

Oregon Supreme Court Practice in the Criminal Appellate Section

Ernest Lannet, Chief Defender
PDSC Meeting – October 26, 2018

Oregon Appellate Courts

Court of Appeals

13 members

- Chief Judge
- 4 Presiding Judges
- 8 Judges

Supreme Court

7 members

- Chief Justice
- 6 Associate Justices

Disclaimer: These are the last precise numbers in this presentation.
Henceforth, the use of “~” means, “close enough for our purposes.”

Oregon Appellate Courts

Court of Appeals

Supreme Court

3-judge panels

sit “en banc”

opinions

500+

~60-80

criminal opinions

~330

~30 (incl. ~3 direct)

Oregon Appellate Courts

Court of Appeals

Direct Review

- circuit court judgments & some orders
- final orders of board of parole and post-prison supervision

“Error Correcting,”
Intermediate Court
can't-say-no court

Supreme Court

Direct Review

- death penalty cases
- state's appeals when murder charged
- claimed violations of crime victims' rights
- ballot title
- bar/judicial discipline
- appeal from tax court
- mandamus (original jurisdiction)

Oregon Appellate Courts

Court of Appeals

Direct Review

- circuit court judgments & some orders
- final orders of board of parole and post-prison supervision

“Error Correcting,”
Intermediate Court
can’t-say-no court

Supreme Court

Discretionary Review

- significant issue of law
- affects many people
- issue of first impression
- conflicting COA or OSC decisions

“Law Announcing,”
Court of Last Resort
sell-it-to-me court

Oregon Appellate Courts

Court of Appeals

Supreme Court

3-judge panels

sit “en banc”

opinions

500+

~60-80

criminal opinions

330

~30 (incl. ~3 direct)

Oregon Appellate Courts & CAS

Court of Appeals

Supreme Court

criminal opinions

~280 CAS cases

~24 CAS cases

But CAS files

~700 briefs

~250 PFRs

(petitions for review)

65% AWOP'ed

(affirmed w/o opinion)

93% review denied

(PFR denied)

A decorative graphic at the top of the slide consisting of several overlapping, wavy bands in various shades of blue, creating a sense of movement and depth.

Oregon Supreme Court

Supreme Court

- Procedure
- Importance
- Preparation
- Participation
- Results



Oregon Supreme Court

Supreme Court – Procedure

Allow review and schedule argument about six months in advance

Joint motion to set briefing schedule

60-min oral arguments held six weeks/yr

January, March (law schools), May, June, September, November

“Under advisement” for an average of seven months after argument



Oregon Supreme Court

Supreme Court – Importance

Cases with significant legal issues of wide applicability and/or high stakes

Few opportunities to clarify rule of law or correct precedent

Stare decisis: Outcome will control until OSC convinced incorrect, legislative act, or constitutional amendment



Oregon Supreme Court & CAS

Supreme Court – Preparation

Lead attorney, editor, and team of ~5 attorneys

“Informal” moot (weeks before brief due)

- review COA briefs & outline/draft
- discuss arguments & strategies for about 2 hours

Drafts exchanged between attorney & editor

“Formal” Moot (1 week before argument)

- review briefs submitted to OSC
- reconvene for practice argument & discussion



Oregon Supreme Court & CAS

Supreme Court – Participation

Since October 2016

- 47 cases briefed, 44 cases argued by 26 CAS attorneys
- > 70% of CAS attorneys
- participation at all levels, from chief defender to deputy one (9)



Oregon Supreme Court & CAS

Supreme Court – Participation

CAS files briefs in ~24 cases/year

~4 Direct Review

~20 Discretionary Review

CAS petitioner in 2 out of 3 cases



Oregon Supreme Court & CAS

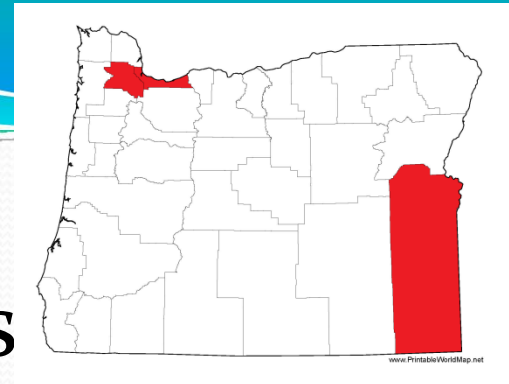
Supreme Court – Results

| | | |
|--------------|------|-----------------|
| CAS prevail? | ~46% | over last 5 yrs |
| | ~57% | over last 3 yrs |

Numbers consistent whether or not
CAS is petitioner or respondent

Oregon Supreme Court & CAS

Supreme Court – Your Results

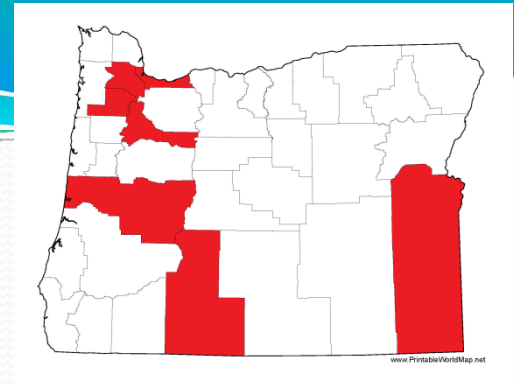


Returning an item taken from a store shelf for a “refund” is not the felony offense of theft by receiving by means of selling. *State v. Fonte*, 363 Or 327 (2018) (Multnomah County)

Expert evidence about “grooming” children for later sexual activity is scientific evidence for which a foundation must be made. *State v. Henley*, 363 Or 284 (2018) (Malheur County)

A warrant to search a digital device must identify, as specifically as reasonably possible, what information is sought and when it was created, accessed, or otherwise used; evidence discovered for which there was no probable cause must satisfy an exception to the warrant requirement. *State v. Mansor*, 363 Or 185 (2018) (Washington County)

Oregon Supreme Court & CAS



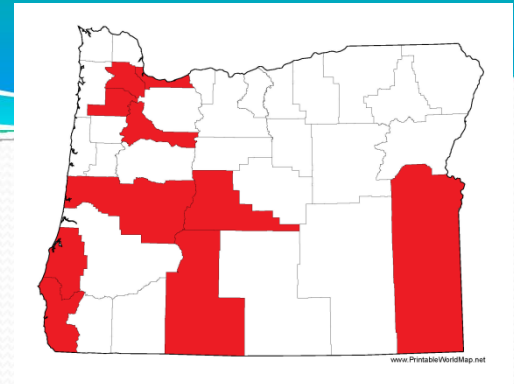
Breath-test results must be suppressed when an arrested driver invokes his right to counsel yet the officer interviews him and requests consent to the test. *State v. Swan*, 363 Or 121 (2018) (Multnomah County)

An indictment for conspiring or endeavoring to engage in racketeering must include the intended offenses and facts showing a relationship between them. *State v. Stout*, 362 Or 758 (2018) (Klamath County)

To increase the crime seriousness of a drug-delivery offense because it was “for consideration,” the state must present evidence that defendant entered an agreement. *State v. Stewart*, 362 Or 638 (2018) (Marion County); *State v. Villagomez*, 362 Or 390 (2018) (Yamhill County)

When the defendant claimed that his girlfriend accidentally injured herself, evidence of prior domestic assaults was impermissible character evidence. *State v. Tena*, 362 Or 514 (2018) (Lane County)

Oregon Supreme Court & CAS

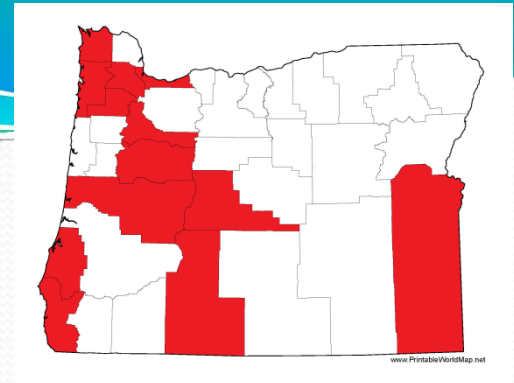


Under Article I, section 11, the state must take reasonable efforts to secure the attendance of a witness who ignores a subpoena before offering their out-of-court statements based on their “unavailability.” *State v. Harris*, 362 Or 55 (2017) (Deschutes County)

Unauthorized use of a vehicle requires evidence that the vehicle was currently operable or capable of operation with reasonable repairs. *State v. Eastep*, 361 Or 746 (2017) (Coos County)

The exigent-circumstances exception to the warrant requirement does not allow the police to enter the home to seek blood-alcohol evidence. *State v. Ritz*, 361 Or 781 (2017) (Curry County)

Oregon Supreme Court & CAS

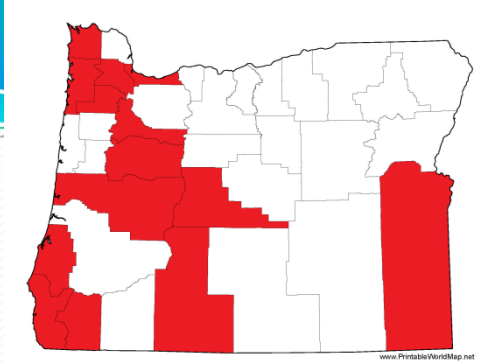


When the state agrees to a plea deal for assault yet knows the victim may die from his injuries, the state cannot prosecute for murder and manslaughter if it did not disclose that intention. *State v. King*, 361 Or 646 (2017) (Linn County)

Whether the defendant intended an unqualified assent to a search of a backpack or purse extends to closed containers discovered inside is a factual question to be resolved based on the totality of circumstances. *State v. Winn*, 361 Or 636 (2017) (Marion County); *State v. Blair*, 361 Or 527 (2017) (Tillamook County)

When comparing the gravity of the offense and the severity of the sentence for an Article I, section 16, proportionality analysis, the court must consider evidence that defendant's intellectual capacity fell below the minimum level of a child's criminal responsibility. *State v. Ryan*, 361 Or 602 (2017) (Marion County)

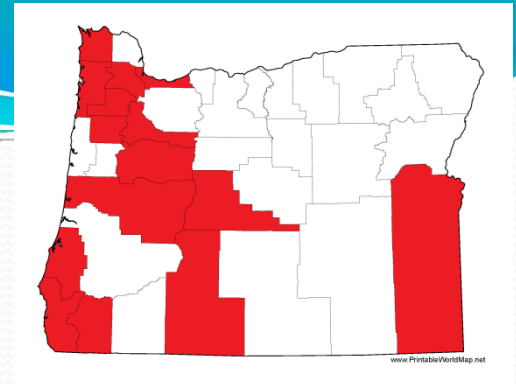
Oregon Supreme Court & CAS



When the state offers uncharged acts to prove propensity to commit the charged crimes under OEC 404(4) or for a non-propensity purpose of OEC 404(3) and defendant objects, the court must conduct balancing under OEC 403 to determine whether the probative value is substantially outweighed by the danger of unfair prejudice. *State v. Baughman*, 361 Or 386 (2017) (Clatsop County); *State v. Mazziotti*, 361 Or 370 (2017) (Lane County)

When a defendant attempts to exercise his Article I, section 11, constitutional right to self-representation after trial begins, the court must exercise its discretion whether to allow the motion. *State v. Hightower*, 361 Or 412 (2017) (Multnomah County)

Oregon Supreme Court & CAS

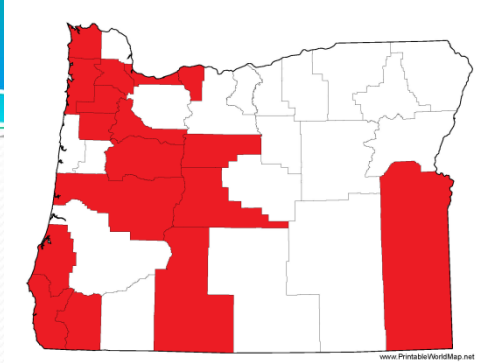


In a prosecution for interfering with a peace officer, the court must instruct the jury on passive resistance when there is evidence in the record that the defendant engaged in inactive, nonviolent noncooperation. *State v. McNally*, 361 Or 314 (2017) (Multnomah County)

When defendant challenged reliability of procedures used for eyewitness identification, remand was necessary for trial court to reconsider admissibility under new test announced in *Lawson/James*. *State v. Haugen*, 361 Or 284 (2017) (Josephine County)

“Reasonable suspicion” requires that an officer reasonably suspect that a defendant has committed or is about to commit a specific crime or type of crime. *State v. Maciel-Figueroa*, 361 Or 163 (2017) (Polk County)

Oregon Supreme Court & CAS

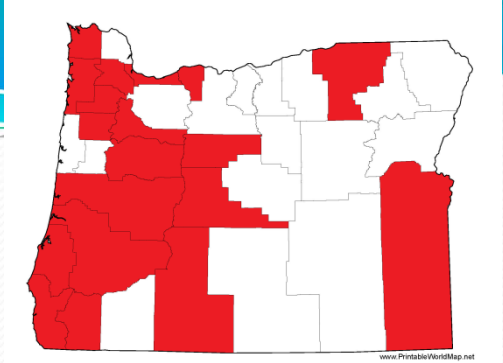


Defendant unequivocally invoked his right to cease interrogation under Article I, section 12, by stating, “It’s not something I want to talk about,” when asked about the circumstances behind death. *State v. Nichols*, 361 Or 101 (2017) (Hood River County)

Out-of-state convictions are “comparable offenses” to Oregon felony sex crimes for purposes of life imprisonment without the possibility of parole when elements are the same or narrower. *State v. Carlton*, 361 Or 29 (2017) (Josephine County)

Computer crime requires evidence that defendant was not authorized to use a computer rather than that defendant used it for an impermissible purpose. *State v. Nascimento*, 360 Or 28 (2016) (Jefferson County)

Oregon Supreme Court & CAS

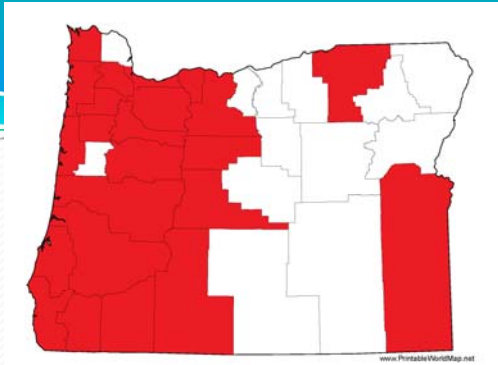


Unauthorized use of a vehicle requires evidence that defendant knew the use of the vehicle was without consent of the owner. *State v. Simonov*, 358 Or 531 (2016) (Umatilla County)

Police may not rely on a reasonable belief that a third party had authority to consent to a search of defendant's property; the consent exception to the warrant requirement depends on actual authority. *State v. Bonilla*, 358 Or 475 (2015) (Douglas County)

Oregon Supreme Court & CAS

Pending CAS Cases



Do postal inspectors seize a package by taking it from a sorting facility to the addressee and stating their belief it contains drugs? *State v. Smith*, 283 Or App 422, *rev allowed*, 361 Or 486 (2017) (Lincoln County)

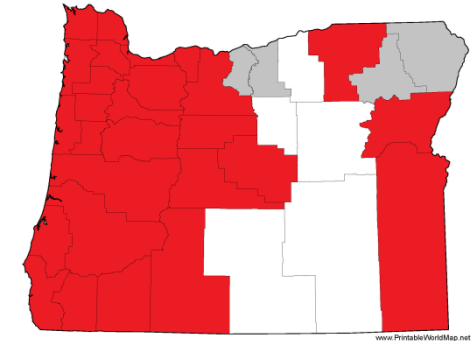
Is evidence that defendant tried to deliver a written offer to pay a stranger to murder sufficient for attempted murder? *State v. Kimbrough*, 285 Or App 84, *rev allowed*, 362 Or 38 (2017) (Wasco County)

Does the exemption for police records in the public records hearsay exception apply to the business records exception? *State v. Edmonds*, 285 Or App 855 (2017), *rev allowed*, 362 Or 482 (2018) (Clackamas County)

Must a court find a separate violation for each consecutively imposed probation revocation sanction? *State v. McFerrin*, 289 Or App 96 (2017), *rev allowed*, 362 Or 794 (2018) (Jackson County); *State v. Sparks*, 289 Or App 642 (2017), *rev allowed*, 363 Or 119 (2018) (Multnomah County)

Oregon Supreme Court & CAS

Looking a bit further back...



“Tampering,” for purposes of third-degree criminal mischief, requires conduct that alters, rearranges, or changes property. *State v. Schoen*, 348 Or 207 (2010) (Baker County)

State v. Rodgers/Kirkeby, 347 Or 610 (2010) (traffic stop and request for consent search) (Benton County) (Yamhill County)

State v. Scott, 343 Or 195 (2007) (police can’t quiz murder suspect on news article after unequivocal invocation of counsel) (Columbia County)

State v. Durbin, 335 Or 183 (2003) (right to *private* consultation with counsel before taking breath test) (Crook County)

(Dis)Honorable Mentions – We lost, so let’s sleeping dogs lie.

Oregon Supreme Court Practice in the Criminal Appellate Section

Ernest Lannet, Chief Defender
PDSC Meeting – October 26, 2018