No. 23-5413

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

CHRISTOPHER RAY LIPSKA/AKA HARE -PRO SE- PETITIONER

vs.

STATE OF OREGON - RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

OREGON SUPREME COURT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PRO SE PETITION FOR WRIT OF CERTIORARI

CHRISTOPHER RAY LIPSKA/ AKA HARE

777 STANTON BLVD.

ONTARIO, OREGON 97801

QUESTION(S) PRESENTED

1) In an ECSA and unlawful contact with a trial, does a trial court abuse its OEC 401, 402, 403 discretion by allowing the state to present evidence that the defendant's prior convictions were for rape in the second degree, kidnapping in the first degree, unlawful sexual penetration with a foreign object, and sexual abuse, all involving a minor?

2) Is a sentence of life imprisonment for three counts each of encouraging child sexual abuse (ECSA) 1 and 2 unconstitutionally disproportionate when more serious conduct often receives a lesser sentence, and the prior offenses do not allow an inference that deterrence has failed?

3) In an ECSA and unlawful contact with a child trial, does a trial Court abuse its 401, 403 and 404 discretion of propensity and non-propensity, by allowing the state to present evidence that the defendant's prior convictions were for Rape in the second degree, kidnapping in the first degree, unlawful sexual penetration with a foreign object in the first degree, and sexual abuse in the first degree, all involving a minor?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

Gonzalez V. Duncan	551 F3d 875 (9th Cir 2008)
Harmelin v. Michigan	501 US 957, 111 S CT 2680, 115 L Ed 2d 836 (1991)
Miller v. Alabama	567 US 460, 132 S Ct 2455, 183 L Ed 2d 407 (2012)
Norris v. Morgan	622 F3D 1276 (2010)
Robinson v. California	370 US 660, 82 S Ct 1417, 8 L Ed 2d 758 (1962)
Solem v. Helm	463 US 277, 103 S Ct 3001, 77 L Ed 2d 637 (1983)
United States of America v. Dost and Wiegand	636 F.Supp. 828 (1986)
State v. Althouse	359 Or 668, 375 P3d 475 (2016)
State v. Baughman	361 Or 370, 393 P3d 963 (2016)
State v. Brumbach	273 Or.App. 552 (2015)
State v. Davidson	360 Or 370, 380 P3d 963 (2016)
State v. Davis	319 Or App 737, 511 P3d 10 (2022)
State v. Delp	297 Or App1, 441 P3d 590 (2019)
State v. Jones	285 Or App 680, 398 P3d 376 (2017)
State v. Leistiko	352 Or 172, 282 P3d 857 (2012), 352 Or 622, 292 P3d 522 (2012)
State v. Levasseur	309 Or.App. 745, 483 P.3d 1167 (2021)
State v. Lyons	324 Or 256, 924 P2d 802 (1996)

State v. Maiden	222 Or App 9, 191 P3d 803 (2008), 345 Or 618 (2009)
State v. McMullin,	269 Or.App. 859, 860 n. 2, 346 P.3d 611 (2015)
State v. Nolen	319 Or App 703 (2022), 511 P3d 1110
State v. Parker	285 Or App 777, 398 P3d 437 (2017)
State v. Rodriguez/buck	347 Or 46, 217 P3d 659 (2009)
State v. Serrano	355 Or 172, 324 P3d 1274 (2014)
State v. Skillicorn	367 Or 464, 479 P3d 254 (2021)
State v. Travis	320 Or App 460, 513 P3d 614 (2022)
State v. Turnidge	359 or 364, 374 P3d 853 (2016)
State v. Wheeler	343 Or 652, 175 P3d 438 (2007)
State v. Wiesse	238 Or App 426, 241 P3d 1210 (2010), 240 Or 654 (2011)
State v. Williams	357 Or 1, 346 P3d 455 (2015)
State v. Wright	283 Or App 160, 387 P3d 405 (2016)
State v. Wyatt	331 Or. 335, 343, 15 P.3d 22 (2000)
State v. Zavala	276 Or App 612 (2016)

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ORS 163.686

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Imwinkelried, *Criminal Minds*, 45 Hofstra. L. Rev. at 857

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **Federal Courts:**

The opinion of the United States court of appeals appears at Appendix _____to the petition and is

[ ] reported at _____; or

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

[**X**] For cases from **State Courts:**

The opinion of the highest state court to review the merits appears at Appendix **B** to the petition and is

[**X**] reported at **371 Or. 21, 527 P.3d 1001** ; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the **Supreme Court of Oregon** court appears at Appendix **B** to the petition and is

[**X**] reported at **323 Or.App. 639** ; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

JURISDICTION

[ ] For cases from **Federal Courts:**

the date on which the United State Court of Appeals decided my case was _____.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United Stat s Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition or a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No.___.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[X] For cases from **State Courts:**

The date on which the highest state court decided my case was 04/202023 , A copy of that decision appears at Appendix **C** .

[X] A timely petition for rehearing was thereafter denied on the following date:

06/21/23 , and a copy of the order denying rehearing appears at Appendix **D** .

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___.

The jurisdiction of this Court is invoked under 28 U.S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C.A. § 2256

U.S. Const. Amend. 1

U.S. Const. Amend. V

U.S. Const. Amend. VI

U.S. Const. Amend. VIII

Or Const, Art I, § 5

Or Const, Art I, § 8

Or Const, Art I, § 11

Or Const, Art I, § 12

Or Const, Art I, § 14

Or Const, Art I, § 16

OEC 401

OEC 403

OEC404

ORS 137.719

ORS 138.035

ORS 163.476

ORS 163.479

ORS 163.686

ORS 164.684

STATEMENT OF THE CASE

Nature of the Proceedings

This is a criminal appeal requesting admittance of a Petition for Writ of Certiorari, which the petitioner challenges his convictions and sentence. Defendant was charged by indictment with 11 counts as follows: Counts 1 and 8, unlawfully being in a location where children regularly congregate, ORS 163.476; Counts 2, 4, 6, and 11, encouraging child sexual abuse (ECSA) in the second degree, ORS 163.686; Counts 3, 5, and 10, ECSA in the first degree, ORS 164.479. A copy of the superseding indictment is attached at **Appendix E.**

Nature of Judgment

Petitioner waived his right to a jury trial and was tried by the Court. The trial Court granted defendant's motion for judgment of an acquittal on Count 2. TR. 1314. The Court found petitioner guilty of Counts 1, 3-6, and 10-11, and not guilty of Counts 7-9.

On counts 1, a misdemeanor, the Court imposed a sentence of six months' jail. On the ECSA in the first and second degree counts the Court found defendant to be grid-block 8A and 5A offender, respectfully. On each of those, the Court imposed a concurrent sentence of life in prison without the possibility of parole pursuant or ORS 137.719. A copy of judgment is attached at **Appendix B.**

Jurisdiction

This court has jurisdiction pursuant 28 U.S.C.A. § 1254

Notice of Appeal

Petitioner timely filed a notice to appeal on November 27, 2020, from the judgment entered in Lane County Circuit Court on October 29, 2020. The Court affirmed without opinion on January 05, 2023.

Notice Requesting Review

Petitioner timely filed for a notice of appellate review on January 05, 2023, from the judgment entered in the Supreme Court of Oregon. The court denied review on April 20, 2023. and affirmed the Appellate judgment without opinion on June 21, 2023 by a Court of Appeals (**seal**).

REASONS FOR GRANTING THE PETITION

1. Under OEC 401, evidence is not relevant if it is not probative of the fact or proposition at which it is directed. Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. Does the item of evidence tend to prove the matter sought to be proved? Whether the relationship exists depends upon principles evolved by experience or science, applied logically to the situation at hand.

2. Under OEC 402, in order to evaluate whether petitioner suffered prejudice under *Strickland*, it is necessary to identify precisely the evidence that was inadmissible, from that which would have been admitted, but for defense counsel's failure to make a segregated offer of proof and identify OEC 402(2)(b) and 405(1) as the applicable rules of evidence. "All relevant evidence is admissible, except as otherwise provided by the Oregon Evidence Code, by the Constitutions of the United States and Oregon, or by Oregon statutory and decisional law. Evidence which is not relevant is not admissible."

3. Under OEC 403, evidence is inadmissible if its risk of causing unfair prejudice so substantially outweighs its probative value that a trial Court would abuse its discretion by admitting it. Under that standard, the trial Court erred as matter of law, by allowing the state to present the names of those convictions added little,

if any, probative value and presenting evidence that the Petitioner's had been convicted of unrelated, serious crimes created an exceedingly high risk of unfair prejudice.

Because the trial court would have abused its OEC 403 discretion by admitting the names of petitioner's convictions under the circumstances of this cases, defendant's conviction should be reversed and remanded for a new trial.

4. Considering the relative culpability of Petitioner's conduct compared with the severity of the penalty and sentences for other related crimes, and Petitioner's criminal history, the trial Court's imposition of a life sentence was disproportionate to petitioner's crimes and thus violated Article I, section 16, of the Oregon Constitution and the Eighth Amendment to the United States Constitution.

5. Considering the relative difference between the photos normally considered as ECSA, the Petitioner's photos that he was charged for do not meet the test of The Dost Factors nor sexually explicit *(18 USCA § 2256)* and violated Article I, section 8, of the Oregon Constitution provides: "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."

Summary of Facts[1]

Defendant was incarcerated from 1994 until 2019 and has prior convictions for rape in the second degree, kidnapping in the first degree, unlawful sexual penetration, and sexual abuse involving a minor, Tr. 780, 790. Defendant is a level 3 sex offender and needs permission from a probation officer to be in places regularly occupied by minors. Tr. 780.

Upon his release from prison, probation officer Linda Hamilton picked petitioner up and later met with him on June 21, 2019. Tr. 787, 789. Petitioner acknowledged that his action plan required him to avoid parks, playgrounds, and similar spaces. Tr 791.

On June 25, 2019, Hillary Lazinski took her eight-year-old daughter to Monroe Park in Eugene for the "Share Fair." Tr. 805. Lazinski erroneously believed the event would feature local crafts and goods for sale, but it was actually an event giving items away to people in need. Tr 811. Lazinski noticed petitioner in the middle of the park taking photographs of lots of people, and he seemed to be "dialing in" on children. Tr. 808. At some point, she realized petitioner was right behind her and her daughter, taking their photograph. Tr. 808. Lazinski reported her interaction to Linda Hamilton. Tr, 803-05. At a meeting on July 1, 2019, Hamilton asked Petitioner to show her the pictures on his phone and Petitioner instead deleted his photographs in front of her. Tr. 797.

Hamilton contacted Eugene Police Officer Joseph Kidd to help investigate Petitioner. Tr. 998. He met with and spoke to the petitioner on July 3, July 23, July 29, and August 5, 2019. Tr. 998-99. On July 3< 2019, Petitioner provided Kidd with an orange

[1] A significant portion of the trial testimony related to facts underlying the state's allegations in Counts 7-9. Because Petitioner was acquitted of those charges he does address those facts.

DOC-issued thumb drive. Tr. 1003. On July 23, while Kidd interviewed Petitioner at his transitional housing placement, Sponsors, Petitioner acknowledged that he had another thumb drive hidden behind a light in his bathroom, which he allowed Kidd to retrieve. Tr. 1000. Petitioner gave Kidd permission to search his phone and drives. Tr. 1003-004.

Springfield Police digital forensics investigator Robert Weaver examined the phone and USB drives. The orange thumb drive labelled "inmate" contained explicit images of children which had been placed several directories deep in the file structure. Tr. 1039. The PNY-brand drive contained 47 explicit images of children. Tr. 1044. Weaver also found evidence that Petitioner performed a Google search for the term "term" on his phone and for terms involving preteen girls in showers on a computer Petitioner accessed at DHS. Tr. 1053, 1049. There was evidence that the PNY drive had been used on the same DHS computer. Tr. 1054. The orange "inmate" drive had information related to Petitioner, such as emails, sent both before and after the images were stored on it. Tr. 1071.

FIRST ASSIGNMENT OF ERROR

The trial Court erred when it denied Petitioner's motion to exclude evidence of his prior convictions.

Preservation of Error

Prior to trial, Petitioner filed a written motion seeking to exclude, *inter alia*, "Any other acts evidence pertaining to his prior convictions or charges." Appendix F. In support of his motion he cited *State v. Williams*, 357 Or 1, 346 P3d 455 (2015), *State v. Turnidge*, 359 Or 364, 366, 374 p3d 853 (2016), *State v. Leistiko*, 352 Or 622,292 P3d (2012), *adh'd to as modified on recons*, 352 Or 622, 292 P3d 522 (2012), and OEC 401 403, and 404.

At a pretrial hearing, the state declared its intention to offer evidence of Petitioner's prior convictions. Tr. 685. Petitioner, in turn, offered to stipulate that he was a level 3 sex offender. Tr. 663. He argued that such a stipulation was sufficient for the state's needs, that the specific nature of his prior convictions was prejudicial, and that the state needed to identify a particular theory of relevance. Tr. 678-79. The state argued the convictions were relevant to show petitioner's sexual interest. Tr. 680.

The Court ruled that the Petitioner's prior convictions were relevant to show Petitioner's reasons for possessing images of children or contacting children. Tr. 681. The Court acknowledged that the evidence was highly prejudicial, but found that it was more probative and thus ruled it admissible. Tr. 681-83.

The State's first witness testified and offered evidence showing that Petitioner had prior convictions from 1994 for rape in the second degree, kidnapping in the first degree, unlawful sexual penetration with a foreign object, and sexual abuse, all involving a minor. Tr. 780.

Standard of Review

Whether evidence is relevant is a question of law. *State v. Serrano*, 355 Or 172, 191, 324 P3d 1274 ()2014). A trial Court's decision to admit evidence over an objection that the evidence is unfairly prejudicial is reviewed for abuse of discretion. *State v. Parker*, 285 Or App 777,785, 398 P3d 437 (2017), *State v. Levasseur,* 309 Or.App. 745483 P.3d 1167 *State v. Nolen,* 319 Or App 703 (2022), 511 P3d 1110 (2022), *State v. Skillicorn,* 367 Or 464, 479 P3d 254 (2021), *State v. Travis,* 320 Or App 460, 513 P3d 614 (2022). However, a trial Court generally abuses that discretion if it rejects a Petitioner's offer to stipulate to a nonprejudicial evidentiary equivalent. Id.

Argument

The trial Court erred when it admitted evidence of petitioner's prior convictions in the face of Petitioner's offer to stipulate to his status as a level 3 sex offender, an element of some but not all of Petitioner's charges. Even if that evidence was minimally relevant, the trial Court abused its discretion in finding that its probative value outweighed the danger of unfair prejudice.

Three rules form the legal framework that governs the admission of other-acts evidence: OEC 404(3); OEC 404(4); and OEC 403. *State v. Baughman*, 361Or 386, 390-391, 393 P3d 1132 (2017). OEC 404(3) provides:

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

(Emphasis added).

OEC 404(4) provides:

> "In criminal actions, evidence of other crimes, wrongs or acts by the defendant is admissible if relevant except as otherwise provided by:
> "(a) OEC 406 through 412 and, to the extent required by the United States Constitution or the Oregon Constitution, OEC403;
> "(b) The rules of evidence relating to privilege and hearsay;

"(c) The Oregon Constitution; and

"(d) The United States Constitution."

(Emphasis added). The first sentence of OEC 404(4) supersedes the first sentence of OEC 404(3). *Baughman*, 361 Or at 404, *State v. Brumbach*, 273 Or App 552 (2015), State v. Zavala, 276 Or App 612 (2016).

In turn, OEC 403 provides for exclusion of otherwise relevant evidence on certain grounds:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence."

Id.

Baughman, 361 Or at 404, synthesizes OEC 404(3), OEC 404(4), and OEC 403 into logical framework for evaluating other-acts evidence. Under the *Baughman* framework, the Court's consideration of other-acts evidence is a two-step process. First,

> "when presented with an objection to other acts evidence, a Court should first analyze any proffered non-propensity purposes under OEC 404(3)." *State v. Jones,* 285 Or App 680, *398 p3d 376 (2017) (summarizing framework in* Baughman, *361 Or at 404) State v. Serrano*, 355 Or 172, 191, 324 P3d 1274 (2014). *State v. Brumbach*, 273 Or App 552 (2015). *State v. Parker*, 285 Or App

777,785, 398 P3d 437 (2017), *State v. Levasseur,* 309 Or.App. 745483 P.3d 1167 *State v. Nolen,* 319 Or App 703 (2022), 511 P3d 1110 (2022), *State v. Skillicorn,* 367 Or 464, 479 P3d 254 (2021), *State v. Travis,* 320 Or App 460, 513 P3d 614 (2022).[2] Second, "only if necessary, should it proceed to analyze any OEC 404(4) theories." *Id.* Finally, regardless of whether the evidence is relevant for propensity or non-propensity purpose, upon request, a trial Court must conduct OEC balancing before admitting the evidence in order to comply with OEC 404(3) and 404(4). *Id.*"'

The State did not argue, and the Court did not rule, that the evidence was admissible under a character theory under OEC 404(4). The State argued, and the Court ruled, the evidence was, relevant to show Petitioner's sexual purpose in both approaching children and possessing explicit images.

It proceeded from that reasoning to conclude that the probative value outweighed its prejudicial effect. But even if the evidence was logically relevant without resort to character reasoning, it was still unduly prejudicial, and the Court should have excluded it under OEC 403. The risk of misuse was high because the inferential chain that underlies the Character-based reasoning is substantially more straightforward. And the error was not harmless because the damning nature of his prior convictions rendered his trial fundamentally unfair.

Zavala, 276 Or App 612, Defendant now petitions for reconsideration because the

[2] As we further explain below, *Johns* concerned the admissibility of evidence under a "doctrine of chances" theory of relevance. Here, the trial court indicated, correctly, that the doctrine of chances does not apply in this case. It nevertheless considered the *Johns* questions in its relevancy analysis. At the time, the Supreme Court ruled that it was not inappropriate for a court to do so. *State v. Turnidge,* 359 Or. 364, 442 n. 43, 374 P.3d 853 (2016), *cert. den.*, — U.S. —, 137 S. Ct. 665, 196 L.Ed.2d 554 (2017). But, as noted, *Skillicorn* has since overruled *Johns.*

uncharged, "other acts" evidence against him is subject to the "significant change in the law" announced in *Williams*. In that decision, the Supreme Court held that

> "OEC 404(4) supersedes OEC 404(3) in a criminal case except to the extent required by the state or federal constitution. In a prosecution of child sexual abuse, the federal ***834*** constitution requires that a trial court determine whether the risk of unfair prejudice posed by the evidence outweighs its probative value under OEC 403."

357 Or. at 24, 346 P.3d 455. The consequence of that holding is that the prohibition against propensity evidence in OEC 404(3) yields, in a criminal case, to the admissibility of relevant evidence of a defendant's "other crimes, wrongs or acts, * * * except as otherwise provided by [various evidentiary rules] and, to the extent required by the United States Constitution or the Oregon Constitution, OEC 403." OEC 404(4). Put differently, "other acts" evidence of child sexual abuse—previously prohibited by OEC 404(3) if sought to be admitted for a propensity purpose—is allowed under OEC 404(4) so long as it is relevant and subject to OEC 403 unfair-prejudice balancing. Thus, on reconsideration, defendant ***616*** contends that, under *Williams*, the evidence of uncharged conduct offered by the alleged victims' mother's coworker is allowed under OEC 404(4), but only if subject to OEC 403 balancing, which was not conducted in this case.

The state counters that defendant did not preserve, at trial, his argument that admitting the evidence of uncharged sexual conduct requires OEC 403 balancing. A party preserves an issue for review by "providing the trial court with an explanation of his or her objection that is specific enough to ensure that the court can identify its alleged error with enough clarity to permit it to consider and correct the error immediately, if correction is

warranted." *State v. Wyatt,* 331 Or. 335, 343, 15 P.3d 22 (2000). The state argues that, in *Williams,* the court clearly indicated that OEC 403 determinations must be sought by the defendant:

> "We therefore hold that balancing is required by the Due Process Clause. Even if due process does not categorically prohibit the admission of 'other acts' evidence to prove propensity in prosecutions for child sexual abuse, it at least requires that, *on request,* trial courts determine whether the probative value of the evidence is outweighed by the risk of unfair prejudice."

357 Or. at 18–19, 346 P.3d 455 (emphasis added). And, the court stated:

> "Consequently, the admission of evidence under OEC 404(4) remains subject to balancing under OEC 403. *When a party objects, under OEC 403,* to 'other acts' evidence offered under OEC 404(4), a trial court must engage in the balancing anticipated by OEC 403."

Id. at 19, 346 P.3d 455 (emphasis added). Moreover, the state relies on *State v. McMullin,* 269 Or.App. 859, 860 n. 2, 346 P.3d 611 (2015), to assert that we have recently and clearly indicated that, in order to preserve an OEC 403 challenge, a defendant must seek a ruling or object to the evidence on those grounds at trial.

Although defendant did not request OEC 403 balancing in the context of his challenge below to admission of the evidence under OEC 404(4), as required by *Williams,* his ***617** request for reconsideration in light of *Williams* constitutes a request that we review for error apparent on the face of the record. ORAP 5.45(1).

I. The evidence was not logically relevant under a permissible non-propensity theory.

Here, the threshold is whether the evidence was relevant under OEC 401. That rule provides, "'Relevant evidence' means evidence having any tendency to make the existence of any that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Here, Petitioner's general purpose was relevant to the charges of encouraging sexual abuse in the second degree, which requires that that a person act with "the purpose of arousing or satisfying the sexual desires of the person or another person;" and for unlawful contact with a child, which can be committed with the same purpose. ORS 163.479, ORS 163.686.

The evidence of 's prior convictions was not logically relevant under a permissible non-propensity theory. In *Williams*, the Oregon Supreme held that evidence that the Defendant had possessed a child' underwear to show hi sexual purpose in his acts in the charged offenses. The Court noted that, "In this case, there is a slim but distinct difference between using the underwear evidence to establish Defendant's character and propensity to act accordingly, and offering that evidence to establish Defendant's sexual purpose." *Williams*, 357 or at 23. The Court held that the underwear evidence fell on the permissible side of the line.

But here, the evidence is merely that Petitioner has been convicted of prior, serious offenses against children. To use that evidence to demonstrate Petitioner's sexual purpose by showing that he was previously convicted of offenses against children is classic propensity evidence. He was guilty of prior offenses; thus, he is guilty of the instant offense. The logical relevance of Petitioner's prior convictions to show his sexual purpose

flows inexorably through a factfinder's determination that he is simply the type of person who commits offenses against children. The evidence falls on the wrong side of the "slim difference" identified in *Williams*.

II. In the alternative, even if it was relevant, the prejudicial impact of the evidence significantly outweighed any probative value it might have possessed.

Upon an OEC 403 objection, the proponent bears the burden of establishing that evidence has a probative value "substantial enough to outweigh any attendant danger of unfair prejudice," *Mayfield*, 302 or at 645. Evidence is unfairly prejudicial when it has "an undue tendency to suggest a decision on an improper basis, commonly, although not always, an emotional one," or when, "the preferences of the trier of fact are affected by reasons unrelated to the persuasive power of the evidence to establish a fact of consequence." *State v. Lyons,* 324 Or 256, 280, 924 P2d 802 (1996). The trial Court errs if it "fails to exercise discretion, refuses to exercise discretion or fails to make a record which reflects an exercise of discretion." *Id.*

In the other acts context, a trial Court's decision at step one of the *Baughman* analysis, about whether other acts evidence is relevant for a non-propensity purpose, will have a significant effect on whether the trial Court admits that evidence was actually admitted that must be compared to its prejudicial effect. *See id.*

Here, even if there was some minimal probative value that did not flow through a propensity inference in this case, the Court should nonetheless have excluded the evidence. If the other acts evidence was relevant to that theory at all, the inferential link is

tenuous for the reasons articulated above. On the other hand, the risk of prejudice was extremely high because the character-based inference was much more straightforward: Petitioner is a person who commits serious offenses involving children. He did before, so he has again. This is not the stuff of a fair trial.

In the other acts context, a trial Court's decision at step one of the *State v. Travis,* 320 Or App 460 (2022), about whether other acts evidence is relevant for a non-propensity purpose under OEC 403, will have a significant effect on whether the trial Court admits that evidence was actually admitted that must be compared to its prejudicial effect. *See id.*

On appeal, the state concedes that the evidence of defendant's prior rape conviction was not properly admitted for a non-character purpose under OEC 404(3). In light of the record and our recent cases explaining that sexual motive is generally not a permissible reason to admit evidence for non-character purposes, we accept that concession as well taken. See *State v. Martinez*, 315 Or.App. 48, 56-57, 499 P.3d 856 (2021) (evidence of prior conduct to show sexual purpose was impermissible character evidence under OEC 404(3)); I, 309 Or App. 745, 753, 483 P.3d 1167, adh'd as modified, 312 Or.App. 733, 489 P.3d 630, rev den, 368 Or. 788 (2021) (same); *State v. Terry*, 309 Or.App. 459, 463-64, 482 P.3d 105 (2021) (same). Due to that concession, the resolution of this appeal reduces to whether the evidence was also considered for a permissible character purpose under OEC 404(4) and, if considered for that purpose, whether the evidence had to be excluded as unfairly prejudicial under OEC 403. We conclude that the record does not support a finding that the trial court considered the evidence for an OEC 404(4) purpose, and therefore reverse and remand.

The state made clear to the trial court that it was offering the evidence under a non-character theory and a character theory. First, the state argued that the evidence was relevant and admissible as non-character evidence to "prove defendant's sexual motive in offending the child victim in the current case under OEC 404(3) and 403." The state suggested that the similarities between the victim and circumstances underlying the 1992 conviction were indicative of a class of victim that was the object of defendant's sexual offenses, which was an explanation of "the driving force behind this behavior," and therefore why the evidence was relevant and admissible as non-character evidence under OEC 404(3). The state then argued, under a character

Here, with the Petitioner, even if there was some minimal probative value that did not flow through a propensity inference in Petitioner's case, the Court should nonetheless have excluded the evidence under OEC 403 and 404(3). If the other acts evidence was relevant to that theory at all, the inferential link is tenuous for the reasons articulated above. On the other hand, the risk of prejudice was extremely high because the character-based inference was much more straightforward: Petitioner is a person who commits serious offenses involving children. He did before, so he has again. This is not the stuff of a fair trial.

Moreover, a trial Court's decision at step one of the *State v. Nolen*, 319 Or App 703 (2022), about whether other acts evidence is relevant for a non-propensity purpose under OEC 403 and 404(3), will have a significant effect on whether the trial Court admits that evidence was actually admitted that must be compared to its prejudicial effect. *See id.*

During the hearing, the state argued that the evidence was not being offered for a propensity purpose under OEC 404(4)-although the state did assert that propensity evidence is admissible in child sexual abuse cases-but that the state was offering the evidence for the non-propensity purpose of demonstrating sexual purpose under OEC 404(3).[3]The state argued that at trial they would have to prove that defendant not only touched K, but that when the touching occurred, it was done for a sexual purpose; as an element of first-degree sexual abuse pursuant to ORS 163.427, [4] which,

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[319 Or.App. 706] the state argued, requires that "sexual contact" be established. Therefore, the state's theory of admissibility for the prior acts evidence was that the evidence demonstrated that defendant "is sexually aroused by children and that, when this touching happened, it was done for a sexual purpose and not by accident or for some other type of purpose." The state further argued that a limiting instruction would be sufficient to controvert the potential prejudice caused by the evidence and prevent the jury from using the other acts evidence as propensity evidence.

Defendant opposed the admission of the other acts evidence, arguing that it was irrelevant and should not be admitted under OEC 401. Defendant then argued that, even if the other acts evidence was relevant, it would be improper to admit it as non-propensity evidence under OEC 404(3). Defendant argued, relying on State v. Williams, 357 Or. 1, 346 P.3d 455 (2015), that the other acts evidence was propensity evidence that should not be admitted under OEC 404(3) because it had "little to no cognizable probative value," and that the risk that the jury may conclude "that the defendant acted in accordance with [the] past acts on the occasion of the charged crime will be

substantial." Lastly, defendant argued that the other acts evidence was unduly prejudicial under OEC 403 because of the high likelihood that the jury would use the evidence as propensity evidence.

Recently, in Martinez, we determined that the trial court erred by admitting other acts evidence demonstrating sexual purpose under OEC 404(3) because it required propensity-based reasoning. 315 Or.App. at 56. That case did not require that we determine whether the sexual purpose admission of the evidence relied on propensity-based reasoning because the state conceded that the evidence was in fact propensity evidence. However, the state argued that the evidence had been implicitly admitted by the court under OEC 404(4). Id. We agreed with the state that, under the facts of that case, the other acts evidence of sexual purpose did require propensity-based reasoning, but we concluded that the trial court had admitted the evidence under OEC 404(3) and as such erred.

> [319 Or.App. 711] * * * about whether other acts evidence is relevant for a non-propensity purpose, will have a significant effect on whether the trial court admits that evidence" under OEC 403. 315 Or.App. at 54.

Defendant argues that the trial court's error was not harmless as the other acts evidence from T and C likely affected the verdict. The state does not address harmlessness. We agree with defendant that the error was not harmless, as we cannot conclude that "there is little likelihood that the evidence that defendant" not only sexually abused T, but also abused C, affected the jury's verdict. See Martinez, 315 Or.App. at 59 (citing State v. Baughman, 361 Or. 386, 407, 393 P.3d 1132 (2017)).

Here, with the Petitioner, even if there was some minimal probative value that did not flow through a propensity inference in Petitioner's case, the Court should nonetheless have excluded the evidence under OEC 403 and 404(3). If the other acts evidence was relevant to that theory at all, the inferential link is tenuous for the reasons articulated above. On the other hand, the risk of prejudice was extremely high because the character-based inference was much more straightforward: Petitioner is a person who commits serious offenses involving children. He did before, so he has again. This is not the stuff of a fair trial.

III. The erroneous admission of the evidence was harmful and requires a new trial.

This Court will affirm a conviction despite the erroneous admission of evidence only if there is little likelihood that the evidence affected the verdict. *State v. Davis*, 336 Or 19, 32, 77 P3d 1111 (2003). That inquiry must focus on the possible influence that the evidence had on the verdict and not on whether proof for Defendant's guilt was compelling even without the evidence. *State v. Maiden*, 222 Or App 9, 13, 191 P3d 803 (2008), *rev den*, 345 Or 618 (2009). The admission of inflammatory evidence that invites a factfinder to convict a Defendant based on her character and propensity is harmful. *E.g.*, *State v. Wright*, 283 Or App 160, 178, 387 P3d 405 (2016) (other acts evidence that the Defendant threatened the victim was "highly inflammatory, and, as such, created a risk that the jury would convict Defendant based on his past acts or his character").

Here, the trial Court improperly admitted highly inflammatory evidence showing that Petitioner had committed extremely serious crimes involving children. A factfinder cannot reasonably put aside the knowledge that a Petitioner has previously committed

such serious offenses. Moreover, the danger was not ameliorated by the fact that Petitioner tried his case before a Court rather than a jury. While we can hope that a trial Court will be less shocked by such evidence than a lay jury, because the Court itself erred in finding the evidence relevant, despite the propensity problems outlined above, the Court was extremely likely to misuse the evidence.

The Court of Appeals observed that "It is an understatement to say that the line between propensity and non-propensity inferences is difficult to discern under Oregon law." *State v. Skillicorn*, 297 Or App 678, 443 P.3d 683. It noted that, when uncharged misconduct evidence is admitted—as it was in this case and *Johns*—to prove that a person acted with a particular intent on a prior occasion and, therefore, likely acted with the same intent on the charged occasion, the relevance of the evidence appears to rely "on a classic propensity theory." *Id.* But, because it was bound by *Johns*, the court held that the evidence of defendant's prior driving was admissible. *Id.* at 681, 443 P.3d 683.

On review, defendant renews his argument that the trial court erred in admitting the evidence of the prior incident in which he drove onto the grassy area. He contends that, contrary to the Court of Appeals decision based on *Johns*, the evidence was not admissible under the doctrine of chances. Defendant asserts that the doctrine is based on "the improbability of recurring inadvertent events: that it is objectively improbable that the same accident will befall the same person again and again." Therefore, he reasons that

> "A deliberate prior act is not admissible under the doctrine of chances because its relevance does not depend on that probabilistic inference. Instead, it depends on a propensity inference. The prior act is relevant

because if a person acted deliberately—with bad intent or guilty knowledge—on a prior occasion, it is likely that he acted with the same bad intent on a later, similar occasion."

Defendant appealed, challenging, among other things, the trial court's admission of evidence of the prior incident when he had ***261*** driven onto the grassy area. Defendant argued that the evidence was propensity evidence, which is barred ***473*** by OEC 404(3). In response, the state argued that the evidence was admissible under the doctrine of chances, which, it asserted, is a non-propensity theory of relevance that, as applied in *Johns*, allows for the admission of uncharged misconduct evidence to support an argument that, because a person engaged in similar behavior on other occasions it is more likely that the person engaged in the behavior at issue.

Imwinkelried, *Criminal Minds*, 45 Hofstra. L. Rev. at 857 (footnotes omitted).

When applying the doctrine of chances, a factfinder is asked to consider the likelihood of the recurrence of the uncommon events. Therefore, *Imwinkelried* asserts, the admission of evidence of uncharged misconduct under the doctrine of chances does not violate the prohibition against propensity reasoning. To illustrate the difference between propensity reasoning and doctrine-of-chances reasoning,

***Imwinkelried* sets out another figure**:

Item of Evidence	Intermediate Inference	Ultimate Inference
An uncharged event involving the accused	Considered together with the charged event, an objectively improbable coincidence	The probability of the accused's criminal state of mind at the time of one or some of the events

According to Imwinkelried, doctrine-of-chances reasoning differs from propensity reasoning "with respect to both of the probative dangers inspiring the character evidence prohibition." *Id.* First, doctrine-of-chances reasoning "does not require the jurors to consciously advert to the question of the accused's personal, subjective character. Rather, they are asked to assess the objective improbability of so many accidents or inadvertent acts." *Id.* Second, it "does not require jurors to use character as a predictor of conduct." *Id.* Rather, "the second step necessitates that the jurors do what the judge will tell them to do

in another part of the jury charge, namely, draw on their common sense and knowledge to assess the relative plausibility of the parties' competing versions of the events." *Id.*

The fact that the doctrine of chances is based on the objective improbability of the recurrence of similar, uncommon events leads us to two conclusions relevant to this case.

Here, the trial Court improperly admitted highly inflammatory evidence showing that Petitioner had committed extremely serious crimes involving children. A factfinder cannot reasonably put aside the knowledge that a Petitioner has previously committed such serious offenses. Moreover, the danger was not ameliorated by the fact that Petitioner tried his case before a Court rather than a jury. While we can hope that a trial Court will be less shocked by such evidence than a lay jury, because the Court itself erred in finding the evidence relevant, despite the propensity problems outlined above, the Court was extremely likely to misuse the evidence.

Additionally, the Court improperly admitted highly inflammatory evidence showing that Petitioner had committed extremely serious crimes involving children. A factfinder cannot reasonably put aside the knowledge that a Petitioner has previously committed such serious offenses. Moreover, the factfinder failed to follow the doctrine of chances is based on the propensity and non-propensity rules of OEC 404(3).

SECOND ASSIGNMENT OF ERROR

The trial Court erred in imposing a sentence of life without the possibility of parole.

Preservation of Error

Petitioner filed a written sentencing memorandum, a copy of which is attached at

Appendix-B. In the memorandum, Petitioner argued:

> "Under ORS 137.719, the presumptive sentence for a felony sex crime is life in prison without the possibility of parole "if the defendant has been sentenced for sex crimes that are felonies at least two times prior to the current sentence" ORS 137.719(1). [defendant] has previous convictions for first-degree unlawful sexual penetration with a foreign object, first-degree sexual abuse, and second-degree rape, all from 1994. Those prior convictions make him statutorily eligible for a true-life sentence; however, this Court should not impose such a sentence because it would violate the Oregon Constitution."
>
> Appendix-B.

Petitioner further argued that a life sentence would be unlawful under Article I, section 16, of the Oregon Constitution and cited *State v. Rodriguez/Buck*, 347 or 46, 217 p3d 659, and *State v. Althouse*, 359 Or 668, 375 p3d 475 (2016)-. Appendix-B.

Petitioner analogized his situation to the Defendant in *State v. Davidson*, 360 Or 370, 380 p3d 963 (2016), where the Oregon Supreme Court found that a life sentence was unconstitutional upon the defendant's conviction for public indecency, because here, as there, his "new convictions do not involve any attempt to have physical contact with the victims." Appendix-B. He also noted that the record here contained evidence, absent in *Davidson*, that Petitioner understood "the socially unacceptable nature of his attraction toward children." *Id.*

Petitioner also argued a true-life sentence would violate the Eighth Amendment to the United States Constitution. Appendix-B.

At the sentencing hearing Petitioner relied on the sentencing memorandum as to I proportionality argument. Tr. 1390. The trial Court addressed that argument and held that sentence was not unconstitutional as applied. Tr. 1418-20.

Standard of Review

This court reviews questions of sentence proportionality for legal errors. *State v. Rodriguez/buck*, 347 Or 46, 217 P3d 659 (2009).

Argument

I. Article I, section 16, of the Oregon Constitution requires proportionate sentences.

Article I, section 16, of the Oregon Constitution provides in pertinent part: "Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportional to the offense." The provision requires that the penalties for a defendant's offenses be comparatively related to his conduct. *State v. Wheeler*, 343 or 652, 656,657, 175 P3d 438 (2007).

A Court ordinarily defers to the legislature's judgment in assigning penalties, as long as those judgments are reasonable. *Id.* At 669-70,676. However, trial Courts have "an obligation to consider a claim that a particular sentence is unconstitutional." *Rodriguez/buck*, 347 Or at 52. A sentence is disproportionate when it "shocks the moral sense of reasonable persons" as to what is right or proper under the circumstances. *Wheeler,* 343 Or at 669-71.

To determine whether a sentence is disproportionate, a Court considers; (1) a comparison of severity of the penalty and the gravity of the crime; (2) a comparison of the penalties imposed for other, related crimes; and (3) the criminal history of the Petitioner. *Rodriguez/Buck*, 347 Or at 58. The severity of the penalty is primarily determined by the amount o time the convicted person must spend in prison. *Id.* At 60. The "offense' is generally defined by the statute, but in an as-applied challenge, it is also defined by the convicted person's particular criminal conduct. *Id.* At 62. A Court conducting a proportionality review may consider the historical sentences for a crime, but should keep in mind that the legislature may always reevaluate its determination of the gravity of the offense and the propriety of the sentence. *Id.* At 73.

II. The sentences in the case were disproportionate under Article I, section 16, of the Oregon Constitution.

A. Comparison of severity of the penalty and the gravity of the crime supports a finding of disproportionality.

In *State v. Delp*, 297 Or App 1, 441 P3d 590 (2019), this Court affirmed Defendant's extensive criminal history demonstrated that he was not amenable to being rehabilitated. In evaluating the gravity of the offense, the Court first noted that the Defendant's crimes of first-*degree* encouraging child sexual abuse were relatively severe. *Id.* At 10. Even though the Defendant had not directly physically harmed—repeatedly—with each duplication of the image or recording. *Id.* The images at issue were "beyond horrifying," depicting adults raping children and forcing them to commit sexual acts on each other. *Id.* At 10-11. The Defendant had downloaded

hundreds of other images and videos depicting adults abusing infants and toddlers and some depictions included bestiality with children. *Id.* at 11. Thus, the gravity of the offenses was high.

Moreover, the prior convictions that triggered the Defendant's true-life sentence were also serious, including convictions for possession of child pornography and encouraging child sexual abuse in different jurisdictions. Indeed, the Defendant had been imprisoned for first-degree encouraging child sexual abuse ad within months of being released from custody, and in violation of his supervision conditions, he committed the crimes at issue in that case. *Id.* "Thus, he had opportunities to reform his criminal behavior, but he did not." *Id.* (citations omitted).

In contrast, in *Davidson*, the Court reversed a true-life sentence that was imposed on a felony public indecency charge when, even though the Defendant had an expansive criminal history, it involved only low-level crimes. 360 or at 372. In that case, the defendant's two prior felony public-indecency convictions triggered the true-life sentence. *Id.* Aside from those predicate convictions, the Defendant had a lengthy history of committing minor crimes, including numerous drug-possession charges, "battery based on fights with his girlfriends," criminal trespass, and driving while suspended. *Id.* at 376. The Defendant also had a lengthy history of committing public indecency, which included masturbating and exposing himself in front of unsuspecting women and children. *Id.*

The Court also looked at the underlying charges that triggered the sentence under ORS 137.719. *Id.* "The state described that cited conduct as 'aggressive' behavior toward 'vulnerable members of the public,'" *Id.* at 386. Although the Court did not "take such

harm lightly," it ultimately concluded that the first and third factors (gravity of the offense compared to the severity of the penalty and the Defendant's criminal history) weighed against finding the life-sentence proportionate to the offense. *Id.* at 386-87. In making that determination, the Court explained that the gravity of the Defendant's offense was not as serious as crimes involving nonconsensual sex or sexual conduct targeting children. *Id.* at 3837.

This case is more like *Davidson* than *Delp*. In this case, Petitioner received true life sentences on the various counts of ECSA 1 and 2. None of petitioner's crimes physically harmed or threatened harm against any other person. Petitioner's crimes were not in any way aggravated, more serious than typical, or more harmful than typical. Here, one of the images contained an apparent depiction of intercourse with a child, but that image was blurred. Tr. 1163. The other images showed a child in lingerie and a naked toddler on a bed. Tr. 1162. These are not the truly horrific images discussed in *Delp*. Thus, comparing the gravity indicates disproportionality.

Moreover, these Petitioner's images would not pass the *Dost Factors Test of the Federal Courts.* United States of America v. Dost and Wiegand, 636 F.Supp. 828 (1986). Defined:

The Dost Factors

1) whether the focal point of the visual depiction is on the child's genitalia or pubic area;

2) whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;

3) whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;

4) whether the child is fully or partially clothed, or nude;

5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity;

6) whether the visual depiction is intended or designed to elicit a sexual response in the viewer.

Of course, a visual depiction need not involve all of these factors to be a "lascivious exhibition of the genitals or pubic area." The determination will have to be made based on the overall content of the visual depiction, taking into account the age of the minor.

These images also would not be verified as sexually explicit conduct, through; 18 U.S.C.A. § 2256, § 2256. Definitions.

"For the purposes of this chapter, the term--

(1) "minor" means any person under the age of eighteen years;

(2)(A) Except as provided in subparagraph (B), "sexually explicit conduct" means actual or simulated--

(i) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex;

(ii) bestiality;

(iii) masturbation;

(iv) sadistic or masochistic abuse; or

(v) lascivious exhibition of the anus, genitals, or pubic area of any person;

(B) For purposes of subsection 8(B)[1] of this section, "sexually explicit conduct" means--

(i) graphic sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex, or lascivious simulated sexual intercourse where the genitals, breast, or pubic area of any person is exhibited;

(ii) graphic or lascivious simulated;

(I) bestiality;

(II) masturbation; or

(III) sadistic or masochistic abuse; or

(iii) graphic or simulated lascivious exhibition of the anus, genitals, or pubic

area of any person;

(3) "producing" means producing, directing, manufacturing, issuing, publishing, or advertising;

(4) "organization" means a person other than an individual;

(5) "visual depiction" includes undeveloped film and videotape, data stored on computer disk or by electronic means which is capable of conversion into a visual image, and data which is capable of conversion into a visual image that has been transmitted by any means, whether or not stored in a permanent format;

(6) "computer" has the meaning given that term in section 1030 of this title;

(7) "custody or control" includes temporary supervision over or responsibility for a minor whether legally or illegally obtained;

(8) "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where--

(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;

(B) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.

(9) "identifiable minor"--

(A) means a person--

(i)(I) who was a minor at the time the visual depiction was created, adapted, or modified; or

(II) whose image as a minor was used in creating, adapting, or modifying the visual depiction; and

(ii) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and

(B) shall not be construed to require proof of the actual identity of the identifiable minor.

(10) "graphic", when used with respect to a depiction of sexually explicit conduct, means that a viewer can observe any part of the genitals or pubic area of any depicted person or animal during any part of the time that the sexually explicit conduct is being depicted; and

(11) the term "indistinguishable" used with respect to a depiction, means virtually indistinguishable, in that the depiction is such that an ordinary person viewing the depiction would conclude that the depiction is of an actual minor engaged in sexually explicit conduct. This definition does not apply to depictions that are drawings, cartoons, sculptures, or paintings depicting minors or adults.

B. The penalties for other, related offenses are less severe than the life sentence here.

Considering the penalties imposed for related crimes, "[i]f the penalties for more

'serious' crimes than the crime at issue result in less severe sentences, that is an indication that the challenged penalty may be disproportionate." *Rodriguez/Buck*, 347 Or at 63.

Here, Petitioner received true life sentence for ECSA 1 and 2. The legislature placed Petitioner's crimes on the crimes seriousness eight and five line of the sentencing guidelines grid. Even with Petitioner's "A' criminal history score, the maximum presumptive sentence for any of those counts was 45 months. Thus, other crimes thought to be equally serious typically receive probation. The second factor, too, weighs in Petitioner's favor.

C. Petitioner's criminal history does not outweigh the first two factors.

Although a Petitioner's criminal history can increase the sentence that a Court may consider proportional, nothing in Petitioner's criminal history justifies a life sentence. *Rodriguez/Buck*, 347 Or at 65-67. Petitioner's criminal history is not as grave as the *Althouse* or *Delp* Defendants. In *Althouse*, the record showed that the Defendant had an extensive criminal history and inability to reform his conduct despite repeated opportunities to do so, considering he committed various sex crimes over three decades. Similarly, in *Delp*, the details of the Defendant's underlying crimes were "beyond horrific," and the Defendant had a long and extensive history of exploitive and predatory behavior. On that record, the Defendant had had the opportunity to reform his criminal behavior, but failed to do so.

In contrast, here, Petitioner's criminal history does not indicate that Petitioner was unable to reform his conduct. Here, Petitioner's criminal history was serios, but it took place in 1994. And as defense counsel noted in the sentencing memorandum, Petitioner's history does not establish that was incapable of rehabilitation. Petitioner's current crimes

are of a different, and substantially less serious nature. And his release from custody in 2019 was the first time that Petitioner had access to modern internet. Petitioner's prior history does not reflect a consistent or frequent pattern or offending. Therefore, even though the offenses here are serious, the record does not indicate that petitioner had an opportunity to reform his criminal behavior, but failed to do so—which were central considerations in *Althouse* and *Delp*. Therefore, Petitioner's life aggregate sentence was unconstitutionally disproportionate under Article I, section 16, and warrants reversal.

II.

Petitioner's sentence violates the Eighth Amendment to the United States Constitution.

> "The Eighth Amendment to the United States Constitution's prohibition of "cruel and unusual punishment' guarantees individuals the right not to be subjected to excessive sanctions. *Miller v. Alabama*, 567 US 460, 132 S Ct 2455, 183 L Ed 2d 407 (2012). It impliedly contains a "narrow proportionality principle" that 'applies to noncapital sentences." *Harmelin v. Michigan*, 501 US 957, 996-997, 111 S Ct 2680, 115 L Ed 2d 836 (1991); *Robinson v. California*, 370 US 660, 667, 82 S Ct 1417, 8 L Ed 2d 758 (1962) (applying the Eighth Amendment to the United States via the Fourteenth Amendment)."'

Whether a sentence is so disproportionate that it violates the Eighth Amendment depends on three factors: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Solem v. Helm*, 463 US 277, 103 S Ct 3001, 77 L Ed 2d 637 (1983) (holding that a life sentence

without possibility of parole was grossly disproportionate when applied to the minor felony offense of uttering a $100 "no account" check committed by an offender with six prior nonviolent felonies). A **Court** weighs the criminal offense and the resulting penalty in light of the harm caused or threatened to the victim or society and the culpability of the offender. *Gonzalez v. Duncan*, 551 F3d 875, 883-84 (9th Cir 2008) (Defendant's failure to comply with sex offender registration caused no actual harm). Recidivism is a legitimate basis for increased punishment. *Norris v. Morgan*, 622 F3d 1276, 1295 (9th Cir 2010).

This Court has noted that an analysis of the three factors set forth in R*odriguez/Buck* provides a sufficient basis to decide whether a Defendant's sentence is disproportionate under the Eighth Amendment. *State v. Wiese*, 238 Or App 426, 429-30, 241 P3d 1210 (2010), *rev den*, 240 or 654 (2011). Accordingly, for the same reasons as those set forth in the preceding section, the severity of Petitioner's sentence is disproportionate compared to his offense. *Cf. Gonzalez*, 551 F3d at 883-87, 898 (because the (because the Defendant's failure to comply with annual sex offender registration caused no actual harm, a 28-year-to-life recidivist sentence was grossly disproportionate, even for the Defendant whose criminal history included prior convictions involving both violence and sexual predation). Petitioner's life sentence thus violates the Eighth Amendment's prohibition against cruel and unusual punishment.

CONCLUSION

Petitioner respectfully request that this Court reverse his judgment of conviction and remand for a new trial. If this Court agrees with only Petitioner's second assignment of error, he respectfully requests that this Court reverse and remand for resentencing.

Respectfully submitted,

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AKA Hare