 13 (5/04/10) (Brewer, Schuman, Deits SJ) Officers observed defendant talking outside a drug user's house. Defendant drove away without fastening his seat belt; police stopped him for that. Officer recognized his name from a confidential informant as a recent meth dealer. Another officer was summoned, with Benny, his drug detection dog. Benny "alerted" at the driver's door handle. Officer asked defendant if he had drugs. Defendant nervously said no, but said maybe Benny alerted because his relative may have smoked marijuana in the car earlier. Defendant denied consent to search. Officer searched and found meth in a pipe in the car. At a suppression hearing, trial court heard testimony of Benny's training and service records, and a defense expert criticizing the training method, which is set out in detail in the opinion. Trial court denied motion to suppress, stating that Benny's accuracy record shows that it is more likely than not that he will alert in the presence of drugs, with some hits and some

misses, but the totality of the evidence presented establishes probable cause to search an automobile.

Court of Appeals affirmed. There is no question that the officer here had the requisite subjective belief of probable cause, thus the issue only is to objective probable cause; in other words, did the facts demonstrate that it was more likely than not that drugs would be found in defendant's car? The tips from two confidential informants do not establish probable cause. (The 6-month old tip has "little weight" and "did not contribute to probable cause" in the objective probable cause analysis due to its age, its lack of specificity, its lack of a purchaser identification or location, and its lack of a basis for the informant's knowledge. The 2-3 week old tip, however, identified the buyer and seller and location and thus "correctly weighs into the probable cause equation" although "it does not weigh heavily in favor of finding probable cause" because it was received not from a named informant but instead from a confidential reliable informant.). But objective probable cause was established when adding in Benny's "alert" at the door of defendant's car, along with evidence such as defendant's nervousness during the stop, his suggestion that a relative might have smoked marijuana after Benny alerted, and that more recent tip implicating defendant as a drug dealer. The state established the requisite probable cause to support a warrantless search under the automobile exception.

Also, the "probable cause" necessary to conduct a warrantless search and to obtain a warrant to search is the same standard. *See* ORS 131.007(11) (probable cause to arrest); ORS 133.555 (probable cause to issue a search warrant). "'Probably' means 'more likely than not.'" "Those basic requirements for objective probable cause are equally applicable in the context of warrantless and warranted searches."

State v Smalley, 233 Or App 263 (1/20/10) *rev denied* 348 Or 415 (6/11/10) (Schuman, Brewer, Riggs SJ) Defendant was in a truck pulled over for an infraction. Officers smelled marijuana in the truck and found 62 ounces in defendant's backpack. Defendant moved to suppress the marijuana and the state countered that the search fell within the automobile exception to the warrant requirement. Trial court granted the motion. Court of Appeals reversed. This vehicle was not impounded, immobile, or being inventoried. The officer had probable cause to believe, objectively, that the lawfully stopped vehicle was capable of movement and contained contraband. The search of the vehicle's contents and defendant's backpack were lawful.

Defendant argued that possession of less than an ounce of marijuana is not a "crime" – only a violation – and therefore suspicion of possession of less than an ounce of marijuana cannot support probable cause for an arrest or a search, thus the automobile exception cannot apply, because under *Brown* the state must show that (1) the vehicle was mobile when stopped and (2) probable cause (subjective and objective belief) existed to believe that defendant's backpack contained contraband or crime evidence. Court of Appeals rejected that theory: Marijuana in any quantity is "contraband" under BLACK'S LAW DICTIONARY (2009) and WEBSTER'S (2002) (Note: *Brown* is a circa-1986 case; the Court of Appeals here used dictionaries post-dating *Brown*). *Held*: probable cause to believe a mobile vehicle contains less than an

ounce of marijuana justifies a warrantless automobile search because even that noncriminal amount is "contraband."

State v Kurokawa-Lasciak, 237 Or App 492 (9/29/10) (Schuman, Landau, Ortega) Defendant was arrested about thirty feet from his parked van in the Seven Feathers Casino parking lot. He would not consent to a search of his van after the officer told him he believed there was evidence of money laundering in that van. He gave his van keys to his girlfriend, told her to check on the dog in the van, then to lock it and wait for him. She went into the casino. Officers began asking the girlfriend repeatedly if there was money, drugs, or marijuana in the van. Finally she said there was a little marijuana, and that the amount was probably under but could be over an ounce. She did not consent to the search at first. She said she intended to drive the van away. Officer said he would impound it and get a search warrant if she did not consent. She said she felt badgered but finally signed a consent form. Inside the van was $48k in cash, 56 grams of hashish, 77 grams of marijuana, and electronic scales. Defendant moved to suppress the evidence from the van. Trial court granted that motion, concluding that the girlfriend's consent was involuntary and the automobile exception did not apply because the van was not "mobile" when defendant was approached and because the vehicle was not the focus of the stop until after officers developed probable cause to arrest defendant.

Court of Appeals reversed, explaining that the judge-made doctrine called the "automobile exception" to the warrant requirement "has what charitably might be called an irregular history" but "at present, a vehicle is 'mobile' for purposes of the automobile exception as long as it is operable." It is not "mobile" if it is functionally disabled, impounded, or being impounded. The exception does not apply if officers do not focus attention on the automobile until after they have probable cause to detain a defendant. After stating the law, the Court of Appeals noted that here the officer focused his attention on the van almost immediately after he arrived at the scene, when he asked for (and was denied) consent to search it. The fact that there may have been more or less than an ounce of marijuana in it does not render the automobile exception inapplicable, see *State v Smalley* (even a noncriminal amount of marijuana is contraband therefore justifying a warrantless automobile search). When probable cause to believe contraband was in the van developed, the van was mobile, operable, and was not being impounded. It also became the subject of the officer's focus before probable cause to arrest defendant had developed.

11. Public School Searches for Illegal Drugs

(The right to attend public school is not a fundamental right under the U.S. Constitution). *San Antonia Independent School District v Rodriguez,* 411 US 1, 33-37 (1973).)

i. Fourth Amendment on suspicionless drug testing:

"Special needs" inhere in the public school context. "Fourth Amendment rights . . . are different in public schools than elsewhere; the [Fourth Amendment] 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children." *Vernonia School Dist. v Acton*, 515 US 646, 656 (1995). Suspicionless drug testing of student athletes does not violate the Fourth Amendment – students' privacy interest is limited where the state is responsible for maintaining discipline. *Id.*

A school district's policy, requiring all middle and high school students to consent to urinalysis testing for drugs to participate in any extracurricular activity is a reasonable means of furthering the school district's important interest in preventing an deterring drug use in school children and does not violate the Fourth Amendment. *Bd of Education of Pottawatomie County v Earls*, 536 US 822 (2002).

Drug testing of students need not "presumptively be based upon an individualized reasonable suspicion of wrongdoing . . . . The Fourth Amendment does not require a finding of individualized suspicion." *Earls*, 536 US at 837.

ii. Strip-searches and clothing-searches of individual students for drugs, Fourth Amendment:

"[S]chool officials need not obtain a warrant before searching a student who is under their authority." *New Jersey v T.L.O.*, 469 US 325, 340 (1985). "Under ordinary circumstances, a search of a student by a teacher or other school official will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.* at 341-42.

See **Public Schools** under Search and Seizure, *ante.*

SER Juvenile Dep't of Clackamas County v M.A.D., 348 Or 381 (6/10/10) (Balmer) The juvenile court concluded that although public school officials did not have probable cause to search a student's jacket pocket for marijuana, the federal

standard from *New Jersey v TLO*, 469 US 325 (1985), should determine whether the school violated the student's Article I, section 9, rights. (The Fourth Amendment, applicable to the states through the Fourteenth, allows a public school official to search a public school student for contraband if the school official has reasonable grounds – a lower standard of suspicion than probable cause -- to suspect that the search will reveal evidence of a violation of law or school rules). The juvenile court here concluded that, under that federal standard, school officials had "reasonable grounds" to search Youth and the search was reasonable in scope. Juvenile court denied Youth's motion to suppress. Court of Appeals reversed in a divided opinion.

State conceded that the school did not have probable cause to search. State did not argue that any existing exception to the warrant requirement applied here. Specifically, the state did not contend that the "statutorily authorized administrative program" exception applied or that Youth consented to the search. Instead it argued that the Supreme Court should import *TLO*'s "reasonable suspicion" standard into Article I, section 9.

The Supreme Court did. The Supreme Court reversed the Court of Appeals, apparently creating a new exception to the warrant requirement in Article I, section 9. The Court held:

> "when school officials at a public high school have a reasonable suspicion, based on specific and articulable facts, that an individual student possesses illegal drugs on school grounds, they may respond to the immediate risk of harm created by the student's possession of the drugs by searching the student without first obtaining a warrant."

The Supreme Court created the lower-suspicion standard by describing what it views "as the closest analogy" to schools: the "officer-safety exception." That exception allows a police officer to conduct a limited search:

> "to protect the officer or others if 'during the course of a lawful encounter with a citizen, the officer develops a reasonable suspicion, based upon specific and articulable facts, that the citizen might pose an immediate threat of serious physical injury to the officer or to others present."

The Supreme Court reasoned that the officer-safety exception applies to

> "unique circumstances" where a "police officer in the field frequently must make life-or-death decisions in a matter of seconds. There may be little or no time in which to weigh the magnitude of a potential safety risk against the intrusiveness of protective measures."

The Supreme Court simultaneously wrote that school settings are both similar to and different from street encounters with law enforcement, stating:

> - The "unique context of the school setting <u>distinguishes</u> school searches from searches conducted by law enforcement officers in other settings."

> - The "school context is sufficiently <u>different</u> from the setting in which ordinary police-citizen interactions occur to justify an exception to the warrant requirement in certain circumstances". (Emphasis added)
>
> - The "concerns underlying the officer-safety exception also apply to some searches conducted by school officials.
>
> - "For the same reasons that we have applied the less exacting 'reasonable suspicion' standard, rather than the probable cause standard, to determine whether a limited officer-safety search is permissible under Article I, section 9, we conclude that the reasonable suspicion standard should apply to a search . . . for illegal drugs that is conducted on school property by school officials acting in their official capacity."

The Supreme Court reasoned that school searches for marijuana are sufficiently similar to ordinary police-citizen interactions where there is an "immediate threat of serious harm" to dispense with the Oregon Constitution's warrant requirement:

> As "with an officer-safety search, when a school official develops a 'reasonable suspicion,' based on 'specific and articulable facts,' that a particular individual on school property either personally poses or is in the possession of some item that poses an 'immediate threat' to the safety of the student, the official, or others at the school, the school official 'must be allowed considerable latitude to take safety precautions.'" (Quoting *State v Foster*, 347 Or 1, 8 (2009) on the officer-safety exception).

The Supreme Court did not address the text of Article I, section 9, except to recite it in a footnote. The Supreme Court did not address the history of Article I, section 9, such as founders' intent or early case law. It did not cite any law review articles or books. It did not cite any statistics or data. It did not discuss or distinguish an idea that noncriminal administrative searches in public schools could be justified by a lower standard. It did not cite (or credit) the "special needs" doctrine that Justice Blackmun posited in *TLO*, see 469 US at 351-53 (Blackmun, J., concurring). Instead, the Supreme Court just recited some state statutes on public schools' authority and purpose.

12. <u>Jails and Juvenile Detention</u>

<u>Adults</u>:

Bull v City and County of San Francisco, 595 F3d 964 (9th Cir 02/09/10) (en banc) (<u>Ikuta</u>; Kozinski and Gould concurring; Graber specially concurring; Thomas, Wardlaw, Berzon, and Rawlinson dissenting) (This is not an Oregon case or an Oregon Constitution case, but subsequent Oregon cases rely on it, see *post*.). Numerous plaintiffs brought this §1983 class action lawsuit after being strip-searched and in some cases body-cavity searched in the San Francisco County jails, under the sheriff's policy that mandated strip searches of all arrestees to be introduced into San Francisco's general jail population. Plaintiffs challenged this policy on its face.

Plaintiffs also introduced the facts of their cases. One plaintiff, Ms. Bull, had poured red dye mixed with corn syrup on the ground at a political protest. She was arrested, jailed, forcibly stripped, visually body-cavity searched in a squatting position in front of men while her genital and rectal areas were inspected, left naked for 11 hours, subjected to a second visual body-cavity search, left naked for another 12 hours, then released, and was never charged with a crime. A nun was arrested at an anti-war demonstration, and was strip searched at the jail. Another plaintiff was arrested for driving with a suspended license, forcibly strip searched by male officers, kept naked for 12 hours with male officers regularly viewing her, then was released with no charges being filed.

District court held that the policy violated the Fourth Amendment and denied the sheriff qualified immunity. City and County brought an interlocutory appeal, challenging the denial of qualified immunity. A divided Ninth Circuit panel affirmed, 539 F3d 1193 (9th Cir 2003). The Ninth Circuit granted rehearing en banc. Ninth Circuit, en banc, held that San Francisco's policy does not violate plaintiffs' Fourth Amendment rights.

Majority noted that the issue is the policy itself, not violations of the policy, thus plaintiffs' individual situations are not relevant. The policy authorized a visual body cavity search only – no physical touching of body cavities was authorized. The majority noted that the purpose of the strip search policy was to prevent the smuggling of drugs, weapons, and other contraband into the general jail population. And San Francisco presented a well-documented record of the contraband problem in its jails via body cavities. *Bell v Wolfish*, 441 US 520 (1979) and *Turner v Safley*, 482 US 78 (1987) govern the analysis. The majority here recited *Bell*'s acknowledgement that the scope of visual body cavity searches is "invasive," and described the gender-specific requirements for such searches in detention-facility strip searches. *Bell*, the majority here noted,

> "held that a mandatory, routine strip search policy applied to prisoners after every contact visit with a person from outside the institution, without individualized suspicion, was facially constitutional."

Given the sheriff's central objective to safeguard institutional security, and that confinement brings the "necessary withdrawal or limitation of many privileges and rights," and that courts cannot impermissibly substitute their view for experienced prison administrators,

> "it is apparent that the scope, manner, and justification for San Francisco's strip search policy was not meaningfully different from the scope, manner, and justification for the strip search policy in *Bell*."

Under *Turner*, San Francisco's strip search policy did not violate the plaintiffs' Fourth Amendment rights because it was reasonably related to the legitimate penological interests of the jail in maintaining security for inmates and employees by preventing contraband smuggling.

Majority noted the circuit split on the issue of whether strip searches of arrestees entering the general jail population are per se unreasonable unless the officials have individualized reasonable suspicion that the arrestees are smuggling contraband. The Ninth Circuit here joined the Eleventh Circuit (not the opposing views held by the 1st, 2nd, 4th, 5th, 6th, 8th, and 10th Circuits) to conclude that strip searching every arrestee *without* individualized reasonable suspicion as part of the booking process, provided the searches are no more intrusive than those in *Bell* and are not conducted in an abusive manner, does not violate the arrestees' rights. Ninth Circuit overruled its own panel opinions in *Thompson v City of Los Angeles*, 885 F2d 1439 (9th Cir 1989) and *Giles v Ackerman*, 746 F2d 614 (9th Cir 1984). Reversed.

Dissent: "In holding that such searches were unconstitutional, the district court [here] faithfully applied a quarter century of Ninth Circuit law, which was consistent with the law of all but one of our sister circuits. Under that nearly uniform interpretation of constitutional law, a body cavity strip search of a detainee is only justified by individualized reasonable suspicion that the search will bear fruit. If jailors have no reasonable suspicion, the search must be categorically reasonable based on empirical evidence that the policy is necessary. . . . The majority sweeps away twenty-five years of jurisprudence, giving jailors the unfettered right to conduct mandatory, routine, suspicionless body cavity searches on any citizen who may be arrested for minor offense, such as violating a leash law or a traffic code, and who pose no credible risk for smuggling contraband into the jail." "The overwhelming majority of circuits believe that *Bell* mandates a reasonable suspicion standard [rather than a suspicionless standard]."

Dissent also noted that the District Court found that San Francisco had satisfied a reasonableness requirement for all detainees who had been arrested on weapons, violence, or controlled substance charges, or who had a criminal history. "The small set of plaintiffs that the district court allowed to proceed were only those whose backgrounds did not give rise to the categorical suspicion necessary to justify a strip search."

Wong v Beebe, 2010 WL 2231985 (9th Cir 6/04/10) (Graber, Fisher, M. Smith) (unpublished) In 1999, Ms. Wong was detained for 5 days in Multnomah County jails pending her removal from the United States. She was subjected to two strip searches in the presence of men. She brought a section 1983 action alleging violations of her Fourth Amendment rights. District court denied the INS director's motion for summary judgment. Ninth Circuit reversed, in light of *Bull v City and County of San Francisco*. Although Ms. Wong was an immigration detainee rather than a domestic detainee, the panel did not decide whether the searches were unconstitutional, because even if they were, the INS director is entitled to summary judgment based on qualified immunity. Also, although she was searched in the presence of men, in violation of the County's written policy, the searches may have been unconstitutional, but she did not produce any evidence that the INS director knew or should have known that she would be searched in the presence of men.

Juveniles:

Mashburn v Yamhill County, 698 F Supp 2d 1233 (D Or 3/11/10) (Mosman) Plaintiffs are minors who were strip searched on entry to the county jail and after having "contact visits" with non-jail staff, including their lawyers. The strip searches under the detention center's policy requires "astonishingly thorough" searches, including of genitalia and body cavities. The juveniles brought a section 1983 action alleging that their Fourth Amendment rights were violated. The detention center's policies authorize jail staff to strip search juveniles, without any reasonable suspicion, after admittance to the juvenile detention center and after "contact visits." The intake policy evaluates the juvenile's charged crime, criminal history, physical and mental status, and behavior.

Cross-motions for summary judgment were filed. In a detailed and thorough opinion, the district court concluded that the strip searches conducted on *these* plaintiffs on their admission to the facility did not violate Fourth Amendment standards (because all engaged in conduct that created concern about whether they had drugs or weapons). (As applied to others, however, the admissions policy could be unconstitutional if the reason for their admission did not raise security concerns.). But strip searches conducted after contact visits, without any individualized suspicion (without any reasonable basis to suspect) that the juveniles have contraband, violate the Fourth Amendment.

The district court reasoned as follows: "The Fourth Amendment generally requires searches to be conducted pursuant to probable cause, or at least 'some quantum of individualized suspicion.' *Skinner v Ry Labor Executives' Ass'n*, 489 US 602, 624 (1989)." In certain limited circumstances, commonly referred to as "special needs" cases, the warrant and probable cause requirements are impracticable. Examples of "special needs" cases are public schools, see *Vernonia Sch Dist v Acton*, 515 US 646, 656 (1995) and *Pottawatomie County v Earls*, 536 US 822, 829 (2002). But "Fourth Amendment challenges in the context of prisons and jails are not typically referred to as special needs cases," but the Supreme Court and Ninth Circuit have upheld prison searches predicated on less than probable cause, or even reasonable suspicion, such as "suspicionless strip searches of arrestees who were confined in a prison's general population," see *Bell v Wolfish*, 441 US 520, 560 (1979) and *Bull v City and County of San Francisco*, 595 F 3d 964, 980-82 (9th Cir 2010 (en banc) (discussed, *ante*). (*Bull*'s reasoning is binding precedent to adult prisons, but not to juvenile detention, the district court reasoned.). Even in "special needs" cases, the government still must conduct the search in a way not "excessively intrusive in light of the age and sex of the student and the nature of the infraction," see *New Jersey v T.L.O.*, 469 US 325, 342 (1985) and *Safford Unified School Dist v Redding*, 129 S Ct 2633, 2642-43 (2009). Neither the US Supreme Court nor the Ninth Circuit has directly ruled on the constitutionality of strip searches of juvenile detainees. "On the constitutional spectrum, the standard for analyzing strip searches of children at the [county detention center] falls somewhere between the standards that govern searches of adult prison inmates and searches of school children."

"Unlike students, youth confined to a juvenile detention facility are under substantially greater restraint and have a lesser expectation of privacy than do students." In short, "the unique concerns of children and of the government" frame

the district court's analysis. The strip searches conducted upon admission do not violate Fourth Amendment standards, but the searches after contact visits violate the Fourth Amendment.

13. "Community Caretaking" - Fourth Amendment only

- Exception to Fourth Amendment warrant requirement
- Not an exception to Article I, section 9, warrant requirement

See **Emergency Aid** exception to Warrant requirement, *ante*.

Sivik v DMV, 235 Or App 358 (5/19/10) (Schuman, Landau, Ortega) "The community caretaking statute is not an exception to the warrant requirement. . . . It is the statutory expression of the well-settled precept that the actions of law enforcement officers, like all other government actors' actions, must be traceable to some grant of authority from a politically accountable body. *State v Bridewell*, 306 Or 231, 239 (1988). ORS 133.033 [the community caretaking statute] is such a grant of authority. . . . a 'community caretaking' search or seizure (as distinct from a search or seizure for purposes of law enforcement) must fall within the ambit of ORS 133.033 and it must also meet constitutional standards. The statute provides the predicate grant of authority, and the constitution specifies limitations on that grant."

State v Mazzola, 238 Or App 201 and 238 Or App 340 (10/27/10) (Haselton, Armstrong, Edmonds SJ) Although the community caretaking statute gives officers statutory authority to perform various community caretaking activities, such as entering homes and other premises to perform certain searches, it does not create an exception to the warrant requirement.

State v Gonzales, 236 Or App 391 (7/28/10) (Rosenblum, Brewer, Deits) (Fourth Amendment case) Officer observed defendant commit a traffic infraction. Officer activated his overhead lights. Defendant drove 2-3 blocks and parked in his own driveway. Defendant told officer his license was suspended and handed him an expired insurance card. Officer cited ORS 809.720 and a Cornelius city code provision as authority to impound the vehicle (because defendant was driving while suspended and without insurance). Officer then conducted an inventory before impoundment and found a small plastic bag of cocaine under the seat. Defendant moved to suppress the evidence on grounds that the inventory was unlawful. Officer testified that he did not know whose name the vehicle was registered in. Defendant's wife testified that the vehicle was registered to her mother. State argued that officer validly impounded the vehicle under the "community caretaking" doctrine. Defendant argued that the community caretaking doctrine did not apply here because defendant stopped in his own driveway and the car was not blocking traffic or otherwise left unretrieved. Defendant conceded that if he had pulled over when the officer turned on his overhead lights, he would not be able to argue that the "community caretaking" doctrine was inapplicable because he was in his own driveway. Trial court denied the motion, stating that it would not allow defendant to

benefit from evading the officer and making it to his driveway. Trial court convicted defendant.

Court of Appeals reversed and remanded, holding that the "community caretaking" exception to the Fourth Amendment's warrant requirement does not justify impounding this defendant's car from his driveway. In so holding, the Court of Appeals agreed with the Ninth Circuit's reasoning in a case with similar facts, *Miranda v City of Cornelius,* 429 F3d 858 (9th Cir 2005). In that case, a man was teaching his wife how to drive. Wife drove poorly, at low speed, and when a police officer activated his overhead lights, the wife pulled into their driveway. Officer cited wife for driving without a license and husband for permitting her to drive unlawfully, and impounded the van, pursuant to the same City of Cornelius ordinance and statute at issue in this present case. The Ninth Circuit panel cited *South Dakota v Opperman*, 428 US 364 (1976), and concluded that under the "community caretaking" function, officers may impound vehicles that jeopardize public safety, impede traffic, create a hazard, or may be vandalized or stolen. The Ninth Circuit panel also concluded that "the deterrence rationale [for impounding a vehicle] is incompatible with the principles of the community caretaking doctrine." Here, the Court of Appeals stated: "We agree with the Ninth Circuit's reasoning . . . The community caretaking doctrine does not encompass all police activity that furthers the interests of public safety . . ." The warrantless seizure of the vehicle was unlawful and the cocaine from the inventory should have been suppressed.

14. Probation Status

A probation officer may order the arrest of a probationer when the officer has reasonable grounds to believe that the probationer has violated the conditions of probation. ORS 144.350(1)(a); *State v Davis*, 133 Or App 467, 473-74, *rev den* 321 Or 429 (1995).

(no cases)

F. Remedies and Exceptions

"The criminal is to go free because the constable has blundered." *People v Defore*, 242 NY 13, 21-22 (1926) (Cardozo, J.).

"One way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else." *Elkins v United States*, 364 US 206, 217 (1960) (Quoting 8 Wigmore, EVIDENCE (3d ed 1940, §2184)).

"It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense [against the right to be free from unreasonable searches and seizures]; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property". *Boyd v United States*, 116 US 616, 630 (1886).

"Cooley said of the Fourth Amendment 110 years ago that 'it is better oftentimes that crime should go unpunished than that the citizen should be liable to have his premises invaded, his trunks broken up, [or] his private books, papers, and letters exposed to prying curiosity.' * * * If the government could not have gained a conviction had it obeyed the Constitution, why should it be permitted to prevail because it violated the Constitution? * * * It is possible that the real problem with the exclusionary rule is that it flaunts before us the price we pay for the Fourth Amendment." *State v Warner*, 284 Or 147, 163-64 (1978) (quoting Yale Kamisar, *Is the Exclusionary Rule an 'Illogical" or "Unnatural" Interpretation of the Fourth Amendment?*, 62 JUDICATURE 66, 73-74 (Aug 1978).

Oregon's exclusionary rule for Article I, section 9, violations is not based on a deterrence rationale like the Fourth Amendment's. Instead, in Oregon, the right to be free from unreasonable searches and seizures also encompasses the right to be free from the state's use (in certain proceedings) of evidence obtained in violation of Article I, section 9, rights. *State v Hall*, 339 Or 7, 24 (2005).

Under Oregon's Constitution, "the deterrent effect on future practices against others, though a desired consequence, is not the constitutional basis for respecting the rights of a defendant against whom the state proposes to use evidence already seized. In demanding a trial without such evidence, the defendant invokes rights personal to himself." *State v Murphy*, 291 Or 782, 785 (1981).

1. Exception or applicability of exclusionary rule under Article I, section 9

If a defendant establishes that, but for unlawful police conduct, evidence of a crime would not have been discovered, then the evidence must be suppressed unless the state establishes *either* (1) that the evidence would have been discovered independently of the illegality (inevitable discovery or obtained not only as a result of the illegality but also as a result of a chain of events that did not include any illegality) *or* (2) the connection between the unlawful stop and discovery of evidence is so tenuous that the unlawful police conduct cannot be viewed as the source of that evidence. *State v Hall*, 339 Or App 7, 25 (2005).

ORS 136.432 precludes courts from excluding evidence for statutory violations. *But see State v Davis*, 295 Or 227, 236-37 (1983) (There is "no intrinsic or logical difference between giving effect to a constitutional and a statutory right. Such a distinction would needlessly force every defense challenge to the seizure of evidence into a constitutional mold in disregard of adequate state statutes. This is contrary to normal principles of adjudication, and would practically make the statutes a dead letter.")

(a). Inevitable Discovery as Exception to Suppression

State v Medinger, 235 Or App 88 (4/28/10) (Wollheim, Brewer, Sercombe) (See discussion, *ante*, of Probable Cause to Arrest). "Generally, evidence that police officers discover as a result of an unlawful seizure must be suppressed under Article I, section 9. An exception is that evidence that law enforcement officers would have inevitably discovered will not be suppressed." Here, an officer arrested defendant without probable cause, in violation of Article I, section 9. He found paystubs belonging to other people while "inventorying" defendant's pockets. Officer testified that the paystubs' discovery was inevitable (and thus not suppressable) because an inventorying officer at an alcohol detox facility would have required to place the contents of his pockets into a basket. But the evidence does not establish that an officer would have inspected the paystubs that defendant placed into the basket. *Held*: Evidence properly suppressed.

(b). Attenuation as Exception to Suppression

State v Ayles, 348 Or 622 (8/12/10) (Gillette; Durham concurring; Kistler, Balmer, and Linder dissenting) Defendant was a passenger in a speeding car with no front license plate that was stopped. Driver appeared to be under the influence of meth. Officer asked driver if there was any meth in the car. Defendant interrupted and asked how to rectify the license plate situation. Officer found defendant's question and "over friendly" demeanor suspicious. Officer asked defendant for ID. Defendant handed him a VA card. Officer put it in his patrol car, had driver get out of the car, patted her down, told her to sit on the rear bumper, and ran a computer check of driver and defendant, which revealed nothing of interest. Officer retained defendant's ID, asked him to step out (he did), asked him if he hand any weapons (he said he did not), asked for consent to pat him down (he consented), and asked him to lace his fingers behind his neck (he did). Officer saw a pill bottle with plastic wrap in defendant's right breast pocket. Officer asked "is that the meth?" Defendant admitted it was. Officer arrested him and read him his *Miranda* rights. One of the other passengers said a backpack in the car was defendant's. Defendant admitted it was his. Officer asked if more meth was inside. Defendant described in detail what officer would find in the backpack. Meth and drug items were inside.

Defendant moved to suppress all statements and evidence after the officer took his VA card, on grounds that officer had no reasonable suspicion that defendant had committed a crime or posed a threat to officer safety. Trial court denied the motion, concluding that defendant was not illegally seized when officer took his VA card and that he had consented to the search of his person and his statements after *Miranda* warnings were voluntary.

Court of Appeals reversed, concluding that under *State v Hall*, 339 Or 7 (2005), a defendant who seeks suppression of evidence obtained from a consensual but illegal search bears an initial burden to show a "minimal factual nexus between the unlawful police conduct and the defendant's consent." Court of Appeals concluded that defendant met that burden, and then the state failed to show mitigating factors. On appeal, the state conceded that the officer's taking of defendant's VA card was an unlawful seizure.

Supreme Court affirmed the Court of Appeals' decision, holding that the trial court should have suppressed the pill bottle, defendant's statements, and the backpack evidence.

State acknowledged that defendant was seized in violation of Article I, section 9, when the officer "took and retained defendant's identification without reasonable suspicion of criminal activity." Although defendant's consent was voluntary (his "free will" was not overcome), he "consented to the search of his person *during* that illegal seizure." (Emphasis in *Ayles*).

The issue, per the state's petition, is only "what is required for the defendant to establish the 'minimal factual nexus' that is mentioned" in *Hall*, 339 Or at 34, which is: "After a defendant shows a minimal factual nexus between unlawful police conduct and the defendant's consent, then the state has the burden to prove that the defendant's consent was independent of, or only tenuously related to, the unlawful police conduct."

Supreme Court explained that "*Hall* requires the defendant to establish a 'minimal factual nexus between unlawful police conduct *and the defendant's consent*,' not the police officer's request for consent. That is, the focus of the factual nexus determination . . . is on whether defendant would have consented to the search that uncovered the evidence if the officer had not unlawfully seized him." (Emphasis in *Ayles*).

Here, "defendant met his burden to establish a minimal factual nexus between the illegal police conduct and his consent to search. During defendant's unlawful seizure, defendant was not free to leave. The unlawful police conduct thus made defendant available to [the officer] for questioning."

"A defendant gains nothing from having a constitutional right not to be seized if the police can seize him and – by definition – use the circumstance of that seizure as a guarantee of an opportunity to ask him to further surrender his liberty. There was a minimal factual nexus between defendant's illegal seizure and his decision to consent." Defendant thus met his initial burden (that "minimal factual nexus"). The burden shifts to the state to prove that the evidence obtained did not derive from exploitation of the unlawful police conduct. But the "state has not argued that it did or could meet its burden to prove that defendant's consent to search was independent of, or only tenuously related to, [the officer's] unlawful seizure of defendant".

Additionally, defendant's statements post-*Miranda* and his backpack also should have been suppressed. The statements and consent to search the backpack were voluntary, but are inadmissible unless the state can demonstrate that the statements and consent did not derive from the preceding illegal seizure. Under *Hall*, that determination (whether the state met that burden) is a fact-specific inquiry into the totality of the circumstances. Here, the officer gave *Miranda* warnings after illegally arresting defendant, and defendant was handcuffed in the patrol car when the officer

questioned him about the backpack. The facts suggest that the initial unconstitutional seizure of defendant affected his actions (statements and consent). Here, the *Miranda* warning was inadequate to relieve the obvious taint of the unlawful police conduct.

Durham concurred, noting that his dissent in *State v Hall*, 339 Or 7, 37 (2005) and from the Supreme Court's recent extension of *Hall* into the arena of traffic stops in *State v Rodgers/Kirkeby*, 347 Or 610, 631 (2010). State here does not challenge *Hall*, and Durham joins the majority's conclusion that defendant met his initial burden under Hall, and also that the *Miranda* warning alone did not nullify the causal link between defendant's statements and the backpack search. Concurrence notes: "Counsel for any party who chooses to challenge the correctness of the decision in *Hall* in a future case is well-advised to bear in mind the guidance that this court provided in *Stranahan* [*v Fred Meyer, Inc.*, 331 Or 38, 54 (2000)].

Kistler, Balmer, and Linder dissented: Dissent would hold that "because the detention in this case resulted equally from a lawful and an unlawful cause, the illegality did not have a sufficient effect on defendant's voluntary decision to consent to the patdown search to prevent that decision from breaking the causal chain, even under *Hall*." Further, even if defendant's "voluntary consent to the patdown did not break the causal chain, his receipt of the *Miranda* warnings did." The dissent concluded: "The degree of attenuation necessary to purge the taint varies with the extent of the taint, and where, as here, any taint is minimal, the required degree of attenuation is correspondingly reduced. The point has nothing to do with deterrence. Rather, under a rights-based suppression analysis, the degree of attenuation necessary to purge the taint (and thus restore the defendant to the position he or she would have been in had no constitutional violation occurred) varies with the extent, nature, and severity of any illegality. Any other rationale would give a constitutional violation that had only minimal effect far greater reach than either the constitution requires or good sense warrants."

State v Nell, 237 Or App 331 (9/22/10) (Haselton, Armstrong, Edmonds) Defendant arrested on an outstanding warrant. She was about 6-10' from her parked car. She was holding a wallet about 4-5" tall. Officer asked her to place the wallet on the hood, but she did not comply. She moved to put her wallet in her car. Officers put their hands on her to prevent her from getting into the vehicle. They testified that they did so because they didn't know if there were weapons, contraband, or means of escape in the wallet. She put her wallet on the hood. Officer opened it, handcuffed her, searched her wallet, and found a bag of meth. Officer Mirandized her, and she said it was "a twenty sack," worth about $20, and that she eats meth. Trial court denied her motion to suppress the meth and her statements, under the search incident to arrest exception to the warrant requirement (for officer safety), and also under the inevitable discovery doctrine because the wallet would have been inventoried at the jail.

Court of Appeals reversed. *State v Hite*, 198 Or App 1, 6 (2005) identifies three justifications for a search incident to arrest: (1) safety, (2) to prevent destruction of

evidence or escape, and (3) to discover evidence relevant to the crime for which the defendant is being arrested. Only officer safety is at issue in this case. The Supreme Court addressed a similar case in *State v Hoskinson*, 320 Or 83 (1994). Here, as in that case, nothing in the record suggests that the officer "had a *reasonable* suspicion that [the handcuffed] defendant posed an immediate threat of escape or harm." (Emphasis in *Hoskinson*). The search violated Article I, section 9. As to whether defendant's statements (on appeal she challenged only her statements, not the meth) were obtained through exploitation of that illegality, the trial court erred, because the minimal factual nexus between the unlawful search and defendant's incriminating statements is patent. After finding meth in the wallet, the officer confronted her, read her *Miranda* warnings, and asked her several questions about her use of the drug, all in rapid succession, and detailed incriminating statements ensued. Under *State v Ayles*, 348 Or 622 (2010), the *Miranda* warnings did not attenuate the taint of the illegality (it is not a universal solvent to break the causal chain).

2. Exception or application of exclusionary rule under Fourth Amendment

Martinez-Medina v Holder, 616 F3d 1011 (9th Cir 8/12/10) (Bea, Kleinfeld, Ikuta) (Fourth Amendment, federal court). Five people were in petitioners' car, driving from California to Hood River. The car overheated in Canyonville. They pulled in to a gas station. They poured water on the overheating engine. The gas station owner called the Douglas County sheriff's department. A deputy arrived and asked the father (one of the petitioners) where he was traveling. His son (also a petitioner) translated. Deputy asked for their ID, which they produced. Deputy asked: "do you have green cards?" They said they did not. They interpreted the deputy's question to mean: are you legally here? Deputy told petitioners they could not leave the gas station and he was going to call "Immigration." Another police officer arrived. Father and son were allowed to wait by their car, but the other 3 were loaded into the police car. Father needed to use the restroom and an officer went with him while the other officer stood guard over the rest of the group. 2-1/2 hours later, an INS agent arrived. INS agent asked if they had green cards. No one answered "yes." Without further questions, the INS agent reloaded them into his van, did not issue a citation, and did not tell them why they were arrested. They were interviewed then served with charges subjecting them to removal from the US because they had remained in the US longer than permitted. Petitioners responded with a motion to suppress all evidence obtained in violation of their Fourth Amendment rights (evidence at issue was the INS agent's testimony and information from their interviews).

Immigration judge denied the motion. BIA affirmed. Ninth Circuit panel agreed with the lower tribunals and denied the petition for review. The exclusionary rule (for evidence obtained in violation of Fourth Amendment rights) does not apply to civil deportation proceedings, except where the Fourth Amendment violation is egregious. Here, the initial encounter between petitioners and the sheriff was consensual so it did not violate the Fourth Amendment. Ninth Circuit panel reasoned that a seizure does not occur "simply because a police officer approaches

an individual and asks a few questions," quoting *Florida v Bostick*, 501 US 429, 434 (1991). A seizure does not occur until a reasonable person would not believe that he or she is not free to leave or would not feel free to decline the officers' requests or otherwise terminate the encounter, under *Bostik*, 501 US at 435-36. Officers do not need reasonable suspicion to ask questions of an individual or to ask for ID under *Bostick* and *Muehler v Mena*, 544 US 93, 101 (2005). The encounter here became a seizure when the sheriff told petitioners they could not leave the gas station and he was calling "Immigration." There, Fourth Amendment scrutiny was triggered.

But even if the seizure violated petitioners' Fourth Amendment rights, that violation was not egregious, thus exclusion of the evidence is not a remedy. (An "egregious" constitutional violation occurs when the violation is "deliberate" or "a reasonable officer should have known" that his conduct violates the Constitution" under Ninth Circuit precedent). There is no evidence that this officer deliberately violated the Fourth Amendment, and due to a "lack of clarity in the law," the officer would not have known he lacked probable cause to detain petitioners. The Ninth Circuit has concluded that, unlike illegal entry (a crime), illegal presence in the US is only a civil violation, see *Gonzales v City of Peoria*, 722 F2d 468, 476-77 (9th Cir 1983) *overruled on other grounds by Hodgers-Durgin v de la Vina*, 199 F3d 1037 (9th Cir 1999) (en banc). But the US Supreme Court has stated that "entering or remaining unlawfully in this country is itself a crime." *INS v Lopez-Mendoza*, 468 US 1032, 1038 (1984). A reasonable officer could have concluded that an alien's illegal presence in the US is a crime.

Petitioners raised one other point: Oregon law prohibits state officers from using agency moneys, equipment, or personnel to detect or apprehend people whose only violation is that they're foreign citizens in the US illegally. ORS 181.850. But a "violation of Oregon law does not constitute a violation of the Fourth Amendment" "even if a reasonable Oregon law enforcement officer should have known he lacked authority under his own state's law to apprehend aliens based solely on a violation of federal immigration law" and cannot be the basis for an egregious Fourth Amendment violation, under *Virginia v Moore*, 553 US 164, 173-74 (2008).

V. SELF-INCRIMINATION

"No person shall be * * * compelled in any criminal prosecution to testify against himself." – Article I, section 12

A. False Pretext Communications

State v Davis, 234 Or App 106 (3/03/10) (Wollheim, Brewer, Sercombe) Defendant retained counsel after detective began investigating him for sexually abusing his stepdaughter. Defendant's attorney sent the detective a letter, stating: "Please do not talk to [defendant] except through me. If you need to do an interview I will be happy to help arrange it." Eight months into the investigation, the stepdaughter told detective that she and defendant had had contact via online instant

messaging. The detective installed IM software on his computer, invited the stepdaughter to his office, and she came in several evenings so the detective could supervise their contact via IM chat. The detective testified that, at times, he directed the stepdaughter to say certain things that he thought were probative to his investigation. Detective called that "pretext communication." Defendant made incriminating statements to stepdaughter. Detective used those statements in an affidavit for a search warrant. On execution of the search warrant, he found evidence of sex abuse, rape, sodomy, and other crimes. Defendant moved to suppress all statements he made during the "pretext communications" and all evidence derived from those statements. Trial court granted defendant's motion to suppress based on Article I, sections 11 and 12 (right to counsel and right to remain silent) and the Fifth and Sixth Amendments. State appealed.

Court of Appeals affirmed. State concedes that the detective knew defendant had retained counsel and did not wish to speak to detectives without counsel present. The detective's "'pretext communications' violated defendant's right to remain silent." The two state constitutional protections are interrelated:

Right to Counsel: Under *State v Sparklin*, 296 Or 85, 95 (1983), the right to counsel helps to ensure the fairness of the "criminal prosecution" identified in Article I, section 11. The right to counsel applies to "criminal prosecutions" but the policy extends back before the trial to preserve fairness of that trial. *Id.* And under *State v Spencer,* 305 Or 59, 74 91988), the right to counsel extends back even before formal charges are filed. Court of Appeals here reasoned: "Together, *Sparklin* and *Spencer* illustrate that the constitutional right to counsel may arise at any time that an individual's uncounseled actions would undermine the right to assistance of counsel at trial. . . . Thus, even though the text of the constitutional right to counsel is limited to 'all criminal prosecutions,' the right to counsel can be invoked prior to the criminal prosecution, and applied to events that would render the right to counsel meaningless during the criminal prosecution."

Right to Remain Silent: A person's Article I, section 12, right to remain silent arises before trial, as with the right to counsel. Here, defendant's attorney unequivocally and specifically invoked defendant's right to remain silent in a letter. The detective knew this. Nothing prohibited him from contacting defendant through counsel. Instead, the detective communicated with defendant through the stepdaughter, for investigatory purposes. "On those facts, the detective's actions violated defendant's constitutional right to remain silent under Article I, section 12. Accordingly, the trial court did not err in granting defendant's motion to suppress statements that the state obtained while subverting defendant's right to remain silent." (Federal constitution not addressed.)

B. ***Miranda***

Under Article I, section 12, *Miranda* warnings must be given to a person subjected to custodial interrogation who is in "full custody" and also to a person in circumstances that create a setting which judges would and officers should recognize to be compelling. *State v Roble-Baker*, 340 Or 631, 638

(2006). "Compelling" circumstances are determined by four factors in the encounter: (1) location; (2) length; (3) pressure on defendant; and (4) defendant's ability to terminate the encounter. *Id.* at 640-41; *State v Shaff*, 343 Or 639, 645 (2007) (same).

Under Article I, section 12, the state has the burden to prove, by a preponderance of the evidence, that any admissions or confessions by a defendant were made voluntarily. *State v Stevens*, 311 Or 119, 135-37 (1991).

State v Gardner, 234 Or App 486 (6/30/10) (Schuman, Landau, Ortega) Defendant pulled over for DUII. She appeared confused, her eyes were glassy with dilated pupils, she could not find her ID, she gave the officer her checkbook rather than ID, and she had a "choppy, nonresponsive interaction" with the officer. Officer asked defendant to perform field sobriety tests. She refused. Officer informed her of the consequences, asked her to perform the tests again. Again, she refused. Officer arrested her, took her to the jail, and asked her if she would take a breath test and advised her of the consequences of a refusal. Officer did not give her *Miranda* warnings. Defendant asked officer to explain the consequences if she refused. Officer said her license could be suspended. She asked what would happen if she was convicted of DUII. Officer said he could not tell her what her best choice was. Defendant continued to question officer three more times. Officer asked her to take the breath test. Defendant said: "I am afraid I will fail because I drank two glasses of wine, so I am going to refuse." Trial court suppressed her statements ("two drinks" and her refusal to take the breath test).

Court of Appeals reversed. Defendant's statement that she refused the breath test, and that she had had "two drinks" were not made in response to an "interrogation" for *Miranda* purposes under Article I, section 12. Defendant did not argue that her statements were involuntary, but rather that the state violated her right to *Miranda* warnings while she was in custody. "As a general rule, officers are required to give suspects Miranda warnings when they are subject to custodial interrogation," citing *Miranda v Arizona*, 384 US 436 (1966) and *State v Fish*, 321 Or 48, 84 (1995) (Graber, J., concurring and dissenting). Here, the officer's statements were based on the implied consent law, which require officers to attempt to ensure that suspects understand the consequences of a refusal. There was no "interrogation" here. Given defendant's confusion, it was reasonable for the officer to engage her in a conversation to ensure that she understood the consequences of a refusal to take the breath test. The breath-test refusal should have been admitted. The "two drinks" statement also should have been admitted. As the US Supreme Court has noted in *Rhode Island v Innis*, 446 US 291 (1980), the police cannot be accountable for unsolicited statements that defendants make. Remanded.

Holcomb v Hill, 235 Or App 419 (6/9/10) (Brewer, Landau, Schuman) This is a post-conviction case. Officers had received a radio dispatch about a possible trespass at the victim's apartment. Officers went to that apartment. Defendant was sitting on the stairway outside the apartment. Detectives approached defendant, identified themselves, asked to talk to him, and apparently took and returned his ID to him. Defendant said ok, and agreed to step to a covered area due to rain. Thirty-

minute, low-key conversation was held, with defendant being cooperative and describing his relationship with victim. No one indicated that defendant was under arrest or not free to leave, until the end of the conversation when defendant was arrested. Prosecutor had argued that defendant was not in custody when he made statements to the detectives, and defense counsel made no contrary argument. Trial court had ruled that there was no *Miranda* violation in that interaction. Defendant convicted of rape, sexual assault, and other crimes.

Defendant brought the present post-conviction action. Post-conviction trial court concluded that defendant had received constitutionally deficient trial counsel. Post-conviction trial court concluded, *inter alia*, that trial counsel had failed to adequately litigate a suppression motion regarding the statements defendant made to police outside of the victim's apartment, because the police should have, but did not, give him *Miranda* warnings.

State appealed. Court of Appeals reversed, holding that no *Miranda* violation occurred (thus no Article I, section 12 violation) and thus defendant's trial counsel was not constitutionally inadequate on this claim. Applying the four *Roble-Baker* and *Schaff* factors, Court of Appeals noted that (1) surroundings were familiar to defendant, because he had previously lived with the victim and went there willingly; (2) 30-minute encounter was not excessive; (3) no evidence of coercive pressure or misleading defendant; and (4) although defendant testified that he did not feel free to leave while being questioned, he was not physically restrained in any way and his ID had been returned to him at the beginning of the encounter. "In the totality of the circumstances, *Miranda* warnings were not required."

State v L.A.W., 233 Or App 456 (1/27/10) (Edmonds, Wollheim, Sercombe) Youth was 12 years old. He was charged with unlawful sexual penetration of a 10 year old girl. A plainclothes detective interviewed Youth at his school. Detective read him *Miranda* rights from a card, one right at a time. He asked Youth if he had any questions, showed him the card, and Youth signed an acknowledgement. A caseworker observed the interaction between detective and Youth; both seemed calm and Youth did not cry. Youth at first said the girl was "crazy." Then he admitted that he had sexually penetrated the girl at her invitation (she said she wouldn't play videogames with him unless he sexually penetrated her, he said), and then he spontaneously demonstrated the extent of his penetration into the girl. Interview lasted 30-35 minutes. Psychologist tested Youth, who demonstrated an IQ of 106 and "serious emotional problems." Trial court ruled that based on Youth's age and lack of prior involvement with law enforcement, and his emotional problems, the State failed to show that Youth actually understood what his *Miranda* rights meant. Juvenile court ruled that youth's statements were made voluntarily but his waiver of rights was not knowing and intelligent.

On de novo review, Court of Appeals reversed and remanded. "To conclude that youth's waiver of his rights was 'knowing and intelligent,'" the court determines whether, "under the totality of the circumstances, youth knew that he could choose not to speak with the detective, to speak only with counsel present, and to discontinue talking at any time. Consequently, the inquiry focuses on youth's state of

mind rather than on the detective's conduct. . . . . Among the factors to be considered in determining whether youth made a knowing and intelligent waiver are youth's age, physical condition, experiences, level of education, background, and intelligence." Court of Appeals cautioned against fact-matching, then fact-matched this case with two others where the youths were 11 and 12 years old and mentally retarded. In contrast with those youths, here, "youth was of average intelligence and the testing administered by the psychologist did not indicate that youth had any learning disabilities. Youth's education level and mental age were both commensurate with his chronological age."

State v Machain, 233 Or App 65 (12/20/09) (Ortega, Landau, Riggs SJ) Defendant, 15 years old, was convicted of murdering her 14 year old nephew in their home. The day after the killing, police drove defendant to the police station and interviewed her twice (after having interviewed her the prior day). The first interview was videotaped and lasted 2-1/2 hours. Defendant was tired. Detective gave her *Miranda* warnings. She was not told that she was free to leave. After some questioning, detective returned with another detective. At that point, the detectives began telling her that her story wasn't adding up, and asked questions about sensitive topics not related to the killing. She eventually began crying and said that another person had shot the victim but said she was present during the shooting. She admitted that she had stolen money from a safe in the house. The trial court concluded that defendant was not in "compelling circumstances" during that interview and did not decide whether she validly waived her right to remain silent and have counsel assist her.

Court of Appeals vacated and remanded, concluding that she was in compelling circumstances that required *Miranda* warnings, based on *Roble-Baker* and *Shaff*. Here, defendant was interviewed for 2-1/2 hours, stated she felt tired, and she was answering "questions that delved into extremely personal, sensitive topics" (her suicide attempt, her sexuality, her mother). Detectives also repeatedly told her they would be able to disprove any false statements, they knew she was lying, and she needed to be honest. "In short, the detectives 'created the sort of police-dominated atmosphere that *Miranda* warnings were intended to counteract.'" Remanded for trial court to determine whether defendant knowingly and intelligently waived her rights. If waiver was invalid, statements should be suppressed. If waiver was valid, conviction should be reinstated.

See ***State v Moore***, 229 Or App 255, 259-60 (2009), *rev allowed*, 348 Or 114 (2010)

State v Schwerbel, 233 Or App 391 (1/27/10) (Rosenblum, Brewer, Deits SJ) Defendant, stopped at a motel parking lot for driving with a cracked windshield, had a suspended license. Officer told defendant he would be "detained, as it was a crime for [him] to drive" and asked if he had anything on him or in his car that officer needed to be aware of. Defendant said he had a pipe in his jacket. Officer patted him down, found a closed zipper bag, then handcuffed defendant. Officer asked defendant if there was a crank pipe in the bag. Defendant said yes. Officer received defendant's consent to open the bag, which contained meth and a pipe. Defendant moved to suppress both his statements and the meth and pipe as having been

produced as a result of unlawful questioning under compelling circumstances without *Miranda* warnings. Trial court denied the motion on grounds that the search was a valid search incident to arrest for officer safety purposes.

Court of Appeals reversed and remanded in part, following the *Roble-Baker* and *Shaff* principals. The circumstances became "compelling" when the officer told defendant that he was going to be "detained" and that it was a crime for him to drive. "Ultimately, our 'overarching inquiry is whether the officers created the sort of police-dominated atmosphere that *Miranda* warnings were intended to counteract.'" The first two factors (location and length of encounter) weigh against domination: public highway, 15-minute encounter, only one officer, no physical force, polite demeanor, no loud voice, and no repeated questioning. The third and fourth factors (pressure exerted on defendant and defendant's ability to terminate the encounter) tip the scale into "compelling" circumstances: armed and uniformed officer in a marked police car with lights on ordered defendant to get out of his car, then unambiguously informed defendant he was not free to leave because he had committed a crime. A reasonable person in defendant's position, being asked if there was anything on him the officer needed to be aware of, would feel compelled to cooperate by answering the question. The officer's question called for an incriminating response – it was a custodial interrogation, not a routine booking question (which is an exception to the requirement for *Miranda* warnings, see *State v Moeller*, 229 Or App 306, 311 (2009)). Defendant's oral and physical evidence suppressed as a remedy for the Article I, section 12, violation, because that remedy set forth in *State v Hall*, 339 Or 7 (2005) applies in Article I, section 12, cases as well.

State v Tanner, 236 Or App 423 (7/28/10) (Sercombe, Wollheim, Brewer) Defendant was stopped for a traffic infraction. She consented to a search of her car, which resulted in the seizure of a used meth pipe and 24 baggies of marijuana and 4 bindles of cocaine. One of the officers recognized defendant as the alleged victim in a domestic violence case set for trial soon. The other officer provided defendant with *Miranda* warnings, told her that if she lied to him while he took her statement for his report about the marijuana, someone in her pending domestic violence case could find and use her lies against her in court, and thus her abuser could avoid conviction. Defendant admitted that she had purchased the marijuana and intended to sell it for $20 for each baggie. Defendant was charged with one count of delivery of marijuana. She moved to suppress on several grounds (one was deemed unpreserved on appeal). Her preserved argument was that statements she made after receiving *Miranda* warnings should be suppressed because those warnings were not voluntary but instead were coerced because of the pending domestic violence case. Trial court denied her motion to suppress in its entirety.

Court of Appeals affirmed: her confession was voluntary. Court of Appeals quoted its precedent: A defendant's admissions may be suppressed as involuntary either because they were the product of coercion or because the defendant's *Miranda* rights were violated. (Defendant argued not that her *Miranda* rights were violated, but rather that her admissions were coerced.). Quoting Oregon Supreme Court precedent from 1913, the Court of Appeals explained: Voluntariness requires that neither duress nor intimidation, hope nor inducement caused the defendant to

confess. The test for voluntariness under Article I, section 12, is whether, under the totality of the circumstances, the waiver of rights and the confession were the product of an essentially free, unconstrained, and informed choice or whether the defendant's capacity for self-determination was critically impaired. Here, the officer's testimony shows only that the police conduct at issue involved "a mere adjuration to tell the truth along with a truthful – not a fraudulent – comment regarding the possibly consequences of lying." The conduct did not amount to a threat, subtly implied or otherwise. And defendant was not compelled to speak. Rather, she was encouraged to speak truthfully, if she did speak. The Court of Appeals concluded that the officer's "comments about the pending domestic violence case addressed only the possible consequences of *lying* to him in any statements for his report; his comments did not address any consequences of *not speaking* to him in the first instance." (Emphasis by court). The status as a domestic violence victim does not transform all police comments into inappropriate threats or overreaching.

State v Vondehn, 348 Or 462 (7/01/10) (Walters – with Linder, Balmer, and Kistler concurring) Defendant was a passenger in a car stopped for possible DUII. Two officers were on the scene. Both officers smelled a strong odor of fresh marijuana seeming to come from the trunk. Officer asked defendant for ID. Defendant lied but then gave correct information. He had an outstanding warrant, officer arrested him, handcuffed him, and sat him in the back of the patrol car, without *Miranda* warnings. Officers asked the driver if she had any drugs or weapons. She said no but gave consent to search the car. Officer opened the trunk, which had only a backpack and a stronger smell of marijuana. Officer lifted the backpack. It was heavy. Officer asked driver who owned it. She said she didn't know. Officer brought the backpack to defendant in the patrol car and asked defendant (1) if the pack belonged to him, (2) if there was marijuana in it, and (3) if he could search the pack. Defendant said yes after officer asked each of those three questions in that order. That conversation was about 30-60 seconds. Officer found two grocery bags with fresh marijuana inside the pack. Thereafter, officer consulted with the other officer for about 5 minutes. One officer went back to defendant, gave him *Miranda* warnings, and asked if defendant understood those rights. Defendant said he did. Defendant waived his rights and answered the officer's questions: where he got the marijuana (Tualatin the day before), how much was in each bag (quarter-pound per bag), how much it cost him ($2200 total), and if he was the middleman (he was). Defendant then said he wanted a lawyer. Neither officer asked more questions. Those post-*Miranda* questions occurred intermittently over a 15-20 minute time period.

Trial court suppressed defendant's answers to the first set of questions (the three questions asked before the officers had given *Miranda* warnings) but admitted the marijuana (because defendant had consented to the search) and admitted defendant's responses to the post-*Miranda* questions (after the 5-minute gap). Court of Appeals concluded that the police had obtained both the marijuana and the post-*Miranda* statements by exploiting defendant's pre-*Miranda* statements, therefore the marijuana and statements must be suppressed under Article I, section 12.

The Supreme Court called this a "question first and warn later" case (or a "belated warning" case). First, the Supreme Court concluded that "when the police violate Article I, section 12, by failing to give required *Miranda* warnings, the state is precluded from using physical evidence that is derived from that constitutional violation to prosecute a defendant." In other words, both "testimony" and physical evidence are suppressable for failure to give *Miranda* warnings.

Turning to the evidence obtained before *Miranda* warnings were given, defendant was in "custody" when he was handcuffed in the police car and defendant was "interrogated" when officers questioned him. Defendant had the right to remain silent, and to advice of counsel, but officers failed to obtain a waiver of those rights when they interrogated him. That failure to obtain a waiver violated defendant's Article I, section 12, rights. Thus, the answers defendant gave, and the marijuana, resulted from the violation of defendant's Article I, section 12, rights. The trial court erred by failing to exclude that evidence, derived before a valid waiver of *Miranda* rights was obtained. Court of Appeals' decision (to exclude that evidence) was affirmed on that point.

As to "belated" or "midstream" *Miranda* warnings, the Oregon Supreme Court recited two "helpful" US Supreme Court cases addressing belated *Miranda* statements under the Fifth Amendment: *Oregon v Elstad*, 470 US 298 (1985) and *Missouri v Seibert*, 542 US 600 (2004). The Oregon Supreme Court quoted the *Seibert* plurality that identified six relevant facts to determine "whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object [a valid waiver of constitutional right to remain silent and to counsel]." The *Seibert* plurality's test, to determine whether evidence obtained after midstream *Miranda* warnings is admissible, is an objective one (not subjective). The Oregon Supreme Court then stated: "we adopt the reasoning and the analysis of the *Siebert* plurality as our own." The Oregon Supreme Court stated: "The Oregon Constitution requires *Miranda* warnings to ensure that a waiver of the rights conferred by Article I, section 12, is knowing as well as voluntary. When the police fail to give the required warnings, a suspect's response to their unwarned questions must be excluded from evidence. When the police then correct course and give the required warnings, the relevant inquiry must be whether the bleated warnings are effective and accomplish the purpose for which they are intended. . . . If the state establishes that the police accurately and effectively, although belatedly, gave the suspect the information necessary to a valid waiver of the right against self incrimination, then, under the Oregon Constitution, a suspect's subsequent voluntary statements will be admissible." The Oregon Supreme Court further stated: "Our focus is not on the subjective intent of the police but on the objective message that the police actually convey by the techniques that they use and the warnings that they give."

Having adopted the federal *Seibert* test as its own, the Oregon Supreme Court held that the circuit court correctly admitted defendant's post-*Miranda* statements, because the midstream *Miranda* warnings the officers gave accurately and effectively conveyed to information necessary to obtain a knowing and voluntary waiver of defendant's right against self-incrimination. The Oregon Supreme Court explained its application of factors: First, the set of questions (those asked before *Miranda* rights

were given) were routine and undetailed. Second, there was a 5-minute break between the unwarned and warned questions. Third, the officer did not tell defendant that he had already made incriminating statements; "when an officer does caution a defendant that the unwarned statements that the defendant made may not be admissible, that caution may militate (indeed, often will) in favor of finding that the officer's belated *Miranda* warnings were effective, but such a caution is not necessary to that result. Fourth, the post-*Miranda* questions were "in a conversational tone" and were of short duration. In short, the belated *Miranda* warnings effectively communicated that defendant had a right to remain silent.

Concurrence noted that only the first two of the three pre-*Miranda* warning questions involved "interrogation." The third question asked for consent to search the pack that smelled of marijuana. "With apparent unanimity, courts throughout the country that have considered the question have held that asking for consent to search is not interrogation within the meaning of the *Miranda* doctrine" and defendant does not contend otherwise.

Concurrence further noted that the majority did not explain whether its test (to determine if evidence derived from a *Miranda* violation) "turns on causation, or exploitation, or some other way in which an initial illegality may be said to 'taint' evidence that police gather after that illegality. . . . At the least, if the state is to have that burden [to disprove the connection], it must know what it must disprove. As important, at some point, both litigants and lower courts are entitled to meaningful guidance as to the analysis that applies."

Concurrence observed that, as for "defendant's subsequent, post-*Miranda* warning statements, the majority essentially adopts the test articulated by the plurality decision" in *Seibert*. . . . That test asks whether, viewed from the perspective of a reasonable person, the *Miranda* warnings that police give after an initial *Miranda* violation were effective for purposes of informing a suspect of his rights and obtaining a knowing and voluntary waiver of those rights." The concurrence has "no objection to that test" which has "little or no difference in the 'totality of the circumstances' analysis used to analyze that issue and the totality of the circumstances test that has long been in place to analyze the voluntariness of a confession following prior illegal conduct by police. *See, e.g., State v Wolfe*, 295 Or 567, 572 (1983) (drawing test from *Brown v Illinois*, 422 US 590-603-04 (1975))."

See ***State v Ayles***, 348 Or 622 (8/12/10), discussed under **Attenuation**, *ante*.

C. **Polygraph Testing**

"No person * * * shall be compelled in any criminal case to be a witness against himself[.]" – Fifth Amendment, US Const

Dep't of Human Services v KLR, 235 Or App 1 (4/21/10) (Brewer, Haselton, Armstrong) (An Article I, section 12, argument had not been briefed; this case addresses the Fifth Amendment.). In a juvenile dependency case, trial court ordered that a mother and father take a polygraph test to determine who caused injuries to their child. In this case of first impression in Oregon, the Court of Appeals reversed that order, concluding that it violated mother's Fifth Amendment right against self-incrimination. In so concluding, the Court of Appeals followed *Kastigar v United States*, 406 US 441,444-45 (1972) and other state opinions. The Fifth Amendment protects statements that could be directly incriminating and also testimony that would furnish a link in the chain of evidence needed to prosecute the crime. The Court of Appeals summarized:

> (1) requiring an admission of abuse as a condition of family reunification violates a parent's Fifth Amendment rights; (2) on the other hand, terminating or limiting parental rights based on a parent's failure to comply with an order to obtain meaningful therapy or rehabilitation * * * may not violate the Fifth Amendment; and (3) providing use immunity from criminal prosecution is a necessary condition to compelling potentially incriminating statements as an inducement for full cooperation and disclosure during dependency proceedings.

Here, the trial court never made an immunity provision, the polygraph requirement was not part of a treatment but rather was just to determine the cause of the child's injuries. And even if the court had authority to require a polygraph test as part of treatment, the imposition of a polygraph requirement in this case violated her Fifth Amendment right against self-incrimination. Reversed.

D. **Trial**

See **Prosecutorial Comments**, *post*.

VI. ACCUSATORY INSTRUMENTS

" (3) Except as provided in subsections (4) and (5) of this section, a person shall be charged in a circuit court with the commission of any crime punishable as a felony only on indictment by a grand jury.

" (4) The district attorney may charge a person on an information filed in circuit court of a crime punishable as a felony if the person appears before the judge of the circuit court and knowingly waives indictment.

" (5) The district attorney may charge a person on an information filed in circuit court if, after a preliminary hearing before a magistrate, the person has been held to answer upon a showing of probable cause that a crime punishable as a felony has been committed and that the person has committed it, or if the person knowingly waives preliminary hearing.

" (6) An information shall be substantially in the form provided by law for an indictment. The district attorney may file an amended indictment or information whenever, by ruling of the court, an indictment or information is held to be defective in form." – Article VII (Amended), section 5, Or Const

Article VII (Amended), section 5, requires generally that those charged with a felony must be charged by grand jury indictment. That provision serves four functions: (1) to provide notice; (2) to identify the crime to protect against additional prosecution for the same crime; (3) to inform the court; and (4) to ensure that a defendant is tried only for an offense that is based on facts found by the grand jury. *State v Burnett*, 185 Or App 409, 415 (2002).

State v Anderson, 233 Or App 475 (2/3/10) (Landau, Ortega, Carson SJ) Defendant charged with two counts of being a felon in possession. The indictment cited to the criminal statute and recited the text of the statute but did not allege that he "knew" he was a felon when he possessed the firearms. He demurred to the indictment; the trial court disallowed the demurrer. The Court of Appeals affirmed. "Even assuming that the state was required to prove that defendant had a culpable mental state regarding his status as a felon, we conclude that the indictment is legally sufficient." An indictment pleaded in the language of the relevant statute ordinarily is sufficient to withstand a demurrer. The primary function of an indictment is to provide notice to a defendant as to what crime he is being prosecuted for. When an indictment completely lacks language regarding an essential element of a crime, as in *Burnett*, then the indictment is insufficient. Here defendant was tried for an offense that was based on facts found by the grand jury.

State v Pierce, 235 Or App 372 (5/26/10) (Ortega, Landau, Schuman) A grand jury indicted defendant of 7 crimes. One crime alleged was unauthorized use of a vehicle, which can be committed by taking, operating, exercising control over, riding in, or otherwise using another's vehicle without the owner's consent. The grand jury alleged that defendant *took* a vehicle, without mentioning any of the other methods

of committing the crime. Trial court instructed the jury that that crime can be committed either by taking, operating, exercising control over, riding in, or otherwise using the vehicle, and that "proof of any means is sufficient to sustain a conviction." Defendant objected to that instruction, arguing that he was indicted only for "taking." Trial court rejected his objection. Jury convicted.

Court of Appeals reversed and remanded. The Court of Appeals accepted the state's concession that because the additional bases for conviction were not alleged in the indictment, the instruction permitted a conviction on an unindicted crime. "Accordingly, the trial court's instruction to the jury violated Article VII (Amended), section 5." The error was not harmless: although some portions of the jury instruction referred only to taking, the instructions nevertheless listed additional means of committing the crime, and the instruction that "proof of any means is sufficient to sustain a conviction" permitted the jury to convict even if they found that defendant "took" the vehicle. The error also was not harmless despite the fact that, in opening statement and closing argument, the state focused solely on "taking" the vehicle. The state's "arguments are no substitute for proper instructions." The trial court had told jurors to base their verdict on the evidence and instructions, not on the lawyer's arguments. Jurors are presumed to follow a trial court's instructions. Conviction for unauthorized use reversed and remanded; otherwise affirmed.

State v Williams, 237 Or App 377 (9/22/10) (Rosenblum, Haselton, Armstrong) Grand jury indicted defendant for assault. The indictment did not allege whether the victim contributed to the assault. (If a victim precipitates an assault, the sentencing guidelines rank the offense as a category 9. If the victim did not precipitate the assault, the sentencing guidelines rank the offense as a category 10. Those rankings are called "subcategory facts."). Nine days before the trial, the state moved to amend the indictment to allege that the victim did not precipitate the assault. Trial court overruled defendant's objection.

Court of Appeals affirmed, overruling *State v Paetehr*, 169 Or App 157 (2000). "The Oregon Constitution does not require that a grand jury find facts that pertain only to sentencing." The "grand jury's jurisdictional function does not include finding facts that pertain only to sentencing. Thus, an amendment to an indictment that adds only a subcategory fact does not 'impermissibly circumvent or supersede the constitutional function of the grand jury by subjecting defendant to trial and conviction based on facts materially different from those presented to the grand jury'", quoting *State v Delaney*, 160 Or App 559, 567 *rev den* 329 Or 358 (1999). There "is no requirement that facts that pertain only to sentencing be pleaded in the indictment." In sum, "Article VII (Amended), section 5(6), authorized the prosecutor to amend the indictment to include the subcategory fact at issue in this case without resubmitting the indictment to the grand jury."

State v Sanchez, 238 Or App 259 (10/27/10) (Rosenblum, Schuman, Wollheim) Before sentencing defendant for rape, the state notified defendant, in a letter, of enhancement facts it would rely on for an upward departure. The state also notified defendant, in an email, of more enhancement facts it would rely on for an upward departure. None of those facts were included in the indictment or any other

pleading, nor were they filed with the court. Defendant filed motions to disallow the enhancement facts under Article I, section 11 (jury trial right) and Article VII (Amended), section 5(3), and the Sixth Amendment (see *Apprendi* and *Blakely*). Trial court disagreed, denied the motions, and the jury returned a verdict finding that the state had proved a number of enhancement facts and imposed upward departure sentences.

Court of Appeals affirmed. In *State v Williams*, 237 Or App 377, 383 (2010), the Court of Appeals held that subcategory facts that pertain only to sentencing need not be submitted to the grand jury; the "Oregon Constitution does not require that a grand jury find facts that pertain only to sentencing. That is because "a fact that pertains only to sentencing is not a matter that is essential to show that an offense has been committed." The Court of Appeals recited several Oregon appellate cases and concluded that "the Oregon Constitution does not require that enhancement factors be set forth in the indictment. The establishment of enhancement facts is pertinent only to sentencing – making defendant eligible for a harsher sentence than could be imposed were those facts not present. They do not, however, relate to the determination of whether a defendant committed the underlying criminal offense. And because enhancement factors pertain only to sentencing, they need not be found by the grand jury or pleaded in the indictment under the Oregon Constitution."

VI. PRE-INDICTMENT OR PRE-TRIAL DELAY

A. Pre-indictment Delay

The time before an arrest or formal charge is not taken into consideration in determining whether a defendant has been given a speedy trial under the state and federal constitutions. *State v Serrell*, 265 Or 216, 219 (1973); *United States v Marion*, 404 US 307, 313 (1971).

B. Speedy Trial

"[J]ustice shall be administered, openly and without purchase, completely and without delay." - Article I, section 10, Or Const

Speedy trial claims under Article I, section 10, are guided by considering the length of the delay and, if it is not manifestly excessive or purposely caused by the government to hamper the defense, the reasons for the delay, and prejudice to the defendant. *State v Harberts*, 331 Or 72, 88 (2000).

State v Doak, 235 Or App 351 (5/19/10) (Landau, Ortega, Carson SJ) (Statutory only, no constitutional issue raised.). Trial court dismissed DUII charges against defendant for violating Oregon statute that requires defendants to be brought to trial within a reasonable period of time. Court of Appeals reversed. "In calculating the

length of the delay under that statute, we first determine the length of time from the date the defendant was charged until the motion to dismiss was filed, and subtract from that period any delays either consented to or requested by the defendant. . . . If the remaining period of time exceeds expectations for bringing an accused person to trial on the particular type of charge, the court must determine whether the delay was nevertheless reasonable given the attendant circumstances. . . . In considering whether a delay exceeds expectations for bringing a defendant to trial, we have relied on the aspirational standards adopted by the Oregon Judicial Conference of 1990. . . . Those standards provide that '90% of all * * * nonfelony cases should be adjudicated or otherwise concluded within 90 days from the date of arraignment, 98% within 180 days and 100% within one year.' . . . A delay that exceeds expectations may nonetheless be reasonable."

Here, 16 months elapsed between the date defendant was charged and the date he filed his motion to dismiss. Defendant consented to some of the delays and his counsel waived objections to another. The result is a 13-month time period that is not attributable to defendant. That does not violate his statutory speedy trial rights. It exceeds the aspirational standards by one month, but the state offered reasonable justification for each period of delay. Trial court erred in dismissing the charges on statutory speedy trial grounds.

State v Davis, 236 Or App 99 (6/23/10) (Sercombe, Brewer, Deits SJ) (Statutory only, no constitutional issue raised). Trial court concluded that 17.3-month delay in bringing defendant to trial was reasonable. Court of Appeals reversed and remanded for judgment of dismissal. Defendant applied for or consented to delays of 70 days, leaving a delay attributable to the state of 15 months. Net delay is evaluated to determine if it is longer than ordinarily expected. "That expectation can be shown by evidence of practice or custom, as well as by judicial policies or rules, including the *Standards of Timely Disposition* adopted by the Oregon Judicial Department in 1990. The *Standards of Timely Disposition* 'do not in any way define the scope of a speedy trial under the statute or the constitution,' but instead are 'informative in determining the length of time that is "reasonable" in which to bring a case to trial.' *State v Emery*, 318 Or 460, 471 n 17 (1994)." There is no justification in the record for the 15-month delay attributable to the state. The unjustified delay of 15 months was unreasonable.

State v Cam Ton, 237 Or App 447 (9/29/10) (Landau, Schuman, Ortega) (Statutory only, no constitutional issue raised on appeal). Trial court found that defendant's case "slipped through the cracks" in that there were 476 days between his arraignment to his trial, 130 of which he consented to or requested, and 346 of which were delays he did not consent to. Trial court denied defendant's motion to dismiss the case on state constitutional and statutory grounds. Court of Appeals reversed under the statute (ORS 135.747). The state conceded that the trial continued for longer than average, thus courts must examine the circumstances to determine if the delay was reasonable, under *State v Garcia/Jackson*, 207 Or App 438, 444 (2006) and *State v Johnson*, 339 Or 69, 88 (2005). Here, the state provided no reasonable explanation for 248 of the 346 days of delay attributable to the state. The Court of Appeals restated the trial court's finding that this case "sort of slipped through the cracks" and put it another way: the delay was "the product of simple

neglect." Nothing in the record suggests that the delay was due to any special circumstance or policy, thus there is no sufficient reason on this record for the trial court to have continued this case.

C. Statute of Limitations – (statutory)

State v Anthony, 234 Or App 659 (4/14/10) (Schuman, Wollheim, Rosenblum) Defendant murdered people in 1980. He was not charged until 2006. He demurred to the charges, claiming that in 1980, the statute of limitations for murder was 3 years. The trial court denied his demurrer. Court of Appeals affirmed: "the unlimited statute of limitations for murder has been in effect, in virtually the same language, since the time of the Deady Code. . . (Deady 1845-1864). The statute provided: "A prosecution for murder or manslaughter may be commenced at any time after the death of the person killed."

VIII. TRIAL

A. Criminal

" In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor." -- Article I, section 11, Or Const

1. Venue

State v Turner, 235 Or App 462 (6/9/10) (Haselton, Armstrong, Edmonds SJ) Defendant charged for failing to report as a sex offender. At his stip facts trial, there was no information regarding where the offense was committed, where defendant resided, or where he was arrested. He moved for a judgment of acquittal because the state failed to prove venue. Trial court denied that motion. Court of Appeals reversed. Under *State v Cervantes*, 319 Or 121, 123 (1994), "Article I, section 11, of the Oregon Constitution guarantees a criminal defendant the right to a trial 'in the county in which the offense shall have been committed.' This venue requirement is a material allegation of the indictment that must be proven beyond a reasonable doubt."

Edmonds, SJ, concurred, noting that lawyers may not know, under the applicable statute, what evidence will satisfy the state's burden to prove venue. A "legislative fix" may be desired.

2. Jury

(a). "Jury Non-Unanimity"

"[I]n the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by unanimous verdict, and not otherwise[.]"

(no cases)

(b). Waiver of Jury-Trial Right

" In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury * * * any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and consent to be tried by the judge of the court alone, such election to be in writing[.]"

(no cases)

3. Right to Counsel

(a) Before Trial

The Article I, section 11, right to counsel includes the right of an arrested driver, on request, to a reasonable opportunity to obtain legal advice before deciding whether to submit to a breath test. *State v Spencer*, 305 Or 59, 74-75 (1988). That right includes the right to consult with counsel confidentially, in private. *State v Durbin*, 335 Or 183, 191 (2003). The state has the burden to show that a defendant was afforded a reasonable opportunity to consult with counsel in private. *State v Carlson*, 225 Or App 9, 14 (2008).

See ***State v Davis***, 234 Or App 106 (3/03/10) (Wollheim, Brewer, Sercombe), discussed under False Pretext Communications, *ante*.

State v Burghardt, 234 Or App 61 (3/03/10) (Landau, Schuman, Ortega) Defendant failed roadside field sobriety tests. During transport to the police station, he asked officer if he could "call someone or an attorney." Officer said he could at the police station. At the station, officer asked if defendant wanted to make a call. Defendant said he wanted to call his dad, who was an attorney and couldn't represent him, but he wanted to call his dad for a phone number. Officer asked if the purpose of the call was for legal advice, because he would give defendant privacy if that were the case. Defendant said no, he was just asking his father for a phone number. Officer stayed while defendant called his father and began to weep and apologize for his DUII arrest. Father asked to talk to officer, and asked officer if defendant had taken a breath test and the consequences of refusing. Officer gave responses to father. Defendant told his father, "it's my fault. I'm just gonna blow."

Defendant never obtained a phone number. Defendant then said he wanted to call a buddy. Officer remained in the room and did not re-advise defendant of his right to confidentiality in consulting with counsel. Defendant just told his buddy "where he was." Defendant consented to the breath test, which showed a BAC of .16%. Trial court suppressed the results of the breath test and defendant's statements he made to his father, because his father was an attorney and officer had remained in the room and also because officer did not repeat to defendant his right to confidential legal advice before defendant called his buddy. State appealed.

Court of Appeals reversed and remanded. A person has a right under Article I, section 11, to confidential legal advice. That right, however, "is triggered by a request for legal advice, not merely a request to talk with an individual who happens to be a member of a bar association." "The requirement of confidentiality is a consequence of the privileged nature of conversations between an attorney and his or her client." Here, nothing that defendant told officer triggered the right to a confidential call. Court of Appeals rejected defendant's claim that he could have asked his father for legal advice but for officer's presence in the room. Defendant explicitly disclaimed to officer that he had any intent to ask for legal advice, and there is a complete absence of evidence in the record that defendant changed his mind, let alone that officer's presence had a "chilling effect" on defendant's interest in asking for legal advice. As to the argument that officer needed to re-advise defendant of his right to counsel when defendant called his buddy, Court of Appeals is aware of no source of law requiring an officer to repeatedly advise a defendant of his right to counsel before each telephone call.

State v Higley, 236 Or App 570 (8/11/10) (Schuman, Landau, Ortega) Defendant was arrested for drunk driving and driving with a "felony revoked" license. Officer cited him at the scene, *Mirandized* him, and took him to jail. Officer asked him to complete a field sobriety test. Defendant asked to consult an attorney first. Officer noted that as a refusal. Officer asked defendant to take a breath test. Defendant asked to consult an attorney first. Officer gave him 20 minutes to do so. Defendant could not reach an attorney and told the officer to record that as a refusal. Defendant's probation officer asked defendant to take the breath test. Defendant again refused. At trial, defendant sought suppression of "all observations" of him, all statements, admissions, confessions, and fruits thereof because his right to counsel was violated. Trial court denied the motion. Court of Appeals affirmed: "Defendant's 'right to counsel' argument under the United States and Oregon constitutions depends on the proposition that asking a person to take field sobriety or breath tests is 'interrogation.' That argument has been unequivocally rejected," *South Dakota v Neville*, 459 US 553, 564 n 15 (1983); *State v Gardner* 236 Or App 150, 155 (2010); *State v Cunningham*, 179 Or App 498, 502, *rev den* 334 Or 327 (2002), "and we reject it again with no further discussion."

State v Mendoza, 234 Or App 366 (3/24/10) (Brewer, Sercombe, Deits SJ) Defendant arrested for DUII, given *Miranda* warnings, and taken to police station. He did not invoke any *Miranda* rights. At the station, officer told defendant he was being videotaped. Officer placed a phone and phone books next to defendant, and told him he could call a lawyer or anyone. Officer did not tell defendant that he

could have privacy to call an attorney. Defendant made calls from his cell phone, first leaving a message for his girlfriend, then a friend, then his employer. Officer asked defendant if he wanted to make more calls. Defendant said there was nothing more he could do. Defendant took a breath test which registered a .21% BAC. Trial court denied defendant's motion to suppress his breath test. Court of Appeals affirmed: recently, in *State v Burghardt* (discussed, *ante*), the court emphasized that the constitutional right to consult with an attorney must actually be invoked before an officer needs to provide the opportunity for a private consultation with an attorney. "Defendant has cited no authority, and we are aware of none, to support the proposition that a DUII suspect's limited right to consult an attorney in the context of deciding whether to take a breath test is violated in the absence of an invocation of the right."

State v Roesler, 235 Or App 366 (6/9/10) (Ortega, Landau, Carson SJ) Defendant arrested for DUII, read him his *Miranda* rights, placed him in the patrol car, and drove him to a detox center. Defendant's truck was taken to an impound lot. At the detox center, defendant asked if he could speak with someone about his rights. Officer gave defendant a phone, phone directory, and 15 minutes of complete privacy. Defendant unable to read the directory without reading glasses, which were in his truck, and he did not try to call anyone. Officer testified that defendant said he could not read the directory and that officer had no glasses for defendant. Defendant and officer differed on their testimony as to whether defendant requested his reading glasses during or after the 15-minute period. Defendant and officer agreed that defendant asked officer to dial an attorney, and officer declined to assist defendant, and asked him to submit to a breath test. Defendant said he would after speaking with an attorney, which officer interpreted as a refusal. Defendant moved to suppress evidence of his refusal to take the breath test. Trial court denied the motion, ruling that he had the directory, the phone, and 15 minutes, and there is no case that says people have to provide reading glasses when the defendant may or may not have made it clear he needs them. The trial court did not make findings on the timing of the defendant's request for reading glasses.

Court of Appeals reversed and remanded for the trial court to determine when defendant requested his reading glasses. The Court guided the trial court on remand as follows: "If, as [officer] testified, defendant made his additional requests only *after* he was given an opportunity to contact an attorney, defendant was not denied a reasonable opportunity to consult with an attorney before deciding to submit to the breath test." But if, "on the other hand, the factfinder were to believe defendant's testimony that he asserted a need for reading glasses before [officer] gave him an opportunity to contact an attorney and that, despite that assertion, [officer] denied defendant any assistance, the denial of defendant's motion to suppress would be erroneous, because defendant had no reasonable opportunity to consult an attorney."

(b) Post-Trial

A trial court may accept a defendant's proffered waiver of counsel only if it finds that the defendant knows of his or her Article I, section 11, right to

counsel and, if indigent, of his or her right to court-appointed counsel, and that the defendant intentionally relinquishes or abandons that right. *State v Meyrick*, 313 Or 125, 133 (1992).

State v Phillips, 235 Or App 646 (6/16/10) (Sercombe, Brewer, Deits SJ) Defendant convicted of reckless driving, criminal mischief, and disorderly conduct after he was involved in a slow-motion collision. Defense counsel moved to withdraw. The trial court allowed him to withdraw. Trial court then allowed defendant to represent himself without counsel at the restitution phase of his trial, without making any determination regarding the constitutional validity of defendant's proffered waiver of his right to counsel. Trial court ordered defendant to pay $2,728 in restitution to the victim.

Court of Appeals vacated and remanded that order. A convicted defendant has a right to counsel at a restitution hearing. Under *Meyrick*, to determine if a defendant has intentionally relinquished or abandoned that right, appellate courts examine the record as a whole and consider the defendant's age, education, experience, and mental capacity, the charge, the possible defenses, and other relevant factors. Here, defendant was charged with 3 counts from a collision and he was a 48 year old professional truck driver, so he likely understood the potential cost in repairing the victim's truck. The record is devoid of evidence as to his criminal history, and whether he had had counsel in the past, but he had some experience based on his representation by counsel at the guilt phase. However, it is not apparent that defendant understood he had a right to counsel at the restitution phase, much less court-appoint counsel if he was indigent. At no time during any of the proceedings did the trial court advise defendant of his right to counsel, his right to court-appointed counsel if indigent, or the dangers of self-representation. That was error. That error was not harmless, because the court cannot determine what the outcome would have been had defendant been represented by counsel.

4. Right to Self-Representation

Under Article I, section 11, and the Sixth Amendment, a criminal defendant has a right to be represented by counsel and to represent himself, see *State v Verna*, 9 Or App 620, 624 (1972) and *Faretta v California*, 422 US 806, 819 (1975). .

Under the Sixth Amendment, a court's denial of a defendant's right to be self-represented is "structural error" that is not subject to a harmless-error analysis. *State v Blanchard*, 236 Or App 472 (2010) (citing *US v Gonzalez-Lopez*, 548 US 140, 149-50 (2006)).

State v Blanchard, 236 Or App 472 (8/04/10) (Landau, Schuman, Ortega) Defendant failed to report to his probation officer and was arrested for violating his probation. At the probation-revocation hearing, defendant appeared with his court-appointed attorney. Defendant said he wanted to proceed without counsel. Trial court denied that request. Trial court then revoked his probation, and imposed a 6-

month jail sentence and 12 months of post-prison supervision, with monetary charges being assessed against defendant for his post-prison supervision. Defendant appealed. Court of Appeals reversed. First, this case is not moot just because defendant has served his time: the supervision charges are a "potential economic liability" showing that "a decision on the merits will have some practical effect on the rights of the parties."

As to the merits, under Article I, section 11, and the Sixth Amendment, a criminal defendant has a right to be represented by counsel and to represent himself, see *State v Verna*, 9 Or App 620, 624 (1972) and *Faretta v California*, 422 US 806, 819 (1975). Defendant's request to represent himself was made timely, on the 14th day after his arrest (as the statute requires), and he said he was ready to proceed to trial. Defendant's request also was not "arguably equivocal" as the state contended, just because he politely accepted the court's rejection of his request to represent himself (he said "Yes, sir" after the court ruled against his request). Also, the error was not harmless, because under the Sixth Amendment, a court's denial of a defendant's right to be self-represented is "structural error" that is not subject to a harmless-error analysis, citing *US v Gonzalez-Lopez,* 548 US 140, 149-50 (2006). (Court of Appeals did not address the harmless-error argument under Article I, section 11). Court of Appeals reversed the judgment revoking defendant's probation (and denied the state's motion to dismiss the case as moot).

State v Ormsby, 237 Or App 26 (8/25/10) (Haselton, Brewer, Armstrong) Trial court denied defendant's request to represent himself on charges of unauthorized use of a vehicle and giving false information to a peace officer. On appeal, defendant contended that the trial court's ruling violated his "state and federal constitutional rights to self-representation". State conceded that error, citing *Faretta v Californi*a, 422 US 806 (1975), *State v Davis*, 110 Or App 358 (1991), and *State v Verna*, 9 Or App 620 (1972). Court of Appeals accepted that concession: the record does not establish that defendant's waiver of counsel was unknowing or unintelligent, nor does it show that defendant's request to proceed pro se would have disrupted the proceedings, and the trial court's finding that defendant lacked knowledge and skill to take his case to trial was insufficient to deny his constitutional right to represent himself. Reversed and remanded for a new trial.

5. Self-Incrimination: Prosecutorial Comments

State v Clark, 233 Or App 553 (2/17/10) (Rosenblum, Brewer, Riggs SJ) Defendant arrested for meth found in her backpack. At trial, defense counsel cross-examined the police officer who had arrested defendant by asking: "And you didn't confront her with this [a baggie of meth found in her backpack] and try to obtain a statement; is that correct as well?" In closing argument, the prosecutor said, "There was no testimony that the Defendant disputed that, claimed that someone else owned it [the meth], claimed that it wasn't hers. No testimony that when –" Defense counsel then objected and moved for a mistrial. The trial court denied that motion.

Court of Appeals affirmed. The privilege against self-incrimination applies equally to trial and post-arrest interrogation. The state may not call attention to a defendant's silence in either instance. Comments that implicate only a defendant's post-arrest silence generally are improper. But here, because defense counsel had "opened the door" to the prosecutor's comment by asking the officer if he had confronted defendant about the meth. Defense counsel "put the state in the position of having to challenge the implication that defendant would have made an exculpatory statement to the police if she had been given the opportunity." Under both Article I, section 12, and the Fifth Amendment, "defendant cannot complain that the prosecutor pointed out to the jury that [defendant] did not make use of the opportunity" to dispute that someone else may have owned the meth.

See **Self-Incrimination**, *ante*.

6. Confrontation

See ***State v Willis***, 348 Or 566 (7/29/10), discussed under **Appellate Review**, *post*.

See ***State v McNeely***, 237 Or App 54 (9/01/10), discussed under **Appellate Review**, *post*.

B. Civil Jury Right

"In actions at law, where the value in controversy shall exceed $750, the right of trial by jury shall be preserved * * *." -- Article VII (Amended), section 3, Or Const

The right to a jury trial is guaranteed under the Oregon Constitution in those classes of cases in which the right was customary at the time the constitution was adopted and does not extend to cases that would have been tried in equity. *McDowell Welding & Pipefitting v US Gypsum Co.*, 345 Or 272, 279 (2008). The pleadings determine whether claims are legal or equitable. *Id.*

Prehall v Weigel, 232 Or App 148 (11/18/09) (Ortega, Landau, Schuman) The parties had organized an LLC. Plaintiff brought an action against defendants for breach of contract, breach of fiduciary duty, fraud, and an accounting. Plaintiff asserted that he did not seek rescission of any agreement but rather that he sought damages. Plaintiff demanded a jury trial, which the trial court denied, ruling that plaintiff's claims sounded in equity. Court of Appeals reversed and remanded. The complaint explicitly requests money damages on each claim – a legal remedy. The request for an accounting to determine the exact amount of damages did not convert the legal claims to equitable claims. Plaintiff's replies to defendants' affirmative defenses were legal bases. Plaintiff's requested remedy of damages is a complete remedy (rescission not required) that makes it unnecessary for the court to invoke its equitable jurisdiction.

" In all civil cases the right of Trial by Jury shall remain inviolate." -- Article I, section 17, Or Const

Foster v Miramontes, 236 Or App 381 (7/28/10) (Rosenblum, Schuman, Wollheim) Female coworker petitioned for a Stalking Protective Order (SPO) against a male coworker, seeking, in addition to the SPO, a money award for her sick leave, annual leave, lost overtime compensation, and the cost of counseling. The male coworker asserted to the trial court that he was entitled to a jury trial under the Oregon Constitution. Trial court denied the request for a jury trial, tried the case itself, and entered a general judgment for a permanent SPO against the male coworker, and a money award for the female coworker, plus her attorney fees.

Court of Appeals affirmed. The SPO statute itself does not confer a right to a jury trial. The statute does not contain any language expressly granting the right to a jury trial, and contains no reference to indicate that the legislature intended to confer a right to a jury trial. As to Article I, section 17, and Article VII (Amended), section 3, "the Oregon Supreme Court has explained that the right to a jury trial is guaranteed 'in those classes of cases in which the right [to a jury trial] was customary at the time the [Oregon] [C]onstitution was adopted or in cases of a like nature.' *McDowell Welding & Pipefitting, Inc. v U.S. Gypsum Co.*, 345 Or 272, 279 (2001) (alterations in original)." Article I, section 17, "is not a source of law that creates or retains a substantive claim or a theory of recovery in favor of any party. *Jensen v Whitlow*, 334 Or 412, 422 (2002)."

Here, male coworker concedes that the legislature enacted the SPO statute in 1993; a civil action for stalking did not exist until 1993. But male coworker contends that a civil stalking claim is "of like nature" to causes of action for which a jury right was guaranteed when the Oregon Constitution was adopted, specifically the torts of assault, battery, and intentional infliction of emotional distress. Court of Appeals explained that those torts are not "of like nature" to a stalking claim, based on the requisite elements of each claim. Battery requires physical contact with the victim and requires intent to actually touch the victim or cause the victim apprehension of touching; a stalking claim does not. Assault and battery require contacts between the victim and defendant; a stalking claim does not (contacts can be by the stalker with members of the victim's family our household members). As for intentional infliction of emotional distress, as a tort, it was not recognized at common law when the Oregon Constitution was adopted; rather it was first recognized as a tort in Oregon in *Pakos v Clark*, 253 Or 113 (1969). The Court of Appeals concluded: "a claim for civil stalking is not 'of like nature' to the common-law claims of assault or battery as [male coworker] contends and, thus, [male coworker] has not demonstrated that the trial court erred in denying his request for a trial by jury."

IX. DOUBLE JEOPARDY

"No person shall be put in jeopardy twice for the same offen[s]e, nor be compelled in any criminal prosecution to testify against himself." – Article I, section 12, Or Const

Retrial may be barred for egregious prosecutorial misconduct when (1) the misconduct cannot be cured by anything other than a mistrial; (2) the prosecutor knew the conduct was improper and prejudicial; and (3) the prosecutor intended or was indifferent to the resulting mistrial or reversal. *State v Kennedy*, 295 Or 260, 276 (1983).

State v Garner, 234 Or App 486 (3/31/10) (Landau, Schuman, Ortega) Defendant refused a field sobriety test on the roadside and again at the police station. The trial court suppressed his roadside refusal but allowed his police station refusal into evidence. In opening statement at trial, the prosecutor commented specifically on the (suppressed) roadside refusal. Trial court dismissed the complaint against defendant for prosecutorial misconduct and found it sufficient to constitute double jeopardy. State appealed. Court of Appeals reversed. The trial court could have cured the prosecutor's misconduct, either by requiring the prosecutor to clarify that the refusal had occurred at the police station or by giving an instruction that the jury was not to consider any refusal that had occurred at the scene. Even if it was not possible to erase the jury's knowledge of defendant's refusal at the scene, the prejudice was not so extreme to require a mistrial, thus the first *Kennedy* prong has not been satisfied here.

X. PUNISHMENT

A. Cruel and Unusual; Proportionality

"Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense." - Article I, section 16, Or Const

"This court first articulated the test for determining whether a sentence violates the proportionality provision of Article I, section 16, in *Sustar v County Court of Marion County*, 101 Or 657 (1921)." *State v Wheeler*, 343 Or 652, 668 (2007). "Since *Sustar*, this court often has used the 'shock the moral sense' standard to resolve a claim that a sentence does not meet the proportionality requirement." *Id.* "This court has used the test of whether the penalty was so disproportioned to the offense as to 'shock the moral sense of reasonable people' and ordinarily has deferred to legislative judgments in assigning penalties for particular crimes, requiring only that the legislature's judgments be reasonable." *Id.* at 676.

A punishment is constitutionally disproportionate if it "shocks the moral sense of all reasonable [persons]". Three factors to make that determination are: (1) comparison of the penalty to the crime; (2) comparison of other penalties imposed for other related crimes; and (3) defendant's criminal history. *State v Rodriguez/Buck*, 347 Or 46, 57-58 (2009).

State v Alwinger, 231 Or App 11 (2009), a*dh'd to as modified on recon*s., 236 Or App 240 (7/14/10) (Landau, Ortega, Riggs SJ) Defendant digitally penetrated a 3 year old child one time, causing some visible physical injury to her. Defendant has two prior convictions for burglary, one of which was for stealing women's underpants from a home, but he has no prior rape convictions. For first-degree penetration of this young girl, trial court sentenced him to a legislatively prescribed 300-month prison term with lifetime post-prison supervision. In 2009, the Court of Appeals held that that prison term, as applied to him, did not violate the Oregon Constitution's proportionality guarantee. One day later, the Oregon Supreme Court decided *State v Rodriguez/Buck*. On reconsideration, the Court of Appeals adhered to its former opinion based on *Wheeler*, as modified by *Rodriguez/Buck*, attempting to reconcile the supreme court's cases.

In so concluding, the Court of Appeals noted that in *Wheeler*, the proportionality test includes an assessment of whether the legislature's penalty is founded on an "arguably rational basis," out of respect for separation of powers. In *Rodriguez/Buck*, "the court appears to have abandoned the 'arguably rational basis' test described in *Wheeler*," replacing with a 3-factor test: (1) comparison of the severity of the penalty to the gravity of the crime; (2) comparison of the penalties for other related crimes; and (3) the defendant's criminal history. Here, defendant argued that 300 months is disproportionate, because he would receive the same sentence for murdering or raping the child as he did for just using a finger to injure her, and he has no prior sex-offense convictions. Court of Appeals applied the three factors and concluded that it "cannot say that this is a 'rare' case in which defendant's penalty would shock the moral sense of reasonable people." 300 months is a very lengthy sentence, but unlawful sexual penetration of a three year old is a very serious crime – the fact that it was only one violation and the physical injury was not serious does not minimize the severity. In *State v Shaw*, 233 Or App 427 (2010), the court rejected the theory that a person convicted of murder, who has served 300 months, is not entitled to release at that point, but only to a review. Finally, defendant's two burglary convictions are relevant – the *Rodriguez/Buck* Court did not state that a court's consideration of a defendant's criminal history is limited to the same or similar offenses. Affirmed as modified.

State v Baker, 233 Or App 536 (2/17/10) (Wollheim, Brewer, Breithaupt pro tem) Defendant pleaded guilty to 5 counts of sex abuse and 5 counts of incest for having an ongoing sexual relationship with his minor biological daughter, who gave birth to his child/grandchild. Defendant had a prior sexual relationship with an underage girl that produced a pregnancy. Trial court sentenced defendant to 180 months in prison. Defendant alleged that the 180 months was disproportionate under Article I, section 16. Court of Appeals affirmed, citing *Shumway,* 291 Or 153 (1981), *Cannon v Gladden*, 203 Or 629 (1955), and *Rodriguez/Buck*. Applying the 3-factor *Rodriguez/Buck* analysis: (1) sex with one's minor child is egregious; (2) sentences resulting from multiple convictions are not properly compare with one sentence resulting from a single conviction; and (3) defendant admitted that he had sex with his daughter repeatedly even after police contacted him about it and he had

a history of impregnating another minor female. "This is not a rare case where the penalty imposed violates Article I, section 16."

Engweiler v Powers, 232 Or App 214 (11/25/09) (Landau, Schuman, Ortega) Relator in this mandamus action was 15 when he raped, sodomized, and murdered a 16 year old female. He was sentenced to life with a 30-year minimum. The parole board reset his prison term at 480 months under new rules. Relator sought mandamus relief contending that the Board established a 40-year prison term because he was a minor whereas an adult would have been eligible for a "murder review hearing" in just 20 years. The trial court issued the writ. The Board appealed.

Court of Appeals reversed and remanded with instructions to vacate the writ and dismiss the petition. The issue on appeal is whether the trial court erred in ordering the Board to provide a hearing to relator under ORS 144.120 (1989) (which provided in part, for those prisoners sentenced to a term of imprisonment for life or for 15 years or more, the board shall conduct a parole hearing, and shall set the initial release date, within one year following admission of the prisoner to the Department of Corrections institution). The Oregon Supreme Court has not analyzed a board-established prison term under Article I, §16. Both of the appellate courts of this state have declined to decide the constitutionality of board-established prison terms. Also, the legislature has not enacted any provisions specifically related to the board's authority to establish prison terms. For those reasons, the Court of Appeals rejected relator's argument.

State v Shaw, 233 Or App 427, *rev den* 348 Or 415 (1/27/10) (Edmonds, Brewer, Deits SJ) Defendant raped and sexually abused an 11 year old girl. He received 25 years' imprisonment for rape and concurrent 75 months for the sex abuse. On appeal, he alleged only that the rape sentence was disproportionate as applied and cruel and unusual under Article I, section 16, and the Eighth Amendment. Court of Appeals affirmed. "Regardless of defendant's criminal history or likelihood of reoffending, the 25-year sentence that defendant received for a crime as heinous as the forcible rape of a child under 12 does not present on the of the 'rare circumstances' in which a disproportionate punishment requires reversal by this court under Article I, section 16." *Wheeler*. Under *Rodriguez/Buck*, however, a fuller explanation is necessary to describe why that sentence does not "shock the moral sense of reasonable people. First, the sex abuse statute at issue in *Rodriguez/Buck* was broader than the first-degree rape in this case. Second, "our role is not to reorganize the criminal code in a hierarchy of offenses." Compared to related criminal statutes (first-degree sodomy for a child under 12, first-degree unlawful sexual penetration of a child under 12), the mandatory 25-year sentence is "certainly proportional to the extraordinary gravity of first-degree rape of a child under 12 – a violent sexual crime against a highly vulnerable victim." Third, the "fact that defendant had no criminal history is of no relevance in this case." Criminal history is one factor in disproportionality analysis, but the lack of a history has never been sufficient to render an otherwise constitutional penalty disproportionate. This sentence does not shock the moral sense of reasonable people. Same result under the Eighth Amendment.

State v Wiese, 238 Or App 426 (11/03/10) (Ortega, Landau, Schuman) Defendant repeatedly sexually abused his 11 year old stepdaughter for over a year. He has prior convictions for robbery and assault but not for sex abuse. Trial court sentenced him to the mandatory 300-month sentence for rape and sodomy. Defendant contends that the sentence is disproportionate because: his prior convictions didn't include sex crimes, the child he raped and sodomized for over a year didn't suffer serious physical injury, and the sentence is disproportionate compared to intentional-murder sentences. Court of Appeals affirmed, applying the three *Rodriguez/Buck* factors. First, the penalty is congruent with the gravity of the crime, see *Alwinger* [discussed, *ante*]. Second, sentences for child rape to intentional murder has been rejected and under *Rodriguez/Buck*, courts are not free to "roam through the criminal code, deciding which crimes are more or less serious than others." Third, a defendant's criminal history need not be limited to the same offenses, see *Alwinger*. "Accordingly, defendant's sentences are not disproportionate or cruel and unusual punishment in violation of Article I, section 16."

(Note: *Rodriguez/Buck* did not address the prohibition against cruel and unusual punishment – it only addressed the proportionality requirement).

The Court of Appeals then turned to the Eighth Amendment, stating: "Although defendant did not develop his argument under the Eighth Amendment to the United States Constitution, he is not entitled to relief under the federal constitution for similar reasons. *See State v Thompson*, 328 Or 248, 254 n 3, 971 P2d 879, *cert den*, 527 US 1042 (1999) (we do not address constitutional claims in the absence of 'thorough and focused constitutional analysis'); *Rodriguez/Buck*, 347 Or at 58-60 (analysis of the three factors under Article I, section 16, provide a sufficient basis to decide whether defendant's sentence was disproportionate and cruel and unusual under the Eighth Amendment to the United States Constitution)."

(Note: *Rodriguez/Buck* did not address the Eighth Amendment.)

B. Consecutive Sentences; Judicial Factfinding

"No law shall limit a court's authority to sentence a criminal defendant consecutively for crimes against different victims." – Article I, section 44(1)(b), Or Const

(no cases)

C. Right to Allocution – Article I, section 11

A defendant has the right to allocution (right to be heard personally) during a hearing to modify a judgment, under Article I, section 11. *State v Isom*, 201 Or App 687, 694 (2005). The statutory and constitutional rights to speak at a sentence modification proceeding are not unqualified. An enforceable right

extends to changes in a sentence that are "substantive" as opposed to "administrative." *State v Rickard*, 225 Or App 488, 491 (2009).

State v Mayes, 234 Or App 707 (4/14/10) (Rosenblum, Sercombe, Breithaupt pro tem) Trial court misdescribed a punishment in a judgment, then held a hearing and corrected the judgment with clerical correction. Defendant argued on appeal that trial court denied him the right to be heard personally at the hearing, and also that the trial court violated his Sixth Amendment rights under *Blakeley v Washington* by imposing a departure sentence based on its own factual findings. Court of Appeals affirmed: the trial court had no obligation to empanel a jury before making clerical corrections to accurately reflect the previously imposed sentence under *Blakeley v Washington*. Further, the right to allocution was not violated because the trial court did not make any changes to defendant's sentences that involved disputed facts or the exercise of judicial discretion, see *State v Rickard,* 225 Or App 488 (2009).

XI. REMEDY GUARANTEE

"[E]very man shall have remedy by due course of law for injury done him in his person, property, or reputation." -- Article I, section 10, Or Const

"[I]n analyzing a claim under the remedy clause, the first question is whether the plaintiff has alleged an injury to one of the absolute rights that Article I, section 10 protects. Stated differently, when the drafters wrote the Oregon Constitution in 1857, did the common law of Oregon recognize a cause of action for the alleged injury? If the answer to that question is yes, and if the legislature has abolished the common-law cause of action for injury to rights that are protected by the remedy clause, then the second question is whether it has provided a constitutionally adequate substitute remedy for the common-law cause of action for that injury." *Smothers v Gresham Transfer, Inc.*, 332 Or 83, 124 (2001).

Ackerman v OHSU Medical Group, West, and OHSU, 233 Or App 511 (2/10/10) (Schuman, Rosenblum, Sercombe) Patient (plaintiff) was injured in a neck surgery at OHSU. He sued two physicians, OHSU, and OHSU Medical Group (the latter were the physicians' employers). Jury returned a verdict against one physician (Dr. West) for $1.4 million in damages for his negligence. The trial court limited OHSU's liability to the $200K maximum liability under the Oregon Tort Claims Act's statutory damages cap. The trial court concluded that if the OTCA's cap were to limit Medical Group's and Dr. West's liability, that would violate plaintiff's constitutional right to a remedy. The trial court entered judgment for plaintiff for $1.4 million with OHSU's liability being $200K of that total.

On appeal, the parties agreed that OHSU's liability was properly limited to $200k under the OTCA, under *Clarke v OHSU*, 343 Or 581, 600 (2007). Court of Appeals held that (1) Article I, section 10, prevents applying the OTCA cap to plaintiff's claim against Dr. West; (2) OHSU's liability was properly limited to $200K under the

OTCA; and (3) Medical Group's liability should have been limited to $200K under the OTCA.

Defendants argued that Medical Group should have been dismissed outright from this case. Court of Appeals rejected that theory. First, Dr. West was an employee of OHSU and Medical group, and the OTCA does not require a plaintiff to bring an action against only one public employer. Second, Medical Group is not an agent of OHSU so as to shift its liability onto OHSU, because the evidence here does not establish that OHSU had the right to control the physical details of Dr. West's conduct, as that principal-agent test was set out in *Vaughn v Frist Transit, Inc.*, 346 Or 128 (2009). Trial court did not err by refusing to dismiss Medical Group under the OTCA.

Defendants also argued that Medical Group was itself a public body that should have been limited to $200K in damages. In a detailed analysis, the Court of Appeals concluded that "under *Clarke*, to determine whether an entity is a state instrumentality requires a functional as opposed to a formal inquiry and that, functionally, Medical Group qualifies. That conclusion means that, because medical Group would have been immune at common law in 1857, application of the OTCA so as to limit Medical Group's liability to plaintiff does not deprive plaintiff of anything that is protected by the Remedy Clause. The trial court erred in denying Medical Group's motion to limit its liability to $200,000 pursuant to ORS 30.265(1) [of the OTCA]."

Defendant next argued that although plaintiff's remedy against OHSU was limited to $200K, and the OTCA limited plaintiff's remedy against Medical Group to $200K, and applying the OTCA's damage cap to plaintiff did not violate Article I, section 10, despite plaintiff's $1.4 million in damages being cut back to $400K by the OTCA. Court of Appeals disagreed, concluding that capping plaintiff's remedy at $400K would violate Article I, section 10. In so concluding, the Court of Appeals noted that Supreme Court cases have left it "without a clear indication of how to resolve this dispute," but distilled "certain factors that appear to bear on the adequacy of a capped remedy." Those factors are (1) the difference between the capped remedy and the common law remedy; (2) uncompensated out-of-pocket costs in a capped remedy; (3) whether the capped remedy supplants a common law cause of action; (4) whether the capped remedy is consistent with a narrow construction of sovereign immunity; and (5) the degree to which the capped remedy conforms to widespread social indicators regarding just compensation for injuries. Affirmed in part, reversed in part, remanded.

Comfort v Jackson County, 2010 WL 2817183 (D Or 7/16/10) (Clarke)
Plaintiff brought a section 1983 claim and a state tort claim under the OTCA against his jailers, arguing that they beat him while he was in jail. Federal magistrate dismissed his state claim against the individual defendant-jailers due to his failure to give the requisite statutory notice. Plaintiff argued that by dismissing the individual jailers, he was being deprived of remedy, as guaranteed under Article I, section 10, and as explained under *Clarke v OHSU*, 343 Or 581, 610 (2007). The magistrate here

distinguished *Clarke*, which involved a proposed limited remedy for permanent and severe injuries caused by medical negligence. The magistrate found that the remedy clause is not comparably emasculated, because plaintiff's removed remedy is not due to a limit on damages, but rather "it is due to the dismissal of the claim on notice grounds." The magistrate mused that a "challenge to the remedy might be more persuasive if the Plaintiff had a valid claim under the OTCA," but "the court cannot reach the merits of his argument of a violation of the remedy clause before he has established an OTCA claim." The magistrate granted defendants' motion for summary judgment.

XII. APPELLATE REVIEW

"If the supreme court shall be of opinion, after consideration of all the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed, notwithstanding any error committed during the trial * * * ." – Article VII (Amended), section 3, Or Const

Error in admitting evidence is "harmless" under the Oregon Constitution if there is little likelihood that the admission of the evidence affected the verdict. *State v Davis*, 336 Or 19 (2003); *State v Gibson*, 338 Or 560, 576, *cert denied*, 546 US 1044 (2005). That applies whether the evidence in question is scientific or ordinary. *State v Willis*, 348 Or 566, 572 n 2 (2010).

Oregon courts assess violations of federal constitutional rights under the federal harmless error test in *Chapman v California*, 386 US 18, 23 (1967). That is, the "deprivation of such a right is harmless error when the reviewing court, in examining the record as a whole, can say, beyond a reasonable doubt, that the error did not contribute to the determination of guilt." *State v Sierra-Depina*, 230 Or App 86, 93 (2009).

(Note: "Harmless error" doctrine also is set out in ORS 138.230: "After hearing the appeal, the court shall give judgment, without regard to * * * technical errors, defects or exceptions which do not affect the substantial rights of the parties.")

State v Willis, 348 Or 566 (7/29/10) (Gillette) Defendant was arrested and asked if she had any contraband. She hesitated, then said "Yes, she had some stuff," and pulled out a Chanel perfume bottle from her bra that contained crusted dried material that the experienced, trained officer believed to be meth. The state police crime lab report identified the contents as meth. Defendant was indicted for possessing meth. At her trial, the trial court admitted the state police crime report into evidence, but the author of that report was not present to testify. The officer testified that he believed the contents to be meth, but he could not be certain (not having run the lab test himself). Jury convicted defendant. On appeal, the state conceded that under *State v Birchfield*, 342 Or 624 (2007), the trial court erred by admitting the report without supporting testimony by the author, but the state

contended that the error was harmless. Court of Appeals had agreed, concluding that the error was harmless.

Supreme Court reversed the Court of Appeals' decision. On this record, the report went to the heart of the case:

> "The state had no witness who could affirmatively identify the substance in the vial as methamphetamine. Defendant's verbal act in giving up the substance established only that it was 'contraband.' The only witness even to suggest that the substance was methamphetamine was [the arresting officer], and he admitted that he was not sure. The substance was not self-identifying, as certain other substances might be – the substance could have been methamphetamine, but it also could have been, *inter alia*, cocaine, or heroin, or a harmless white crystalline substance. Without the laboratory report, that was all the evidence that the state had. We certainly cannot say that the evidence that the substance was methamphetamine was overwhelming." (Quoting *State v Davis*).

The Supreme Court reviewed the basics: The state indicted defendant for possession of meth. So the state was required to prove beyond a reasonable doubt that the substance in the bottle was meth, not some other substance. Defendant was not required to contend that the bottle's contents were anything other than meth, she bore no burden of proof or persuasion, she "was entitled to content herself with arguing that the state had not proved by the requisite degree of persuasiveness that the contents of the vial *were* what they were alleged to be." (Emphasis in *Willis*). The Supreme Court further mused:

> "Science either can turn suspicion into probability, or it can establish that the substance was not the specific controlled substance alleged in the indictment (or, indeed, was not a controlled substance of any kind). . . . Far from being able to say, on this record, that there was "little likelihood" that any error in admitting the lab report "affected the verdict," we conclude that there was a high likelihood that the improperly received report *did* affect the verdict. The error here was not harmless." (Emphasis in *Willis*).

The Supreme Court noted that the US Supreme Court recently reached a similar conclusion under the Sixth Amendment in *Melendez-Diaz v Massachusetts*, 129 S Ct 2527 (2009).

State v McNeely, 237 Or App 54 (9/01/10) (Landau, Schuman, Sercombe) Defendant was charged with possession of meth, based on lab report from residue on seized items. Defendant denied ownership of those seized items. The state lab report's author was not called to testify. Defendant did not object to the admission of the report and he did not challenge the lab report's conclusion that the residue was meth. He was convicted. He appealed, claiming that the lab report's admission was plain error under *State v Birchfield*, 342 Or 624 (2007) (which held that admission of lab reports without author's testimony, over a defendant's objection, violates state confrontation clause rights). Here, in contrast with *Birchfield*, defendant did not

object, as in *State v Raney*, 217 Or App 470, *rev denied* 344 Or 671 (2008) (*held*: admission of a lab report without the author, in the absence of defendant's objection, is not plain error). In contrast, when a defendant does object to the admission of a lab report without the report's author present for confrontation at trial, the admission of the report is error apparent on the face of the record, see *State v Choin*, 218 Or App 333 (2008); *State v Marroquin*, 215 Or App 330, 335-36 (2007) (*held*: it's still plain error under *Birchfield* where defendant objected under Sixth Amendment but not state constitution).

Court of Appeals reasoned that, in *Willis* [discussed *ante*] the Supreme Court held that a defendant bears no burden of persuasion in a criminal proceeding, thus defendant Willis's failure to contest the lab report did not, by itself, mean that any error in admitting the report was harmless. In this case, as in *Raney*, defendant did not object at all. Thus defendant here may have chosen not to assert that the admission of the lab report violated his constitutional confrontation rights, so the admission of the lab report without its author did not constitute error. Affirmed.

State v Sanchez-Alfonso, 238 Or App 160 (10/27/10) (Brewer, Haselton, Armstrong) Defendant was charged with abusing his girlfriend's 18-month old child. A pediatrician evaluated the child and prepared a report stating that defendant clearly caused the child's injuries that caused his hospitalization. She stated that she did not believe defendant's theory that he threw the child into a dresser, because the child had 10 areas of injury on his head and neck alone, and she believed more injuries occurred that night. Defendant took the stand at trial and admitted that he lied in giving several different versions of how the child got a golf-ball-sized lump on his head that was covered in makeup, how the child got a fractured skull, bruises on his chest, back, right leg, chin, and why the child had a vacant expression, was unresponsive, and would not eat. Defendant admitted that he threw the child against a dresser. He then said his girlfriend told him to lie. He said he tripped onto the child. He also said he must've blacked out. Defendant never posited that anyone other than himself caused the physical injuries at issue in this case. Defendant objected to admitting the pediatrician's report into evidence. Trial court admitted the pediatrician's written report into evidence and allowed her to testify about her opinions. A jury convicted defendant of numerous assault and criminal mistreatment.

Defendant appealed, assigning error to the admission of the pediatrician's report and testimony. Court of Appeals did not determine whether that challenged evidence was admissible, "because any error in admitting it was harmless." Court of Appeals explained: "Under Article VII (Amended), section 3, of the Oregon Constitution, an appellate court must 'affirm a conviction, notwithstanding any evidentiary error, if there is little likelihood that the error affected the verdict.'" *State v Gibson*, 338 Or 560, 576, cert denied 546 US 1044 (2005). Under the state constitution's harmless error analysis in Article VII (Amended), section 3, the asserted error is considered in context. In determining the possible influence on the jury, courts consider whether the evidence went to "the heart of * * * the case." *State v Davis*, 336 Or 19, 34 (2003). Here, defendant took the stand in his own defense, admitted he lied, and never identified anyone else as the perpetrator. The "heart of the case" was defendant's

mental state when he assaulted the child. The challenged evidence (the pediatrician's report and testimony) went to defendant's role as the cause of those injuries, not his mental state. Affirmed.

XIII. EQUAL PRIVILEGES AND IMMUNITIES

"No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." -- Article I, section 20, Or Const

Article I, section 20, proscribes two types of unequal treatment: "first, to any citizen, and second, to any class of citizens." It "may be invoked by an individual who demands equality of treatment with other individuals as well as by one who demands equal privileges or immunities for a class to which he or she belongs." *State v Clark*, 291 Or 231, 237 (1981). For individual-based claims, the question is whether the state distributed a benefit or burden "without any coherent, systematic policy." *State v Freeland*, 295 Or 367, 375 (1983).

State v Davis, 237 Or App 351 (9/22/10) (en banc) (Wollheim, Brewer, Haselton, Rosenblum for majority; with Sercombe and Landau concurring; with Schuman, Ortega, Armstrong, Breithaupt pro tem concurring and dissenting) Defendant drove past a deputy. Without any suspicion that defendant was engaged in any unlawful activity, the deputy randomly entered defendant's license plate number into the DMV database. Defendant's license had been suspended, so officer stopped defendant for that reason. Defendant moved to suppress all evidence from officer's access of his DMV records, under Article I, section 9 (as an unreasonable search) and Article I, section 20 (as an unequal and standardless burden on defendant). The trial court denied his motion to dismiss and defendant was convicted of driving while suspended. Court of Appeals unanimously agreed that no Article I, section 9, violation occurred.

As to Article I, section 20, the Court of Appeals affirmed, dividing its opinions. Majority (of 4 judges) concluded that there was no Article I, section 20, violation. The majority noted that Article I, section 20, may be invoked by an individual who demands equality of treatment with other individuals, and also by an individual who demands equal privileges or immunities for a class to which he belongs. Here, defendant argued the former, that the government has made or applied a law so as to grant or deny privileges or immunities to an individual person without legitimate reasons related to his individual situation. In other words, the state must not distribute a benefit or burden in a haphazard, random, standardless, ad hoc fashion without any coherent, systematic policy, but here, the deputy's random, suspicionless license-plate search was just that. The majority concluded that, although the deputy testified that he "randomly" ran the plates,

> "the deputy's testimony suggests that the decision to run the plates was not a haphazard or ad hoc decision at all. Instead, it was the result of a confluence of training, time, and opportunity: the deputy was trained to run plates to investigate for stolen vehicles; based on the position of defendant's vehicle, the deputy was able to see defendant's front license plate and was able to make out defendant's physical characteristics, which would have allowed him to compare the driver to the registered owner. Under those circumstances, the result was that defendant's license plates were run as part of the deputy's normal activity of investigating for stolen vehicles."

"There was nothing arbitrary or whimsical about the deputy's decision to run defendant's license plates." Defendant was not denied any privilege or immunity on the same terms as other citizens. "Article I, section 20, has never been applied to require police officers to articulate and adhere to criteria for every discretionary patrol activity that might occur in the ordinary course of a day."

Concurrence (of 2) concluded that Article I, section 20, is immaterial to the outcome of this case. A "privilege or immunity" is an advantage that is created or embellished by a constitutional or statutory policy. Here, no law creates, regulates, or authorizes the deputy to "establish the purported privilege or immunity" to be free from "license plate scrutiny." In other words, the "action of the police officer here was not taken under a law that either directly or indirectly classifies license check inquiries or creates privileges or immunities for persons affected by those inquiries." Therefore, this case does not involve a law that classifies privileges in impermissible ways or that affects an individual citizen by a delegation of authority to a government agent to offer or restrict an official privilege or immunity that is available to that person.

Dissent (of 4) When the officer ran defendant's license plate, the deputy initiated a law-enforcement investigation, which imposes a constitutionally significant burden on the investigated person. Defendant was subjected to a criminal investigation while other similarly situated drivers are immune, simply due to the officer's exercise of discretion. This case deals with an immunity, not a privilege.

Dissent rejects the concurrence's idea that Article I, section 20, is not implicated unless the privilege or immunity at issue is either a statutory or constitutional entitlement. If that were correct, then the officer could run plates only of one ethnic minority because no law regulates one ethnic group's right to be free from license plate scrutiny. "Article I, section 20, prohibits police officers from making choices that are based either on no facts (that is, haphazard or ad hoc choices) or on impermissible facts (for example, race)." Also, Article I, section 9, cases, such as *State v Holmes* [see Searches and Seizures, ante], regarding "mere encounters" with citizens, are not relevant to Article I, section 20, analysis.

This deputy testified that "his decision to investigate defendant was *not* based on criteria or standards. It was 'random.'" Thus the officer's decision to initiate a criminal investigation of defendant was not guided by any criteria, policy, or system.

It was ad hoc. If, in contrast, there was a *system* under which police officers run plates, such as every fifth car, that would not violate Article I, section 20.

State v Clark, __ Or App __ (10/27/10) (Haselton, Armstrong, Duncan) Similar facts and issues as in *State v Davis* [see, *ante*]. Court of Appeals affirmed trial court's entry of defendant's conditional plea of guilty.

XIV. TAKINGS

"**Private property shall not be taken for public use . . . without just compensation.**" – Article I, section 18, Or Const

"**No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.**" -- Fifth Amendment, US Const

Fifth Amendment:
Although the government has the power to condemn and take private property (eminent domain), the Fifth Amendment prohibits the government from taking private property without just compensation, which is measured by the market value of the property on the date of the taking. United States v 50 Acres of Land, 469 US 24, 25-26 (1984).

The Just Compensation Clause of the Fifth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. *Chicago, Burlington, Railroad v Chicago*, 166 US 226, 241 (1897).

Physical takings:
The "rough proportionality" test from *Dolan v City of Tigard*, 512 US 374 (1994) governs a Fifth Amendment takings claim. Under that test, "the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *David Hill Development, LLC v City of Forest Grove*, 688 F Supp 2d 1193 (D Or 2010).

"Oregon law is identical to Fifth Amendment 'physical' takings law." *Hoeck v City of Portland*, 57 F3d 781, 787 (9th Cir 1995) (citing *Ferguson v City of Mill City*, 120 Or App 210, 207 (1993)).

Regulatory takings:
As to regulatory takings, "Oregon law provides less protection to property owners than the protection provided by the Fifth Amendment". *Hoeck*, 57 F3d at 788. Under the Oregon Constitution, if "a zoning designation allows

a landowner *some substantial beneficial use* of his property, the landowner is not deprived of his property nor is his property 'taken.' *Dodd v Hood River County*, 317 Or 172, 182 (1993) (quoting *Fifth Avenue Corp v Washington County*, 282 Or 591, 609 (1978)) (emphasis in original).

"Oregon law dictates that a regulatory taking occurs only when a property owner is deprived of all beneficial use of its property by the government's allegedly unlawful actions." If an owner is "was able to complete the development and sell the majority of the parcels of land," the owner is "not deprived of all beneficial use of the property and, thus, [the owner's] state takings claim fails." *David Hill Development, LLC v City of Forest Grove*, 688 F Supp 2d 1193 (D Or 2010).

Temporary takings:
To assert a claim for a "temporary taking" under the Oregon Constitution, "the complaining party must allege that it has been denied all economic use of its property under a law, ordinance, regulation, or other government action that either is permanent on its fact or so long lived as to make any present economic plans for the property impractical." *Boise Cascade Corp v Board of Forestry*, 325 Or 185, 199 (1997).

Oregon Constitution:
Under the Oregon Constitution, a "taking" must be intentional or it isn't a "taking": "a claim for inverse condemnation requires a showing that the governmental acts alleged to constitute a taking of private property were done with the intent to take the property for a public use." *Vokoun v City of Lake Oswego*, 335 Or 19, 27 (2002).

David Hill Development, LLC v City of Forest Grove, 688 F Supp 2d 1193 (D Or (2/23/10)) (Acosta) Real estate developer brought action against City, alleging, *inter alia*, takings claims under the state and federal constitutions. Defendants moved for summary judgment. *Held*: "Oregon law dictates that a regulatory taking occurs only when a property owner is deprived of all beneficial use of its property by the government's allegedly unlawful actions. Here, Plaintiff was able to complete the development and sell the majority of the parcels of land. As Plaintiff admits, sales to date have netted approximately $4 million in profit. Accordingly, Plaintiff was not deprived of all beneficial use of the property and, thus, Plaintiff's state takings claim fails. Defendants' motion for summary judgment as to this claim is granted."

The "rough proportionality" test from *Dolan v City of Tigard*, 512 US 374 (1994) governs a Fifth Amendment takings claim. Under that test, "the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." The district court denied defendants' motion for summary judgment on its Fifth Amendment takings claim: defendants bear the burden of demonstrating compliance with the rough proportionality standard and have provided not rough proportionality analysis.

***West Linn Corporate Park LLC v City of West Linn* et al**, 349 Or 58 (9/23/10) (Walters, De Muniz, Durham, Balmer; with Kistler and Linder concurring/dissenting) The Ninth Circuit certified three questions to the Oregon Supreme Court. In a lengthy and detailed opinion, the Oregon Supreme Court concluded as follows:

1. Question: "[W]hether a plaintiff bringing an inverse condemnation action alleging that a condition of development amounts to an exaction or a physical taking is required to exhaust available local remedies as a prerequisite to bringing his claim in state court." Supreme Court's response: "Assuming that Oregon law permits an inverse condemnation action premised on allegations that a condition of development requires a landowner to construct off-site improvements at a cost not roughly proportional to the impacts of development, Oregon law requires the landowner to pursue available local administrative remedies, but not to appeal to LUBA, as a prerequisite to bringing that action in state court."

2. Question: "[W]hether a condition of development that requires a plaintiff to construct off-site public improvements, as opposed to dedicating an interest in real property such as granting an easement to a municipal entity, can constitute an exaction or physical taking." Supreme Court's response, first under the Fifth Amendment: A "government's requirement that a property owner undertake a monetary obligation that is not roughly proportional to the impacts of its development does not constitute an unconstitutional condition under *Nollan/Dolan* or a taking under the Fifth Amendment, nor does it require payment of just compensation." Also, "a requirement that a property owner construct off-site improvements is the functional equivalent of the imposition of a monetary obligation." Under the state constitution: "Article I, section 18, extends to the taking of personal, as well as real, property, we disagree that the city effected a taking of plaintiff's personal property in this case." Here, "the city did not acquire personal property that plaintiff owned; it required that plaintiff construct public improvements that previously did not exist. That was the functional equivalent of requiring that plaintiff make a monetary payment to the city for a specific purpose – the construction of public improvements." Thus, "a property owner that alleges that a city has required it to construct off-site improvements at a cost that is not 'roughly proportional' to the impact of the development, as opposed to dedicating an interest in real property, such as granting an easement, does not allege a taking that gives rise to a claim for just compensation."

3. "[W]hether the vacation of a street approved by the City Council purporting to act pursuant to [ORS 271.110] is *ultra vires* where the petition does not comply with the landowner consent provisions of [ORS 271.080]." Supreme Court's response: The Supreme Court reframed the Ninth Circuit's third question, and concluded: "Street vacation affects title to real property, and stability and certainty in real property records is essential. . . . Oregon statute clearly makes a provision for notice to property owners affected by street vacation and gives them an opportunity to be heard and oppose vacation. If, after notice, a majority of affected property owners

object in writing, the city is precluded from vacating the street. However, consent of property owners prior to notice and hearing is necessary only if vacation is initiated by petition. Oregon statute permits city initiation of vacation proceedings without the preheating consent of affected landowners. Thus, that consent is not indispensible to city street vacation, and, in answer to the Ninths Circuit's third question, we hold that the absence of such consent does not render the vacation ordinance void and of no effect."

XV. RIGHT TO BEAR ARMS

> **"The people shall have the right to bear arms for the defence of themselves, and the State, but the Military shall be kept in strict subordination to the civil power . . ."** -- Article I, section 27, Or Const

Willis v Winters, 235 Or App 615 (6/16/10) (Wollheim, Brewer, Sercombe) The right to possess a handgun is constitutional in origin; it does not flow from Oregon's concealed handgun licensing statutes. A concealed handgun licensee is not affirmatively authorized to carry a firearm because he has a license. The Oregon handgun licensing statutes provide an exemption from state criminal liability for concealing a handgun that the licensee independently has a right to possess. Court of Appeals held that the trial court correctly concluded that Oregon's concealed handgun licensing statutes are not preempted by the federal Gun Control Act of 1968. See discussion under Supremacy Clause, *post*.

XVI. UNITED STATES CONSTITUTION

A. Supremacy Clause

> The laws of the United States "**shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding**." -- Article VI, clause 2, US Const

1. Preemption

State laws that conflict with federal law are "without effect." *Altria Group, Inc. v. Good*, 129 S Ct 538 (2008) (quoting *Maryland v Louisiana*, 451 US 725, 746 (1981)). The "purpose of Congress is the ultimate touchstone" in every preemption determination. *Ibid.*; *Wyeth v Levine*, 129 S Ct 1187 (2009). Congress may indicate preemptive intent through a statute's express language or through its structure and purpose. Preemptive intent may also be inferred

if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and federal law. *Altria*. An actual conflict will exist either when it is physically impossible to comply with both state and federal law or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Wyeth*, 129 S Ct at 1196-1200 (quoting *Hines v Davidowitz*, 312 US 52, 67 (1941)).

In all preemption cases, particularly those where Congress has legislated in a field traditionally occupied by the States, preemption analysis begins with the assumption that the historic police powers of the States were not to be superseded by a federal act unless that was the clear and manifest purpose of Congress. *Wyeth*.

2. Supremacy and Intergovernmental Immunity

The "states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government. *McCulloch v Maryland*, 17 US (4 Wheat) 316, 436 (1819). A state or local law is invalid (thus violating intergovernmental immunity) in either of two ways: "only if it regulates the United States directly or discriminates against the Federal Government or those with whom it deals." *North Dakota v United States*, 495 US 423, 435 (1990).

Emerald Steel Fabricators, Inc. v BOLI, 348 Or 159 (4/14/10) (Kistler; with Walters and Durham dissenting) The Oregon Medical Marijuana Act authorizes persons holding a registry identification card to use marijuana for medical purposes, see ORS 475.306(1). The Federal Controlled Substances Act prohibits the manufacture, distribution, dispensation, and possession of marijuana even when state law authorizes its use for medical purposes. *Gonzales v Raich*, 545 US 1, 29 (2005); 21 USC § 801 *et seq*.

A drill-press operator, with a Medical Marijuana Act registration card, used marijuana 1-3 times per day, including during work days, but not during work. When his employer (Emerald Steel) told him he would have to pass a drug test, he showed his registry card and said he used marijuana. No one in management talked with him about his condition that allowed him to have the card. He was discharged. BOLI filed charges against Emerald Steel. An ALJ found that Emerald Steel's failure to talk with him about his situation itself did not accommodate his disability. Court of Appeals affirmed, also concluding that Emerald Steel had not preserved a preemption argument.

Supreme Court reversed, framing the issue as: "whether, under the doctrine of implied preemption, a state law authorizing the use of medical marijuana 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives

of Congress.'" (quoting *Hines v Davidowitz,* 312 US 52, 67 (1941)). More specifically, the "only issue that [Emerald Steel's] preemption argument raises is whether federal law preempts ORS 475.306(1) to the extent that it authorizes the use of medical marijuana. In holding that federal law does preempt that subsection, we do not hold that federal law preempts the other sections of the Oregon Medical Marijuana Act that exempt medical marijuana use from criminal liability." In other words, the Supreme Court held that "under Oregon's employment discrimination laws, employer was not required to accommodate employee's use of medical marijuana." With this holding, Oregon joins California and Washington courts' conclusions that voters in those states did not intend to affect an employer's ability to take adverse employment actions based on an employee's use of medical marijuana.

Altria Group, Inc. v Good, 129 S Ct 538 (2008) and *Wyeth v Levine*, 129 S Ct 1187, 1196-1200 (2009) guided the preemption analysis here. Under *Wyeth*, to determine if there is an "actual conflict" between a state and a federal law, the US Supreme Court reasoned that an actual conflict will exist either when it is physically impossible to comply with both state and federal law or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

ORS 475.306(1) affirmatively authorizes the use of medical marijuana. The Controlled Substances Act, in contrast, prohibits the use of marijuana regardless whether it is used for medicinal purposes. Thus, it "is not physically impossible to comply with both the Oregon Medical Marijuana Act and the federal Controlled Substances Act. . . . . a person can comply with both laws by refraining from any use of marijuana".

Thus, to "the extent that ORS 475.306(1) affirmatively authorizes the use of medical marijuana, federal law preempts that subsection, leaving it without effect." And because "ORS 475.306(1) was not enforceable when [Emerald Steel] discharged employee, no enforceable state law either authorized employee's use of marijuana or excluded its use from the 'illegal use of drugs,' as that phrase is defined [by Oregon employment statutes]. It follows that BOLI could not rely on the exclusion in [Oregon employment statutes] for 'uses authorized . . . under other provisions of state . . . law' to conclude that medical marijuana use was not an illegal use of drugs within the meaning of [Oregon employment statutes]."

The majority wrapped up as follows: "whatever the wisdom of Congress's policy choice to categorize marijuana as a Schedule I drug, the Supremacy Clause requires that we respect that choice when, as in this case, state law stands as an obstacle to the accomplishment of the full purposes of the federal law. Doing so means that ORS 475.306(1) is not enforceable. Without an enforceable state law authorizing employee's use of medical marijuana, that basis for excluding medical marijuana use from the phrase 'illegal use of drugs' in ORS 659A.122(2) is not available." Employee was engaged in the illegal use of drugs and Emerald Steel discharged him for that reason. Both the Court of Appeals' and BOLI's decisions are reversed.

Dissent stated: "I do not understand why, in our system of dual sovereigns, Oregon must fly only in federal formation and not, as Oregon's motto provides, 'with her

own wings.' ORS 186.040. Therefore, I cannot join in a decision by which we, as state court judges, enjoin the policies of our own state and preclude our legislature from making its own independent decisions about what conduct to criminalize." The dissent would hold that a state law stands as an obstacle to the execution and accomplishment of the full purposes of a federal law (and is thus preempted) if the state law purports to override federal law either by giving permission to violate the federal law or by preventing the federal government from enforcing its laws. "Because neither the Oregon Medical Marijuana Act nor any subsection thereof gives permission to violate the Controlled Substances Act or affects its enforcement, the Oregon act does not pose an obstacle to the federal act necessitating a finding of implied preemption."

Willis v Winters, 235 Or App 615 (6/16/10) (Wollheim, Brewer, Sercombe) Petitioner regularly uses marijuana under a state-issued card. She applied to the county sheriff to renew her concealed handgun license under ORS 161.291. Petitioner met all statutory criteria for license renewal. But county sheriff had added his own questions to the application for license renewal, including a question about drug use. Petitioner reported that under a state card and a doctor's authorization, she does use marijuana. Sheriff refused to renew her license. Sheriff contended that the federal Gun Control Act, 18 USC § 922(g), preempts the state statute that requires him to renew petitioner's license, because the federal Act prohibits unlawful drug users from possessing firearms in interstate commerce. Sheriff argued that (1) petitioner is an "unlawful user" and (2) federal Gun Control Act prohibits an "unlawful user" from possessing a firearm, so because she cannot possess a firearm, she cannot possess a concealed one. Sheriff then argued that Oregon's concealed handgun licensing statutes authorize a licensee to possess a concealed handgun. Therefore, Sheriff argued, state law contravenes federal law, and the Supremacy Clause and federal Act preempt Oregon's licensing statutes. Circuit court rejected sheriff's preemption argument and ordered sheriff to reinstate petitioner's concealed handgun license.

Court of Appeals affirmed: the federal Gun Control Act does not preempt Oregon's concealed handgun licensing statutes. Court of Appeals retraced its preemption analysis under *Emerald Steel Fabricators* (discussed, *ante*). The issue here is whether Oregon's concealed handgun licensing statutes are obstacles to the execution of the federal Gun Control Act. Court of Appeals concluded that it is not, because the "right to possess a handgun does not flow from Oregon's concealed handgun licensing statues; the right to carry a firearm is constitutional in origin", which has been limited through the state's history. One limit to that constitutional right is the crime carrying a *concealed* firearm. The "legal effect of a concealed handgun license is to exempt the licensee from state laws that would otherwise prohibit *concealment* of that firearm." "Thus, a concealed handgun licensee – marijuana user or not – is not affirmatively authorized to carry a firearm by way of Oregon's concealed handgun licensing statutes; what the licensing statutes do is provide an exemption from state criminal liability for concealing a handgun that the licensee independently has a right to possess." Additionally, the sheriff is not being forced to violate any federal law by issuing a concealed handgun license under Oregon's statute. There is no direct conflict between Oregon's licensing statutes and the federal Gun Control Act.

B. Full Faith and Credit Clause

" Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other State." -- Article IV, section 1, US Const

State v Berringer, 234 Or App 665 (4/14/10) (Schuman, Landau, Ortega), *rev denied* 348 Or 669 (8/19/10) Defendant, a California resident, had over 2 pounds of marijuana in his car in Oregon. Defendant charged with unlawful possession, delivery, and manufacture of marijuana. He moved to suppress and to dismiss based on a California doctor's written recommendation that he use 1.5 oz/week of marijuana to deal with, *inter alia*, his "troubled history with his father." Under California law, that physician's document apparently allows defendant to possess up to 2 pounds of marijuana. Trial court denied his motions. Court of Appeals affirmed. The "California Compassionate Use Act" by its terms is a defense to prosecution for certain California marijuana laws. It "does not (and could not) provide a defense against enforcement of Oregon's marijuana laws in Oregon. Put another way, the Full Faith and Credit Clause requires (at most) that a state give effect to rights established between parties that arise from judgments, agreements, or statutes originating in other states. * * * The [California Act] establishes (again, at most) rights between qualified California residents and the state of California – not the state of Oregon." (See also "Right to Interstate Travel," *post*).

State v Syvertson, 234 Or App 783 (4/14/10) (Per Curiam – Landau, Schuman, Ortega) Same arguments rejected as in *Berringer*.

C. Commerce Clause

" The Congress shall have [p]ower [t]o * * * regulate [c]ommerce with foreign [n]ations and among the several [s]tates, and with the Indian Tribes." -- Article I, section 8, clause 3, US Const

Article I, section 8, of the Constitution confers upon Congress only discrete enumerated governmental powers. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people. U.S. Const. Amendment X; *Printz v United States*, 521 US 898, 919 (1997).

State v Maybee, 235 Or App 292 (5/12/10) (Schuman, Armstrong, Rosenblum), *rev denied* 349 Or 56 (2010). In 1998, Oregon and 46 other states entered into a settlement agreement with leading tobacco manufacturers in the United States. Tobacco manufacturers that were not parties to that settlement agreement that sell cigarettes in Oregon must provide the Attorney General with, among other things, a list of all cigarette brands it sold in Oregon. Those brands are listed in a directory. It is illegal for anyone to sell, offer to sell, or possess to sell cigarettes from a manufacturer or brand family that is not included in that directory. See ORS 180.400 to 180.455 (the Complementary Act). Defendant is a member of the Seneca Nation of Indians. His business is physically located on tribal territory in New York. He has websites accessible in Oregon. He takes cigarette orders by phone and internet, then mails cigarettes to customers, including those in Oregon. Some of his cigarettes are brands that are not in the directors. The Attorney General sought an injunction prohibiting him from dealing cigarettes in Oregon that are not listed in the directory. The trial court granted summary judgment for the state.

Court of Appeals affirmed. Defendant argued that the Complementary Act unduly interferes with Congress's constitutional authority to regulate commerce among the states, even though Congress has not enacted any law with which the state statute conflicts. The dormant Commerce Clause has been interpreted as prohibiting states from overtly discriminating against out-of-state interests, from operating to protect in-state economic interests from out-of-state competition, and from imposing a burden on interstate commerce that is clearly excessive in relation to the putative local benefits, see Pike v Bruce Church, 397 US 137, 142 (1970). The Complementary Act is not discriminatory – it applies equally to in-state and out-of-state persons. It is not protectionist – no Oregon sellers or manufacturers receive an economic benefit from it. The state interest at stake – public health – is weighty, while the burden on interstate commerce is minimal, given that 46 other states have similar statutes. Defendant cannot lawfully offer for sale or sell unlisted cigarettes to consumers in Oregon.

D. Contracts Clause

"No State shall . . . pass any . . . Law impairing the Obligation of Contracts." Article I, section 10, clause 1, US Const.

Citizens for Constitutional Fairness v Jackson County, 2010 WL 2836106 (9th Cir 7/20/10) (unreported) (Kozinski, Kleinfeld, Ikuta) Ninth Circuit panel reversed lower court's decision, 2008 WL 4890585 (D Or 11/12/08) (unreported) (Panner). Measure 37 requires state and local governmental entities to compensate private property owners for reduction in the fair market value of real property caused from land use regulations. The governmental entities can either pay property owners for the loss of fair market value, or waive enforcement of land use regulations. Plaintiffs own real property that would be affected by zoning regulations. They filed timely Measure 37 claims seeking compensation. The County

could not pay the plaintiffs, so it waived enforcement of zoning changes. The County issued orders confirming each plaintiff's claims, stating that their claims are valid, and that the County would not apply certain zoning regulations to their properties. The orders state that the County does not promise that each plaintiff would be allowed to put the property to any particular use. The orders are known as waivers because of the promise to waive enforcement of zoning changes. Then Measure 49 was enacted, replacing Measure 37's compensation provisions. The County notified plaintiffs that it would not honor the Measure 37 waivers because Measure 49 nullified the waivers. Plaintiffs brought the present action against the County.

The district court concluded that the Measure 37 waivers are enforceable on two grounds. First, the district court held that "the Measure 37 waivers are binding, constitutionally protected contracts between plaintiffs and Jackson County" under the Contracts Clause of the US Constitution, citing *General Motors Corp v Romein*, 503 US 181, 186 (1992). "The waivers are in effect settlement agreements," according to the district court. "Jackson County may not rely on Measure 49 as an excuse to avoid its obligations under plaintiffs' Measure 37 waivers." Second, the district court held that Measure 49 cannot rescind the Measure 37 orders without violating separation of powers because the Measure 37 waivers are final quasi-judicial orders.

A Ninth Circuit panel reversed the district court's judgment. On appeal, there was no dispute that the Measure 37 waivers themselves were not contracts. The waivers do not show any offer, any acceptance, or any consideration, thus no contract. No contract = failure to state a Contracts Clause claim. Also, the waivers were administrative decisions, not court judgments, so Measure 49 does not implicate the separation of powers doctrine.

E. Interstate Travel

State v Berringer, 234 Or App 665 (4/14/10) (Schuman, Landau, Ortega), *rev denied*, 348 Or 669 (8/18/10). Defendant, a California resident, had over 2 pounds of marijuana in his car in Oregon. Defendant charged with unlawful possession, delivery, and manufacture of marijuana. He moved to suppress and to dismiss based on a California doctor's recommendation that he use 1.5 oz/week of marijuana. Under California law, that physician's document apparently allows defendant to possess up to 2 pounds of marijuana. He contended that, *inter alia*, Oregon's failure to honor his California documentation and status as a medical marijuana patient interfered with his constitutional right to travel. Trial court denied his motions.

Court of Appeals affirmed. Oregon's law against possession of marijuana does not violate his right to travel from state to state. The constitutional right of interstate travel is not named, and its source is not identified, but it "undoubtedly exists" in the Privileges and Immunities Clause of Article VI, section 2, or the Equal Protection Clause, or somewhere else (noting US Supreme Court cases). Access to medical treatment is among the interstate traveler's protected rights (noting US Supreme Court cases). But Oregon's Medical Marijuana Act requires both residents and

nonresidents to either possess or have applied for an OMMA registration card – the regulations apply equally to residents and nonresidents. Moreover, the Court of Appeals found no authority for the idea that the difficulty a nonresident might encounter in finding an Oregon physician could be considered an impediment of constitutional magnitude. Further, the administrative rule setting a list of either exclusive or nonexclusive identification documents required to apply for an OMMA registration card may or may not make it "easier for an Oregon resident" but that list is interpreted as nonexclusive to avoid constitutional infirmity. Finally, even if Oregon law made access to medical marijuana more difficult for nonresidents, that would not violate defendant's right to travel. Although the US Supreme Court has held that access to publicly funded medical care and abortion services are the types of "privileges" and "immunities" bearing upon the vitality of the Nation as a single entity (requiring each state to treat all citizens equally), "access to a particular drug" is not a privilege "bearing upon the vitality of the Nation as a single entity.

F. Fourth Amendment

The rights in the Fourth Amendment apply to the states through the due process clause of the Fourteenth Amendment, see *Aguilar v Texas*, 378 US 108 (1964) (warrants); *Mapp v Ohio*, 367 US 643 (1961) (exclusionary rule); *Wolf v Colorado*, 338 US 25 (1949) (unreasonable searches and seizures). *McDonald v City of Chicago*, 130 S Ct 1316 n 12 (2010) (so stating).

See ***United States v Ahrndt***, 2010 WL 373994 (D Or 1/28/10) (08-468-KI)

See ***State v Caster***, 236 Or App 214 (7/6/10)

See ***State v Gonzales***, 236 Or App 391 (7/28/10)

See ***Mashburn v Yamhill County***, 698 F Supp 2d 1233 (D Or 3/11/10)

See ***Wong v Beebe***, 2010 WL 2231985 (9th Cir 6/04/10)

See ***Martinez-Medina v Holder***, 616 F3d 1011 (9th Cir 8/12/10)

See ***United States v Eggleston***, 2010 WL 2854682 (D Or 7/19/10)

G. Fifth Amendment

Most of the rights in the Fifth Amendment apply to the states through the due process clause of the Fourteenth Amendment, see *Benton v Maryland*, 395 US 784 (1969) (Double Jeopardy Clause); *Malloy v Hogan*, 378 US 1 (1964) (privilege against self-incrimination); *Chicago, B&Q R. Co. v Chicago*, 166 US 226 (1897) (Just Compensation Clause). *McDonald v City of Chicago*, 130 S Ct 1316 n 12 (2010) (so reciting). The Fifth Amendment's grand-jury

indictment requirement has not been fully incorporated to the states but the "governing decisions regarding the Grand Jury Clause of the Fifth Amendment . . . long predate[s] the era of selective incorporation." *McDonald*, 130 S Ct at n 12 and 13 (so stating, without citing any cases).

See ***State v Vondehn***, 348 Or 462 (7/01/10)

See ***Dep't of Human Services v KLR***, 235 Or App 1 (4/21/10)

See ***State v Clark***, 233 Or App 553 (2/17/10)

See ***David Hill Development, LLC v City of Forest Grove***, 688 F Supp 2d 1193 (D Or 2010)

See ***West Linn Corporate Park LLC v City of West Linn,*** 349 Or 58 (9/23/10)

H. Sixth Amendment

" In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." -- Sixth Amendment, US Const

Most of the rights in the Sixth Amendment apply to the states through the due process clause of the Fourteenth Amendment, see *Duncan v Louisana*, 391 US 145 (1968) (trial by jury in criminal cases); *Washington v Texas*, 388 US 14 (1967) (compulsory process); *Klopfer v North Carolina*, 386 US 213 (1967) (speedy trial); *Pointer v Texas*, 380 US 400, 403 (1965) (right to confront adverse witnesses); *Gideon v Wainwright*, 372 US 335 (1963) (assistance of counsel); *In re Oliver*, 333 US 257 (1948) (right to a public trial). *McDonald v City of Chicago*, 130 S Ct 1316 n 12 (2010) (so reciting). But although the Sixth Amendment right to trial by jury requires a unanimous jury verdict in federal criminal trials, it does not require a unanimous jury verdict in state criminal trials, see *Apodaca v Orego*n, 406 US 404 (1972) and *Johnson v Louisiana*, 406 US 356 (1972). *McDonald*, 130 S Ct at n 14 (so stating).

Confrontation: The Sixth Amendment guarantees a defendant's right to confront those who "bear testimony" against him. A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination. *Melendez-Diaz v Massachusetts*, 129 S Ct 2527 (2009) (quoting

Crawford v Washington, 541 US 36, 54 (2004)). Testimonial statements covered by the Confrontation Clause include ex parte in-court testimony and its functional equivalent, such as affidavits, custodial examinations, prior testimony (not subject to cross), and similar pretrial statements, extra-judicial statements. *Ibid*. Affidavits, declarations, and "certificates" that plainly are declarations made for the purpose of establishing or proving some fact that are functionally identical to live in-court testimony all fall into the "core class of testimonial statements" covered by the Sixth Amendment. *Id*. This includes a lab report showing the results of a forensic analysis performed on a seized substance. *Id*.

In contrast with a clerk or custodian's certificate attesting to a fact, however, business and public records are generally admissible absent confrontation because they were created for administrative purposes, not for the purpose of establishing some fact at trial. They are not testimonial under the Sixth Amendment. *Melendez-Diaz,* 129 S Ct at 2538-39 (citing *Palmer v Hoffman*, 318 US 109 (1943)). "A clerk could by affidavit *authenticate* or provide a copy of an otherwise admissible record, but could not . . . *create* a record for the sole purpose of providing evidence against a defendant." *Id*. (emphasis in original).

State v Alvarez-Amador, 235 Or App 402 (6/02/10) (Ortega, Landau, Carson SJ) Defendant was charged with identity theft for possessing a fraudulent Social Security number. At defendant's trial, a police officer testified that he asked the Social Security Administration (SSA) to verify the Social Security number defendant used. The custodian of records for the SSA stated (in the certificate) that the custodian of SSA records prepared the certificate, that two Social Security numbers "do not belong to" defendant, and those numbers belong to deceased people. The custodian was not present to testify at trial. The certificate was prepared for use in defendant's prosecution. The trial court admitted the certificate into evidence, over defendant's objections.

Court of Appeals reversed, quoting heavily from *Melendez-Diaz v Massachusetts*, which was decided after the appellate oral argument in this case. Court of Appeals here concluded that the SSA certification, wherein the custodian opined that the Social Security numbers "do not belong to" defendant, was a type of testimonial statement the Sixth Amendment protects. The certificate was a sworn statement created at a police officer's request, it furnishes evidence and an opinion that the number defendant used was not defendant's, and the creator was neither present to testify nor established as unavailable. "Under *Melendez-Diaz*, admission of the certificate violated defendant's Sixth Amendment right to confrontation." Remanded.

State v Calderon, 237 Or App 610 (10/06/10) (Armstrong, Haselton, Carson SJ) Defendant charged with robbing two people in a Plaid Pantry parking lot. Neither could identify him clearly. Plaid Pantry clerk could identify him. State wanted that clerk's testimony. Defendant wanted to impeach the clerk for bias under OEC 609-1, under a theory that the clerk wanted to curry favor with the DA's office because he had three criminal charges pending: DUII, DWS, and failure to register as a sex

offender. Trial court ruled that the sex-offender registration charge is not to be raised, but the DUII and DWS could be. Clerk testified, answering "yes" when defense counsel asked if he had any pending matters with the DA's office. State asked on redirect if clerk had been promised anything "because you have a DUII and a driving while suspended," and clerk said, "no one promised me anything." Court of Appeals affirmed under the OEC. Defendant also argued that the trial court's ruling violated his state and federal confrontation rights, without citing to any state case. Court of Appeals addressed only his Sixth Amendment argument: "The Sixth Amendment protects defendant's opportunity to engage in effective cross-examination, which may not necessarily be defendant's desired cross-examination." *Delaware v Van Arsdall*, 475 US 673, 679 (1986). "Even when the focus is bias, trial judges have discretion 'to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" On this record, no denial of defendant's federal confrontation right by exercising discretion on the extent of defendant's cross-examination.

State v Carter, 238 Or App 417 (11/03/10) (Ortega, Landau, Carson SJ) Defendant was cited with a preprinted citation and complaint ordering her to appear on a certain date and time in the circuit court. The circuit curt issued a "bench/arrest warrant" for failure to appear (she apparently failed to appear). She later was charged with failure to appear. She objected to the admission of the warrant because it wasn't a public record under the OEC and because she had not had the opportunity to confront and cross-examine the judge who issued the warrant. Trial court denied her motion and convicted her of failure to appear. Court of Appeals affirmed. The warrant is a record setting forth the court's activities, thus it is a public record admissible under OEC 803(8)(1). As for the Sixth Amendment's Confrontation Clause, the warrant is a nontestimonial statement and thus the Confrontation Clause is not implicated. In *Crawford v Washington*, 541 US 36, 68 (2004), the US Supreme Court held that the Confrontation Clause prohibits the admission of out-of-court statements that are "testimonial" unless the declarant is unavailable and defendant has had a prior opportunity to cross-examine the declarant about the statements. A "testimonial" statement is a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* at 51. In *Melendez-Diaz v Massachusetts*, 129 S Ct 2527 (2009), the US Supreme Court focused on the purpose for which documents were created. A clerk's authority by affidavit to authenticate or provide a copy of an otherwise admissible record does not violate the Confrontation Clause, but an analyst's certifications made to create a record for the sole purpose of providing evidence against a defendant does implicate the Confrontation Clause. Here, "the warrant was created for the purpose of causing defendant to appear in court to answer a reckless driving charge. It was created for administration of the trial court's process, not for the purpose of proving a fact at trial." Court of Appeals cited recent Ninth and DC Circuit cases. The warrant was not "testimonial."

I. Eighth Amendment

"**Excessive bail shall not be required, nor excessive fines imposed, nor cruiel and unusual punishments inflicted**." -- Eighth Amendment, US Const

The cruel and unusual punishment prohibition in the Eighth Amendment applies to the states through the due process clause of the Fourteenth Amendment, see *Robinson v California*, 370 US 660 (1962), and the prohibition against excessive bail likewise applies to the states, see *Schilb v Kuebel*, 404 US 357 (1971). *McDonald v City of Chicago*, 130 S Ct 1316 n 12 (2010).

The US Supreme Court has not decided whether the Eighth Amendment's prohibition on excessive fines applies to the states through the Fourteenth Amendment. *McDonald v City of Chicago*, 130 S Ct 1316 n 13 (2010) (citing *Browning-Ferris Indust. v Kelco Disposal, Inc.*, 492 US 257, 276 n 22 (1989)).

"The Cruel and Unusual Punishments Clause prohibits the imposition of inherently barbaric punishments under all circumstances. See, *e.g., Hope v Pelzer*, 536 US 730 (2002). '[P]unishments of torture,' for example, 'are forbidden.' *Wilkerson v Utah*, 99 US 130, 136 (1879). These cases underscore the essential principle that, under the Eighth Amendment, the State must respect the human attributes even of those who have committed serious crimes. For the most part, however, the Court's precedents consider punishments challenged not as inherently barbaric but as disproportionate to the crime. The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.' *Weems v United States*, 217 US 349, 367 (1910)." *Graham v Florida*, 130 S Ct 2011, 2021 (5/17/10).

Comfort v Jackson County, 2010 WL 2817183 (D Or 7/16/10) (Clarke) Plaintiff was arrested and allegedly beaten by his jailers. He brought a section 1983 claim against the individuals and the County based on alleged violations of his Eighth Amendment rights. Magistrate dismissed the claim on defendants' motion for summary judgment: plaintiff's "rights are not attached to the Eighth Amendment" because the Eighth Amendment does not protect people before a formal adjudication of guilt has been secured in accordance with due process.

"**No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.**" -- Fourteenth Amendment, US Const

J. Due Process (Fourteenth Amendment)

A "ruler . . . should avoid doing anything that will make him either hated or despised. . . . . What will make him hated, above all else, . . . is being rapacious and seizing the property or womenfolk of his subjects: he must avoid doing these things. If the vast majority of men are not deprived of their property and honour they will live contentedly, and one will have to deal only with the ambition of a few men, which can easily be restrained in various ways." Niccolò Machiavelli, *The Prince,* pages 63-64 (University of Cambridge Press 1988).

The Fifth Amendment's due process clause applies to the federal government. The Fourteenth Amendment's due process clause applies to the states. *See Dusenbery v United States*, 534 US 161, 167 (2002) ("The Due Process Clause of the Fifth Amendment prohibits the United States, as the Due Process Clause of the Fourteenth Amendment prohibits the States, from depriving any person of property without "due process of law.)".

In *McDonald v City of Chicago*, 130 S Ct 3016 n 12-14 (2010), the Court recited the provisions of the first eight amendments in the Bill of Rights that have, and have not, been selectively incorporated to apply to the states through the Fourteenth Amendment's Due Process Clause. Besides the Sixth Amendment right to a unanimous jury verdict, the only other rights not fully incorporated are the Third Amendment's protection against quartering of soldiers (has not been decided), the Fifth Amendment's grand jury indictment requirement (predates the era of selective incorporation), the Seventh Amendment's civil jury requirement (predates the ear of selective incorporation), and the Eighth Amendment's prohibition on excessive fines (has not been decided). See sections, *ante,* discussing each Amendment.

1. Punitive Damages

Punitive damages awards that are "grossly excessive" violate the Due Process Clause of the Fourteenth Amendment because excessive punitive damages serve no legitimate purpose and constitute arbitrary deprivations of property. *BMW of North America, Inc. v Gore*, 517 US 559, 568 (1996). Excessive punitive damages also implicate the fair-notice requirement in the Due Process Clause. *Id.* at 574.

Oregon courts' review of punitive damages awards involves three stages. First, is there a factual basis for the punitive damages award. Second, does the award comport with due process when the facts are evaluated under the three *Gore* guideposts ((1) degree of reprehensibility; (2) disparity between the actual or potential harm plaintiff suffered and the punitive damages award; and (3) difference between the punitive damages award and civil penalties authorized or imposed in comparable cases). Third, if the punitive damages exceed that permitted under the Due Process Clause, then what is the "highest lawful amount" that a rational jury could award consistently with the Due Process Clause. *Goddard v Farmers Ins Co.*, 344 Or 232, 261-62 (2008).

> "The Due Process Clause of the Fourteenth Amendment prohibits a jury from imposing punitive damages to punish a defendant directly for harm caused to nonparties. However, a jury may consider evidence of harm to others when assessing the reprehensibility of the defendant's conduct and the appropriate amount of punitive damages verdict. *Philip Morris USA v Williams*, 549 US 346, 356-57 (2007)." *Schwarz v Philip Morris, Inc.*, 348 Or 442 (2010).

Schwarz v Philip Morris Inc., 348 Or 442 (6/24/10) (Walters, De Muniz, Durham, Balmer, Kistler) (Gillette and Linder not participating). Deceased smoker's husband sued Philip Morris for negligence, strict products liability, and fraud regarding "low-tar" cigarettes that decedent smoked. Philip Morris allegedly waged a massive disinformation campaign to create the perception of uncertainty about the health risks of cigarettes, when Philip Morris knew that research confirmed the harm caused by smoking. At trial, plaintiff offered expert testimony on the harm that Philip Morris's pattern of fraud had caused on nonparties. The trial court gave a jury instruction on punitive damages based on UCJI 75.05A (Oct 1997), which basically stated that "to recover punitive damages, [plaintiff] must show by clear and convincing evidence that defendant Philip Morris has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety, and welfare of others. . . . Punitive damages, if any, shall be determined . . . based on . . . the likelihood at the time that serious harm would arise from the defendant's misconduct . . . and the degree of the defendant's awareness of that likelihood." (When this case was tried, the US Supreme Court had not ruled that the Constitution required any particular instruction on punitive damages.).

Philip Morris argued to the trial court that the jury instruction was incomplete because it "allowed the finder of fact to award of calculate punitive damages based on harms to persons other than Michelle Schwartz." Philip Morris proposed two alternative instructions, one stating that "you are not to impose punishment for harms suffered by persons other than the plaintiff before you", and the other stating that "you are not to punish a defendant for the impact of its conduct on individuals in other states," both of which the trial court declined to give. The trial court decided that the constitutionality of a punitive damages award "is more of a legal determination" for a court to make post-verdict.

The jury found against Philip Morris on all three theories, apportioning 49% fault to plaintiff on the negligence and strict liability claims. Jury awarded $118K in economic damages, $50K in noneconomic damages, $25 million in punitive damages on the negligence claim, $10 million in punitive damages on the strict liability claim, and $115 million in punitive damages on the fraud claim. On Phillip Morris's post-verdict motion to reduce those punitive damages, the trial court ruled that the award was "grossly excessive" and reduced the award to $100 million.

En banc, a divided Court of Appeals vacated the punitive damages award, with the majority holding that the trial court had erred in refusing to give Philip Morris's

requested instruction that "you are not to punish a defendant for the impact of its conduct on individuals in other states." The majority based its conclusion on *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 US 408 (2003), wherein the US Supreme Court stated that due process dictates that a defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Court of Appeals vacated and remanded for a new trial on punitive damages.

The Oregon Supreme Court affirmed the Court of Appeals' decision, vacating and remanding for a new punitive-damages trial. In the Supreme Court, Philip Morris raised two claims of error: (1) the uniform jury instruction the trial court gave was deficient, and (2) the trial court's failure to give its proffered instruction was error. The Oregon Supreme Court held that the trial court did not err in refusing to give the instructions that Philip Morris proffered. But the Court held that the trial court had erred in giving the uniform jury instruction, because that instruction did "permit the jury to consider evidence of harm to nonparties in assessing punitive damages."

The Court also declined plaintiff's invitation to weigh the verdict to determine if it is in accordance with the limits that substantive due process requires on punitive damages awards. The Court explained that under Article I, section 17, of the Oregon Constitution, in "all civil cases the right of Trial by Jury shall remain inviolate." And in *Lakin v Senco Products, Inc.*, 329 Or 62, 69 (1999), the Court interpreted that provision to create a rights to litigants to have "a jury determine all issues of fact". Under US Supreme Court precedent, "it is still the constitutional role of the jury to decide all facts, including those necessary to assess punitive damages in the first instance."

2. Fair Trial

State v Bittner, 235 Or App 554 (6/9/10) (Rosenblum, Brewer, Deits SJ) At defendant's trial for various assault-related offenses, the victim testified as follows. Defendant and his mother lived in a house. Victim lived in a camper on that property. Mother's friend visited, and they all ordered Chinese food. Defendant became angry when the order was delivered. Victim went to his camper with mother's friend. Defendant broke some camper windows, grabbed victim by the throat, and held a machete to his throat, ordering him to leave, with nothing but his dog. Victim went to a friend's home. Victim returned later to get his personal belongings – with a different friend to help -- but defendant entered the camper and began beating victim with a large stick. At the hospital, police interviewed victim. Apparently the victim did not identify either of his two friends to the police or the prosecution. At trial, on cross, defense counsel repeatedly asked the victim to name his friends. The victim would not name the friends, and testified that a friend did not witness anything. The court sustained the prosecution's objection as not relevant, over defense counsel's due process argument. The mother's friend, though, testified that the victim's friend must have witnessed these events. At no time during or after the presentation of evidence did defendant renew the motion to compel the victim to disclose the names of his two friends. Jury convicted defendant.

Court of Appeals affirmed. Due process mandates that a criminal defendant be given a fair trial, but depriving a defendant of evidence violates due process only if the evidence is favorable to the defense and material – only if there is a reasonable probability that the evidence would affect the outcome of the trial. Under *United States v Valenzuela-Bernal*, 458 US 858 (1982), a defendant has a duty to make some showing of materiality, and in that case, the US Supreme Court affirmed that defendant's conviction after concluding that he had made "no effort to explain what material, favorable evidence the [witnesses] would have provided for his defense." Here, the Court of Appeals noted "to make out a claim that allowing the victim to refuse to identify them violated defendant's due process right to a fair trial, defendant was nevertheless required to 'at least make some plausible showing of how their testimony would [be] both material and favorable to his defense. *Valenzuela-Bernal*, 458 US at 867." "Defendant did not show that the testimony of either of the two friends was material . . . or that it would have been favorable to his defense." Court of Appeals "cannot say that the court erred." Affirmed. (Court of Appeals noted that although *Valenzuela-Bernal* involved the Compulsory Process Clause of the Sixth Amendment, the US Supreme Court stated in that case that it borrowed much of its reasoning from cases involving the Due Process Clause, therefore, the Oregon Court of Appeals relied on *Valenzuela-Bernal* in analyzing defendant's due process claim here) .

State v Cazares-Mendez, 233 Or App 310 (1/27/10) (Haselton, Armstrong, Rosenblum) Jury convicted defendant of murder and other crimes and sentenced him to life without parole. At his trial, 4 witnesses testified that a specific person (Scherer) had made statements to the 4 witnesses that Scherer had killed the victim. Defendant, in an offer of proof, called Scherer to testify, who denied murdering the victim and denied making the self-inculpatory statements. Defendant argued that Scherer's statements satisfied all requirements for admission under OEC 804(3)(c) except that Scherer was not unavailable. Defendant argued that it would violate due process to preclude him from presenting reliable, materially exculpatory hearsay evidence based solely on the declarant's (Scherer's) availability. OEC 804(3)(c) provides an exception to the hearsay rule, when declarant is unavailable as a witness, and when the statement is so far contrary to the declarant's interest that a reasonable person in the declarant's position would not have made the statement unless he believed it to be true, and a "statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." The trial court excluded the evidence on grounds that (1) Scherer was not unavailable and (2) the trustworthiness of the evidence was not circumstantially corroborated.

Court of Appeals reversed and remanded: Trial court's exclusion of proffered reliable and materially exculpatory evidence denied him a trial in accord with traditional and fundamental standards of due process under *Chambers v Mississippi*, 410 US 284 (1973). First, the circumstances sufficiently indicated the trustworthiness of the proffered evidence as a threshold matter under OEC 804(3)(c), as described in detail in this opinion. As for defendant's due process rights, the Oregon Supreme Court, in *State v Thoma*, 313 Or 268 (1992), stated that *Chambers*'s *sine qua non* is that

the proponent of reliable, materially exculpatory evidence must demonstrate that state law completely precludes the admission of that evidence. That is, state law affords no common law or statutory basis on which the evidence could be admitted. Here, in defendant's offer of proof, he called Scherer who did not invoke any privilege but rather denied that she had been involved in the murder or that she had made self-incriminating statements. The state did not contend that the excluded testimony could have been admitted as substantive evidence under any other provision of the Oregon Evidence Code. "Accordingly, defendant established the requisites for admissibility under *Chambers*, and the trial court, by excluding that evidence, denied defendant 'a trial in accord with traditional and fundamental standards of due process.' *Chambers*, 410 US at 302." The error was not harmless, either. Remanded for a new trial on all charges.

State v Reyes-Sanchez, 234 Or App 102 (3/3/10) (Wollheim, Brewer, Sercombe) Defendant was convicted of aggravated murder and other felonies. In *State v Cazares-Mendez,* the Court of Appeals reversed the convictions of this defendant's coperpetrator, who was separately tried. The only material distinction between this case and *Cazares-Mendez* is that this defendant did not preserve his due process argument. Court of Appeals reversed this defendant's convictions anyway, as error apparent on the fact of the record, and because *Cazares-Mendez* is defendant's alleged coperpetrator, and "the ends of justice strongly militate" in favor of an exercise in discretion to correct the error. Reversed and remanded.

State v Anthony, 234 Or App 659 (4/14/10) (Schuman, Wollheim, Rosenblum) Defendant charged with murder. Defendant tried to introduce, through hearsay, evidence that a person allegedly confessed to the murder. Trial court excluded that hearsay evidence. Court of Appeals affirmed. Court of Appeals noted that in *State v Cazares-Mendez,* it held that under the evidence code, where "the corroboration/'trustworthiness' requirement for admission of statements against penal interest" is met, exclusion as hearsay evidence of a confession merely because the confessing witness is not "unavailable" can, in some circumstances, violate the Due Process Clause of the Fourteenth Amendment. In *Cazares-Mendez,* "the corroboration . . . consisted of *multiple* witnesses who had heard *detailed* confessions that 'related *particulars* that were *peculiar* to' the crime that defendant allegedly committed." (Emphasis added by *Anthony* court). There, "that the circumstances there were sufficiently clear to establish the trustworthiness of the hearsay confession so as to justify a due process inquiry," but here in this case the "evidence is a far cry from what the defendant presented in *Cazares-Mendez*." Here, in contrast with *Cazares-Mendez,* the "corroboration" was this: an uninvolved witness saw an unidentified man in the victims' doorway the night after the murder, that same witness saw 2 motorcycles outside the victims' home, the witness who confessed owned a motorcycle, and a different witness saw two ominous-looking men walking toward the victims' home the night of the murder.

State v Coen, 231 Or App 280, 285 (2009), *rev allowed*, 348 Or 114 (3/25/10).

State v Pitt, 236 Or App 657 (8/18/10) (Ortega, Landau, Carson SJ) Defendant charged with multiple counts of sex abuse against one victim. Defendant's defense

was: "wasn't me." State wanted to introduce evidence of uncharged other acts against the victim and a cousin to show defendant's intent, and the absence of mistake, OEC 404(3) (evidence of other crimes is not admissible except to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident). Defendant moved to exclude evidence of those other acts against the victim and her cousin. Trial court denied defendant's motion and the jury convicted him.

Court of Appeals affirmed. Defendant contended that the OEC 403 balancing test (weighing the probative value of the evidence against the danger of unfair prejudice) "is required by due process under the Fifth and Fourteenth Amendments to the United States Constitution." Court of Appeals stated that it had "previously rejected those arguments. Under OEC 404(4), in a criminal case, a trial court cannot engage in OEC 403 balancing unless such balancing is required by the state or federal constitution. . . . Due process does not require such balancing here. *State v Coen*," 231 Or App 280, 285 (2009), *rev allowed*, 348 Or 114 (3/25/2010).

(Note: In ***Coen***, the Court of Appeals did not address an argument under the Fifth Amendment's due process clause. The Fifth Amendment's due process clause applies to the federal government. The Fourteenth Amendment's due process clause applies to the states. *See Dusenbery v United States*, 534 US 161, 167 (2002) ("The Due Process Clause of the Fifth Amendment prohibits the United States, as the Due Process Clause of the Fourteenth Amendment prohibits the States, from depriving any person of property without "due process of law.)"; *Martinez-Rivera v Sanchez Ramos*, 498 F3d 3, 8 (1st Cir 2007) ("The Fifth Amendment Due Process Clause . . . applies 'only to actions of the federal government – not to those of state or local governments.' *Lee v City of Los Angeles*, 250 F3d 668, 687 (9th Cir 2001)").

3. Procedural Rights

> Fourteenth Amendment procedural due process analysis has two steps: "the first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Kentucky Dep't of Corrections v Thompson*, 490 US 454, 460 (1989).
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> "It is axiomatic that due process 'is flexible and calls for such procedural protections as the particular situation demands.'" *Greenholtz v Nebraska Penal Inmates*, 442 US 1, 12 (1979) (citation omitted).

State v Barnes, 232 Or App 70 (11/18/09) (Wollheim, Brewer, Carson SJ) Defendant is not a student at Portland State University (PSU). He was sitting in a non-public lounge at PSU. An officer issued him a written criminal trespass warning. That warning stated that he must mail a petition to a PSU office if he wanted to have the warning withdrawn, and that a review would be held, and a decision communicated to him. A month later, defendant was back on the PSU campus. He war arrested for trespass. At trial, he testified that after receiving the

warning, he had submitted a written petition. The record did not contain any such petition. A PSU officer testified that to his knowledge, defendant had not requested an appeal. Trial court denied defendant's motion for a judgment of acquittal, rejecting his argument that his Fourteenth Amendment procedural due process rights had been violated. Court of Appeals affirmed. "Procedural due process generally requires that an exclusion order provide a meaningful opportunity for review that reduces the risk of erroneous deprivation." Here, the record shows that PSU provided defendant with an opportunity for review of his criminal trespass warning and he did not use PSU's review process. "Defendant cannot argue that PSU denied him procedural due process when the record establishes that defendant did not take advantage of the process available to him." In a footnote, the Court of Appeals held: "We do not decide whether PSU's administrative review process satisfies due process requirements. We merely hold that a rational factfinder could find that the criminal trespass warning was a lawful order."

State v Koenig, 238 Or App 297 (10/27/10) (Sercombe, Brewer, Wollheim) Sheriff's Department issued a "notice of exclusion" to defendant, prohibiting him from entering the count courthouse, because, according to the notice, he twice insulted entrance personnel and disrupted people in the courthouse. He entered a building against that "notice of exclusion" and was arrested. He moved for a judgment of acquittal, contending that the "notice of exclusion" violated the substantive and procedural aspects of the Due Process Clause of the Fourteenth Amendment. He argued that the notice interfered with his fundamental right to petition government and was not narrowly tailored to achieve a compelling state interest. Under procedural due process, he contended that the notice was a "sham." Trial court denied defendant's motion for a judgment of acquittal.

Court of Appeals reversed defendant's conviction for trespass. The charge of "criminal trespass" required the state to prove that defendant entered or remained unlawfully in a premises. Defendant argued that the "notice of exclusion" was not lawful – he was not provided any process to challenge it. The state was required to prove that the "notice of exclusion" did not run afoul of procedural due process, see *State v Barnes* 232 Or App 70, 74 (2009) and *Mathews v Eldridge*, 424 US 319, 332 (1976). He has a "protected liberty interest in petitioning his government for redress of grievances and . . . his interest was constrained by the notice of exclusion." The Court of Appeals cited an Article I, section 26, case and a First Amendment case in support. "Accordingly, to comply with procedural due process, it was necessary that defendant be afforded some process compliant with the balancing test enunciated in Mathews by which defendant could have obtained timely review of the notice of exclusion in order to safeguard his liberty interest against the risk of erroneous deprivation." Here, the notice of exclusion stated that defendant could file a "writ of review" with the court if he wanted to appeal, but that writ is available only where the decision at issue was brought before a lower court or tribunal, see ORS 34.020. Here, defendant was not a party to any process or proceeding. Trial court erred in denying his motion for a judgment of acquittal.

4. Substantive Rights

> The substantive component of the due process clause of the Fourteenth Amendment "forbids the government to infringe certain fundamental [rights] *at all*, no matter what process is provided." *Reno v Flores*, 507 US 292, 302 (1993) (emphasis in *Reno*). A "fundamental right" is one that is "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id*. at 303. Substantive due process rights are created only by the Constitution. *Regents of Univ of Michigan v Ewing*, 474 US 214, 229 (1985).

Doyle v City of Medford, 606 F3d 667 (9th Cir 5/26/10) (Graber, Fisher, Smith) ORS 243.303 provides that a local government that offers health insurance coverage to its officers and employees "shall, insofar as and to the extent possible, make that coverage available for any retired employee" who elects it. The City of Medford adopted a resolution setting a plan to comply with ORS 243.303: a retiree shall have 60 days from retirement to elect coverage. The City contracts with the Oregon Teamster Employers Trust to provide health insurance, and that contract excludes retirees from coverage under the Teamsters' plan. The Teamsters were willing to provide health insurance to retirees but only if members vote for such insurance, and the members have not approved an extension of insurance to retirees. Although the city does not provide insurance to its retirees, they can choose COBRA coverage for 18 months, then enroll in the PERS program.

Plaintiffs are former City employees who retired and were denied benefits under the Teamsters' plan. They alleged that the City violated the Due Process Clause of the Fourteenth Amendment, among other things. The district court held that neither the statute nor the resolution gave plaintiffs a constitutionally protected property interest, reasoning that the statute did not sufficiently limit the conditions under which the City would be required to extend health insurance coverage to retirees. Because a protected property interest is a prerequisite to a due process claim, plaintiffs' claim failed. No Oregon appellate court has construed the statute at issue.

The Ninth Circuit thus had certified a question to the Oregon Supreme Court: "What amount of discretion does [ORS] 243.303 confer on local governments to determine whether to provide health insurance coverage to their employees after retirement? The Oregon Supreme Court determined that the statute does not delegate to the City the discretion to make health insurance coverage available to retired employees. Local governments have an obligation to make that insurance available, but there may be circumstances that excuse that obligation. The government has the burden to show circumstances sufficient to excuse the obligation. The obligation need not be excused only by actual impossibility. The statute requires the government "to make some coverage available" insofar as and to the extent possible. See *Doyle v City of Medford*, 347 Or 564 (2010).

A Ninth Circuit panel affirmed the district court's conclusion that neither ORS 243.303 nor a city resolution created a protected property interest under the Due Process Clause of the Fourteenth Amendment. The Ninth Circuit panel reiterated that the Due Process Clause protects, but does not itself create, property interests. Such interests are created and defined by "an independent source such as state law." The court concluded that neither the statute nor the resolution creates a property

right. The statute "cannot sustain a due process claim. We hold that section 243.303 does not create a protected property interest because 'insofar as and to the extent possible' is not a particularized standard, because the nature and extent of the entitlement that section 243.303 allegedly creates are too indeterminate, and because the statute allows local governments extensive functional discretion." As for the resolution, "it too must fail in creating a property interest" because it "merely duplicates the obligation of section 243.303" and it includes a "discretionary loophole for any obligation that it might impose." Affirmed.

See ***Thunderbird Mobile Club, LLC v City of Wilsonville***, 234 Or App 457 (3/24/10) (Sercombe, Wollheim, Brewer) *rev denied* 348 Or 524 (7/08/10), discussed under Home Rule, *ante*, for discussion of substantive due process claim.

See ***State v Cervantes***, 232 Or App 567 (12/23/09) (en banc) for discussion, as dicta, of the "fundamental right to decide whether to become pregnant or to carry [the] pregnancy to term."

K. Equal Protection (Fourteenth Amendment)

"No State shall * * * deny to any person within its jurisdiction the equal protection of the laws." – Fourteenth Amendment, US Const

L. Sovereign Immunity

"**The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.**" - Eleventh Amendment, US Const

In *Chisolm v Georgia*, 2 Dall. 419 (1793), the US Supreme Court asserted jurisdiction in a case brought by a South Carolina citizen against the State of Georgia, reasoning that Article III, section 1, clause 1, extending the federal judicial power to controversies "between a State and Citizens of another State," qualified Georgia's sovereign immunity. *Chisolm* created a "shock of surprise" and prompted the immediate adoption of the Eleventh Amendment. Though its precise terms bar only federal jurisdiction over suits brought against one State by citizens of another State or foreign state, the Eleventh Amendment repudiated *Chisholm*'s premise that Article III superseded the sovereign immunity that the States had before entering the Union. While immunity from suit is not absolute, the US Supreme Court has "recognized only two circumstances in which an individual may sue a State.

First Congress may authorize such a suit in the exercise of its power to enforce the Fourteenth Amendment – an Amendment enacted after the Eleventh Amendment and specifically designed to alter the federal-state balance. *Fitzpatrick v Bitzer*, 427 US 445 (1976). Second, a State may waive its sovereign immunity by consenting to suit. *Clark v Barnard*, 108 US 436, 447-48 (1883)." *College Savings Bank v Florida Prepaid*, 527 US 666, 670 (1999).

Byrd v Oregon State Police, 236 Or App 555 (8/11/10) (Armstrong, Haselton, Rosenblum) Plaintiffs are Oregon State Police sergeants who sued for overtime pay under state law. They then moved to amend the complaint to add a federal Fair Labor Standards Act (FLSA) claim. OSP moved to dismiss the complaint on grounds that the state had not waived its sovereign immunity against claims under the FLSA, so plaintiffs could not bring their proposed FLSA claim against the state. Trial court agreed with OSP, denied plaintiffs' motion to amend, and granted OSP's motion to dismiss.

Court of Appeals reversed and remanded for reconsideration of plaintiffs' motion to amend the complaint to allege an FLSA claim. Whether a state has waived its sovereign immunity against being sued in federal court (immunity protected under the Eleventh Amendment) is a federal-law question. The issue here is whether the state waived its sovereign immunity against being sued in its own courts. Nevertheless, the state attempted to import the Eleventh Amendment's strict standard for a state's waiver of sovereign immunity in federal court, citing *Alden v Maine*, 527 US 706 (1999) (*held*: Congress does not have power under Article I to subject nonconsenting States to private FLSA suits in their own courts).

The Court of Appeals stated: "we reject the state's argument that the Eleventh Amendment standard for waiver of sovereign immunity applies to whether the state has waived its immunity against being sued on FLSA claims in state court." An "FLSA claim is a tort under the OTCA," as the Court of Appeals held in *Butterfield v State of Oregon*, 163 Or App 227 (1999), *rev denied* 330 Or 252 (2000), and thus "it is a claim on which the state has waived its sovereign immunity against being sued in state court."

M. First Amendment

"**Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.**" - First Amendment, US Const

Application to the States:
The rights in the First Amendment apply to the states through the Fourteenth Amendment's due process clause, see *Everson v Board of Education*

of Ewing, 330 US 1 (1947) (Establishment Clause); *Cantwell v Connecticut*, 310 US 296 (1940) (Free Exercise Clause); *De Jonge v Oregon*, 299 US 353 (1940) (freedom of assembly); *Gitlow v New York*, 268 US 652 (1925) (free speech); *Near v Minnesota ex rel Olson*, 283 US 697 (1931) (freedom of the press). *McDonald v City of Chicag*o, 130 S Ct 3016 n 12 (2010) (so reciting).

Types of unprotected speech:
Lewd, obscene, profane, libelous, and fighting words are categories of speech wholly outside the protections of the First Amendment. *Chaplinsky v. New Hampshire*, 315 US 568, 571-72 (1942); *United States v Stevens*, 130 S Ct 1577, 1584 (2010) (certain categories of speech fall outside First Amendment protection precisely *because of* their content: obscenity, defamation, fraud, incitement, and speech integral to criminal conduct). Knowingly communicating an intentional lie may also be regulated without regard to the substance of that speech as long as the government is not favoring or disfavoring certain messages, see *United States v Gilliland*, 312 US 86, 93 (1941), *Gertz v Robert Welch, Inc.*, 418 US 323, 340 (1974), and *R.A.V. v City of St. Paul*, 505 US 377, 391-92 (1992). Pornography produced with real children (as with defamation, incitement, obscenity) is not protected by the First Amendment. *Ashcroft v Free Speech Coalition*, 535 US 234, 245-46 (2002).

Powell's Books, Inc. v Kroger, 622 F3d 1202 (9th Cir 9/20/10) (McKeown, Fernandez, Paez) Held: ORS 167.054 and 167.057 are facially unconstitutionally broad and cannot be rewritten to conform to the constitution. "The statutes' overbreadth impinges on the rights of all individuals to legitimately share and access non-obscene materials without the interference of the state."

The two statutes at issue were anti-child abuse laws enacted in 2007. One criminalizes intentionally furnishing to a child under 13, or intentionally permitting a child to view, sexually explicit material, when the person knows the material is sexually explicit. The other statute criminalized furnishing, or using with a minor, a visual or explicit verbal description or narrative account of sexual conduct to arouse or satisfy the minor's or the person's sexual desires, or to induce the minor to engage in sexual conduct.

Powell's Books, Inc., and numerous other bookstores, sought declaratory and injunctive relief, which the district court denied.

Relying on *Ginsberg v New York*, 390 US 629, 641 (1968), *Miller v California*, 413 US 15 (1973), and Judy Blume, the Ninth Circuit panel explained why the statues are overbroad:

> "Sections 054 and 057 sweep up material that, when taken as a whole, has serious literacy, artistic, political, or scientific value for minors and thus also has at least some 'redeeming social value.' Because the statutes sweep beyond *Miller*'s more lenient definition of obscenity, they necessarily extend beyond the *Ginsberg* formulation as well. In addition, sections 054 and 057 do not

limit themselves to material that predominantly appeals to minors' prurient interest. As a result, the statues reach a substantial amount of constitutionally protected speech." Reversed.