Oregon
Constitutional Law
Newsletter

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A Note From The Chair

Alycia Sykora

This edition of our section's newsletter contains articles on several interesting topics.

Ed Trompke discusses a recent Fourth Amendment case where Judge Garr King analogized file-sharing on iTunes over an unsecured wireless network to "leaving one's documents in a box marked 'take a look' at the end of a cul-de-sac." See the following article.

Greg Chaimov provides an update on legislative action from the February 2010 session, on page 8.

Les Swanson evaluates two recent Oregon Supreme Court decisions, beginning on page 2.

The final article outlines Oregon constitutional law cases from 2009. A 2010 update on three of those 2009 cases also is included. Those articles begin on page 9.

Commentary, responses, or articles for the upcoming winter newsletter can be submitted to Alycia Sykora at alycia.sykora@millernash.com.

We hope to see you at our fall CLE as well.

Privacy on Wireless Computer Networks
– What It Means to Attorneys With Wireless Computers

Ed Trompke

The US District Court for Oregon (Judge King) recently ruled on what it called the "new frontier" in jurisprudence, searches and seizures of electronic data over wireless networks. The case involved an Aloha area neighbor who discovered child pornography on a computer hard drive she accessed through a wireless network from her home.

The owner was unknown to her, but she called the police, who came to her home, viewed a file briefly, and who then obtained a warrant to enter the network to obtain its IP address. Having obtained the IP address, they served a summons for information from the internet service provider to determine the name and address of the subscriber.

With the name and address, they obtained a second warrant to search the owner's computer equipment for child pornography. They found it, and criminal charges followed. On a motion to suppress for violation of privacy rights protected by the fourth amendment, the court denied the motion and upheld the search.

Significantly, the court found that the owner has no reasonable expectation of privacy of files that may be accessed through peer to peer file sharing. The court compared two types of open networks – peer to peer file sharing, and unsecured networks. "When a person shares files on LimeWire [a peer to peer software], it is like leaving one's documents in a box marked "free" on a busy street. When a person shares files on iTunes [which shares files locally, not on the internet] over an unsecured network, it is like leaving one's documents in a box marked "take a look" at the end of a cul-de-sac." US v Ahrndt, Criminal Case No. 08-468-KI (January 27, 2010).

The take-away message to lawyers is that the ethics rules require us to keep confidential information confidential. When lawyers use laptops for both social and business purposes, we risk compromising confidential information unless we either never connect to an unsecured network or disable file sharing of all documents, pictures, recordings and data that may be confidential. And that means talking to your IT advisor.

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Oregon Constitution Dvd Project

Les Swanson

In 2009 we took important steps toward completion of The Constitutional Law Section's OREGON CONSTITUTION DVD PROJECT. With grant money from the Multnomah Bar Foundation and the Wayne Morse Center for Law and Politics, we selected five outstanding students at the University of Oregon Law School (the only Oregon law school whose Dean responded to our request for applications from student scholars) to write background papers for five of the six planned DVDs. Each student received a grant of $1500. The selected students, their lawyer and judge advisors, and their topics are:

A) The Constitutional Convention and Organization of State Government, student Noah Olson, advisors Judges Henry Breithaupt and David Schuman.

B) Rise of Direct Democracy – the Initiative and Referendum, student Lindsay Burton, advisors Ed Trompke and Jim Westwood.

C) Speech and Expression, student Lindsay Byrne, advisor Charlie Hinkle.

D) Equality Issues – Equal Privileges and Immunities, student Daniel Bartz, advisor Chin See Ming.

E) Search and Seizure, Privacy, and Other Criminal Law Issues, student Jennifer Nicholls, advisors Erin Lagesen and Rebecca Duncan.

F) Religion Issues is the sixth topic and will be written by attorney Charlie Hinkle.

The papers were completed this past summer and the next step in the project is to secure funding from foundations for the project.

We will need to obtain funding of $250,000 to complete this project. We have recently obtained the assistance of a volunteer grant writer and will be preparing grant proposals to go out to some of Oregon's larger foundations as well as smaller ones. Partners in this project are Classroom Law Project, Oregon Historical Society, and The Oregon Community Foundation. We also have support from the Oregon State Bar, The Multnomah Bar Foundation, and the Wayne Morse Center for Law and Politics. We have been working on this project for some time now and the critical time for obtaining funding for the project is here. If you have any leads, inroads, or ideas about foundations or individuals to approach to obtain funding for the project please let me know at lesswanson@comcast.net. We are very grateful to those who have already supported this project with their time, money, and talents and we look forward to continued participation from members of our Constitutional Law Section.

Les Swanson
Chair, Oregon Constitution DVD Project Committee

Two Recent, Important Oregon Supreme Court Decisions

Les Swanson

The Oregon Supreme Court has recently decided two important cases in unanimous decisions written by the Chief Justice. Vannatta v. Oregon Government Ethics Commission (SC SO57570, December 31, 2009)} decided the constitutionality under Article I, section 8, Oregon Constitution of recent legislation restricting gifts by lobbyists to legislators. State of Oregon v. Machuca (SC SO57910, February 11, 2110) decided the constitutionality under Article I, section 9, Oregon Constitution of searches of the person (extracting blood) in drunk driving cases. I took a close look at each of these cases because both were written by the Chief Justice and were unanimous on two very important public policy issues in our society. I wondered whether the decisions in these two cases would reflect a straining by the court to reach a certain public policy result or whether they would be fairly straight-forward in their analyses, reliance on precedents, and reasoning.

My initial impression was that Vannatta made a hard to defend distinction between the constitutionality of a public official receiving a more than $50 gift (the court decided it was not ok) and a lobbyist offering a more than $50 gift (the court decided it was ok), and I doubted whether it was even worthwhile to make the distinction. A closer look caused me to conclude that the Vannatta decision is well -reasoned, follows the court's precedents (part of one precedent is overruled), and the analyses are

generally sound although I find some of the criteria the court uses for making its distinctions to be questionable. I generally favor the regulation of money in politics and of gifts to legislators so I was pleased to change my initial negative impression about the court's analyses in reaching its decision. My remaining reservations about that decision are really reservations about how well judicial decision-making can deal with complex actions, speech, and expressions that are not nearly as easily divisible and analyzable as the court makes them out to be (a little more about that later).

My initial impression of Machuca was that the court was doing some judicial tap dancing to get to the desired result – not interfering with law enforcement's ability to get blood samples from drivers suspected of drunk driving violations. A closer look confirmed for me that the court was paying much less attention to Article I, section 9, Oregon Constitution than it was to not interfering with law enforcement efforts at controlling the mayhem on Oregon roadways caused by drunk drivers. I question the court making particular fact statements a specific part of the Oregon Constitution and I also conclude that the court used some questionable reasoning to reach a public policy decision that assists law enforcement officials in prosecuting DUII cases.

Vanatta v Oregon Government Ethics Commission (SC SO57570, December 31, 2009)

ORS 244.025 prohibits a public official from receiving a gift or gifts or payment exceeding $50 in value from a lobbyist, or payment of any amount of expense for entertainment, and ORS 244.042 prohibits a public official, a candidate for public office, or members of their households, from receiving a lobbyist honoraria exceeding $50 in value. The court reaches it decision on the constitutionality under Article I, section 8, Oregon Constitution of the receipt of gifts or honoraria by retracing its precedents in State v. Robertson, 293 Or 402 (1982), State v. Plowman, 314 Or 157 (1992) and Huffman v Wright Logging Co. v Wade (317 Or 445 (1993). Robertson and Plowman make it clear that a statute directed in terms against the pursuit of a forbidden effect and not directed against forbidden speech as such can survive scrutiny under Article I, section 8. The forbidden effect in ORS 244.025 and 244.042 is the receipt of gifts, payment, or honoraria exceeding $50 in any one calendar year. The statutes do not refer to speech or expression.

Plaintiffs in Vannatta argued that the court in Fidanque v. Oregon Govt. Standards and Practices, 328 Or 1 (1998) invalidated a statute requiring lobbyists to pay registration fees and held that lobbying was a profession that was "essentially expressive [in] nature," 328 Or at 8, and that lobbying constituted political speech." Therefore, Plaintiffs argued, the statutory prohibitions on public officials receiving gifts or entertainment or honoraria (exceeding $50 in any calendar year) is directed against the free speech rights of lobbyists and violates Article I, section 8. The Vannatta court rejected that argument making the following points: 1) A person's reason for engaging in punishable conduct does not transform conduct into expression under Article I, section 8 (Plowman case); 2) speech accompanying punishable conduct does not transform conduct into expression under Article I, section 8. (Plowman case); 3) the court's decision in Vanatta I (Vanatta v. Keisling, 324 Or 514 (1997)) that a political contribution to a candidate's campaign is in and of itself the contributor's expression of support for the candidate or cause does not apply here because campaign contributions are so inextricably intertwined with the candidate or the campaign's message that the two cannot be separated, whereas a gift to a public official is not inextricably intertwined with a public official's ability to carry out official duties. He or she can do that with or without gifts exceeding $50 in a given calendar year.

This distinction by the court between speech that is inextricably intertwined with conduct and speech that is not is a weak point in the court's decision. How do we decide when speech is inextricably intertwined with conduct and when it is not? The court sees a necessary connection between campaign contributions and a candidate's message (Vanatta I), but sees only a contingent connection between gifts from a lobbyist and receipt by a public official (Vanatta). To me, both connections are contingent. A candidate can get out her message without your or mine contribution and a public official can perform her duties without this or that lobbyist's gift exceeding $50. When the court concludes that there is an inextricable connection between campaign contributions and campaign messages it is saying there is a necessary connection between money and political speech. There is certainly a practical connection because generally the candidate that has more money is able to produce more speech. But, it is also true as a practical matter that a lobbyist that has more and better connections with leg-

Continued next page

islators will have more influence on legislative decision-making. Making the former a necessary connection ("inextricably connected") and the latter a contingent connection (not "inextricably connected") makes for a nice clean distinction, but it is a hardly a distinction that accurately reflects the actions described.

Candidates can campaign without private campaign contributions and public officials can perform their public duties without lobbyists. Speech and the expenditure of money are closely connected in a capitalist society like ours, but it is more a matter of political or moral preference to conclude that some connections are necessary ("inextricably intertwined") and that some are not. Consequently, I think it would be more reasonable to overrule Vanatta I and get rid of "inextricableness" than it is to distinguish Vanatta I from Vanatta because the first exhibits "inextricableness" and the second does not. But, Vanatta I is a major decision of the court, and if it is to be overruled some day, this was probably not a propitious time for it to be done.

Having decided that gift receipt restrictions limit non-expressive conduct and that the gift restrictions legislation is not contra to Article I, section 8, the court goes on to consider whether the legislature's restrictions on lobbyists offering gifts exceeding $50 to public officials violates Article I, section 8. Offering gifts to public officials, the court decides, is protected expression under Article I, section 8, because the legislation is focused on the content of speaking or writing: offering a gift. It is not focused on the conduct of giving a gift. The legislature did not prohibit lobbyists from giving gifts exceeding $50 to public officials; it only prohibited lobbyists from offering gifts to public officials. So, the court here, implicitly, makes the distinction between offering (speech or expression) a gift and receiving a gift (conduct). Presumably, had the legislature prohibited lobbyists from giving a gift exceeding $50 to a public official, the court would have held that restriction to apply to conduct and would have upheld the restriction as not violating Article I, section 8. Lobbyists are now protected in offering public officials any amount of money, gifts of any value, or unlimited entertainment expense because these offerings are speech and are not conduct. But, a public official who accepts any such offerings exceeding $50 in a given calendar year will be in violation of Oregon law.

These distinctions between offering, receiving, or giving, and labeling them as either conduct or as speech, are troublesome. A lobbyist can send a $100 gift to a public official and the public official can receive it via UPS and there may be no speech or expression involved other than the delivery and receipt of the package. Or, a lobbyist can take a public official out to dinner and pay the $150 tab and who among us will believe that speech and expression from both parties are not directly involved? I have no alternative means of analysis to offer, but I do believe that the distinctions the court is making between conduct and speech provide opportunities to tilt the scale toward either conduct or toward expression depending on the result the court wishes to reach rather than on the phenomena being examined.

Speech is clearly the result of actions taken and speech acts are clearly actions as in the case of "I now pronounce you man and wife" or "I christen you the Ship of Love." And, giving and receiving gifts include ways of speaking and ways of behaving that are difficult to cleave from the overall gifting transactions that take place in many different and complex ways between different people at different times. But, my reservations may apply to law in general as an attempt to carve out rules for governing and decision-making that inevitably result in slicing and dicing that is difficult to justify when we consider the world as we know it. And, I do not deny that rules need to be made and that life under law is generally better than life under no law. In that spirit, I think that the court in Vannatta generally followed its precedents, applied its analyses, and reasoned to its conclusions.

State Of Oregon v Machuca,
231 Or. App. 232 (2009), SC SO57910,
February 11, 2010

In this unanimous decision, written by the Chief Justice, the Oregon Supreme Court decided an important Article I, section 9 (constraints on searches and seizures) case: 1) without discussing the central issue of when consent to a search and seizure is invalid because coerced; 2) it made the evanescence of alcohol in the blood part of the Oregon Constitution; 3) it appears to have reversed the burden of proof from law enforcement to a defendant regarding the exigency of relying on probable cause for search and seizure instead of obtaining a warrant; 4) it appears to have practically eliminated the requirement that a blood sample be timely taken if the police are relying on probable cause as their basis for the search and seizure.

The defendant, Machuca, was involved in a single-car accident, was injured, and was taken to a hospital. The police officer decided there was probable cause to believe that the defendant had committed the crime of DUII. He informed defendant he was under arrest for DUII and for reckless driving, gave him Miranda warnings, and read him the Driver and Motor Vehicle Services Division "implied consent rights and consequences" and asked defendant if he would like to take a blood test. Defendant agreed to take the test. Defendant moved to suppress the blood alcohol evidence claiming his consent was not voluntary, that there was no probable cause, and that there was no exigency that negated the requirement of obtaining a warrant. The trial court denied the motion to suppress. Defendant entered a conditional plea of guilty reserving the right to appeal the trial court's ruling.

The Court of Appeals in a decision written by Judge Sercombe and joined by judges Edmonds, Ortega, Rosenblum and Riggs, noted that extraction of blood is a search of a person and seizure of an effect (blood); that warrantless searches and seizures are per se unreasonable unless the state proves an exception to the warrant requirement, and that a person's voluntary consent to be searched and to have evidence seized must be proven by the state (it is the state's burden to go forward) by a preponderance of the evidence. The Court of Appeals majority listed various factors that relate to the voluntary nature of consent and concluded:

> "What is determinative in this context, however, is that the consent was procured through a threat of economic harm and loss of privileges. It was obtained only after defendant was given the warnings required by ORS 813.130(2) about the consequences of a refusal to allow a blood test." p. 240.

Relying on State v Newton, 291 Or 788 (1981), that was overruled in part on other grounds by State v Spencer, 305 Or 59 (1988), the Court of Appeals majority held that a consent to search obtained in that fashion is coerced by the fear of adverse consequences and is ineffective to excuse the requirement to obtain a search warrant. p. 240. The court concluded that the officer had probable cause that defendant had committed DUII, that the officer had admitted that he could have obtained a telephonic search warrant within an hour of when he decided that he had probable cause, and that the blood was not drawn for one hour and eight minutes from the time that he had probable cause. So the state failed to prove that a warrant could not have been obtained within a reasonable time to secure the evidence. The trial court's ruling on the motion to suppress was reversed. The evidence obtained from the blood draw should have been suppressed.

The dissent, written by Judge Haselton, was joined by Judges Landau, Armstrong and Schuman. They argued, first that State v Newton, supra, was inadequate precedent because only a plurality of three judges joined in the court's analysis of the circumstances under which a consent is voluntary and second that "informing a citizen of statutorily prescribed consequences that will as a matter of law flow from a refusal is not, and cannot be deemed, impermissibly coercive for constitutional purposes." P. 249 Apparently the dissent takes the position that a law enforcement officer cannot be judged to have been coercive in obtaining a consent if all that he has done is accurately read to the defendant the law. That may be generally true, but if the law is itself coercive by making a penalty more severe if consent is not given than if consent is given then how can the voluntariness of the defendant's consent not be negated by the legislature's own act of coercion? And, when the police office reads to the defendant the relevant part of the legislative act, does he not become an actor in the coercion that occurs?

The Oregon Supreme Court by-passed the consent issues and went right to the question of whether the exigent circumstance of the evanescent nature of alcohol in the blood is a circumstance that will ordinarily permit a warrantless blood draw. The court's answer was yes. To reach that decision, the court disavowed that part of its decision in State v. Moylett, 313 Or 540 (1992) where it held:

> "The exigency created by the dissipating evidence of blood alcohol, however, did not make the blood sample seizure per se reasonable under Article I, section 9. The state was still required to prove, in order to justify the warrantless extraction of defendant's blood, that it could not have obtained a search warrant 'without sacrificing the evidence' and that the blood sample that it obtained had been extracted 'promptly.' State v Milligan, supra, 304 Or at 666, 748 P 2d 130."

The court in Machuca, however, did agree with the observation in Milligan that a "[w]arrantless seizure and search under such circumstances therefore is constitutionally justified (where the officer has probable cause to believe that a DUII offense has been committed) unless

a warrant can be obtained without sacrificing the evidence." 304 Or at 665-66. The Machuca court continues: "Milligan, however, illustrates that when probable cause to arrest for a crime involving the blood alcohol content of the suspect is combined with the undisputed evanescent nature of alcohol in the blood, those facts are a sufficient basis to conclude that a warrant could not have been obtained without sacrificing that evidence." The Machuca court then holds:

> "It may be true, phenomenologically, that among such cases, there will be instances in which a warrant could have been both obtained and executed in a timely fashion. The mere possibility, however, that such situations may occur from time to time does not justify ignoring the inescapable fact that, in every such case, evidence is disappearing and minutes count. We therefore declare 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. We do so, however, understanding that particular facts may show, in the rare case, that a warrant could have been obtained and executed significantly faster than the actual process otherwise used under the circumstances. We anticipate that only in those rare cases will a warrantless blood draw be unconstitutional."

Here are some conclusions that can be drawn from the court's holding:

1) the burden of proof on law enforcement in a DUII case to justify a search and seizure of a blood sample based on probable cause by proving by a preponderance of the evidence that exigent circumstances did not permit the obtaining a warrant without sacrificing the evidence, and that the blood sample was timely drawn, has now been reversed. Those burdens of proof are now on the defendant. The law (constitutional law) now is that a police officer's probable cause to believe that a DUII offense has been committed is sufficient to justify a search and seizure of a defendant's blood sample provided the defendant has given consent and has not proven extraordinary circumstances where a warrant could have been obtained for the search and seizure significantly faster than the process followed by the officer. This is a radical change in Article I, section 9 Oregon constitutional law. The burden of going forward with the evidence concerning the availability of a warrant and the burden of proving the availability of a warrant has been shifted from law enforcement to the defendant, and the defendant is now required to show that obtaining a warrant would have been significantly faster than the process used under the circumstances.

2) The court has made a physical fact part of Article I, section 9 search and seizure law – "the evanescent nature of a suspect's blood alcohol content is an exigent circumstance" for constitutional purposes in DUII cases. Normally, facts are to be established by either lay or expert testimony at trial. Now, in DUII cases, presumably there will be no need for law enforcement to present testimony on rates of dissipation of alcohol in the blood to justify the taking of a blood sample even though there has been no attempt to obtain a warrant.

3) The court has removed any concerns about "consent" to a blood test based on coercion due to ORS 813.130 from Article I, section 9, Oregon Constitution, and treats this issue as merely a "legislative preference." The court writes:

> "Although the warrantless blood draw in this case did not violate Article I, section 9, the legislature has nevertheless expressed a policy preference against physically compelling blood draws or breath tests, by permitting a suspect to refuse the test …. At the same time, however, the legislature has imposed penalties for refusing the test, mandating longer license suspensions for refusing a test than for failing it, and permitting a refusal to be used as evidence against the person in a civil or criminal court proceeding. … To the extent that defendant's decision to permit the blood draw was influenced, even significantly, by the statutory advice of rights and adverse consequences of refusing the blood draw, the implied consent law operated exactly as the legislature intended."

4) The Oregon Supreme Court treated the issue of "coerced consent" of a blood draw as non-determinative of whether a blood draw is justified under Article I, section 9, Oregon Constitution. The Court of Appeals decided that Machuca's consent to a blood draw was coerced, but then continued its analysis to determine whether probable cause was present and whether exigent circumstances justified failure to obtain a warrant and whether the blood draw was timely. The Court of Appeals apparently considered "coerced consent" to a blood draw not to be the end of the matter under Article I, section 9, and the Oregon Supreme Court doesn't seem to see any connection between Article I, section 9 protec-

tions against unreasonable searches and seizures and any coercion of a suspect by the operation of ORS 813.130.

It appears, then, that the Oregon Supreme Court's position is that consistent with Article I, section 9 protections against unreasonable searches and seizures, in a DUII case, a blood test may be taken either with the permission of the suspect or on the basis of probable cause and the exigent circumstance of evanescent alcohol in the blood justifying the failure to obtain a warrant. The legislative "preference" expressed in ORS 813.100(2) that no chemical test shall be given if the person refuses to submit to the chemical test after the person has been informed of consequences and rights as described under ORS 813.130, is just that, a legislative preference. Article I, section 9 apparently permits a search and seizure (a blood draw) upon a showing of probable cause and the exigent circumstances of the evanescence of alcohol in the blood even if the suspect does not consent to the test. In Machuca, the Oregon Supreme Court made no attempt to determine whether Machuca's consent to a blood test was coerced, so it must not matter whether or not his consent was coerced. There was probable cause and the evanescence of the alcohol in the blood justified there being no warrant, so his blood is taken whether or not his consent to the blood draw was coerced.

Let's consider a different approach. Let's begin with the premise that Article I, section 9 protections against "unreasonable search, or seizure" protect individuals from being coerced to give their consent to searches or seizures. Then, let's add the premise that the legislature followed Article I, section 9 protections against coerced consents by legislating that no blood draws or breathalyzer tests shall be conducted unless the suspect consents. The conclusion, one would think, from those premises is that a suspect's consent must be valid (an uncoerced consent) for that consent to justify a blood draw in a DUII case. The Oregon Supreme Court's decision in Machuca is consistent with this reasoning only if its decision is that the consent of a suspect to have her blood drawn is irrelevant if there is probable cause plus the evanescence of alcohol in the blood that justifies there being no warrant. Then, no consent is needed. The blood can be taken consistent with Article I, section 9 without the suspect's consent and regardless of the legislative preference for consent expressed in ORS 813.100(2). If this is the court's holding in Machuca, and it appears that it is, it could have been expressed much more straight forwardly than it was.

In State v Scharf, 288 Or 451 (1980) the Oregon Supreme Court considered whether law enforcement officials were required to advise a suspect in a DUII case of her right to counsel before deciding to refuse or to submit to a blood test. The state argued that by reading the statutory language to the suspect the suspect was receiving from the officer sufficient legal advice concerning the decision to refuse or submit to a blood test. The court held that the state's position was incongruous because a motorist was entitled to consult with an attorney at the time of arrest and was entitled to legal representation for trial, but the state's position denied her the right to consult with an attorney at the critical point where the police call upon her to choose whether to provide evidence to be used against her or to refuse to provide such evidence. "The logic of such a rule", wrote the court, "would have seemed familiar to Alice from the trial in wonderland." supra, at p.460. The Red Queen in Through the Looking Glass announced "The rule is jam tomorrow and jam yesterday, but never jam today."

Referring to the choice of a suspect in a DUII situation to either consent to a blood draw or to suffer the consequences of economic harm and loss of privileges, the Oregon Supreme Court wrote in State v Scharf, supra, that "The legal consequences of the choice are neither obvious nor easy to evaluate in the individual case…. There may be collateral effects for the individual's overall driving record, insurance coverage, even employment. Commonly an arrested person will know little of these implications of the decision to take or to refuse the test." State v Scharf, supra, at p. 457.

Law enforcement officials and others were greatly concerned that the Court of Appeals decision in Machuca would significantly interfere with the policing and convictions of drunk drivers. The Oregon Supreme Court's decision in Machuca raises equally important issues: Does Article I, section 9 protect a suspect from having blood drawn in a DUII situation without the suspect's consent? If consent is required for a blood test in a DUII situation is it irrelevant under Article I, section 9 whether it is or is not a coerced consent? Under what circumstances will the Oregon Supreme Court consider consent to a blood test to be coerced in a DUII situation? Can judges and juries in DUII cases now take judicial notice of the fact that alcohol is evanescent and that the exigent circumstance of alcohol dissipating in the blood excuses law enforcement officials from obtaining war-

rants unless the defendant goes forward with evidence to the contrary and sustains her burden of proof by a preponderance of the evidence to show that a warrant could have been obtained and executed significantly faster than the actual process otherwise used under the circumstances?

And, should we ask these additional questions? Is the Oregon Supreme Court's Article I, section 9 jurisprudence at the edge of the rabbit hole? Is it heading down the rabbit hole? Is it in Wonderland?

Measures of Special Constitutional Interest from the February Special Session

Greg Chaimov

Legislative leaders largely succeeded in achieving their goal of a controversy-free special session—at least if one defines controversy by addressing issues of such significant public policy that constitutional questions are raised.

The Legislative Assembly referred one significant constitutional amendment to voters for their approval or rejections: adoption of real annual sessions. Currently, Article IV, section 10 requires the Legislative Assembly to meet biennially commencing on the second Monday of September in even numbered years "unless a different day shall have been appointed by law." For many years, the Legislative Assembly has prescribed the second Monday in January of odd numbered years as the date of commencement. ORS 171.010. Article IV, section 10a authorizes the Legislative Assembly to call itself into special session "in the event of an emergency." As a practical matter, the nature of the emergency triggering the Legislative Assembly's authority to call itself into special session is left to the Legislative Assembly itself. See George v. Courtney, 344 Or 76, 85 – 86 (2008). As a result, the Legislative Assembly has called itself into special session in the even numbered years between each of the past two regular sessions.

Senate Joint Resolution 41 proposes to amend Article IV, section 10 to require the Legislative Assembly to meet annually: for not more than 160 days in odd numbered years and not more than 35 days in even numbered years. Members may extend sessions by two-thirds' votes of each chamber and hold preliminary sessions held to elect officers, organize, and introduce measures without counting the days of those preliminary sessions counting in the prescribed duration limits.

In House Bill 3686, the Legislative Assembly effective July 1, 2011, repealed ORS 342.650, which provides that "No teacher in any public school shall wear any religious dress while engaged in the performance of duties as a teacher." The law had been upheld in Cooper v. Eugene School District No. 4J, 301 Or 358, 380 (1986), in the face of a challenge by a teacher that the prohibition on her wearing a Sikh's white clothing and turban violated her rights to religious freedom: "the teacher's appearance in religious garb may leave a conscious or unconscious impression among young people and their parents that the school endorses the particular religious commitment of the person[.]" Opponents of repealing the law expressed the concern that the new freedom to wear religious dress would lead to an increase in lawsuits seeking to stop religious indoctrination in public schools.

In Senate Bill 999, the Legislative Assembly authorized district attorneys to offer diversion to current and former members of the Armed Services under circumstances not available to individuals who are not current or former members of the Armed Services. Oregon courts have not addressed the level of scrutiny that the state constitution requires of legislation favoring members of the Armed Forces, but the United States Supreme Court has routinely upheld laws specially-benefitting members of the Armed Forces, reviewing only for a rational basis for the special benefit. See, e.g., Personnel Administrator of Massachusetts et al. v. Feeney, 442 US 256 (1979) (veterans' hiring preferences). Of particular interest will be whether, upon a challenge, the courts treat Senate Bill 999 as providing a benefit akin to a hiring preference or, instead, views the law with more scrutiny because the end result is likely to be members of the Armed Forces avoiding criminal convictions when members of the general public would not.

2009 Oregon Constitutional Case Law Update

Alycia Sykora

Last December, our section hosted its annual CLE. A CLE coursebook chapter, outlining the cases from 2009, is reprinted herein. Since December 2009, the Oregon Supreme Court published opinions in three of the cases discussed in the 2009 CLE chapter. To update that chapter, those three cases are summarized here.

State v Machuca (S057910) (2/11/10) The supreme court reversed the court of appeals. The lower courts had focused on whether the defendant had voluntarily consented to a hospital blood draw. The supreme court reversed on other grounds, concluding that evidence of blood alcohol dissipation rates established the exigent-circumstances exception to the warrant requirement.

In *Machuca*, the hospitalized drunk driver agreed to allow his blood to be drawn only after an officer read to him a warning of the consequences of refusing the blood draw. At trial, the state's scientist testified that the average blood-alcohol dissipation rate is .015 percent per hour. The state put on no evidence of the time it takes to obtain a warrant for a blood draw. The trial court denied the drunk driver's motion to suppress the blood alcohol test results, concluding that the driver had voluntarily consented to the blood draw. But the trial court also concluded that the state failed to prove probable cause and exigent circumstances; 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."

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 that he would suffer a substantial penalty if he refused. Four court of appeals judges dissented.

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. 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 then 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 Heckathorne (S056073 (12/31/09) The supreme court reversed the court of appeals. 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," smelled of ammonia, and ammonia is used to produce meth. He also testified that 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 Rodgers/Kirkeby (S05630) (2/11/10) The supreme court affirmed the lower courts' decisions suppressing evidence seized during two separate traffic stops. The defendants had been illegally seized – the police conduct was not justified by reasonable suspicion of criminal activity and was unrelated to the traffic violation investigation. 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).

One interesting aspect of the constitutional analysis in *Rodgers/Kirkeby* is that the supreme court interpreted Article I, section 9, as both including and excluding brief traffic-infraction investigations. Thus, the supreme court stated that police-motorist encounters are, and are not, constitutional "seizures."

In one part of the opinion, the supreme court considers brief stops of motorists for the "investigation of noncriminal traffic violations" to be an exception to the warrant requirement. The supreme court stated 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).

The supreme court did not label that "one such exception." But it described what that "one such exception" permits: "*investigation of noncriminal traffic violations*." The court reiterated that traffic stops do implicate Article I, section 9, by defining the constitutional boundaries of that exception:

"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." (Emphasis added).

If the "*investigation of noncriminal traffic violations*" is a new or existing exception to the warrant requirement, inquiries in police-motorist encounters, even those restricted solely to investigation of noncriminal traffic violations, do implicate Article I, section 9.

The supreme court did not provide any citation or reference about that exception to the warrant requirement. The phrase "*noncriminal traffic violations*" does not appear to have been used in any other reported Oregon decision. But the supreme court used it four times in this opinion, including once in italics. Whatever its origin, history, source, or label, the exception's purpose is defined in *Rogers/Kirkeby*. As an exception to the warrant requirement in Article I, section 9, such police-motorist encounters do implicate Article I, section 9.

But a convolution exists in *Rodgers/Kirkeby*. 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." (Emphasis added).

The court reiterated that conclusion:

"[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).

Notably, the dissent appears 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).

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. 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 to be established.

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2009 OREGON CASES

I. SEARCH, OR SEIZURE - Article I, §9

"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."

A. State Action Requirement

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

SER Juvenile Dep't of Jackson County v SLM, 227 Or App 408 (2/16/09) Sixteen year old runaway was found at a known drug user's house. Officer retrieved the runaway and asked to search her bag. She refused. Officer then "encouraged" the girl's mother to empty the girl's bag on the backseat of the police car. Mother did so; used meth pipe was in the bag. Girl charged with crime of possession. Trial court denied the girl's motion to suppress, concluding that there was no state action -- just the mother dumping the purse. Court of Appeals reversed: When, as here, a private person acts at the request of a police officer, Article I, §9, governs the propriety of that action, see *State v Tucker*, 330 Or 85, 90 (2000).

State v Killion, 229 Or App 347 (7/01/09) Oregon Dep't of Fish and Wildlife (ODFW) biologist encountered defendant while biologist was on the job. The biologist was a state actor for Article I, §9. "Article I, §9, prohibits state action that infringes on a citizen's constitutional rights; it therefore protects against unlawful seizures by state actors, not only law enforcement officers."

State v Stokke, 231 Or App 387 (10/21/09) A prior search by a private actor does not affect whether a subsequent police search requires a warrant.

B. Encounters: Public Ways

An encounter between a police officer and a citizen is a "seizure" under Article I, §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.

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). "Temporary restraints" of a person's liberty for investigatory purposes ("stops"), however, are seizures that must be justified by a reasonable suspicion of criminal activity. "Arrests" are another type of seizure. Arrests must be justified by probable cause to believe the person has committed a crime. *State v Hall*, 339 Or 7, 16-17 (2005); *State v Amaya*, 336 Or 616, 627 (2004); *Holmes*, 311 Or at 410.

See 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 ORS 810.410.

1. Traffic Stops

A traffic stop is a temporary seizure that occurs when an officer restrains an individual's liberty or freedom of movement. 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).

State v Amador, 230 Or App 1 (7/29/09) Officer saw defendant driving with a defective brake light (an infraction), then turn into a known drug house. Officer pulled in behind defendant and put on his overhead lights. Defendant got out of the car, nervously. When asked, defendant gave the officer an Oregon ID card. Officer then suspected that defendant was driving without a driver license. Officer, speaking in a conversational tone, asked if defendant had any drugs or weapons. Defendant said no, but began "pocket fidgeting." Officer asked for and received defendant's consent to search him. Officer found meth. The trial court, Judge Michael Marcus, denied defendant's motion to suppress, observing that the exchange: "do you have any drugs or weapons, no, do you mind if I look, sure," is "probably repeated in this city more than 'I love you.'" Court of Appeals affirmed: 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. Officer could ask about drugs and weapons during an ongoing stop after obtaining the ID card because the investigation for the traffic infraction was ongoing.

State v. Ashbaugh, 225 Or App 16 (2008) (en banc), *rev allowed* 346 Or 257 (2009), discussed herein at page 18 (not a traffic-stop case, but Court of Appeals applies *Ashbaugh*'s consent-to-search analysis to traffic stops).

State v Bretches, 225 Or App 602, *rev den* 346 Or 361 (2/11/09) After defendant passed field sobriety tests, officer told defendant he was free to leave. But defendant kept talking. Officer then asked if he had anything illegal. Defendant said he had marijuana in his pocket. Officer asked for and received his consent to search defendant and his truck for drugs. Precursor substances were found in the truck. Trial court denied defendant's motion to suppress without findings. Court of Appeals affirmed: the only issue on appeal was whether a reasonable person would have felt detained when defendant consented to the search, after the unbroken conversation with the officer. Here, there was only one officer (no tag-team tactics), defendant was out of the vehicle, officer did not repeatedly ask him for consent, and defendant never refused consent.

State v Briggs, 229 Or App 660 (7/15/09) Defendant was sitting in a car, parked in the traffic lane of a street, headlights off, in a high-crime area, with his hand outside the window, handing something to bicyclists around him. When officer drove up in his patrol car, bicyclists scattered. Officer observed a traffic violation, and asked for defendant's license and registration. Defendant was a felon on probation. Officer asked to search defendant's car. Defendant refused. Officer said he would call his probation officer. Defendant again refused. Officer called probation officer, who said she could require defendant to allow the search as a condition of probation. Defendant then consented. Defendant had a weapon in the car. Trial court denied defendant's motion to suppress, concluding that the officers had reasonable suspicion of drug activity, so the stop was lawful. Court of Appeals affirmed for the same reason, also noting that if there are possible lawful explanations for a defendant's behavior, that does not preclude reasonable suspicion.

State v Cohan, 227 Or App 63 (4/01/2009) Defendant was driving, stopping with hazard lights on, then driving again. Officer pulled in behind defendant, who then walked to officer and asked if he was in trouble. Officer said no, and asked what was going on. Defendant said he was picking flowers. Officer asked for ID. Officer told defendant he was not under arrest. They walked to defendant's car. Defendant showed officer an ID card. Officer ran a warrant check. Defendant's license was suspended. Defendant consented to a patdown. Officer retrieved a box from defendant's pocket. Defendant said it contained meth and that he had a pipe, too. Trial court denied his motion to suppress. Court of Appeals affirmed: It was a lawful stop when the officer asked for ID. On seeing that defendant had just an ID card, officer developed the requisite reasonable suspicion that defendant was driving without a valid license.

State v Frias, 229 Or App 60 (6/10/2009) Defendant failed to dim his high beams; an infraction. Officer stopped defendant, engaged in "small talk" with defendant, who seemed evasive. Officer asked if defendant was on probation. Defendant said he was awaiting sentencing on a drug possession charge and he was unemployed. Officer noticed dark circles under his eyes. Officer asked defendant to exit the vehicle, then to empty his pockets, then pull up his pants legs. He did. The officer saw a suspicious protrusion in a sock and asked about it. Defendant said it was a glass pipe and pulled it out. It had white residue on it. Officer arrested defendant.

Trial court denied the motion to suppress. On appeal, state conceded that without reasonable suspicion to believe defendant was engaged in, or about to engage in, criminal activity, the officer unlawfully extended the stop by/when asking defendant to get out of the car. Court of Appeals reversed the trial court's denial of the motion to suppress: under the totality of circumstances, the officer did not have objective reasonable suspicion to believe defendant was engaged in criminal activity when he asked defendant to get out of the car. Evasive answers (to questions defendant had a constitutional right not to answer) and a pending sentencing for a drug charge ≠ objective reasonable suspicion.

State v Killion, 229 Or App 347 (7/01/09) ODFW biologist gathering elk data on privately owned property open to the public drove past and waved to defendant while driving on a narrow one-lane road. Defendant and biologist talked from their vehicles through open windows. Defendant, glassy-eyed, fell onto his steering wheel 5-6 times, stunk of alcohol, and had a rifle in his car. Defendant took a cell-phone call and the conversation ended. Biologist called sheriff, and gave his full name as an informant, described defendant's vehicle (gave the wrong model), gave the license plate (was off by one number or letter), and said that defendant was impaired. Thirty minutes later, the sheriff found defendant on the road, followed him with lights unactivated, and defendant stopped. Officer asked him to roll down his window. Defendant was slouching with a blank stare and shook his head no. Officer motioned for defendant to roll down the window. Defendant opened his door ten inches. He was visibly impaired, said he had no driver license, and tried to shut his door, but the officer blocked the door with his leg. A struggle ensued. Officer arrested defendant. Trial court denied motion to suppress, concluding defendant was not illegally seized. Court of Appeals affirmed: biologist, a state actor, did not seize defendant by waving at him and engaging in mere conversation. Officer then had reasonable suspicion to stop defendant for DUII, based on informant's (biologist's) report that bore sufficient indicia of reliability (his name and his personal observations), and officer independently corroborated that report. (License plate number being off by one letter or number, or the wrong vehicle make or model, does not create insufficient indicia of reliability.).

State v Kirkeby, 220 Or App 177, 184, *rev allowed*, 345 Or 301 (2008) State appealed a pretrial order suppressing drug evidence obtained during a consensual search of defendant during a traffic stop. Court of Appeals affirmed, explaining that an officer's actions, even if authorized by a statute such as ORS 810.410, may restrain a person's liberty so as to effect a "seizure" under Article I, §9. Here, a "police officer's questioning of a person unrelated to the initial, legal stop can result in an unlawful restraint of the person's liberty in violation of Article I, section 9, in two situations: (1) when an officer concludes the lawful stop and then reinitiates a second stop by questioning the person about unrelated matters without reasonable suspicion; and (2) when the officer, without letting the person know expressly or by implication that he or she is free to leave, detains the person beyond the time reasonably required to investigate the traffic infraction and issue a citation." Court of Appeals concluded that is case is controlled by *State v Rodgers*, 219 Or App 366, *rev allowed* 345 Or 301 (2008).

State v Lantzsch, 229 Or App 505 (7/15/09) Vehicle stopped for an illegal turn. Driver had no ID. The driver had an outstanding warrant and marijuana and was therefore arrested. Defendant was a passenger. Driver and defendant had open sores on their faces. Officer asked defendant to get out of the car and did not tell defendant he was free to leave. Officer asked if defendant had any weapons or contraband. Defendant said he had a pocketknife. Officer asked if he could search defendant, then searched him. Meth was in defendant's pocket. Officer testified that defendant had open facial sores, the driver had marijuana, and people who use drugs tend to be together and have weapons. Trial court denied the motion to suppress and did not make findings as to defendant's state of mind (subjective belief whether he felt free to leave). Court of Appeals remanded, holding that the officer seized defendant when he asked him to get out of the car. The investigation for the illegal-turn infraction concluded when the driver was arrested and placed in the police cruiser. Association with people who use drugs and have open facial sores ≠ reasonable suspicion of criminal activity. Remanded for trial court to determine if defendant subjectively believed he was free to leave, per *Ashbaugh*.

State v Morgan, 226 Or App 515, *rev allowed*, 346 Or 363 (2009) Defendant was a passenger in her own car that was stopped. Driver arrested. Before officer turned car over to defendant, he asked for her license. Officer then asked to search her car. Defendant consented, grabbed her big bag, and got out of the car. Officer asked for permission to search her bag. Defendant refused, acted nervous, and reached into the bag. Officer took the bag on "officer safety" and found heroin. Trial court denied motion to suppress. Court of Appeals affirmed. The officer's request for, and brief retention of, defendant's driver license for a records check to determine if she could lawfully drive is for a noncriminal investigatory purpose, similar to *Holmes*. That was not a "seizure" because the car was effectively "impounded" at that time. That was a lawful detention of her person, in contrast with *Ashbaugh*. Also, officer articulated specific facts that defendant may have posed an immediate threat of serious physical injury, thus meeting the reasonable suspicion standard for officer safety exception ("protective search") to the warrant requirement. Reasonable suspicion rather than probable cause required before an officer can protect himself during a lawful encounter.

Dissent (Sercombe) concluded that defendant's conduct was not hostile to the officers. Dissent would hold that defendant's purse was seized when the officer directed her to leave it in the car or give it to him.

State v Parker, 225 Or App 610, *adh'd to as modified on recons*, 227 Or App 413 (4/13/2009) Defendant was a passenger in a vehicle stopped for an infraction. Officer got driver's and defendant's ID, wrote down defendant's information, returned his ID to him, and got into the police vehicle. Driver was cited, and another passenger arrested for an outstanding warrant. Officers asked defendant to get out of the truck, and if he had weapons. He said no. Officer asked to pat defendant down. Defendant consented. Officer retrieved a switchblade from defendant's pants pocket, then arrested him for carrying a concealed weapon. Trial court denied the motion to suppress the switchblade, concluding that consent was freely given, and the switchblade was not evidence taken in exploitation of an

unlawful seizure. Court of Appeals remanded: the state can prevail against a "*Holmes* type (b)-based motion to suppress" if it disproves either the subjective or objective components of the type-(b) test. Did defendant not believe he was restrained from moving, or if he did so believe, would a reasonable person not believe he was restrained? Remanded to allow the state to try to prove (disprove) defendant's subjective belief (court concluded that if defendant believed he was restrained from moving, such a belief would be objectively reasonable).

State v Pewonka, 231 Or App 558 (10/28/09) Defendant's husband stopped for a traffic violation. He called defendant, and she came to the scene of the stop. Officer took her driver's license for a records check, found that her license was suspended, questioned her about the suspension, then questioned her about meth use and asked if she had any weapons or contraband with her. She said no. He asked her to consent to a search her person and her car. She consented. Officer found nothing. Officer asked her to consent to a search of her purse. She consented. Meth was in the purse. Trial court denied her motion to suppress. Court of Appeals reversed: under *Kirkeby* and *Rodgers*, the officer unlawfully extended the stop when he questioned the defendant about matters unrelated to her suspended driver's license.

State v Primeaux, 230 Or App 470 (8/26/09) (en banc) Officer saw defendant driving with a missing brake light cover; an infraction. Officer put on his overhead lights. Defendant chucked a beer can out his window. He admitted he had had "2 beers." Officer determined that defendant was not intoxicated based on defendant's eyes. Officer returned defendant's license and gave him warnings. Defendant had shaking hands and nervously looked around for 10-15 seconds. Officer then asked if defendant had any drugs or weapons. Defendant said he was going to a party for his son. Officer asked if a drug dog could walk around. Defendant admitted he had marijuana in his bag. Officer handcuffed defendant and opened the backpack, that contained marijuana packages. Trial court denied motion to suppress. Court of Appeals reversed: officer violated Article I, §9, by questioning defendant during the stop about matters unrelated to the stop, <u>after</u> having concluded that stop without letting defendant know he was free to leave. Officer prolonged an otherwise valid stop without reasonable suspicion of criminal activity. Suppression necessary because its discovery was not otherwise inevitable or sufficiently attenuated from the officer's unlawful conduct.

(<u>Dissent: Edmonds, Brewer, Landau, Wollheim</u>) A reasonable person in defendant's circumstances would have understood that the traffic stop had been resolved with the return of defendant's driver's license to him and the officer's warnings. Ten to 15 seconds is long enough in this case to objectively indicate that the traffic stop ended. Dissent would affirm the conviction.

State v Rodgers, 219 Or App 366, *rev allowed*, 345 Or 301 (2008) Defendant was stopped for not having an illuminated license plate. He had no proof of insurance, open sores on his face, a plastic bag and gallon jug of blue fluid in view, and a lot of clothes in the car. After writing the citation for no proof of insurance, officers began questioning defendant about the bag and jug. He consented to a vehicle search. Officers found meth-manufacturing materials. Trial court denied his motion to

suppress evidence. Court of Appeals reversed: although an officer may question a motorist about matters unrelated to the traffic infraction during an unavoidable lull in the investigation (such as while awaiting the results of a records check), an officer is not free to question a motorist about unrelated matters as an alternative to writing the citation. When an officer has all the information necessary to issue a citation but instead delays in processing it or delays in telling the motorist he is free to leave, the stop is no longer lawful, and it becomes a new restraint on the motorist's liberty, unless the officer has reasonable suspicion of further criminal activity. (State conceded that the officer lacked objective reasonable suspicion of criminal activity just based on the bag and jug and open facial sores.) Here, this was an unlawful extension of a lawful stop, therefore an unlawful seizure. As for the consent, it was obtained during the unlawful seizure and there were no intervening factors. Therefore, the evidence should have been suppressed.

See ***State v Rosa***, 228 Or App 666 (5/27/09).

State v Singer, 230 Or App 485 (8/26/2009) Defendant was a passenger in a car stopped for an illegal turn. Defendant appeared nervous. Officer asked defendant for her name an date of birth for a warrant check. She was on probation. Officer asked her to get out of the car, asked for consent to search her purse, and found drugs inside. *Holmes* type (b) stop may have occurred when officer requested name and date of birth from defendant (passenger in car) and ran a warrant check. She was on probation. She consented to a search of her purse, which contained controlled substances. Trial court denied her motion to suppress. Court of Appeals vacated. Objective reasonableness established (defendant not free to leave) but case remanded like *Ashbaugh* for findings as to defendant's subjective belief on whether she felt free to leave.

2. <u>Parked Vehicles</u>

State v Robles, 229 Or App 287 (7/01/09) Defendant standing by the open door of a parked vehicle. Officers' sole basis for their suspicion that defendant had committed, or was about to commit, a crime, was that he appeared nervous, seemed secretive, and was having trouble placing an object of unknown size and shape in his pants. Officers in uniform identified themselves and said "stop" to him. Defendant turned his back, officer drew his gun, and ordered defendant to the ground. Marijuana and bong found on defendant. Also a 13 year old girl was in the vehicle. Defendant charged with endangering the welfare of a minor. Trial court denied defendant's motion to dismiss. Court of Appeals reversed: Without more, just appearing nervous, seeming secretive, and having trouble placing an object of unknown size and shape in one's pants is insufficient to establish the required reasonable suspicion of criminal activity to justify a stop.

3. <u>On Foot</u>

State v Allen, 224 Or App 524 (12/24/08) Defendant got out of a parked car while the driver waited, walked toward a "dope house," then walked back to the car 3-5 minutes later. Officer did not see where defendant went. Uniformed officer asked

defendant, "what is going on? Where you comin' from?" Officer told defendant he knew she was coming from a dope house, and if she'd just be honest, give him the dope, he'd give her a citation (rather than arrest her). Defendant gave officer crack and a broken crack pipe. She said, "this is mine. I'll have to call my counselor to tell him I've relapsed." Officer cited her for possession and did not arrest her. Trial court denied her motion to suppress the crack and her statements, concluding that the encounter was neither a stop nor a seizure. Court of Appeals reversed: she was seized in that encounter because the officer's statements transcended mere conversation and effected a seizure based on context and content.. A person would not feel free to leave when the officer accused her (as opposed to inquiring). (State conceded the officer acted with out reasonable suspicion of criminal activity to validate even a stop). Difference between an officer's "inquiry" (not a seizure) and an "accusation" (may be a seizure) determined by content and context of officer's statements.

State v Parker, 227 Or App 231 (4/01/09) Officers saw defendant walking in a parking lot where drug activity frequently occurred. Officer yelled out his window for defendant, who then stopped and talked to the officer. Officer asked for defendant's name and date of birth. He did not receive any documents from defendant. No one told defendant he was being checked for warrants, but he saw the other officer using his patrol-car computer after he gave officer his identifying information. He testified that he thought he was being checked for warrants. He was being checked for warrants. Defendant had prior arrests. Officers approached him on foot and asked to search him. He had drug paraphernalia, including a loaded meth syringe. Trial court denied his motion to suppress. Court of Appeals reversed: officer seized defendant when one asked him for his name and date of birth and when defendant observed the other officer use his computer. A reasonable person could conclude that he was the subject of a records check at that point and was not free to leave.

State v Shaw, 230 Or App 257 (8/12/09) Officers responding to a report of animal abuse encountered defendant leaving his house. Officer asked defendant to talk to them. On his front lawn, he consented. (Defendant did not argue that the location changed the character of the encounter). Officer asked defendant what he was carrying in his hands. Defendant said "tools," and showed them the tools, which included a hammer. Officer then asked if defendant had any other weapons. Defendant said he had a knife in his pocket. He consented to the officer's request to pull the butterfly knife out of his pocket. Defendant was a convicted felon. Trial court denied the motion to suppress the butterfly knife. Court of Appeals affirmed: (1) no stop by asking to talk to defendant on foot; (2) asking what was in defendant's hand was not a "seizure"; (3) asking defendant to show his hands <u>was</u> a "seizure" of his person, but it fell within the officer-safety exception to the warrant requirement because the officers supported their belief with reasonable suspicion that an immediate threat of serious physical injury could be present, due to the hammer; and (4) asking if defendant had any other weapons and then retrieving the butterfly knife after defendant consented to the search was not an exploitation because the seizure had been lawful.

4. On Bicycles

State v Astorga, 225 Or App 42 (2008), *rev den* 346 Or 361 (2009) Officer saw defendant on a bike approach a person in a parked car in a vacant lot. Officer walked over to defendant. (State conceded officer had insufficient reasonable suspicion of criminal activity at that point). Officer told defendant he liked to get to know people and they were free to leave. He asked for their names and dates of birth. Officer smelled alcohol on someone. Two officers were present, one in uniform with a badge and gun. Defendant heard officer making inquiries about him. Warrant check showed that defendant was on probation, so his drinking alcohol would be a probation violation. Officer asked if defendant had been drinking. Defendant said yes. Officer told defendant he was not free to leave and handcuffed him. Search incident to arrest produced meth. Trial court denied motion to suppress.

Court of Appeals reversed. This is a *Holmes* type-(b) seizure. Encounter became a "stop" when officer radioed defendant's name and DOB for a warrant check, and defendant heard that dispatch occur. (The stop itself was unlawful: the officer lacked reasonable suspicion to belief that defendant had violated probation or had been involved in any other criminal activity.). Defendant believed he was not free to leave, despite officer assuring defendant he was free to leave. Defendant's belief that he was not free to leave was objectively reasonable: defendant heard officer making inquiries about him, two officers were present, including one in uniform with a badge and gun, and defendant had been asked to allow himself to be searched.

Trial court did not make findings as to defendant's subjective belief, but correctly concluded that a stop had occurred. Court of Appeals assumed that trial court implicitly found that defendant did not believe subjectively that he was free to leave. Court of Appeals assumed that fact because the trial court decided in a manner consistent with its ultimate conclusion that stop had occurred.

State v Huggett, 228 Or App 569 (5/27/2009) Defendant was biking without a headlight at night. Officer recognized him as someone on probation he'd previously arrested for drugs. Officer stopped defendant, got his ID card, ran it for warrants, and asked if defendant had drugs. Defendant said no. Warrant check showed no outstanding warrants. Officer then asked to search defendant anyway. Defendant hedged but consented to a patdown and pocket-emptying. Officer inserted fingers into defendant's pocket and felt plastic. Defendant consented to officer removing the plastic that contained meth. Trial court denied motion to suppress. Court of Appeals affirmed: evidence properly suppressed because officer extended the lawful stop beyond the reasonable time required to write ticket and investigate when he asked defendant to consent to a search of his person. Under the totality of circumstances, he lacked objective reasonable suspicion of criminal activity beyond the traffic infraction (mere knowledge of prior conviction or probation status ≠ objective reasonable suspicion) despite having subjective belief to validate the pocket search. Remanded.

State v Radtke, 230 Or App 686 (9/09/09) Defendant rode her bike to a restaurant parking lot, where an officer had stopped another person who was waiting for her. The armed, uniformed officer motioned for defendant to come over, and in a normal tone, said, "Hey, can I talk to you for a second?" Defendant had bloodshot, glassy eyes with dilated pupils. Officer asked her for ID. Defendant told him her name and date of birth. Officer then asked if she had any drugs or weapons. She said no. Officer then asked to check her person for drugs. She said she did not want the officer touching her, but she showed the contents of her pockets to him. Officer saw her trying to conceal a bag of white powder. Officer took her wrist, the bag fell, he arrested her. Trial court denied motion to suppress. Court of Appeals vacated: asking defendant to come over was not a stop, but asking for ID (name and date of birth) and writing down information may be a stop; asking if defendant had drugs, weapons, or anything illegal and, after defendant said "no," asking for permission to search her may be a stop, depending on remand if defendant testifies that she felt she was free (not a stop) or was not free (a stop) to leave.

5. Incidental Encounters

State v Anderson, 231 Or App 198 (9/30/09) (en banc) Officers were executing a search warrant for drugs in an apartment. Someone told officers that two people (one was defendant) had approached the apartment, then walked away on seeing the officers, and were in a parked car. Three officers left the apartment, and questioned the two on a "hunch" that they had been at the apartment for drugs. One officer told the driver they were executing a search warrant, that he heard she had approached the door, and asked who she and her passenger (defendant) were. When asked, driver gave her name and date of birth. Defendant was asked to identify himself, and he gave a name that the officer knew was false, thus committing the crime of giving false information to a police officer. Two officers simultaneously then asked defendant and the driver to step out of the car. Defendant gave his ID card with his correct name, and he was arrested due to an outstanding warrant. Driver gave written consent to search her car. Meth was inside where the driver and defendant had been. Trial court denied defendant's motion to suppress, concluding that the officers did not "stop" defendant or driver until defendant gave a false name, then he was "stopped." Court of Appeals reversed: defendant already was seized when he gave a false name. Stop occurred when officer asked defendant for ID, because three officers approached the car from both sides, defendant already knew the officers were searching his acquaintances' apartment with a warrant for drugs, and then asked him for ID. If defendant believed his liberty was significantly restricted, that belief was reasonable: ordinary citizens would consider the officer's conduct offensive if the officer was an ordinary citizen.

Dissent (Edmonds, Landau, Wollheim, Sercombe) concluded that defendant was not seized when the officers approached the vehicle and asked for ID. A reasonable person, the dissent asserted, would consider asking for ID an insignificant intrusion. There was no coercive content or tone from the officer, the engine was not running, and no physical restraint was involved. Next, the officers did have reasonable suspicion to believe that defendant was involved in criminal activity after he gave the false name.

State v Billings, 231 Or App 404, rev withdrawn 347 Or 447 Officers were executing a search warrant for drugs in a house. A car driven by a known meth user drove by the house slowly. Defendant was a passenger in that car. Officers followed that car in an unmarked police car. Driver pulled into a driveway. Officers parked and approached the car, and the driver got out. Defendant remained seated in car and officer talked to her, asking for her ID. Officer called her ID in to his dispatch, and asked for consent to search her purse. Defendant asked why he wanted to search her purse. Officer told her she was with a meth user who drove slowly past a narcotics house. Officer asked for her consent to search the purse multiple times. Eventually she consented and evidence was seized. Trial court denied her motion to suppress.

Court of Appeals reversed: this case is similar to *Anderson* [discussed herein at page 17], but even more restrictive to defendant's liberty. Here, defendant was subjected to repeated requests for consent to search her purse. She also testified as to her subjective belief: "I felt like I was being arrested * * * because I couldn't leave." The trial court did not make a finding as to her subjective belief, thus the case was remanded for such findings, unless the state has demonstrated that defendant's consent to search was independent of any prior state illegality. Here, defendant has demonstrated the minimal factual nexus between the state's unlawful conduct and her consent, as established in *State v Hall*, 339 Or 7, 27 (2005). The state thus had the burden, but did not carry that burden, to prove that defendant's consent was independent of or only tenuously related to the prior illegality. Vacated and remanded.

C. Encounters in Other Non-Private Places

1. Public Parks

State v. Ashbaugh, 225 Or App 16 (2008) (en banc), *rev allowed* 346 Or 257 (2009) On an afternoon in a public park, officers saw defendant and her husband, both middle-aged, sitting under a tree. That aroused the officers' suspicions, because most of the other people in the park were either "older people or people with kids." Officer said, "Hey, you're not in any trouble; do you have some ID we can see?" Defendant's husband had a restraining order against him (apparently requiring him to avoid contact with defendant). Husband arrested. Officer then asked defendant, without reasonable suspicion of criminal activity, if she had anything illegal in her purse. She said no. Officer asked to search the purse in a relaxed, nonconfrontational tone. She consented. Meth in purse. Trial court denied her motion to suppress. State conceded at trial and on appeal that officers violated Article I, §9, when they asked for and retained her ID without reasonable suspicion of criminal activity, but contended that she had consented to the purse search.

Court of Appeals vacated, concluding that a person who knows she is being investigated during an encounter could reasonably believe, for that reason, that her freedom of movement has been restrained, thus the encounter could be a *Holmes* type (b) situation. (*Holmes* type (a) seizure does not involve defendant's subjective

belief. *Holmes* type (b) does.). When defendant challenged the validity of her consent to the search, the state must prove that consent was not tainted by an unlawful seizure, per ORS 133.693(4) and *Tucker*. Remanded: "The question before the trial court on remand is whether the second encounter between defendant and the officers constituted a seizure under the type (b) *Holmes* analysis." (Schuman, Haselton, Armstrong, Ortega, for majority).

(Brewer, Rosenblum, Wollheim concurring. Landau concurring separately. Edmonds and Sercombe dissenting.).

State v Nguyen, 230 Or App 490 (7/22/09) Officer observed beer cans strewn around 10 feet from teenagers in a public park near midnight. Officer ordered defendant and others to sit on the ground and not leave. Officer found brass knuckles on defendant. Trial court denied defendant's motion to suppress brass knuckles. Court of Appeals reversed: Beer cans strewn around 10 feet from teenagers in a public park near midnight ≠ reasonable suspicion of possession. Officer's order was an unlawful seizure.

State v Ruff, 229 Or App 98 (6/17/2009) Off-duty informant reported that a man had been sitting in park bushes swinging a samurai sword, then carrying it under his coat. Officer talked with the informant, then saw defendant get into a car with an unidentified object under his coat. Defendant told officer he was playing disc golf and used a sword to retrieve the discs. Officer asked for and took his driver's license. While warrant check was running, another officer found a 4-foot scabbard, defendant consented to a search of vehicle: more knives, rifle, hatchet, meth found. Patdown resulted in discovery of a meth pipe. Trial court denied motion to suppress. Court of Appeals affirmed: that request for ID was reasonable given officer's reasonable suspicion that defendant may be committing the crime of carrying a concealed weapon.

State v Simcox, 231 Or App 399 (10/28/09) An officer approached defendant in the early morning hours for being in a public park that was closed per city ordinance. Defendant said she did not know the park was closed, she was lost, and she'd been in court that day on her warrant that had been released. Officer asked her name and radioed her name in, and also asked if she had any weapons or contraband. She said no, officer asked to search her, she consented, and officer found drugs. Trial court denied defendant's motion to suppress because she was not stopped when the officer approached her and even if she had been stopped, the questions the officer asked were within the permissible scope of the stop. Court of Appeals affirmed: assuming defendant was stopped, the officer had probable cause to cite defendant for violating the city ordinance. Also, there is no authority supporting defendant's proposition that 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, distinguishing traffic stops at issue in *Kirkeby* and ORS 810.410 from non-traffic stops. (See discussion of *State v Kirkeby* herein).

2. MAX Train

State v Chambers, 226 Or App 363 (3/04/2009) Defendant passed out into his partly eaten take-out food on the MAX. Officer roused him with difficulty. Officer escorted him off of the MAX. Officer asked him for ID for a warrant check, and saw a concealed dagger on defendant. Trial court suppressed evidence (dagger) rejecting the state's statutory "community caretaking" argument. Court of Appeals affirmed: escorting defendant off the train was a seizure. And the "community caretaking" statute (ORS 133.033) allowing for officer-individual interactions is not an exception to the warrant requirement in a noncriminal, nonemergency situation. Under Article I, §9, to run the warrant check, officer needed (but did not have) reasonable suspicion that defendant had committed or was about to commit a crime. The legislative authority granted by the community-caretaking statute is subject to constitutional limits. The state must demonstrate that the officer's removal of defendant from the MAX was authorized by that statute *and* that the removal was constitutionally permissible. Here, it was not constitutionally permissible.

3. Hospital Emergency Rooms

State v Machuca, 231 Or App 232 (9/30/09) (en banc) Defendant taken to OHSU ER after a car wreck. Officer at OHSU quickly concluded that he had probable cause to believe that defendant had been drunk driving. Hospital personnel let the officer in to the ER room where defendant was snoring. The room had a very strong smell of alcohol. Defendant was hard rouse. Officer questioned defendant, read him his *Miranda* rights, and warned him of the legal consequences of refusing a blood test. Defendant consented to a nurse drawing his blood. (Unbeknownst to the officer, OHSU already had tested defendant's blood alcohol level, which was .274%). Trial court denied the motion to suppress all evidence from the hospital, concluding that defendant had consented (also concluding that the officer lacked exigent circumstances for to meet the probable cause + exigent circumstances exception to the warrant requirement). The Court of Appeals reversed: his consent was not voluntary. First, an ER is not a home; there is no constitutionally protected privacy interest in the ER, under *State v Cromb*, 220 Or App 315 *rev den* 345 Or 381 (2008) (privacy interests are recognized by association with private places where a person has the right to exclude others). Second, extraction of blood is both a seizure of an effect, and a search of a person, under *State v Milligan*, 304 Or 659 (1988). Here, under the totality of the circumstances, ORS 813.100, the consent was not voluntary. Defendant had just been arrested, was injured, was intoxicated, and a plurality in *State v Newton*, 291 Or 788 (1981) concluded that consent after being warned of the consequences of refusal is *coerced* consent and therefore ineffective to excuse the warrant requirement.

Dissent (Haselton, Armstrong, Landau, Schuman) concluded that the 28-year old, never-before-cited *Newton* was a nonbinding "barren branch." Moreover, *Newton* was wrong: the legislature requires officers to warn about the effect of refusing a test, and under the majority's reasoning, no consent could be constitutionally valid. Dissent would hold that the consent was voluntary.

4. Adult Bookstores

State v Backstrand, 231 Or App 621 (11/04/09) Officer went inside an adult bookstore to conduct a security check. He saw defendant with a girl. Both looked "young." A sign on the door said patrons had to be "18 or older" and a statute prohibits furnishing obscene materials to minors. The officer asked the pair how old they were. Defendant said 22. Officer asked them for ID. Both produced ID. Officer retained their IDs for 10-15 seconds while he called his dispatch to determine if the IDs were real. Before he received a response from dispatch, he returned their ID cards to them and said, "Have a good day," and left the store. Then dispatch called back and told the officer that defendant's license was suspended. Defendant and the girl left the store. Defendant drove away, so officer pulled them over and arrested defendant for driving while suspended. The trial court denied defendant's motion to suppress all evidence, concluding that the officer looked at the ID not to determine if defendant and the girl had done anything wrong, but rather whether the store owner was victimizing them by furnishing obscene materials to minors, therefore, the officer did not "stop" defendant.

Court of Appeals vacated in a fractured three-judge panel. Rosenblum for the lead opinion with Haselton, began by noting that it was undisputed that the officer did not suspect that defendant was involved in criminal activity (a stop must be justified by reasonable suspicion of criminal activity). Under the totality of circumstances, a reasonable person would not necessarily have believed that he was regarded solely as a potential victim, and rather he was being investigated for warrants or false IDs. In this brief encounter, a reasonable person could have viewed it as a stop. The issue for findings on remand is whether defendant subjectively felt free to leave (if so, conviction stands; if not, evidence that defendant's license was revoked must be suppressed). The evidence of defendant's ID itself (just the ID) properly was not suppressed because he voluntarily produced his ID card and gave it to the officer before the stop began, according to Rosenblum. (See discussion herein on the "independent source" doctrine as an exception to the exclusionary rule for constitutional violations.).

The concurrence (Haselton) agreed that the trial court erred in denying suppression but disputed the lead opinion's conclusion as to the timing of the "stop." The stop occurred earlier at the point when defendant produced and the officer took his license. This was an adult bookstore, defendant and the girl looked "young", the officer asked defendant how old he was, and when defendant said "22," the officer obviously did not believe that answer, because he then asked both for ID. The concurrence compared this case to *Zamora-Martinez* [discussed herein].

The dissent (Deits) agreed with the lead opinion that the stop did not occur until the officer contacted dispatch. For the reasons stated in the concurrence, defendant suffered no constitutionally cognizable detriment from the stop that requires suppression.

5. Public Schools

SER Juv Dep't of Clackamas County v MAD, 226 Or App 21 (2/18/2009) *rev allowed*, 347 Or 258 (2009) A high school student, with a history of lying, drug possession, and behavioral problems, reported to school principal that another student (youth) was trying to sell marijuana within 1000 feet of a school. Principal had no prior interaction with youth. Principal summoned youth to his office. Youth denied selling marijuana. Principal called youth's mother, who said youth probably was holding something. The principal told youth he had "reasonable cause" to search him. Principal asked youth to turn out his pockets, which revealed a bulge in his jacket pocket. Principal asked to see what was in the pocket. Youth refused, but consented to another school official unzipping the jacket, reaching in, and removing a bag. Marijuana, a pipe, and plastic bags were inside. Youth confirmed that he was trying to sell marijuana. Trial court denied the motion to suppress. On *de novo* review, Court of Appeals reversed on the consent issue and the probable cause + exigent circumstances exceptions. The state (school officials) failed to prove by a preponderance of the evidence that the consent was voluntary. Mere acquiescence to government authority without reasonable opportunity to make a choice ≠ voluntary consent. As for probable cause: intuition or suspicion ≠ probable cause. Here, the student informant was not credible, and the principal had no independent knowledge of youth's activities. (Exigency not addressed). Also, there is no reasonableness or balancing analysis under Article I, §9. A "search" occurs when a privacy interest is invaded, as here.

The Court of Appeals also noted that school officials may search and seize contraband that could pose a safety risk or interfere with education. But it cannot use evidence derived from those actions unless Article I, section 9, is satisfied. Here, it was not satisfied: no warrant, no exceptions.

D. Encounters: Houses, Curtilages, Motel Rooms

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).

1. Incidental Encounters

See ***State v Brown***, 228 Or App 197 (4/29/09), discussed herein at page 31.

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

State v Hawkins, 225 Or App 355 (1/21/09) Officers executed a search warrant, authorizing the search of "the entire house for any means of forgery," including

checks and ID. Defendant rented a bedroom in that house. He was not named in the search warrant. The officers handcuffed defendant and the others in the house while they searched the house. In defendant's bedroom, officers found meth on a mirror, a photo of defendant and his girlfriend, and a letter. Meanwhile, another officer gave *Miranda* warnings to defendant, who admitted the bedroom was his, and so was the meth and the mirror, and he had set it out to smoke it.

Trial court denied his motion to suppress the evidence (meth and his statements). Court of Appeals affirmed that ruling as to the meth, but reversed as to the statements. The search warrant authorized officers to search the house. The bedroom wasn't anything other than an ordinary bedroom. Defendant did not submit any evidence to show that his room was a separate unit (no separate kitchen, bathroom, etc), or that his room was locked, or that the door was even shut, or that he limited the other residents' access to his bedroom. Neither Article I, §9, nor the Fourth Amendment, required the officers to obtain a separate warrant to search defendant's bedroom. As to his statements, however, he made while handcuffed, the Court accepted the state's concession that the officers lacked reasonable suspicion to believe defendant had committed a crime or was a safety threat at that time. Handcuffing defendant thus was an unconstitutional seizure. His statements should be suppressed because they were obtained in violation of his Article I, §9, rights. "But for" the unlawful seizure, the officers would not have obtained his statements. The burden then shifts to the state to show that the evidence would have been obtained independently or that the evidence is attenuated. Here, the state did not meet that burden here. *Miranda* warnings, alone, do not attenuate an illegal stop.

State v Martinez, 230 Or App 492 (9/2/09) A probationer opened an apartment's front door for officers to investigate. Defendant was in a locked bedroom with a "wanted person" when officers arrived. Officer knocked, but the door was not opened immediately. Officers entered and handcuffed the wanted person. Defendant asked if she could use the bathroom to throw up. Officer said "wait a moment" and asked if she had any drugs. She consented to a search of her person that revealed nothing. Officer escorted her to the bathroom and watched her vomit. Officer asked her if she and the wanted person had not immediately opened the door because they were using meth. Defendant said they had been using meth that the wanted person gave her, and it made her sick. Trial court denied her motion to suppress her statements. Court of Appeals reversed: officer's questioning was an exploitation of an unlawful seizure. Officer seized defendant by/when blocking her and denying her permission to leave bedroom to vomit. Seizure of defendant was unlawful because no specific and articulable facts in the record could give rise to an inference of criminal activity to establish the requisite reasonable suspicion.

State v Zamora-Martinez, 229 Or App 397 (7/1/09) Police executed a search warrant on defendant's sister's residence. Forged immigration documents and forged social security documents were discovered. Immigration officer present called defendant's sister to pick up her children at the residence because all adults were arrested. Defendant showed up apparently in response to the officer's call to his sister. Officer wore a badge, identified himself to defendant, and asked defendant for ID. Defendant produced an Oregon ID card. Officer asked him where he was

from, he answered "Mexico." Officer asked for other ID. Defendant then produced two obviously forged ID cards. Trial court denied defendant's motion to suppress the two forged ID cards. The Court of Appeals reversed: the request for the first ID was permissible. The request for additional ID escalated the encounter into a seizure (which was unconstitutional) because a reasonable person would not have felt free to leave: officer never told defendant he was free to leave, or that he was not in trouble, defendant knew the officer was an immigration officer. Remanded under *Ashbaugh* for findings as to defendant's subjective belief as to whether he felt free to leave.

2. Warrantless Entry to Arrest

State v. Morgan, 230 Or App 395 (8/19/09) Officer received a call that two people were loading copper wire into a car parked at a dilapidated Portland hotel in a high-crime area. Officer in uniform in a marked patrol vehicle saw the described car and approached them. The two immediately walked toward the motel, leaving the car door open. Officer yelled at them, but they went into the motel room and shut the door. In the car, the officer saw stripped copper wire without sheathing, which he understood to be common in wire theft. He believed he had probable cause to arrest them. Officer knocked on the door, it opened a bit, and a lawyer's business card slid out. Someone inside told the officers to leave, then yelled obscenities. Another officer, from behind a 6-foot fence, observed someone trying to escape out the bathroom window, and radioed the officer at the front door with that information. Officer at front door believed an escape was occurring, and kicked in the door. Inside, the officers found a large quantity of copper wire, spool, wire strippers, and bolt cutters, some stamped "PGE." Officers called PGE, who told them their wire and tools had recently been stolen from Beaverton. Officers arrested all 8 people in the room, which was registered to defendant. Trial court denied the motion to suppress, concluding first that the observations outside the room gave subjective and objective probable cause to believe the crime of metal theft was in progress. Second, the warrantless entry to the motel room was justified by probable cause and exigent circumstances (escape in progress confirmed by officer's observation). Court of Appeals affirmed on both bases, further noting that the officer would not have been able to stop the escape due to a 6' barrier. (The Court expressly did not decide whether exigent circumstances would justify entrance to a residence when officers are positioned to guarantee that no escape is possible.).

3. Lawful Vantage Point

> If police observe an item from a lawful vantage point, no "search" occurs because no privacy interest is invaded. *State v. Ainsworth*, 310 Or 613, 617 (1990). Police observe from a lawful vantage point if an individual expressly or impliedly consents to it. A person does not impliedly consent to police conduct that violates social or legal norms of behavior. *State v Campbell*, 306 Or 157, 170 (1988).

State v Malvern, 230 Or App 370 (8/19/09) During a "flyover," officer observed marijuana plants on defendant's property. The next week, without a warrant, officers

opened a wire gate through a barbed-wire fence and entered his 8-acre property to investigate. Officers knocked on the door and called to defendant, who was not on the property. So the officers then began randomly meandering around the property. They found a greenhouse not observable from the road. They peeped inside and saw several pot plants. Defendant was arrested. Trial court denied motion to suppress marijuana evidence. Court of Appeals reversed: Officers' conduct = trespass ≠ lawful vantage point. There is no factual basis to imply that defendant consented to any intrusion beyond his front door.

State v Pierce, 226 Or App 336 (3/04/09) (en banc) At 1:00 a.m., officer received complaint for noise disturbance at defendant's friend's house. Officer parked his car, heard people yelling and screaming behind the house, and believed that the crime of disorderly conduct was ongoing. Officer walked up a 30-foot driveway, bypassed the front door, walked to a chain-link fence and gate at the rear corner of the house. From that vantage point, the officer saw into the backyard. He saw defendant and the friend and identified himself as a police officer. He saw defendant pull marijuana plants from two cups and submerge them in a mudpuddle. Officer arrested defendant, read him *Miranda* rights, obtained his consent to search the home, where police found another marijuana plant and other evidence. Defendant moved to suppress all evidence as the product of an unlawful search of the friend's backyard, specifically that the officer's entry into the curtilage of the friend's house was a "search." The trial court denied the motion to suppress. On appeal, the state conceded that the officer did "search" the residence when he walked up the driveway, but argued that the observations were justified by probable cause and exigent circumstances. Court of Appeals reversed: loud people in the middle of the night may have been irritating, but it did not rise to the level of a constitutionally cognizable exigency.

Dissent (Wollheim, Edmonds, Ortega) would hold that defendant sacrificed his right of privacy by making loud noise late at night. Under normal circumstances, defendant and his friend would not have implicitly invited the officer to enter the driveway and walk to the backyard. "However, defendant engaged in unreasonably loud and disruptive behaviors in the backyard of his friend's Medford house at 1:00 a.m., creating noises loud enough for the officers to have heard the noises from the street in front of the house. Specifically, the trial court found that those behaviors were sufficient to establish probable cause to believe that people were engaged in disorderly conduct. Accordingly, the trial court stated, 'under *these circumstances*, I do find that it was reasonable and justified for the officers' to so enter the curtilage. (Emphasis added.) The trial court was correct."

Majority responded: The state conceded that a "search" occurred. The state has the burden of proving an implicit invitation to public entry sufficient to overcome the presumption of trespass. It could not, on these facts. The dissent basically concludes that if a person engages in sufficiently obnoxious behavior within a residential curtilage, he effectively waives the constitutional protections against warrantless trespassory invasions. The dissent, according to the majority, also conflates consent with notions of reasonable foreseeability.

State v Stokke, 231 Or App 387 (10/21/09) Hotel employees opened a safe that a patron had left in his room after checkout time. They found drugs, sexually explicit material, and identity-theft evidence. Employees told a police officer what they had found, showed the officer photos of the room and the contents of the safe, and left the safe's door open. The officer reached into the safe and removed the items without a warrant. Trial court denied defendant's motion to suppress. Court of Appeals reversed: a search by a private actor does not render a subsequent police search not a "search" for constitutional purposes. When the officer moved and examined the contents of the safe without a warrant, he conducted a search that did not meet any exceptions to the warrant requirement. There was no evidence in the record that the contents of the safe – including the drugs - were in plain view before the officer removed the contents from the safe.

E. Warrants

State v Bostwick, 226 Or App 57, *rev den* 346 Or 589 (2009) Affidavit supporting search warrant was sufficient under ORS 133.545(4), which codifies the Fourth Amendment requirements for search warrant affidavits under *Aguilar v Texas*, 378 US 108 (1964) and *Spinelli v United States*, 393 US 410 (1969), because the reliability of the unnamed informant in the affidavit at issue can be established by independent corroboration, and the information was detailed and based on personal observation. The trial court properly denied defendant's motion to suppress evidence discovered in his home.

State v Chamu-Hernandez, 229 Or App 334 (7/01/09) Defendant asserted that a search warrant was void *ab initio* because it did not conform to statutory requirements, and therefore the warrantless search was *per se* unreasonable, and under Article I, §9, evidence should have been suppressed. Court of Appeals held that search warrant did not violate any statutory requirements and therefore did not address the remedy.

F. Exceptions to Warrant Requirement

Generally, warrantless searches are *per se* unreasonable unless they fall within one of the few "specifically established and well-delineated exceptions" to the warrant requirement. *State v Davis*, 295 Or 227, 237 (1983) (entry into and search of motel room). "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).

1. Probable Cause to Arrest

State v Vasquez-Villagomez, 346 Or 12 (2/26/2009) State directly appealed to Supreme Court after trial court granted defendant's motion to suppress evidence in a capital murder case. The Supreme Court reversed and remanded under both Article I, §9, and the Fourth Amendment. The trial court erred when it concluded that police did not have probable cause to arrest defendants without a warrant.

The Supreme Court noted that the Legislature gave police officers authority to arrest a person without a warrant if the officer has probable cause to believe the person has committed a felony. ORS 133.310(1)(a). Legislature defined probable cause to arrest as a substantial objective basis to believe that it is more likely than not that an offense has been committed by the person being arrested. ORS 131.005(11).

Objective and subjective components of the probable cause determination under Article I, §9, are based on the totality of the circumstances. *State v Owens*, 302 Or 196, 204 (1986). In this case, officers arrested two defendants who fit the descriptions of a pair involved in two murders. The descriptions were based on race, gender, age, height, and weight, and that the shooter was taller than his companion. Here, the legally significant factors in determining that the police did have probable cause to arrest the pair is in the similarities between the descriptions and the pair's appearances, coupled with the series of corroborating circumstances, which the Court described in the opinion.

Unlike the Oregon Constitution, under the Fourth Amendment, the arresting officer's state of mind is irrelevant to the probable cause analysis. Under the Fourth Amendment, a warrantless arrest requires objective probable cause, determined by the totality of the circumstances and a reasonable conclusion drawn from facts known to the officer when he makes the arrest. An arrest is reasonable if there is probable cause to believe that defendant is committing, or has committed, a criminal offense.

State v Edmiston, 229 Or App 411 (7/01/09) During a traffic stop, an officer saw a small, clear, plastic baggie about one inch by one inch in size. He could not see what was inside it. The officer seized it. It contained meth residue. The officer testified that in his experience and training, he had seen packaged meth hundreds of times, and meth for personal use is almost always packaged in one inch by one inch baggies. Trial court denied defendant's motion to suppress the meth. Court of Appeals reversed. Several factors to evaluate probable cause to arrest, or to search, based on a container that could contain drugs include: (1) the nature of the container itself; (2) the context in which the container was found; and (3) the knowledge and experience of the investigating officer. Here, the officer's view of the baggie together with his experience and training is insufficient to establish probable cause that defendant possessed controlled substances. The fact that this type of baggie is commonly used to package meth does not determine whether this particular baggie contained anything, much less controlled substances. Here, the officer did not observe the contents of the baggie, or any furtive gestures, or signs of intoxication or drug use, or drug paraphernalia, or evasiveness by defendant.

2. Exigent Circumstances

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).

See ***State v Pierce***, 226 Or App 336 (3/04/09).

See ***State v Machuca***, 231 Or App 232 (9/30/09).

See ***SER Juvenile Dep't of Clackamas County v MAD***, 226 Or App 21 (2/18/09) *rev allowed*, 347 Or 258 (2009).

See ***State v Morgan***, 230 Or App 395 (8/19/09) (exigent circumstances justified warrantless entry of motel room).

3. Search Incident to Lawful Arrest

> Under Article I, §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 Warren, 221 Or App 514 (2008), *rev denied*, 346 Or 66 (3/04/09) Reversing a pretrial order suppressing evidence, noting the three justifications for search incident to arrest in *Hoskinson*, and that "a search may be considered to be 'incident to arrest' even though it preceded the arrest.

4. Emergency Aid

> "Emergency Aid" exception 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).

State v Pierce, 226 Or App 336 (2009) (en banc) At 1:00 a.m., officer received complaint for noise disturbance at defendant's friend's house. Officer heard people yelling and screaming behind the house, and believed that the crime of disorderly conduct was ongoing. Officer walked up a 30-foot driveway, bypassed the front door, walked to a chain-link fence and gate at the rear corner of the house. From that vantage point, the officer saw into the backyard. He saw defendant pull marijuana plants from 2 cups and submerge them in a mudpuddle. Officer arrested defendant, read him *Miranda* rights, obtained his consent to search the home, where police found another marijuana plant and other evidence. Defendant moved to suppress all evidence as the product of an unlawful search of the friend's backyard, specifically that the officer's entry into the curtilage of the friend's house was a "search." The trial court denied the motion to suppress. On appeal, the state argued that the officers were justified in conducting the search based on the need to give "emergency aid." Court of Appeals reversed: nothing in the record shows that

the officers had a good-faith belief, let alone reasonable grounds to believe, that the noise from the backyard called for their immediate assistance to protect life.

5. Officer Safety

> Article I, §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) During Encounters or Stops

State v Amell, 230 Or App 336 (8/12/09) Officer stopped defendant for speeding. Defendant said his driver license was at home, but officer checked and it was suspended. While one officer wrote citations, a second officer saw defendant digging in the car's console. Defendant exhibited no hostility or belligerence. Officer asked what was going on, defendant said nothing was going on, officer asked to check the car for anything illegal, defendant consented. Officer asked or ordered defendant to leave the car. Patdown of defendant produced a 4" butterfly knife and cocaine. State argued that no warrant was required for the patdown based on the officer safety exception. Trial court denied motion to suppress. Court of Appeals reversed: defendant's digging movements ≠ objective reasonable suspicion that defendant posed an immediate threat to officer safety.

State v Guggenmos, 225 Or App 641, *rev allowed* 347 Or 258 (2009) Officers were at a house where "wanted persons" were suspected of "narcotics activity." One person consented to a look-through of the house. Police saw defendant and another person running down the stairs. Officer demanded that they stop. They briefly did so, ran again, then confronted another officer at the back door. They stopped. Officers ran a warrant check on defendant. One officer returned from outside to conduct a "protective sweep" while his fellow officer was in the house. Meth was in plain view in defendant's bedroom. Defendant had an outstanding warrant. Officer told defendant they found meth in his room. He consented to a further search that revealed no more evidence. Trial court denied the motion to suppress meth and defendant's statements. Court of Appeals affirmed. Defendant was stopped when the officers ordered him to stop. To justify that stop, officers needed reasonable suspicion to believe defendant was engaged in criminal activity. Fleeing alone is insufficient, just vague allegations of "wanted persons" being in the house is insufficient, nor is officer's prior experience that an occupant may have been involved in narcotics activity in the past. But here, under the totality of all those circumstances, the officers had reasonable suspicion to believe defendant was engaged in criminal activity.

Regardless, however, of the lawfulness of the seizure of defendant's person, the warrantless search of his room was not justified. A third person can consent if s/he

has common use, access, or control of the searched premises, but here the state failed to prove that the officer had valid consent to enter defendant's room.

The "officer safety exception" allows for a "protective sweep" of premises, as a search incident to arrest. To justify that exception, officer must articulate specific facts that would lead a reasonable police officer to believe there was an immediate danger to himself or others. Here, officer was outside the house when he decided to reenter and sweep. He was not in immediate danger. Obtaining a warrant, however, was not an option, because a third officer remained in the house and possibly was in danger. The officer safety doctrine permits a sweep if there is a reasonable suspicion of an immediate danger to others. The officer reentering the house saw meth in plain view during his cursory sweep, and that was lawful. The Court does not "uncharitably second guess" officers' judgment. The Court of Appeals affirmed on that ground (officer safety, not consent).

State v Rudder, 347 Or 14 (9/17/09) Defendant was stopped by officers as he walked down a street, away from an activated burglar alarm. Officers saw a bulge in his pants pocket and asked for consent to search the pocket. Defendant refused to consent, and began walking away. Officers ordered defendant to stop and tried to pat him down, but he turned away whenever officers tried to touch his pocket. Officers handcuffed him, pulled his pocket open, shined a light onto it, and pulled out a container of drugs. Trial court denied the motion to suppress, concluding that the stop was lawful, based on reasonable suspicion that defendant was engaged in criminal activity, and the search of his pocket was lawful as an "officer safety" exception to the warrant requirement. Court of Appeals reversed: stop lawful but search of pocket was not.

Supreme Court unanimously affirmed the Court of Appeals' decision. The "officer safety" doctrine emphasizes reasonableness and affords deference to police officers, but the doctrine cannot excuse protective measures that are disproportionate to any threat that the officers reasonably perceive. A patdown of defendant's clothing (rather than shining the light into the pocket) would have been constitutionally permissible, but something more than reasonable suspicion that defendant was armed was required to justify a direct intrusion into his clothes.

See ***State v Shaw***, 230 Or App 257 (8/12/09).

See ***State v Morgan***, 226 Or App 515, *rev allowed*, 346 Or 363 (2009).

(b) At Residences

State v Foster, 347 Or 1 (9/17/09) Sheriff was serving a restraining order at defendant's home. One officer had been to that home several times before. He testified that he had been met with violent armed resistance from up to 10 or more people staying at that home. When that deputy and 3 others went to defendant's house, he positioned himself next to a window to keep an eye on the residents inside. Through the window, he saw defendant loading a pipe with meth. He reported that to another officer, then entered the residence, seized the pipe and

drugs, and arrested defendant. Defendant moved to suppress that evidence. Trial court denied the motion on "officer safety" exception to the warrant requirement. The Court of Appeals reversed. The Supreme Court unanimously reversed the Court of Appeals and affirmed the trial court's decision: the officers had articulated sufficient specific facts to support reasonable suspicion that the occupants posed a threat, and the officer posted at the window was a reasonable precaution. The officer's background knowledge was not "stale," either.

State v Hitchcock/Winters, 224 Or App 77 (11/19/2008) Officers were at a house to execute an arrest warrant. During a "protective sweep", one defendant (not the subject of the warrant) was found in the garage. Officers handcuffed him. The other defendant was in a bedroom, and was ordered into the living room without being handcuffed. That defendant went to get her ID; an officer followed her to the bedroom, seated her therein, and she consented to a search that produced drugs and drug items. Both defendants moved to suppress drug evidence. Trial court denied the motions. Court of Appeals reversed: defendants' detention was justified only for the time necessary to allay concerns of officer safety. That period ended when the arrests were made and the house swept and surveyed. There was no evidence of hostility or danger from either defendant. Their detention continued after the protective sweep and after the subject was arrested, thus it could not be justified under officer safety exception.

See ***State v Shaw***, 230 Or App 257 (8/12/09).

6. <u>Inventory</u>

> Under Article I, §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). State has the burden of proving the lawfulness of an inventory. *State v Marsh*, 78 Or 290, 293 (1986).

State v Bostwick, 226 Or App 57, *rev den* 346 Or 589 (2009) Defendant's pickup impounded then inventoried under City of Aumsville's policy. A loaded handgun was in the locked passenger compartment of the pickup. The inventory policy required the officer to inventory "the passenger and engine compartments of the vehicle." Defendant moved to suppress the gun, contending that his locked passenger compartment was a "closed container," which the inventory policy did not permit. Trial court denied his motion to suppress. Court of Appeals affirmed: the search of the locked passenger compartment was not a search of a "closed container" or an open container – the policy itself distinguished between "compartments" and "containers."

State v Brown, 229 Or App 294 (7/11/09) Officer's inventory of an arrested person, including his pockets and wallet, before placing him in a police car, was consistent with Washington County's inventory policy. The policy itself is valid, in

that it was enacted by a politically accountable body, and it confers no discretion on officers. (In a footnote, the Court of Appeals noted that a trial court may take judicial notice of county ordinances – inventory policies – and an appellate court may, too, for the first time on appeal.). Court of Appeals affirmed trial court's denial of defendant's motion to suppress.

State v Dean, 227 Or App 342 (4/8/09) Officer inventoried vehicle, found a folding digital scale inside, opened the scale, and found white meth residue in it. Defendant confirmed that that was meth in the scale. Officer also found a closed metal tin. Defendant consented to opening the tin, which contained more meth and a needle. Trial court denied motion to suppress. Court of Appeals reversed: The inventory policy at issue did not authorize opening the scale. State conceded that officer opening the scale without a warrant violated Article I, §9.

State v Kay, 227 Or App 359 (4/08/09) Meth found during inventory of a backpack in an automobile trunk. Trial court denied motion to suppress. Court of Appeals reversed. State conceded that Newport Police Department's inventory policy -- permitting officers to open all closed containers -- was not sufficiently limited in scope, so it did not satisfy Article I, §9.

State v Kountz, 229 Or App 538 (7/15/09) A car was being impounded after the driver was arrested. Defendant was a passenger. She was not arrested but stepped away, out of sight, from the car while officer inventoried its contents, per Portland's inventory policy. A purse was on the passenger-side floor, within the driver's reach. Officer inventoried the purse. Meth was inside. When defendant returned, officer asked defendant if the purse was hers and if he could search it. She consented. She moved to suppress the meth, arguing that Portland's inventory policy does not allow opening an unarrested person's purse. Trial court denied the motion. Court of Appeals affirmed: under the policy, a purse may be opened to inventory its contents if it is in the arrested person's "possession." The purse was within the driver's "possession" - readily accessible in his immediate reach - when he was arrested.

State v Sparks, 228 Or App 163 (4/29/2009) Defendant was a passenger in a vehicle being impounded. Officer inventoried the vehicle, per City of Roseburg's inventory policy. Defendant was outside the car with her purse. She refused to let the officer search it. Officer took the purse anyway and searched it, believing that the inventory policy required him to search everything that was in the vehicle when it was stopped. Meth was bindled inside the purse. A coin purse also was inside the larger purse. Officer opened the coin purse and found marijuana inside. The trial court denied the motion to suppress. On appeal, the state conceded that the purse search was unlawful. The Court of Appeals agreed: the purse search violated the inventory policy because the purse was outside the car; the meth should have been suppressed and that is reversible error. Even if the inventory policy allowed the purse search, the search would still be invalid as an inventory because the occupant removed the purse from the vehicle. An inventory is an exception to the warrant requirement. Inventories serve three purposes: (1) protect the owner's property; (2) reduce false theft claims against the police department; and (3) protect from dangers

such as explosives in a car. Searching a purse outside a vehicle serves none of those purposes.

The Court of Appeals held that the marijuana from the coin purse was erroneously admitted, but that was not prejudicial. Defendant was charged with possession with intent to deliver. Defendant had testified that she possessed 5 bags of marijuana, she liked to keep different varieties separately, she planned to smoke it, and she did not like to get high alone. Thus, even if the evidence of the marijuana itself had been suppressed, the jury heard the testimonial evidence directly from defendant. Reversed and remanded.

State v Williams, 227 Or App 453 (4/15/2009) Vehicle impounded then inventoried under Prineville Police Department's inventory policy. Meth found in a closed eyeglasses case. Trial court denied motion to suppress. Court of Appeals reversed: the PD's inventory policy allowed officers to open closed containers only if they may contain items of value. Prineville city ordinance, however, that authorized the PD's policy, was broader than the PD's policy – it allowed officers to open *all* closed containers. PD's policy held invalid because it conflicted with the city ordinance, which was overbroad violating Article I, §9, because it allowed all closed containers to be opened without limitation.

7. <u>Consent</u>

> A warrantless search is reasonable under Article I, §9, when it falls into a recognized exception to the warrant requirement. Consent is one such exception. 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 any limits to the scope of consent were complied with. *State v Weaver*, 319 Or 212, 219 (1994).

State v Quale, 225 Or App 461 (1/28/09) Scope of defendant's consent to allow officer to search him "for weapons" did not extend to allow officer to open a small piece of foil, because there is no evidence that a reasonable person would believe a small piece of foil might contain a weapon. Trial court had denied motion to suppress the opium in the foil. Court of Appeals reversed as to the opium.

State v Rosa, 228 Or App 666 (5/27/09) Police had been observing defendant in her car talking to an informant, who said he saw at least two ounces of meth in her car. The next day, officer stopped defendant for traffic infractions. In plain view, a "Jesus Malverde" medallion (which the officer believed to be a cultural icon related to narcotics trafficking in the Hispanic community) hung from the rearview mirror. Defendant had an out-of-state driver license. After some talk, the officer asked defendant if she had drugs or weapons. She said no. Officer asked to search her car for drugs or weapons, she consented. In plain view, officer saw a bindle of white powder. Officer arrested defendant, and she said the powder was her cocaine. Officer asked if she had other ID. She said her Oregon driver license was at her apartment and offered to get it. Officer said she was under arrest, and he would go with her to get it only if she allowed him to, and she was not required to consent.

She consented. She invited him in to take a brief look around for narcotics, and gave him her keys. She told the officer her license was in her purse in her bedroom, then consented to a purse search, but no license was inside. She then told the officer to look in her dresser drawer, where the officer found a license, and plastic sandwich bags with meth residue on them. Officer told defendant he thought she had drugs, and asked to search her apartment's "cracks, crevices, pockets, places where narcotics-related items" could be concealed. Officer told defendant she did not need to consent, and she could require him to apply for a search warrant with a judge. She said go ahead and search. Officer found and opened a wall safe. Meth was inside. Defendant confirmed it was meth.

Trial court denied the motion to suppress. Court of Appeals affirmed. (1) the stop for infractions was lawful. An officer's motives for an otherwise justifiable stop are not relevant to the Article I, § 9, analysis. "Oregon law does not prohibit pre-text stops." (2) Officer's reasonable suspicion to request consent to search the car was valid. Reasonable suspicion may be based on "reasonable inferences drawn from the circumstances and based on an officer's experience." The 24-hour-old drug information (meth in car) was not stale. (3) The scope of defendant's consent to search her car, her apartment, and her wall safe, was not exceeded, based on the interchange between the requestor and consentor. (The officer's observation of the Jesus Malverde medallion was not a part of the reasonable suspicion calculus and the Court of Appeals noted that including it in the calculus would raise concerns about profiling.).

See ***State v Amador***, 230 Or App 1 (7/29/09).

See ***Juv Dep't of Clackamas County v MAD***, 226 Or App 21 (2/18/09), *rev allowed*, 347 Or 258 (2009).

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

See ***State v Machuca***, 231 Or App 232 (9/30/09).

8. <u>Abandonment</u>

> 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, 228 Or App 197 (4/29/09) Officer responding to hotel clerk's call about suspected credit-card fraud found three people in the room on a bed and a meth pipe on the floor. All three said they had not rented the room. Defendant said she had no ID. Manager asked the three to leave. Officer asked if anyone had personal property in the room. Defendant claimed only flip flops and specifically disclaimed a Lancome bag and a Nike bag next to the flip flops. Officer asked if the two bags belonged to anyone, and if anyone needed them, they should take them, as the room would be locked when they left. No one took the Lancome and Nike

bags. The person who rented the room returned, disclaimed ownership of the 2 bags, said "Sheena" owned the Lancome bag, and consented to a room search, which revealed evidence of identity theft, as did the Lancome bag. Defendant (Sheena) indicted on 22 counts of identity theft. The trial court granted defendant's motion to suppress evidence from the two bags. Court of Appeals affirmed: Defendant's conduct and statements did not demonstrate relinquishment of all possessory or privacy interests. There is no evidence of intent to permanently disclaim interest, the motel room was not a public place, the officer told the 3 the room would be locked, officer did not ask for defendant's consent to search the room or the bags, and defendant had no reason to believe her bags would be searched if she did not assent an interest in them.

9. Noncriminal administrative searches

See ***SER Juv Dep't v MAD***, 226 Or App 21 (2009) *rev allowed*, 347 Or 258 (2009). Whether the school's administrative policy would allow the school to search a student was not argued, and was not on the record, so that possible exception to the warrant requirement was not addressed.

10. Mobile Automobiles

Automobiles may be searched and seized without a warrant 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). 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).

State v Fuller, 230 Or App 239 (8/05/09) Trial court denied a defendant's motion to suppress drug evidence found in an apparently non-mobile vehicle. On appeal, the state conceded that the automobile exception to the warrant requirement did not justify the search. The Court of Appeals reversed, parenthetically citing *State v Kock*, 302 Or 29, 33 (1986) (automobile exception does not apply to a vehicle that is parked, immobile, and unoccupied when the police first encounter it in investigation of a crime).

G. Remedies

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).

Oregon's exclusionary rule for Article I, §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, §9, rights. *State v Hall*, 339 Or 7, 24 (2005).

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.

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.")

State v Backstrand, 231 Or App 621 (11/04/09) "The 'independent source' exception to the exclusionary rule applies when the police 'did in fact acquire certain evidence by reliance upon an untainted source[.]" (Quoting Wayne R. LaFave, 5 *Search and Seizure* at 241 (3d ed 1996)). Whether evidence was available from an independent source is irrelevant. *Held*: vacated and remanded.

State v Silbernagel, 229 Or App 688 (7/15/09) Defendant refused a breath test for DUII. The officer told him he could apply for a search warrant for a blood sample, that could be extracted forcibly. (That statement was incorrect, in that police may only forcibly extract blood if the driver consents or is unconscious.). Defendant took the breath test. The trial court granted defendant's motion to suppress. The state appealed. Court of Appeals reversed: ORS 136.432 precludes courts from excluding evidence obtained in violation of any statutory provision, unless exclusion of the evidence is required by the state or federal constitutions, a rule of evidence on privileges or hearsay, or the rights of the press. Defendant did not present a constitutional argument at trial (which defendant presented on appeal), thus the Court of Appeals did not consider any constitutional arguments.

SER Dep't of Human Services v WP, 345 Or 657 (2/05/2009) Article I, §9, does not require exclusion of evidence used in a juvenile dependency proceeding, even if evidence was seized in violation of a father's Article I, §9 rights (which is not decided herein). Fourth Amendment does not either, under balancing test (likely social benefits of excluding unlawfully seized evidence weighed against the likely costs). The proceeding does not involve any state effort to punish the parent; it does not implicate father's liberty interest in remaining free from state custody. Welfare of the child is the court's primary concern. Although any restriction by the state interferes with father's control over the upbringing of his child, in a juvenile dependency proceeding, the restriction is temporary and conditional.

SER Juv Dep't of Clackamas County v MAD, 226 Or App 21 (2/18/2009) *rev allowed*, 347 Or 258 (2009) Article I, §9, applies to searches of high school students on school property. In this case, evidence seized during a search violated Article I, §9. Exclusionary rule applies in this case to juvenile delinquency proceeding.

II. PUNISHMENT

A. Cruel and Unusual; Proportionality - Article I, §16

> **"Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense."**
>
> "Nothing in the records of the constitutional convention indicates that, when the framers of the Oregon Constitution adopted the proportionality requirement, they had any different concerns than those which led Blackstone and later the framers of state constitutions from Pennsylvania to Indiana to emphasize the need for proportionality in sentencing. We therefore assume that those same concerns animated the Oregon framers." *State v Wheeler*, 343 Or 652, 667 (2007). "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)." *Id.* at 668. "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.

State v Rodriguez/Buck, 347 Or 46 (9/24/09) Defendant Rodriguez stood behind a 13-year old boy – a student – in a room with 30-50 other people, and brought the back of the boy's head into contact with her clothed breasts for about 60-90 seconds. Defendant Buck repeatedly (3-4 times) touched a 13-year old girl, while sitting beside her as she was fishing, by putting the back of his hand up against her clothed buttocks and keeping it there without removing it, after she told him not to, then he brushed dirt off of her shorts with two swipes of his hand.

Jury convicted Rodriguez, and a judge convicted Buck, of first-degree sexual abuse (touching for a sexual purpose). That is a Measure 11 crime with a mandatory 75-month sentence. The trial judges held that 75-month sentences would violate the proportionality provision of Article I, §16, and imposed sentences under the Oregon Sentencing Guidelines (16 months for Rodriguez and 17 months for Buck).

State appealed. Court of Appeals held that the trial courts should have imposed the mandatory 75-month sentences, as the sentences did not shock the moral sense of all reasonable people.

Supreme Court affirmed defendants' convictions, but reversed the Court of Appeals' decision on sentencing. A punishment is constitutionally disproportionate if it "shocks the moral sense" of reasonable people. 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. Here, there "was no skin-to-skin contact, no genital contact, no penetration, no bodily injury or physical harm" and no other post-Measure 11 first-degree sex abuse case involved such "limited" touchings. Measure 11 imposed a mandatory sentence on these defendants that is more than twice as long as the maximum sentence that could have been imposed on these defendants under guidelines. As to the penalties for related crimes, these defendants would have received the same sentences under Measure 11 if they had "anally sodomized" their victims or had "engaged in sexual intercourse with the children that they briefly touched." As to a defendant's criminal history, "Measure 11's mandatory 75-month sentence for first-degree sexual abuse applies even if the defendant has had no prior criminal charges". Here, the trial courts each correctly concluded that the mandatory Measure 11 sentences of 75 months would violate the proportionality clause of Article I, §16, as applied to these defendants.

De Muniz, Gillette, Walters concurred in part, dissented in part. Only the first of the three factors the majority identifies as relevant to the proportionality determination is relevant. The judiciary, applying the other two, oversteps its power. The 75-month sentences would not violate the proportionality clause, because the legislature (and the people through the initiative process), reasonably could impose a zero-tolerance policy toward people who prey on children, and could conclude that first-degree sex abuse with children under 14 years old warrants 75 months imprisonment. The Oregon Supreme Court only once before has invalidated a sentence as "excessive" in an as-applied challenge in *State v Ross*, 55 Or 450 (1909) (that defendant convicted of larceny was fined $500K + 5 years and additional time not to exceed 790 years). In contrast, six years and 3 months here is not disproportionate. Western society has long criminalized sexual contact with children, citing laws in Medieval Europe, English law since the 13th Century, American laws since the early 19th Century, and Oregon's Deady Code (1845-64). The concurrence/dissent traced Oregon's history of the crime and sentencing for that crime, and would hold that the 75-month sentences are not disproportionate to this crime or these facts.

State v Alwinger, 231 Or App 11 (9/23/2009) Proportionality of a statutory 300-month sentence for sexual penetration of a 3-year old is not measured by comparison to sentences for *different* crimes, as *Wheeler* explained. Rather, the measure is whether the sentence is proportioned to *the offense*. Defendant did not explain why a 300-month sentence for *that* crime would shock the moral sense of reasonable persons. Sentence does not violate Article I, §16. It does not violate Eighth Amendment, either: although the Eighth Amendment does not have a separate proportionality guarantee, in 1983, in *Solem v Helm*, a plurality of a starkly divided United States Supreme Court concluded that the Eighth Amendment has only a "narrow proportionality principle" that emphasizes deference to legislative policy choices. Sentence affirmed.

State v Baker, 346 Or 1 (2/12/09) Statute allowing a defendant to plead guilty and appeal his sentence as "cruel and unusual" allows him to appeal sentence as unconstitutionally "disproportionate." Defendant pleaded guilty to numerous counts of incest and sex abuse. The court sentenced him to 180 months in prison for the sex abuse, plus 30 months for incest to be served concurrently. When he appealed, the state moved to dismiss the appeal, noting that ORS 138.050(1) permits a defendant to appeal from a guilty plea for two reasons: the sentence exceeds the maximum allowable by law or the sentence is unconstitutionally cruel and unusual. The state argued that defendant's claim of unconstitutional disproportionality is not within either of those two grounds for appeal. The Court of Appeals agreed and dismissed the appeal. The Oregon Supreme Court reversed and remanded. When (in 1985) the legislature enacted that statute providing for two grounds for appeals, it would have regarded claims under Article I, §16, and the Eighth Amendment both to include challenges to the *length* of a sentence as part of the *manner* of a punishment under the "cruel and unusual" clauses. That is because the legislature enacted the current version of that statute two years after the United States Supreme Court reaffirmed in *Solem v Helm*, 463 US 277 (1983), that the Cruel and Unusual Clause of the Eighth Amendment "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime."

State v Pardee, 229 Or App 598 (7/15/09) Sentence of 400 months' incarceration followed by lifelong supervision is not unconstitutionally disproportionate as applied for defendant's multiple convictions (rape, sodomy, sex abuse, and sexual penetration to a child under 12 years old), under *Wheeler*. Disproportionality measured by whether the legislatively imposed penalty is so irrational that it shocks the moral sense of reasonable people.

B. Consecutive Sentences – Article I, §44(1)(b)

"No law shall limit a court's authority to sentence a criminal defendant consecutively for crimes against different victims."

State v Westbrook, 221 Or App 433 (2008) *vac'd and rem'd on recons*, 224 Or App 493 *remanded for resentencing on recons* 226 Or App 462 (2009) (On state's petition for reconsideration after *Oregon v Ice*, 555 US __ , 129 S Ct 711 (2009), the trial court did not err in imposing consecutive sentences).

C. Judicial Factfinding; Consecutive Sentences – Article I, §11 and Sixth Amdmt

State v Ice, 346 Or 95 (2009) On remand from *Oregon v Ice*, 555 US ---, 129 S Ct 711 (2009) (Sixth Amendment does not prohibit states from assigning to judges rather than to juries the task of finding facts necessary for imposition of consecutive sentences). Trial court does not violate a defendant's Sixth Amendment or Article I, §11, rights when it imposes a consecutive sentence based on the trial judge's factfinding.

D. Right to be heard at sentencing – Article I, §11

See ***State v Rickard***, 225 Or App 488 (2009).

III. CONFRONTATION; COMPULSORY PROCESS – Article I, §11

> **"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."**

State v Fowler, 225 Or App 187, *rev den* 346 Or 257 (2009) State and federal confrontation clauses secure the opportunity to cross-examine witnesses; they do not extend to entitle defendant to a right to submit extrinsic evidence; specifically here, evidence under OEC 412 of a sex abuse victim's past sexual behavior.

State and federal compulsory-process clauses allow defendants to call witnesses and present evidence on their behalf. The clauses are construed virtually identically: a defendant's right to present evidence may be denied if the state's interest in exclusion outweighs the evidence's value to the defense; here, evidence of victim's relationships with peers is of minimal value. The trial court erred by admitting it.

State v Steen, 346 Or 143 (4/16/09) An officer testified with hearsay statements against defendant, who did not object. Defendant was convicted. On appeal, defendant argued for the first time that the officer's testimony violated defendant's federal confrontation right. Court of Appeals affirmed conviction, after deciding *sua sponte* that, had defendant objected at trial, the objection would have been sustained, but concluded that it would not review defendant's unpreserved the claim of error. On state's petition for review, the Oregon Supreme Court affirmed. A defendant's silence during hearsay testimony does not establish either a *per se* violation, or a waiver, of confrontation rights. "When the record discloses, as it does here, that a lawyer for a defendant has made an explicit decision not to make an evidentiary objection that otherwise could have been asserted, reviewing courts will not provide refuge from that deliberate choice on direct appeal." In this case, "the Court of Appeals simply should have stated that it would not review on appeal the admission of hearsay evidence to which counsel had assented at trial."

See ***State v Willis***, 230 Or App 215 (8/05/09).

Confrontation under Sixth Amendment:

State v Bella, 231 Or App 420 (10/28/09) Defendant stabbed his girlfriend (victim) and she went to the ER. No police officers were present during the ER visit. The ER doctor did not solicit any information from the victim to further a criminal investigation or prosecution. The ER doctor noted the victim's statements to him in his "Visit Summary," including "open wound of forearm" and "domestic violence."

The "Visit Summary" did not list the boyfriend by name, but included the victim's statements of his prior abuse and her fear of him. The Summary also noted that the police were called to interview the victim. Trial court denied defendant's motion to exclude the victim's statements that were in the ER doctor's Visit Summary. The Court of Appeals held that the victim's statements noted in the ER doctor's "Visit Summary" were not testimonial under the Sixth Amendment (notwithstanding the ER doctor's statutory duty to report her injuries). Trial court did not err in denying defendant's motion to exclude evidence of those statements.

IV. RIGHT TO TRIAL BY JURY – Article I, §11

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[.]"**

***State v Cobb*,** 224 Or App 594 (12/24/08) The jury non-unanimity provision does not violate the separate-vote provision of Article XVII, §1, of the Oregon Constitution, as the Oregon Supreme Court held in 1936.

State v Bowen, 215 Or App 199 (2007), *adh'd to as modified on recons*, 220 Or App 380, *rev den* 345 Or 415 (2008), *cert denied* __ US __ (10/05/09) Court of Appeals affirmed trial court's denial of defendant's request to instruct the 12-member jury that: "This being a criminal case, each and every juror must agree on your verdict." Oregon Supreme Court denied review. On October 5, 2009, the US Supreme Court denied certiorari.

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[.]"**

State v Jeanty, 231 Or App 341 (10/14/09) Defendant signed but did not check any boxes on a jury-trial waiver form, and was convicted. Court of Appeals affirmed conviction. Article I, §11, specifies the only way in which that right may be lost: by a written waiver executed before trial begins and with the court's consent, as noted in *State v Barber*, 343 Or 525, 529 (2007) (conviction in the complete absence of any written waiver is clear error). Here, both defendant and his counsel signed the jury-waiver form, defendant personally informed the trial court that his signature was intended to give up his right to a jury, he had sufficient time to confer with his attorney before doing so, and the court accepted his waiver. Court of Appeals inferred that it is significantly more likely that defendant unintentionally failed to check the box, rather than that he intended to decline to waive his jury-trial right.

State v Colon, 231 Or App 563 (10/28/09) Trial court's failure to secure a written waiver of right to jury trial violates Article I, §11, and is plain error. Reversed.

V. RIGHT TO BE HEARD; RIGHT TO COUNSEL – Article I, §11

"In all criminal prosecutions, the accused shall have the right * * * to be heard by himself and counsel."

A. Right to Counsel

Article I, §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 in private. *State v Durbin*, 335 Or 183, 191 (2003).

State v Carlson, 225 Or App 9 (2008) Defendant refused to perform field sobriety tests. Officer had probable cause to arrest defendant for DUII and read him *Miranda* rights. Defendant said he wanted to talk to his lawyer. At the jail, officer attempted to call defendant's lawyer, and defendant's girlfriend, but only got a "tone" on the jail phone. Another officer said that phone was working. Defendant eventually submitted to a breath test. Trial court denied his motion to suppress the results of that test. Court of Appeals reversed. The right to consult with counsel includes the right to consult in private, even if the request to do so does not expressly request privacy. When defendant ultimately decided to forego consultation with an attorney, that decision to waive his right to counsel was not a voluntary and intelligent relinquishment of a known right to private consultation. The right to consult with counsel also includes a right to use an operational phone to do so. Without findings as to the operability of the phone used, Court of Appeals presumed that the trial court found the phone to have been operational because that is consistent with its ultimate conclusion and there is evidence in the record to support that conclusion.

State v Hunt, 225 Or App 51 (2008) Arrested driver brought to jail and repeatedly asked to talk to an attorney. Officer said he was welcome to make a phone call, gestured to a separate enclosed room with a solid door, made no indication she would follow defendant, and reiterated that defendant could make a call. Defendant said he didn't know anyone so the officer should keep doing what she was doing. He refused a breath test. Trial court denied motion to suppress that refusal. Court of Appeals affirmed: officer's gesture to the room was sufficient to notify defendant that the call would be private. Defendant waived his right to consult privately with counsel before deciding to submit to the breath test.

State v Ohm, 224 Or App 390 (12/10/08) Defendant arrested for DUII. While confined in police station, she refused to take a breath test. She had equivocally invoked her right to counsel when she told an officer that she "wanted to ask someone" for advice before deciding whether to take a breath test. Therefore, the officer was obligated to ask her follow-up questions to determine if she invoked

her right, then he had to inform her that, if she wanted to talk to an attorney, she could do so in private. Because that did not occur, her Article I, §11, right to counsel was violated. Trial court erred by denying her motion to suppress evidence that she had refused to submit to the breath test. Court of Appeals affirmed, however, concluding that the error was harmless: evidence against her was compelling, and also her refusal was cumulative evidence because she told the officer that she had not been driving.

State v Tyon, 226 Or App 428 (3/11/09) Defendant arrested for DUII, taken to jail, placed in a closed-door (but not soundproof) holding cell with a phone book and phone. Officer told defendant he could call an attorney and left defendant alone for 45 minutes. The officer remained in earshot. The phone made only collect calls. Defendant called his former DUII attorney and got an after-hours recording. He tried to call his girlfriend, couldn't reach her, refused to try to call anyone but his own attorney. Officer offered to help defendant with the phone book after defendant said he needed reading glasses. Officer called defendant's girlfriend (defendant had said that his attorney's home number was in her purse) but when the officer got a hold of the girlfriend, defendant then said his attorney's number was not in her purse but instead somewhere in his house. Officer said, "time," and asked defendant to consent to a breath test. Defendant refused. Trial court denied his motion to suppress his breath-test refusal. Court of Appeals affirmed on that issue: defendant was given a reasonable opportunity to confer with his attorney. He had 45 minutes, a working phone, and a phone book. He had reached his attorney's phone message machine and chose not to call any other attorney. Officers offered to help him read the phone book because he said he needed reading glasses. As for the right to confer in private, there is no evidence in the record that defendant was deterred from trying to call his attorney due to the lack of a soundproof room, thus no chilling effect is presumed.

State v Freytag, 230 Or App 694 (9/9/09) Defendant arrested for DUII. At the police station, officer left defendant alone for 20 minutes with a phone and phone book. Defendant first asked to call his boss, a nonattorney. Officer told him he did not have a right to call a nonattorney. Defendant did not get a hold of an attorney by phone, and received no response to his 411 call. He then submitted to the breath test. Trial court granted his motion to suppress, concluding basically that a defendant has a right to call a nonattorney. Court of Appeals reversed: Article I, §11, applies only to criminal - not administrative – proceedings. The rights to communicate in administrative proceedings, however, are protected by the Due Process Clause of the Fourteenth Amendment; whether the Due Process Clause includes a right to communicate with a nonattorney has not been addressed, and is not decided in this case. Here, however, even if officer violated defendant's rights, suppression is not the remedy. Defendant did not show the requisite minimal factual nexus between the allegedly unlawful police conduct and his consent to the breath test.

B. Right to be Heard

State v Rickard, 225 Or App 488 (1/28/09) Article I, §11, right to be heard includes the right to speak at sentencing, including a sentencing modification proceeding, if the modification is substantive rather than merely administrative. Here, some changes to defendant's sentence were substantive due to a change in the law and their retroactive application would violate the constitutional right against *ex post facto* laws.

VI. SELF-INCRIMINATION – Article I, §12

"No person shall be * * * compelled in any criminal prosecution to testify against himself."

A. Mental Examination

State v Petersen, 347 Or 199 (10/15/09) Defendant, charged with murder, gave notice that he would introduce expert testimony to show that he suffered from an extreme emotional disturbance and diminished mental capacity. Trial court ordered defendant to undergo a mental exam by a state-retained mental heath expert, and to answer "all questions asked of him" regarding his "thoughts at or immediately near the time" of the alleged murder. Defendant petitioned for writ of mandamus. Supreme Court concluded that the state is entitled to have its own expert examine defendant, but under Article I, §12, defendant is not required to answer incriminating questions during that examination. Defendant is free to not answer questions that he or his lawyer view as incriminating. The trial court's order was proper in that it permits the state to fully question defendant, but it was improper in that it prospectively required defendant to provide incriminating answers when defendant had not (yet) waived or forfeited his right against compelled self-incrimination. "The only point at which the trial court can order [defendant] to answer questions that elicit incriminating responses [is] after [defendant] has waived his privilege in that regard." Peremptory writ issued.

B. *Miranda*

Under Article I, §12, *Miranda* warnings must be given to a person 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 Bayer, 229 Or App 267 (7/01/2009) Officer pulled defendant over in a routine traffic stop and immediately suspected defendant was intoxicated. Defendant submitted to field sobriety tests, and answered questions asked by just one officer at a time during the sobriety check. Defendant told an officer he'd "smoked a bowl" of marijuana shortly before the stop. Trial court admitted

defendant's statement. Court of Appeals affirmed: those circumstances are not "compelling" or made while in "custody."

State v Field, 231 Or App 115 (9/30/09) Defendant advised of *Miranda* rights at the police station, before officers began questioning him, before he was arrested. Later that day, he was formally arrested but was not re-advised of *Miranda* rights. He made incriminating statements. Trial court denied his motion to suppress his statements made before his lawyer arrived. Court of Appeals affirmed: under the totality of the circumstances, nothing would cause a reasonable person to believe his *Miranda* rights had changed after he was advised of them. Officers were not required to re-advise him when he was formally arrested, because (1) the *Miranda* warning was not limited in scope, (2) defendant was never outside the presence of the police from the time he was advised until he was arrested, and (3) two days later, defendant said he was aware of and understood his *Miranda* rights. (Court also addressed a "right to assistance of counsel" that arises out of Article I, §12, and the Fifth Amendment, and concluded that those rights were not violated.).

State v Martin, 228 Or App 205 (4/29/09) Defendant arrested on suspicion of stealing a truck. Officer read him *Miranda* rights and asked if he understood them. Defendant said he did. Officer then said, "You need to be honest with me about the vehicle and the pursuit. Were you driving the [pickup]?" Defendant answered yes, and told the officer he had stolen it. Trial court denied his motion to suppress, concluding that the officer did not threaten or order defendant to confess, and defendant had voluntarily waived his right to remain silent. Court of Appeals affirmed: state must, and did, prove the voluntariness of defendant's statement by a preponderance of the evidence, under the totality of the circumstances. It is apparent that defendant's statement was "the product of an essentially free and unconstrained choice [and the] defendant's will was not overborne and his capacity for self-determination was not critically impaired." *State v Vu*, 307 Or 416, 425 (1989). Officer's statement was just an admonition to tell the truth.

State v Moeller, 229 Or App 306 (7/01/09) Defendant arrested and transported to jail. No one questioned her or read her any *Miranda* rights. During the booking process, an intake officer asked her an unspecified question about any medical conditions or medical problems. Defendant answered that she had recently relapsed by using cocaine, after 20 years of sobriety. Trial court denied her motion to suppress. Court of Appeals affirmed: *Miranda* warnings need not be given before questions are asked that are normally attendant to arrest and custody, even if the questions are reasonably likely to elicit incriminating information. "Routine booking questions" are of that type. Here, defendant was not subjected to "interrogation" and *Miranda* warnings were not necessary.

State v Moore, 229 Or App 255 (7/01/09) Defendant stopped for not wearing a seatbelt. Officer asked for and received all driver and vehicle documents he asked for. Officer observed ammunition on dashboard, asked if defendant had any firearms in the truck. Defendant said he had a rifle. Officer asked for it. Defendant gave it to him along with a disassembled rifle. His criminal history showed that he was a felon. Officer politely handcuffed him, put him in the back of the patrol car

with a canine, told him he was not under arrest, and did not give *Miranda* warnings. Officer questioned defendant while blocking him in the patrol car. Defendant made incriminating statements in the car. Defendant testified at trial. The trial court denied the motion to suppress his statements, because the officer told defendant he was not under arrest and was polite. Court of Appeals reversed: circumstances here were "compelling" and *Miranda* warnings should have been given before defendant was questioned while handcuffed and detained. *State v Roble-Baker*, 340 Or 631, 638 (2006) set out 4 key factors to determine when *Miranda* warnings must be given in circumstances that "create a setting which judges would and officers should recognize to be compelling." (Location and length of encounter, pressure exerted and defendant's ability to terminate the encounter.). Here, defendant was not free to leave the patrol car, and could not terminate that encounter. Just because that encounter was short and no undue pressure was exerted on defendant does not outweigh the other *Roble-Baker* factors. The trial court erred.

Error here was not harmless. When the admission of statements violates a statute, but the statements were not compelled in any way to implicate a constitutional concern, there is no reason to exclude a defendant's testimony from review of the record for harmless error. *State v McGinnis*, 335 Or 243, 254 (2003). Under *McGinnis*, a court must consider the nature of the illegally obtained evidence. If there was a constitutional violation involving a defendant's un*Mirandized* statements, the defendant's testimony at trial in response to those statements is not considered in determining whether the admission of the statements was harmless error.

See ***State v Sparks***, 228 Or App 163, 168 n 4 (4/29/09), discussed herein at page 32. (To date of this opinion, neither of Oregon's appellate courts had determined whether *McGinnis* allows the state to use testimony in a harmless-error analysis when defendant can prove that s/he would not have testified but for the fact that the evidence seized in violation of Article I, §9, already had been admitted. *McGinnis* itself was only about erroneously admitted, but not compelled, confessions. Defendant did not raise that issue in this case. The Court of Appeals did not address the issue but noted that it exists.

State v Davis, 345 Or 551 (12/31/08) Defendant's counsel's statement that the defense team was afraid of defendant does not, per se, require a trial court to grant a defense counsel's motion to withdraw as counsel under Article I, §11, as defendant here argued. Instead, the test remains: given the circumstances, did defense counsel adequately perform those functions of professional assistance that an accused relies on counsel to perform on his behalf. Trial court found that defendant was manipulating the court by not cooperating. Here, trial court did not abuse its discretion in denying defense counsel's motions to withdraw in this murder case. Supreme Court affirmed sentence of death on automatic direct review.

VII. ACCUSATORY INSTRUMENTS – Article VII (Amended), §5

"(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."

State v Kuznetsov, 345 Or 479 (12/18/08) Article VII (Amended), §5, does not prohibit a trial court from allowing a substantive amendment to an information charging a misdemeanor (here, for fourth-degree assault). The history of this constitutional provision (amended to its current form by voter initiative in 1974) indicates that one of its purposes was to free the state from procedural strictures applicable to charging felonies, when the state charges only a misdemeanor.

VIII. PRE-TRIAL OR PRE-INDICTMENT DELAY

A. Speedy Trial - Article I, §10

> **"[J]ustice shall be administered, openly and without purchase, completely and without delay."**
>
> Speedy trial claims under Article I, §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 Bayer, 229 Or App 267 (7/01/09) Seventeen months elapsed between the date of an original citation and the trial date. That citation was dismissed. Nine months elapsed between the subsequent information (charging instrument) until the trial date. Seventeen-month delay, would not (did not) violate defendant's *statutory* speedy trial rights because the statutory speedy-trial timeclock begins when the second charging instrument is filed. Regardless when the timeclock begins for state constitutional analysis, a showing of actual prejudice is required to establish the constitutional violation. Here, defendant did not demonstrate sufficient actual prejudice to warrant dismissal under the state constitution. The Court of Appeals did not determine if the speedy-trial timeclock begins when a citation is issued, or instead when an information is filed. Whether a charging instrument that is later dismissed "commences" a prosecution for state constitutional speedy trial purposes is unclear (and undecided). Unlike Article I, §10, the Sixth Amendment's

Speedy Trial clause does not apply after the government, acting in good faith, formally drops charges. Any undue delay *after* charges are dismissed, like delay *before* charges are filed, are scrutinized under the Due Process clause, not the Speedy Trial clause, see *United States v MacDonald*, 461 US 1, 7 (1982). Defendant did not claim in this case that a 9-month delay violated his speedy trial rights, and there is no prejudice. No Sixth Amendment violation.

B. Pre-indictment Delay – Due Process (5th and 14th Amendments)

> 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).

State v Davis, 345 Or 55 (2008) Death sentence affirmed on automatic direct review. The 11-year period between murders and indictment did not violate defendant's Fifth and Fourteenth Amendment due process rights. Only once before this case, 30 years ago, the Oregon Supreme Court had addressed a claim of due process violations for pre-indictment delay. Neither the Oregon Supreme Court nor the United States Supreme Court has addressed whether reasons *other than* a state's *intentional* delay to obtain a tactical advantage in a preindictment delay may rise to the level of a Due Process violation.

The majority of intermediate federal courts require a showing that the government intentionally delayed in indicting a defendant either to gain tactical advantage or for some equally impermissible purpose. The minority of intermediate federal courts (only the 4th and 9th Circuits) apply a more lenient, and less clear, balancing test, depending on the extent of the prejudice. Under either test, or under any middle-ground test, here, defendant does not succeed on his claim of a Due Process violation. The record contains no evidence that the state intentionally delayed in indicting defendant for an impermissible purpose, such as to gain a tactical advantage. Defendant did not challenge the trial court's extensive factual findings about the state's reasons for the delay, all of which are supported by the record. The trial court properly denied defendant's motion to dismiss the charges on due process grounds.

IX. JUSTICIABILITY – Article VII, §1

> The judicial power under Article VII, §1, is limited to resolving existing judiciable controversies. It does not extend to advisory opinions. *Kerr v Bradbury*, 340 Or 241, 244 (2006). If it becomes clear that resolving the merits of a claim will have no practical effect on the parties, the Supreme Court will dismiss the claim as moot. *Corey v DLCD*, 344 Or 457, 464 (2008).

Cyrus v Deschutes County, 226 Or App 1 (2/18/09) A party sought just compensation or waiver of certain land use regulations under Measure 37. The County Board of Commissioners waived the land use regulations. The circuit court affirmed. While the appeal was pending in the Court of Appeals, the voters passed

Measure 49, which amended Measure 37. The Court of Appeals held that this case is moot based on the Oregon Supreme Court's construction of Measure 49 in *Corey v DLCD*, 344 Or 457 (2008) (*held*: Measure 49 was intended to extinguish and replace the benefits and procedures that Measure 37 granted to landowners). The parties to this case have the opportunity to make their arguments under Measure 49, which now governs. A decision by the Court of Appeals would not give any effectual relief, because even a valid Measure 37 waiver, by itself, does not have any continuing viability. Appeal dismissed as moot.

Shineovich and Kemp, 229 Or App 670 (7/15/09) Shineovich and Kemp were same-sex domestic partners who decided to have children via artificial insemination. Kemp became pregnant twice (and had 2 children) via artificial insemination. Shineovich and Kemp separated. Shineovich brought an action for a declaratory ruling that she is a legal parent of the two children, contending that the statute creating conclusive presumptive paternity for married men is unconstitutional. The trial court dismissed her claims for failure to state a claim. Court of Appeals first considered whether this case presented a justiciable controversy when petitioner did not name the state as a party. Court held that the case is justiciable under the declaratory judgments act, which gives courts discretion to refuse to enter a declaratory judgment if a judgment would not terminate all aspects of a controversy. The declaratory judgments act does not deprive courts of jurisdiction just because a judgment would not terminate all aspects of a controversy. (On the merits of Article I, §20, see discussion herein)

X. APPELLATE REVIEW – Article VII (Amended), §3 (harmless error)

> **"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 * * * ."**
>
> Error in admitting evidence is "harmless" under the state constitution if there is little likelihood that the admission of the evidence affected the verdict. *State v Davis*, 336 Or 19 (2003).
>
> ("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 Link, 346 Or 187 (5/7/09) Five teenagers killed a teenager's mother. Defendant was charged with five counts of aggravated murder. Counts 1 to 3 were for aggravated felony murder for killing the victim "personally and intentionally" and Counts 4 and 5 were for killing the victim to conceal the commission of other crimes. Defendant was convicted on all counts, and sentenced to life without parole. On appeal, defendant contended that he had not committed the murder "personally" and he should have been acquitted on Counts 1 to 3. On appeal, the state and

defendant agreed that the trial court should have entered a single judgment of conviction for aggravated murder, then listed the aggravating factors, but didn't, and that that error was not harmless. The Court of Appeals held that the error was harmless because he would receive the same sentence regardless whether this convictions for Counts 1 to 3 were reversed. The Supreme Court disagreed and held that the error defendant alleges is not harmless under Oregon's statutory or constitutional harmless-error standards. The trial court erred in denying defendant's motion for judgment of acquittal on Counts 1 to 3 and finding him guilty. That error was not harmless.

***State v Willis*,** 230 Or App 215 (8/05/09) Trial court's admission of a lab report into evidence without producing the author of that report violated defendant's state and federal confrontation rights under *State v Birchfield*, 342 Or 624 (2007) and *Melendez-Diaz v Massachusetts*, 129 S Ct 2527, 2542 (2009). That error, however, was harmless, because defendant did not dispute that the evidence was meth, but instead defendant disputed that she "knowingly" possessed it. Court of Appeals affirmed conviction: given all evidence, there is little likelihood that the lab report affected the jury's verdict.

State v Idol, 227 Or App 56 (4/01/09) Defendant consented to a search of his person during a traffic stop. Officer found a used meth pipe and a bag with meth. Meth was in was an opaque tube designed to carry M & M candies. The officer testified he had encountered such tubes at least 50 times, and all except one time he found meth or a meth pipe inside. Trial court denied his motion to suppress under then-existing case law that did not require the lab report author to testify. Court of Appeals held that the trial court's admission of a lab report into evidence without producing the author of that report violated defendant's state confrontation rights under *State v Birchfield*, 342 Or 624 (2007). Court of Appeals reversed defendant's conviction: that error was not harmless. Defendant challenged the type of substance he was charged with possessing. Unlike other cases where the court concluded the error was harmless, here, defendant never admitted that the drug in the M & M container was meth, there is no evidence that the officers conducted a field test on the contents of the container, and the substance is not one that is easily identified by its characteristics. The erroneously admitted evidence related to a central factual issue in this case – defendant did not implicitly or explicitly acknowledge the type of substance he possessed. The Court of Appeals was "unable to conclude that the erroneous admission of the laboratory report was unlikely to have affected the verdict."

See ***McCollum v Kmart Corp***, 228 Or App 101 (4/29/09) Personal injury action, defendant Kmart appeals from an order that set aside a judgment for defendant and granted plaintiff a new trial under ORCP 64 B. ORCP 64 B provides several bases for setting aside a former judgment and granting a new trial (*ie.* if irregularity in the proceedings, or abuse of discretion, materially affected the substantial rights of a party and prevented the party from having a fair trial). Court of Appeals reversed: the trial court erred in granting the motion for new trial. Application of ORCP 64 B(1) must comport with the constitutional constraints on overturning a jury's verdict as set in Article VII (Amended), §3. As noted in *Beglau v Albertus*, 272 Or

170, 180 n 2 (1975), it "is fundamental that a new trial may be ordered by a trial court only for prejudicial error" and that "has been the rule since 1910 when Art. VII, §3, was added to the Constitution." Thus a new trial cannot be granted under ORCP 64 B based on an allegedly "prejudicial" effect of a prior judicial act, unless that act was erroneous. Court of Appeals reviewed ORCP 64 B(1), (4), and (6), and concluded that the trial court erred in ordering a new trial. Reversed and remanded with instructions to reinstate judgment.

State v Ohm, 224 Or App 390 (12/10/08) Defendant's Article I, §11, right to counsel was violated when a police officer failed to determine if she wanted to talk to a lawyer after she was arrested for DUII. Trial court erred by denying her motion to suppress evidence of her refusal to take a breath test. Court of Appeals affirmed her conviction, however, concluding that the error was harmless: evidence against her was compelling, and also her refusal was cumulative because she told the officer that she had not been driving. Defendant did not establish that admitting the evidence against her was harmful. Under Article VII (Amended), §3, a judgment must be affirmed notwithstanding error if error did not affect the judgment. The Court of Appeals must affirm the conviction because there is "little likelihood that the particular error affected the verdict."

See ***State v Sparks***, 228 Or App 163, 168 n 4 (4/29/09).

State v Moore, 229 Or App 255 (7/01/09) Defendant was questioned while handcuffed and detained in the back of a police car under compelling circumstances that required him to have received *Miranda* warnings, which he did not receive. Defendant testified at trial. The question under a harmless-error analysis is not whether defendant would have testified at trial if the evidence had not been erroneously admitted. Instead, under the harmless-error analysis in *State v McGinnis*, 355 Or 243, 250 (2003), a court must consider the nature of the illegally obtained evidence. If there was a *constitutional* violation involving a defendant's un*Mirandized* statements, the defendant's testimony at trial in response to those statements is not considered in determining whether the admission of the statements was harmless error. Although prior cases have held that there is no reason to exclude a defendant's trial testimony on a harmless-error review when the admission of his statements violated a *statute*, a defendant's trial testimony cannot be used to establish harmless error regarding evidence of confessions obtained in violation of Article I, §12. In short, under *McGinnis*, defendant's testimony at trial cannot be used to establish "harmless error" with regard to the illegally obtained evidence.

Wieber v FedEx Ground Package System, Inc., 231 Or App 469 (10/28/09) A jury awarded plaintiffs $350,000 in compensatory damages and $7 million in punitive damages for breach of the covenant of good faith and fair dealing, fraud, and intentional interference with economic relations. The Court of Appeals, *inter alia*, concluded that the punitive damages award was grossly excessive under the Due Process Clause. See discussion herein at page 60 on punitive damages.

Before reaching the Due Process issue, the Court of Appeals reviewed the constitutional limits to its review of jury awards. "Thus, unless there is *no evidence* in

the record to support the jury's factual fining that punitive damages should be awarded, a court is barred under the Oregon Constitution from reviewing a jury's award of punitive damages." A jury's award of punitive damages must not be disturbed when it is within the range that a rational juror would be entitled to award in the light of the record as a whole. "Under that standard of review, the court's duty is not to redecide the historical facts as decided by the jury, but to decide where, for purposes of the *Gore* guideposts, the conduct at issue falls on the scale of conduct that does or might warrant imposition of punitive damages." (Quoting *Goddard*). The dissent concludes that the Court may not offer plaintiffs the opportunity to remit the constitutionally excessive portion of the jury's award of punitive damages because this court cannot segregate from the $7 million punitive damage award what the amount of the punitive damages should have been awarded to plaintiffs as a matter of law. The majority responded to the dissent that, "it is not the role of this court to decide anew the amount of damages that should have been awarded in this case."

Edmonds, concurring in part, dissenting in part, concluded that the majority misinterpreted Article VII (Amended), §3. The proper disposition is a remand for a new trial on punitive damages. The record does not allow the appellate court to segregate any amount attributed by the jury to FedEx's fraudulent conduct from the $7 million punitive damages award that the jury made for two separate claims, one of which the majority and dissent agreed should have been disposed of on a directed verdict for defendant.

Federal harmless-error standard:

State v Sierra-Depina, 230 Or App 86 (8/05/09) 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." *Id.* at 93.

Subconstitutional standards for review and reconsideration:

State v Hagberg, 347 Or 272 (10/22/09) Supreme Court may waive a rule of appellate procedure for "good cause" under ORAP 1.20(5). Where, as here in this post-*Ice* petition, a petition for reconsideration was not timely filed, but the delay was for "good cause", and would give the Court the opportunity to conform its decision with an authoritative ruling of the United States Supreme Court, it would be illogical to refuse to consider a petition for reconsideration. Court thus exercised its discretion to reconsider its former opinion, withdrew that former opinion, and affirmed the lower courts' decisions.

XI. SCHOOL FUNDING

Article VIII, §8(1) (BM 1 (2000)): **"The Legislative Assembly shall appropriate in each biennium a sum of money sufficient to**

ensure that the state's system of public education meets quality goals established by law, and publish a report that either demonstrates the appropriation is sufficient, or identifies the reasons for the insufficiency, its extent, and its impact on the ability of the state's system of public education to meet those goals."

Article VIII, §3 (from constitution of 1857): **"The Legislative Assembly shall provide by law for the establishment of a uniform, and general system of Common schools."**

Pendleton School Dist v State of Oregon, 345 Or 596 (1/23/09) School districts filed action against the state, seeking a declaration that Article VIII, §8, requires the legislature to fund the schools sufficiently to meet goals set by law, and a mandatory injunction directing the legislature to appropriate sufficient funds. Trial court granted summary judgment for the state. Court of Appeals affirmed. Oregon Supreme Court affirmed in part, reversed in part, drawing guidance from Chief Justice Marshall in ***Marbury v Madison***:

"Unlike the parties, we are not free to ignore any part of Article VIII, section 8. We must give due regard to all provisions, not some of them. In this particular case, we are mindful of our obligation to determine what the law is. *See Marbury v Madison*, 5 US (1 Cranch) 137, 177, 2 L Ed 60 (1803) (Marshall, CJ) ("It is, emphatically, the province and duty of the judicial department to say what the law is."). In announcing what the law is, however, we are not authorized to grant relief that is inconsistent with the provisions of Article VIII, section 8."

The Court concluded that courts may grant a declaratory judgment that the legislature failed to fully fund the public school system, if that is the case, because the first provision of Article VIII, §8, directs the legislature to appropriate sufficient funds. The state admits that the legislature failed to appropriate sufficient funds. Trial court should have entered a declaratory judgment on that ground.

The Court further concluded that courts cannot grant the other forms of relief plaintiffs seek (that the legislature must be ordered to fund the schools). Article VIII, §8, requires the legislature to explain its failure to sufficiently fund the schools, thus demonstrating that the legislature does not have a duty to sufficiently fund the schools. Article VIII, §8, does not authorize the injunction plaintiffs seek.

Plaintiffs also argued that Article VIII, §3, requires the legislature to appropriate funds sufficient to maintain an adequate system of schools, based on its text. The Court concluded that the text of Article VIII, §3, requires the legislature to establish free public schools that provide a basic education (the text does not use the word "adequate," and "common schools" in 1857 meant "free schools," rather than any educational standard). The trial court correctly granted summary judgment to the state on Article VIII, §3.

XII. FREE EXPRESSION - Article I, §8

"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, §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 restraining 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).

A. Campaign Contribution Reporting

"[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).

State v Moyer, 225 Or App 81 (1/07/09) (**en banc**), ***rev allowed***, 346 Or 157 (4/08/09) ORS 260.402 (2003) was originally enacted by initiative in 1908. It makes lying about the source of political campaign contributions illegal. That statute provided in part: "No person shall make 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." Defendants were charged with violating ORS 260.402.

Trial court granted defendant's demurrer to the indictment, concluding that the statute facially violates Article I, §8, and the First Amendment, because political contributions are speech and the statute makes it a crime to engage in a particular content of speech – political contributions under a false name – that cannot be narrowed. On state's appeal, Court of Appeals reversed in a fractured opinion:

Lead opinion (Landau, Haselton, Ortega) held that the statute is not unconstitutional. It does not limit contributions directly or impose any restrictions on who can give or receive contributions. The gravamen of the offense is a contributor giving false information to the recipient. The only restriction the statute imposes is that persons must truthfully report the source of the contribution. It only limits the information reported by the contributor.

This is a second-category *Robertson* statute under *Vannatta v Keisling*, 324 Or 514 (1997). In *Vannatta*, the Court noted that even if a particular form of contribution is expression, it does not necessarily follow that Article I, §8, protects it. The pivotal

issue is whether the restriction is on the contribution itself. As a second-category statute, the effects are considered. The legislative history demonstrates that the evil the statute addresses is concealing names and amounts of contributions. The harm occurs when a person makes contributions without reporting truthfully who is making the contribution. When the people are misled as to who all contributors and amounts are, there is harm.

Even if this was a first-category statute, it is not unconstitutional because laws that penalize political candidates who mislead the public or engage in fraud do not violate Article I, §8, because a fraud is a historical exception. "We can identify no reason why a law that prohibits a contributor from providing misleading information to the candidate – information that the candidate is required to pass on to the voters – is not subject to the same [historical] exception [for fraud]."

No First Amendment violation, either, under *Buckley v Valeo*, 424 US 1 (1976). And the statute also is not unconstitutional for vagueness; it defines the offense with a reasonable degree of certainty.

Brewer, Edmonds, concurring: Agree that the statute focuses on harmful effects rather than the content of speech itself (thus a second-category *Robertson* statute), but disagree that the statute is contained in a historical exception. "Suffice it to say that * * * a more practical and predictable basis for determining the scope of the constitutional guarantee lies in the distinction between speech and its effects, rather than in reliance on the sometimes debatable and obscure remnants that a limited historical record may yield concerning possible exceptions that do not comport with the constitutional text."

Schuman concurring: Accepting that a "campaign contribution is a form of expression" protected by Article I, §8, under *Vannatta*, agrees with dissent that the statute is a law that prohibits expression per se and not a law that focuses on harm caused by expression. The harm (being deceived) can be achieved only through expression. This is a *Robertson* category 1 statute. Concurs with the lead opinion that the statute is a contemporary variant of a historical exception to free speech guarantees.

Sercombe, Armstrong, Wollheim, and Rosenblum, dissenting: Would hold that ORS 260.402 is unconstitutional: it restricts a communicative act (political contribution) without any regard to any necessary effect of the act (ie. voter behavior, election process, content of public disclosures) in an unprecedented fashion (because historical exceptions require the false statement to be material and intentional). The lead opinion infers that the harmful effect from each violation of this statute is an infringement of the people's "right to know" the source of political contributions. Lead opinion thus concludes this is a law that regulates only the effects of speech. Dissent disagrees in three ways: (1) ORS 260.230 does not regulate only the effects of speech, it regulates the speech act itself: making a contribution." (2) ORS 260.230 can be violated by conduct that does not produce any harmful effect. (3) ORS 260.230 has nothing in common with any traditional crime that punishes untrue

speech other than false utterances; it does not fit within any well-established historical exception.

Bernard v Elections Division, 229 Or App 419 (7/01/09) A landowner had a billboard on his land. He donated and displayed on the billboard, a poster supporting his favored candidate. The candidate welcomed and accepted that donation. The candidate refused to report the value of the use of the billboard as a campaign contribution. The Secretary of State determined that the donated use of the billboard structure was an in-kind contribution that had a fair market value, that the candidate should have reported as a contribution and as an expenditure. Candidate was fined $11,500. Court of Appeals affirmed: ORS 260.055 requires all political candidates to file statements of contributions and expenditures. The landowner furnished the use of the billboard to the campaign, thus he made a contribution. The value of the landowner's *speech* does not have to be reported; rather, the rental value of *the sign structure* has to be reported. Held: law requiring political candidates to report the value of campaign contributions they receive does not burden the contributor's speech at all.

B. School Suspension

Hagel v Portland State University, 226 Or App 174, *on recons*, 228 Or App 239 (4/29/09) PSU did not violate Hagel's free speech rights by expelling him for statements he made to acquaintances about his desire to kill the assistant director and his family. Statements are not considered in isolation, but in context. Hagel had stated that the assistant director was out to get him, he gave specific details about how he might kill or maim him (with a baseball bat or a Mossberg shotgun to the assistant director's knees), said he knew where the family lived on campus, and he showed off guns and ammo in his dorm. PSU had to move the family off campus. Hagel's statements were not protected speech.

C. Mediation Communications

Fehr v Kennedy, 2009 WL 2244193 (D Or 2009) ORS 36.222 prohibits compelled disclosure and use of mediation communications as evidence in court. That statute regulates speech no more than other evidentiary rules, such as privileges. *If* that statute implicates free speech rights, the prohibition falls within a historical exception for settlement discussions or offers of compromise. Court cited only to FRE 408 (public policy) and *Robertson*. Held: ORS 36.222 does not violate Article I, §8.

D. Facial Overbreadth Challenges under Article I, §8

State v Borowski, 231 Or App 511 (10/28/09) The Oregon Supreme Court held, in *State v Illig-Renn*, 341 Or 228 (2006), that statues could not be facially challenged as overbroad under either Article I, §8 (expression), or Article I, §26 (assembly), if the statutes did not expressly restrain expression or assembly. When a statute, by its terms, restrains only conduct, such statutes can be challenged only as applied.

XIII. EQUAL PRIVILEGES AND IMMUNITIES – Article I, §20

"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 XV, §5a: "It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage." (Ballot Measure 36 (2004))

Shineovich v Kemp, 229 Or App 670 (7/15/09) Shineovich and Kemp were a same-sex couple who had two children together via artificial insemination (Kemp carried and gave birth to both children). After they separated, Shineovich brought an action declaring her to be the children's legal parent. She first contended that ORS 109.070, which affords married men the presumption of being the legal parent of a female spouse's children, violates Article I, §20, because that statute is not available to same-sex couples (who are neither male-female partners, nor can be married). The trial court dismissed the claims for failure to state a claim. Court of Appeals affirmed on that statutory aspect. ORS 109.070 creates a presumption as to the biological parent of a child. It is undisputed that Shineovich is not the biological parent. The trial court correctly concluded that ORS 109.070 is not unconstitutionally discriminatory, and Shineovich is not entitled to a declaration of legal parentage under that statute.

Shineovich also contended that another statute violated Article I, §20. ORS 109.243 establishes legal parentage in married men whose spouses were artificially inseminated without requiring them to go through adoption procedures and without regard to biology. Shineovich noted that that statute creates a privilege that is not available to women in same-sex relationships who, under Ballot Measure 36, cannot marry. Shineovich contended that that privilege must be extended to women in same-sex relationships to avoid violating Article I, §20. Trial court had dismissed that claim. Court of Appeals reversed and held that ORS 109.243 violates Article I,§20, for those reasons. "Because same-sex couples may not marry in Oregon, that privilege is not available to the same-sex domestic partner of a woman who gives birth to a child conceived by artificial insemination, where the partner consented to the procedure with the intent of being the child's second parent. We can see no justification for denying that privilege on the basis of sexual orientation, particularly given that same-sex couples may become legal coparents of other means – namely, adoption."

The Court of Appeals did not invalidate ORS 109.243. Instead, the court determined that the remedy is to extend the statute so it applies when the same-sex partner of the biological mother consented to the artificial insemination. Remanded.

English/Pinkerton v PERS Board, 230 Or App 506 (9/02/09) On retirement, petitioners designated their same-sex domestic partners as their beneficiaries. Petitioners' relationships ended, but because Oregon did not allow them to marry

their partners, they also could not divorce. The Public Employees Retirement Board (PERB) denied petitioners' requests to change their retirement allowances and remove their designated beneficiaries. PERB concluded that the plain language of ORS 238.305(6) does not allow a retired PERS member to remove the designated beneficiary unless the beneficiary either dies or divorces. In these cases, the beneficiaries were neither dead nor divorced. At an administrative hearing, petitioners contended that the Board violated Article I, §20, by denying them a benefit afforded to similarly situated individuals based on sexual orientation. The administrative law judge, in a proposed order, concluded that the statute was invalid under Article I, §20, because its facially neutral classification has the side effect of discriminating against homosexuals. PERB did not adopt the ALJ's order. It concluded that to adopt the ALJ's proposed order would violate an IRC provision that would place PERS' tax qualification in peril, thus under another statute (ORS 238.305(6)), PERS cannot grant the relief that petitioners demand, so PERB did not reach the Article I, §20 argument.

Court of Appeals remanded to PERB for reconsideration. ORS 238.305(10) confers authority on PERB to deny an election if the denial is "required" to maintain PERS' tax-qualified status. PERB, however, in its opinion, did not make that determination – rather, it was equivocal. On remand, if PERB continues to assume that ORS 238.305(6) is unconstitutional as applied to petitioners, then it must determine whether the requirements of ORS 238.305(10) are satisfied before it can exercise its discretion and conclude that petitioners are not entitled to the remedy they seek.

XIV. UNITED STATES CONSTITUTION

A. Fifth Amendment: Due Process/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 involve 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).

Lithia Motors v Yovan, 226 Or App 572 (3/19/09) (en banc) *aff'd by an equally divided court*, *petition for review held in abeyance* pending *Hamlin v Hampton Lumber Mills,* 222 Or App 230 (2008)*, rev allowed*, 346 Or 157 (2009) (only the amount of mitigated damages attributable to a defendant may be used as the denominator for punitive damages, not potential damages)

A car dealership undertook efforts to repossess a vehicle that it no longer had a right to possess, thereby violating Oregon's Unlawful Debt Collection Practices Act. The trial court reduced an award of punitive damages from $100,000 to $2,000. The Court of Appeals affirmed by an equally divided court in an en banc decision. Five members of the Court agreed that the "reprehensibility of plaintiff's conduct, while significant, is not egregious." (Edmonds, J., concurring). Two other judges "agree[d] that plaintiff's conduct is not very reprehensible in the universe of cases in which juries have awarded punitive damages" but nonetheless concluded that "low reprehensibility" could not be used to decrease the amount of punitive damages below a 9:1 ratio to compensatory damages. (Sercombe, J., dissenting).

Strawn v Farmers Insurance Co., 228 Or App 454 (5/20/09), *rev allowed* 347 Or 258 (2009) Under *Goddard v Farmers Ins. Co.*, 344 Or 232 (2008), court reviewing a punitive-damages award first determines whether there is a factual basis for the award. Second, the court examines the facts under the three *BMW of North America, Inc. v Gore* guideposts (degree of defendant's reprehensibility; disparity between harm and award; and difference between the punitive damages and civil penalties in comparable cases). Third, if the award is grossly excessive, the court applies the same three guideposts to determine the maximum award that due process permits.

Defendant Farmers Insurance used to software analyze payments of personal injury protection (PIP) benefits, and set a low percentage for payments, resulting in the denial of claims for reasonable medical expenses, thereby increasing Farmers' profits at the expense of PIP claimants and medical providers. Plaintiff, on behalf of a class, brought claims against Farmers. Jury awarded $1.5 million in compensatory damages and prejudgment interest (trial court reduced to just under $900,000), plus $8 million in punitive damages on a fraud claim. The court entered judgment for $2.6 million in attorney fees as well.

Court of Appeals reduced the punitive damages award but otherwise affirmed. The Court first concluded that plaintiffs established the factual predicate for the punitive damages award, which are allowed in Oregon to punish a willful, wanton, or malicious wrongdoer. As to the *Gore* guideposts, the second guidepost establishes that, generally in purely economic damages cases (such as the present case), the Due Process Clause prohibits a punitive damages award that significantly exceeds 4 times the amount of compensatory damages. None of the exceptions to that 4:1 ratio is present. The trial court's judgment was for a 9:1 ratio. As to the other *Gore* guideposts, the evidence established that Farmers intentionally engaged in a pattern of misrepresentation to increase its own profits. The Court of Appeals concluded that a punitive damages award that is four times plaintiffs' actual or potential harm is all that due process will bear on the facts of this case.

Wieber v FedEx Ground Package System, Inc., 231 Or App 469 (10/28/09) A jury awarded plaintiffs $350K in compensatory damages and $7 million in punitives. The Court of Appeals majority remanded: defendant's motion for a new trial on punitives shall be granted unless plaintiffs agree to remittitur of punitives equal to three times their compensatory damages.

In reaching that conclusion, the Court noted that its review of a jury's award of punitive damages is limited to two considerations: (1) whether any evidence supports the jury's finding that punitive damages should be awarded; and (2) whether the amount of punitive damages is excessive under the Due Process Clause. The Court of Appeals concluded that the punitive damages award was grossly excessive under *BMW of North America, Inc. v Gore*, 517 US 559 (1996). The second *Gore* guidepost is the ratio of compensatory damages to punitives is 20:1, which far exceeds the rough reference point of 4:1. Under the first guidepost, the reasonableness of the punitive damages award, FedEx's misconduct does not justify an award of 20:1. As to the third *Gore* guidepost, which compares civil and criminal penalties, there are no correlative comparables, thus the 20:1 ration is grossly excessive. The maximum punitive damages in this case is three times the award for compensatory damages, or $1,050,000.

B. **Fifth Amendment:** Right to Travel and Right to Control Children's Upbringing

Fedorov and Fedorov, 228 Or App 50, *rev den* 347 Or 42 (2009) A mother sought to modify a parenting plan, to allow her to move from Oregon to Australia with her child. Father objected. Trial court denied her motion to modify the parenting plan. Mother appealed, alleging, *inter alia*, that the trial court violated her unspecified federal right to travel "from one State to another," *Shapiro v Thompson*, 394 US 618 (1969), and federal due process right to control the upbringing of her child, *Troxel v Granville*, 530 US 57 (2000). Court of Appeals affirmed on those issues. First, inter*state* travel is not at issue – Mother seeks authority for inter*national* travel. International travel is a protected part of "liberty" interests in the Due Process Clause, but it can be regulated within the Due Process Clause, *Califano v Aznavorian*, 439 US 170, 177 (1978). That is, restrictions that have an incidental effect on international travel do not violate the Due Process Clause unless they are wholly irrational. Here, the trial court's restrictions are not wholly irrational. As to Mother's second asserted federal right, *Troxel* does not support her theory, because its plurality opinion agreed that the Due Process Clause protects "the fundamental right of parents to make decisions concerning the care, custody and control of their children," and *Troxel* involved *both* parties' parental rights, not one parent's over the other's. Affirmed.

C. Eleventh Amendment and Article I, §10

> **"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

> **"[E]very man shall have remedy by due course of law for injury done to him in his person, property, or reputation."** - Article I, §10, of the Oregon Constitution

Padgett v Kowanda, 2009 WL 2216581 (D Or 2009) Medical malpractice claim. At common law in 1857, a prisoner could sue for his injuries. The Oregon Tort Claims Act, however, abolished this plaintiff's remedy against the individual defendants and replaced it with a substituted remedy against the state itself, with additional limits on that substituted remedy (damages cap). Here, after the state is substituted for individual defendants, the state law claims against the state must be dismissed because Oregon has not waived, and has invoked, its Eleventh Amendment sovereign immunity. The magistrate here proposed to abate the state-law claims pending resolution of the federal claim. Trial court judge overruled that aspect of the magistrate's opinion. When an immunity defense against state-law claims is raised promptly, and that immunity has not been waived, and the targeted claims are of the type the Eleventh Amendment bars, it is error to fail to dismiss those claims.

D. Sixth Amendment

Oregon v Ice, 555 US ___ , 129 S Ct 711 (2009) The Sixth Amendment does not prevent states from assigning to judges, rather than to juries, the fact-finding necessary to impose consecutive rather than concurrent sentences for multiple offenses.

State v Bella, 231 Or App 420 (10/28/09) (confrontation rights) .

E. Equal Protection (Fourteenth Amendment)

> **"No state shall * * * deny to any person within its jurisdiction the equal protection of the laws."**

State v Borowski, 231 Or App 511 (10/28/09) ORS 164.887 prohibits intentionally or knowingly obstructing (or attempting to obstruct) agricultural operations. The statute has an exception for persons involved in labor disputes with the agricultural operator. Defendants were arrested and charged with Class A misdemeanors under that statute. They moved to dismiss the charges on grounds that the statute facially violated the free speech, free assembly, and equality guarantees of the state and federal constitutions. The trial court denied their motions. The Court of Appeals affirmed on all state constitutional issues but reversed under the Equal Protection Clause of the Fourteenth Amendment. (The Court of Appeals did not decide this case under the First Amendment). The Court of Appeals explained that "this case occupies the small plot of federal constitutional territory where analysis under the Equal Protection Clause is colored by First Amendment considerations," pointing out *Police Dep't of Chicago v Mosley*, 408 US 92 (1972) and *Carey v Brown*, 447 US 455 (1980). A statute that imposes criminal penalties on persons who picket but creates an exception for picketers protesting labor issues violates the Equal Protection

Clause, because such a statute creates a distinction that has no bearing on a legitimate governmental interest. ORS 164.887 contains the impermissible labor/nonlabor distinction, thus it violates the Equal Protection Clause. The statute also cannot be severed to effect legislative intent in a way that cuts out the unconstitutional part, per ORS 174.040. It creates an entitlement for some persons, and withholds that entitlement to others, thus it does not have a constitutional and an unconstitutional part. The proper relief is not to excise the labor exemption because if presented with the option of taking that action (excision of the unconstitutional part) and not enacting the statute at all, the legislative history demonstrates that the legislature would have chosen to not enact the statute at all. Reversed: the statute is facially unconstitutional *in toto* under the Equal Protection Clause.

F. First Amendment

Legal Aid Services of Oregon et al v Legal Services Corp and United States et al, 587 F3d 1006 (9th Cir 2009) *Held*: Restrictions on lobbying, soliciting clients, participating in class actions, and seeking attorneys' fees that Congress imposed on legal aid organizations do not violate the First Amendment. District court dismissed, for failure to state a claim, plaintiffs' facial challenge to those restrictions and granted summary judgment to defendant on plaintiffs' as-applied challenge to its program integrity rule. A three-judge appellate panel affirmed (Tashima and Rymer) with Pregerson dissenting. (The State of Oregon had brought a separate action against Legal Services Corporation challenging the restrictions and its program integrity rule on Tenth Amendment grounds. A Ninth Circuit panel affirmed the district court's dismissal of that case on Article III standing grounds. *See Oregon v Legal Services Corp*, 552 F3d 965 (9th Cir 2009)).

A "limited public forum" is "a nonpublic forum that the government intentionally has opened to certain groups or for the discussion of certain topics." The Supreme Court has noted that limited public fora can exist "more in a metaphysical than in a spatial or geographic sense," such as a school mail system, a charitable contribution program, and a university program to subsidize and distribute student publications. In a "limited public forum," the government may not regulate speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction. Content discrimination, however, is permissible in a "limited public forum" as long as it is "reasonable in light of the forum's purpose."

Here, defendant Legal Services Corp's grant program operates much like a limited public forum. In prohibiting grantees from soliciting clients, lobbying, seeking attorneys' fees, and participating in class actions, Congress did not discriminate against any particular viewpoint or motivating ideology, much less aim to suppress ideas inimical to the Government's own interest. The restrictions simply limit specific procedural tools and strategies that grantee attorneys may use when carrying out their legal advocacy. As such, the restrictions are permissible under the reasoning in *Legal Services Corp v Velazquez*, 531 US 533 (2001) (striking a restriction in legal aid organizations' funding as viewpoint discrimination, distinguishing *Rust v Sullivan* as not controlling, and explaining that viewpoint-based funding decisions can be sustained in instances in which the government uses private speakers to transmit

specific information pertaining to its own program, but where it endeavors to fund certain modes of private expression, Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest).

The Court also concluded that Legal Services Corporation's rejection of a proposal by Legal Aid Services of Oregon (to merge with the Oregon Law Center with two financially separate divisions) was insufficient to establish an as-applied First Amendment violation. "Plaintiffs' professed fear [of testing the program integrity rule by merging with Oregon Law Center] is not sufficient to establish an as-applied violating of their First Amendment rights." The Court further concluded that individual attorneys at Legal Aid Services of Oregon have not shown that Legal Services Corporation's enforcement of its program integrity rule cuts off alternative channels for engaging in protected speech, thus the district court did not err in denying the individual attorneys' motion for partial summary judgment.

Pregerson, in a partial dissent, would conclude that the district court erred in rejecting plaintiffs' facial challenge to Legal Services Corporation's restrictions under plaintiffs' argument that the restrictions distort legal services attorneys' ability to effectively represent their clients. The dissent concluded that the majority's interpretation of *Legal Services Corp v Velazquez,* 531 US 533 (2001) is mistaken, in that the Supreme Court struck the restriction in that case on reasonableness grounds. The dissent explained why it would reverse the district court's decision as to plaintiffs' facial challenge to the four restrictions:

"It is tough for the poor to find good lawyers. The purpose of LSC grants is to help ameliorate that social problem by providing funds for legal assistance to people who cannot otherwise pay for a lawyer. Even so, there is still a scarcity of lawyers serving the poor. Upholding these four Restrictions severely constrains those dedicated lawyers who choose to serve the poor by seriously and fundamentally limiting their ability to effectively represent their clients. The four Restrictions thus distort a legal system designed to 'do equal right to the poor and to the rich' (28 USC §453, Oaths of justices and judges) so that all Americans will be the beneficiaries of a system of government based on equal justice under the law. Under the limited public forum analysis, because these four Restrictions distort legal services attorneys['] ability to effectively represent their clients, they are thus unreasonable in light of the purpose of the LSC grants and therefore violate the First Amendment."