FILED January 6, 2023 10:38 AM
Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review v. STEPHEN ANDREW ARANDA, Defendant-Appellant. Respondent on Review	Lane County Circuit Court Case No. 19CR07375 CA A171800 SC S069641

BRIEF OF THE OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-RESPONDENT

Review from the decision of the Court of Appeals
On an Appeal from a Judgment of the Circuit Court for Lane County
Honorable Charles M. Zennaché, Judge

Opinion Filed: April 20, 2022
Author of Opinion: Kamins, J.
Before: James, Presiding Judge, and Lagesen, Chief Judge, and Kamins, Judge

ROSALIND M. LEE, #055566
Counsel for Amici Curiae
Oregon Criminal Defense Lawyers Assn.
474 Willamette St., Ste. 302
Eugene, OR 97401
ros@mansonlee.com
Telephone: 541-485-5110
Attorney for *Amici*
Oregon Criminal Defense Lawyers Assn. and National Association of Criminal Defense Lawyers

ELLEN F. ROSENBLUM #753239,
Attorney General
PATRICK M. EBBETT #970513
Senior Assistant Attorney General 400 Justice Building 1162 Court St. NE Salem, Oregon 97301-4096 Telephone: (503) 378-4402
Email: patrick.m.ebbett@doj.state.or.us
Attorneys for Petitioner on Review

(Counsel listed on inside cover)

January 6, 2023

MONICA J. MILTON, DC#100775
Public Defense Counsel
National Association of Criminal Defense Lawyers
1660 L St., NW
Washington, DC 20036
202-872-6800
Counsel for Amicus Curiae
National Association of Criminal Defense Lawyers

ERNEST LANNET #013248
Chief Defender
Office of Public Defense Services
DAVID SHERBO-HUGGINS
#105016
Deputy Public Defender
1175 Court St. NE
Salem, Oregon 97301
Telephone: (503) 378-3349
Email: david.sherbo-huggins@opds.state.or.us
Attorneys for Respondent on Review

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES & CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

STATEMENT OF INTEREST

Oregon Criminal Defense Lawyers Association (OCDLA), is a nonprofit organization based in Eugene, Oregon, that represents Oregon's criminal defense community. OCDLA's members are lawyers, investigators, and related professionals dedicated to defending individuals who are accused of crimes. OCDLA serves the defense community by providing continuing legal education, public education, and networking. OCDLA is concerned with legal issues presenting a substantial statewide impact to defendants in criminal cases.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges.

As the only nationwide professional bar association for public defenders and private criminal defense lawyers, NACDL is dedicated to advancing the proper, efficient, and just administration of criminal justice. To this end, NACDL files numerous amicus curiae briefs each year in the United States

Supreme Court and other federal and state courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

This case presents a question of critical importance to the fair administration of justice: Whether the sweeping admission of prior convictions, including those that are unfairly prejudicial, contravenes principles of due process. Resolution of this issue will provide needed guidance to criminal defense lawyers, their clients, prosecutors, and lower courts.

STATEMENT OF THE CASE

Amici adopts the defendant's statement of the case and facts.

SUMMARY OF ARGUMENT

If OEC 609 is construed to permit all felony convictions without weighing the risk of unfair prejudice, the rule violates federal due process. The indiscriminate admission of even unfairly prejudicial convictions runs counter to common law traditions that require "fundamental fairness" and generally bar the use of propensity evidence.

Barring the use of OEC 403 prior to admitting felony convictions also burdens the exercise of Oregon defendants' constitutional trial rights. First, it forces defendants to choose between the right to the right to testify and an impartial jury. Relatedly, the *per se* admission of prior felony convictions

against defendants tends to produce a chilling effect on the right to testify because if they take the stand, they will be unfairly prejudiced. The Supreme Court has made clear, "[t]he right to testify on one's own behalf at a criminal trial . . . is one of the rights that 'are essential to due process of law in a fair adversary process.'" *Rock v. Arkansas*, 483 US 44, 51, 107 S Ct 2704, 97 L Ed 2d 37 (1987) (quoting *Faretta v. California*, 422 US 806, 817, n 15, 95 S Ct 2525, 45 L Ed 2d 562 (1975)). Second, the threat of *per se* prior conviction impeachment also impermissibly burdens the right to trial because it both distorts the strength of the government's case and adds to the coercive nature of the plea-bargaining system of criminal adjudication.

ARGUMENT

Under existing law, Oregon's prior conviction impeachment rule (OEC 609) requires the admission of all previous felony convictions when that person testifies. *See State v. Phillips*, 367 Or 594, 612, 482 P3d 52 (2021) (stating that OEC 609 "preempt[s] any balancing of the probative value of the conviction against its prejudicial effect to the defendant" (quotation marks omitted)).[1] Of all the states that permit the admission of prior convictions to impeach,

[1] This brief addresses the constitutional validity of that construction. *Amici* do not concede that the existing construction is valid.

Oregon's standard is among those that offer the least protection from unfair prejudice. *See* Dannye W. Holley, *Federalism Gone Far Astray from Policy and Constitutional Concerns: The Admissions of Convictions to Impeach by State's Rules-1990-2004*, 2 Tenn J L and Pol'y 239 (2014) (noting that Oregon is among the few states that require mandatory admission of prior convictions). The rule is also a clear departure from its more protective federal counterpart, FRE 609, which requires trial courts to weigh the probative value of a prior conviction against its prejudicial effect for all witness, with that balance weighted against admissibility against testifying criminal defendants. Oregon's rule suggests that no matter how prejudicial a felony conviction is, if a person with such a conviction testifies, it must be admitted. Allowing courts to resolve the tension between the probative and prejudicial value of a prior convictions safeguards a defendant's right to due process. Oregon's failure to require a balancing test before admitting prior convictions leaves Oregonians uniquely vulnerable to the risk that factfinders will use prior convictions as propensity and bad character evidence.

I. OREGON'S FAILURE TO CONDUCT A BALANCING TEST PRIOR TO ADMITTING FELONY CONVICTIONS VIOLATES DUE PROCESS.

An evidentiary rule contravenes due process if it "violates those fundamental conceptions of justice which lie at the base of our civil and

political institutions, which define the community's sense of fair play and decency." *United States v. Lovasco*, 431 US 783, 790, 97 S Ct 2044, 52 L Ed 2d 752 (1977) (citations and quotation marks omitted). In determining whether OEC 609 meets the *Lovasco* standard of fundamental fairness, courts must look to both "historical practice," *Montana v. Egelhoff*, 518 US 37, 43–44, 116 S Ct 2013, 135 L Ed 2d 361 (1996), and whether the rule violates "any recognized principle of 'fundamental fairness' in operation." *Medina v. California*, 505 US 437, 448 (1992) (citing *Dowling v. United States*, 493 US 342, 352, 110 S Ct 668, 107 L Ed 2d 708 (1990)

A. A rule that permits the admission of prior felony convictions that are unfairly prejudicial is inconsistent with historical practice.

In determining whether a principle is in line with "historical practice," courts look to whether it has "deep roots in our common-law heritage." *Medina*, 505 US at 446. According to the State, "there is no deeply rooted history or tradition of testifying defendants having their prior convictions balanced for unfair prejudice." Pet Br at 12. As an initial matter, this argument obscures the nature of the constitutional question this Court is called to resolve. The issue is not whether testifying defendants have a historic right to have their prior convictions balanced against prejudice; instead, the question is whether the sweeping admissibility of all prior felony convictions—including those that are

unfairly prejudicial—defies fundamental fairness and due process. Unquestionably, the right to a trial that is free from unfair prejudice is fundamental to due process.

Moreover, the general prohibition on the introduction of propensity evidence is indeed "deeply rooted" Anglo-American law. As far back as 1892, the Supreme Court has acknowledged the common law prohibition on prior bad acts evidence because

> [p]roof of them only tended to prejudice the defendants with the jurors * * *. However depraved in character, and however full of crime [the defendants'] past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged.

Boyd v. United States, 142 US 450, 458, 12 S Ct 292, 35 L Ed 1077 (1892). Other states have likewise cautioned against the practice. *See State v. Vance*, 119 Iowa 685, 686, 94 NW 204, 204 (1903) ("The rule as to evidence of similar acts at other times and with other persons than those charged in the indictment is well understood. The state cannot prove against a defendant any crime not alleged in the indictment, either as foundation for separate punishment or as aiding the proofs that he is guilty of the crime charged."); *State v. Lapage*, 57 NH 245, 275, 276, 24 Am Rep 69 (1876) (admission of the accused's rape of another woman violated due process because it promoted propensity reasoning).

This prohibition serves to prevent juries from convicting innocent people based on their perceived bad character instead of the crime charged. As the Supreme Court noted:

> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt * * *. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge.

Michelson v. United States, 335 US 469, 475–76, 69 S Ct 213, 93 L Ed 168 (1948) (footnotes omitted). Ultimately, the reason courts historically prohibited propensity evidence was to preserve the presumption of innocence and to prevent unfair prejudice.

B. OEC 609 also violates fundamental fairness in operation.

OEC 609 also violates "fundamental fairness" in operation. *Cf. Medina*, 505 US at 448 (considering whether the allocation of the burden of proving incompetence transgresses "fundamental fairness" "in operation"). As the Supreme Court has noted, "[t]he touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 18 US 539, 558, 94 S Ct 2963, 41 L Ed 2d 93 (1974). The fatal flaw in the operation of OEC 609 is that it assumes either that (1) no prior felony conviction could unfairly prejudice a defendant; or (2) even if a prior conviction is unfairly

prejudicial, it must be admitted. Both assumptions conflict with established Supreme Court jurisprudence.

The first assumption departs from the Supreme Court precedent that recognizes that there are indeed some prior convictions that *could* unfairly prejudice defendants, and as a result, produce convictions on improper grounds. *See, e.g., Old Chief v. United States*, 519 US 172, 180-82, 117 S Ct 644, 136 L Ed 2d 574 (1997) ("the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance.") Because at least some prior convictions are unfairly prejudicial, due process requires a mechanism to bar their admission.

The second assumption clears a path for impeachment abuse and runs counter to the Supreme Court's well-known interest in preventing "confusion of the issues, unfair surprise and undue prejudice." *Michelson*, 335 US at 476. Although the Supreme Court has not decided whether a state law admitting propensity evidence violates the Federal Due Process Clause, federal circuit courts have acknowledged that the constitutionality of rules that risk unfair prejudice hinges on the use of a balancing test. *Estelle v. McGuire*, 502 US 62, 75 n 5, 112 S Ct 475, 116 L Ed 2d 385 (1991) (declining to resolve whether a state law would violate the Due Process Clause if it allowed the use of prior

crimes for a propensity purpose); *see United States v. LeMay*, 260 F 3d 1018, 1027 (9th Cir 2001) (holding that "Rule 414 does not violate the Due Process Clause of the constitution" as long as FRE 403 applied properly*); United States v. Charley*, 189 F 3d 1251, 1259 (10th Cir 1999) (stating that "Rule 414 is not unconstitutional on its face, 'because Rule 403 applies to Rule 414 evidence'") (quoting *United States v. Castillo*, 140 F 3d 874, 883–84 (10th Cir 1998)); *United States v. Enjady*, 134 F 3d 1427, 1433 (10th Cir 1998) (asserting that "without the safeguards embodied in Rule 403 we would hold the rule [413] unconstitutional"). In short, a balancing test preserves the rule's constitutionality in operation. In Oregon, application of a balancing test would protect the accused from impeachment abuses while still allowing courts to admit evidence for legally permissible purposes.

II. OEC 609'S PROVISION THAT MANDATES THE ADMISSION OF PRIOR CONVICTIONS WHEN THE ACCUSED TESTIFIES ABRIDGES THE CONSTITUTIONAL RIGHT TO TESTIFY.

The common-law practice of barring criminal defendants from testifying on their own behalf prevailed in the United States until the mid-nineteenth century, when states began passing legislation that protected a defendant's right to testify. *See* Alexander G.P. Goldenberg, *Interested, But Presumed Innocent: Rethinking Instructions on the Credibility of Testifying Defendants*, 62 NYU Ann Surv Am L 745 (2007) (describing the development of the right to testify).

In 1987, the Supreme Court finally recognized what it had up until that point only intimated: that testifying in one's own defense is a constitutional right. *Rock*, 483 US at 107 (so holding). The Court held that the right is derived from the Compulsory and Due Process Clauses of the United States Constitution and is a "necessary corollary to the Fifth Amendment's guarantee against compelled testimony." *Id.* at 52.

The decision to testify is one of the most consequential personal choices that a defendant has in presenting a defense. That choice is meant to guarantee a defendant's right to "present his own version of events in his [or her] own words." *Id*. But "[a] defendant's opportunity to conduct his own defense * * * is incomplete if he may not present himself as a witness." *Id*. Given the constitutional nature of a defendant's right to testify, any significant burden placed on exercising this right must be viewed as particularly suspect. *See Brooks v. Tennessee*, 406 US 605, 613, 92 S Ct 1891, 32 L Ed 2d 358 (1972) (striking down a state rule requiring defendants to testify prior to other defense witnesses because it impermissibly burdened the right to testify).

A. OEC 609 forces criminal defendants with felony convictions to either forfeit the right to testify in their own defense or forfeit their right to an impartial jury.

In *Simmons v. United States*, the Supreme Court found it "intolerable that one constitutional right should have to be surrendered in order to assert

another." 390 US 377, 393, 88 S Ct 967, 19 L Ed 2d 1247 (1968). There, Garrett and Simmons were charged with robbery. *Id*. at 381. Prior to trial, Garrett sought to suppress a suitcase containing incriminating items. *Id*. In support of his motion to suppress, Garrett testified at the suppression hearing, asserting he owned the suitcase to establish his standing to challenge the search. *Id*. The court denied the motion and at trial the state sought to admit Garrett's suppression hearing testimony *Id*. Siding with the state, the trial court reasoned that, by testifying, Garrett had assumed the risk that this testimony would later be admitted against him. *Id*. at 391. Ultimately, the Court reversed the lower court's finding, concluding that Garrett could not be forced to choose "to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination." *Id*. In other words, to condition the exercise of one right on the waiver of another is unconstitutional.

Oregon's *per se* evidentiary rule presents defendants with prior convictions with the same kind of Catch-22 that *Simmons* held to be unconstitutional. A person accused of a crime must choose between their right to an impartial jury or their right to a "meaningful opportunity to present a complete defense" as guaranteed by the Constitution. *See Crane v. Kentucky*, 476 US 683, 690, 106 S Ct 2142, 90 L Ed 2d 636 (1986) (recognizing the right

to present a complete defense) (quoting *California v. Trombetta*, 467 US 479, 485, 104 S Ct 2528, 81 L Ed 2d 413 (1984)). Courts and scholars alike have recognized this dilemma. *See State v. Santiago*, 53 Haw 254, 258, 492 P2d 657 (1971) (observing that impeachment with prior convictions, "puts the criminal defendant who has prior convictions in a tremendous dilemma" and "[a]ny defendant who has prior convictions will therefore feel constrained not to take the stand"); *United States v. Garber*, 471 F2d 212, 214 (5th Cir 1972) (emphasizing that the potential of impeachment with prior convictions if the defendant testifies "thrusts the defendant onto the horns of a dilemma"). "While technically the defendant may still be free to testify, the admission of prior convictions to impeach credibility 'is a penalty imposed by courts for exercising a constitutional privilege.'" *Santiago*, 53 Haw at 259 (quoting *Griffin v. California*, 380 US 609, 614, 85 S Ct 1229, 14 L Ed 2d 106 (1965)). Such a penalty "'cuts down on' the right to testify 'by making its assertion costly.'" *Id.* (quoting *Griffin*, 380 US at 614). *See also* Jeffrey Bellin, *Improving the Reliability of Criminal Trials Through Legal Rules that Encourage Defendants to Testify*, 76 U Cin L Rev 851, 853 (2008) (noting that prior conviction impeachment statutes "severely penalize defendants who exercise the right to testify"). Moreover, mandating impeachment by prior felony convictions "is likely to deprive the jury of whatever evidence a defendant might offer on the

question of guilt or innocence by compelling the defendant to 'waive' the constitutional right to testify on pain of suffering the prejudice of having the jury learn of his or her criminal past." Alan D. Hornstein, *Between Rock and a Hard Place: The Right to Testify and Impeachment by Prior Conviction*, 42 Vill L Rev 1, 63 (1997).

The looming threat of impeachment with prior felony convictions thus creates a chilling effect on the right to testify. Indeed, research bears this out. A study of 152 DNA exonerations revealed that nearly 1 in 4 (39%) of factually innocent defendants elected not to take the stand in their own defense. John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record—Lessons from the Wrongfully Convicted*, 5 J Empirical Legal Studies 477, 489 (2008). Notably, in examining those cases, Blume found that 91% of those exonerees had prior convictions that could have been used for impeachment. *Id.* at 490. In comparison, data from four large metropolitan areas indicated that about half (49.4%) of defendants in criminal cases take the stand in their own defense. *Id.* at 489.

Blume's research supports two important conclusions. First, a defendant's decision to testify is not dependent on innocence. *Id*. at 491. Second, the existence of a prior criminal conviction that could be introduced as impeachment played an outsized role in dissuading a person from testifying,

even when that person was completely innocent of their current charges. *Id*. at 492. Notably, in every wrongful conviction case studied as part of this research, the state was permitted to impeach the defendants who did testify. *Id.* at 490.

Though defendants are often faced with numerous difficult choices and tactical assessments, "[t]here are rights of constitutional stature whose exercise a State may not condition by the exaction of a price." *Garrity v. New Jersey*, 385 US 493, 87 S Ct 616, 17 L Ed 2d 562 (1967); *accord Gardner v. Broderick*, 392 US 273, 277-78, 88 S Ct 1913, 20 L Ed 2d 1082 (1968). A rule that automatically permits the admission of prior convictions, "cuts down on the right to testify by making its assertion costly." *Griffin*, 380 US at 614. This is true regardless of the defendant's innocence.

Compounding the problem is the fact that defendants who are constrained by this evidentiary rule are further penalized for their silence. In a study of 400 mock jurors, Professor Jeffrey Bellin documented that when a defendant was reported to have 2 prior convictions, they were convicted 78% of the time ("prior conviction penalty"); and in samples where the defendant did not testify, they were convicted 76% of the time ("silence penalty"). Jeffrey Bellin, *The Silence Penalty*, 103 Iowa L Rev 395, 400 (2018). By contrast, utilizing the same facts, when the defendant testified and there was no impeachment by prior

conviction, the defendant was only convicted 62% of the time. *Id.* In other words, the impact of the "silence penalty" appears to be roughly equivalent to the "prior offender" penalty." *Id*. The impact of the jury being told of a testifying defendant's prior conviction markedly increased their likelihood of being convicted, despite no other change in the case evidence. *Id.* at 413-14.

This research is consistent with what other scholars have described. *See* Anna Roberts, *Impeachment by Unreliable Conviction,* 55 BC L Rev 563, 575 (2014) (summarizing the negative consequences of silent defendants). When defendants are silenced, "the factfinder is deprived * * * of the opportunity to learn directly about the defendant's credibility and her version of the facts." Jay Sterling Silver, *Truth, Justice, and the American Way: The Case Against the Client Perjury Rules*, 47 Vand L Rev 339, 357 (1994). Ultimately these findings support a justifiable fear that juries do not use these convictions to weigh credibility but rather to infer propensity. What this means for Oregon's prior impeachment rule is that it creates a strong likelihood that defendants will not meaningfully participate in their own defense despite the fact that they, "above all others[,] may be in a position to meet the prosecution's case," *Ferguson v. Georgia*, 365 US 570, 582, 81 S Ct 756, 5 L Ed 2d 783 (1961).

B. Admitting prior felony convictions without a balancing test subjects criminal defendants to a significant risk of convictions based on propensity.

It has long been recognized that "the introduction of evidence of a defendant's prior crimes risks significant prejudice." *Almendarez-Torres v. United States*, 523 US 224, 235, 118 S Ct 1219, 140 L Ed 2d 350 (1998). In particular, the danger of unfair prejudice is that the admission of the prior conviction will "lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief*, 519 US at 180. "Although * * * propensity evidence is relevant, the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance." *Id.* at 181 (alteration in original) (internal quotation marks omitted).

This risk of propensity inferences is not merely illusory. Research has repeatedly demonstrated that when provided evidence that a defendant has a prior criminal conviction, jurors are substantially more likely to convict the accused than a factually identical case in which there is no indication of whether accused has a prior conviction. *See*, Theodore Eisenberg and Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 Cornell L Rev 1353 (2009). Likewise, other studies have found that "evidence against a defendant with a prior record appears stronger to the jury," and that jurors tend

to use prior convictions—particularly convictions that are similar to the charged offense— "to develop propensity judgments and other generally negative evaluations of a defendant." Eisenberg and Hans, 94 Cornell L Rev, at 1361; *see also* Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 Law & Hum Behav 37, 47 (1985) (finding that similar underlying records increased convictions while dissimilar underlying records produced convictions at intermediate rates).

The risk that jurors will rely on a propensity inference increases the risk that they will draw the secondary inference that a defendant has a "bad character" and rely on that conclusion to convict on less than proof beyond a reasonable doubt. *See Michelson* 335 US at 475-76 (recognizing that risk). The risk that jurors will use prior convictions for an impermissible purpose are particularly acute when the nature of the prior offenses is both prejudicial and similar to the charged offense. *See*, *e.g.*, Eisenberg & Hans, 94 Cornell L Rev at 1361 (noting that the nature of the prior conviction and its similarity to the underlying charge impacts jurors' view of defendants).

C. The risk of unfair prejudice is compounded by allowing jurors to conclude that a prior conviction is an accurate barometer for truthfulness.

A more pernicious risk of unfair prejudice is that jurors will employ the exact assumption embedded in the rule: *i.e.*, jurors are permitted to use a prior conviction in weighing credibility. Despite these purportedly permissible inferences with respect to credibility—*i.e.*, that people with prior convictions reflect a "general readiness to do evil[,]" *Gertz v. Fitchburg R.R.*, 137 Mass. 77, 78 (1884) —courts and scholars alike have questioned the validity of that premise. For example, the Seventh Circuit has noted that "the proposition that felons perjure themselves more often than other, similarly situated witnesses * * * is one of many important empirical assertions about law that have never been tested, and may be false." *Campbell v. Greer*, 831 F2d 700, 707 (7th Cir 1987). Rather, "[i]t is undermined, though not disproved, by psychological studies which show that moral conduct in one situation is not highly correlated with moral conduct in another." *Id.* More recently, one scholar noted that, although "a record of conviction of a crime is a provable fact, * * * there is *no* evidence that it has the probability of proving that the person whose credibility is attacked has a greater propensity to lie." Holley, 2 Tenn J L & Pol'y at 303–05 (emphasis added).

Others have concluded that there is no probative value in admitting prior convictions to impeach and have recommended barring the practice altogether. *See* Robert D. Dodson, *What Went Wrong with Federal Rule of Evidence 609:*

A Look at How Jurors Really Misuse Prior Conviction Evidence, 48 Drake L Rev 1, 51 (1999) (recommending "a per se rule disallowing prior conviction evidence"). Often, prior conviction impeachment is merely "a cover for the admission of evidence bearing on propensity—which is what the rule's defenders are probably seeking." H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U Pa L Rev 845, 868 (1982). It should be precluded, because "character impeachment evidence of an accused has virtually no probative value with respect to credibility, but its availability has tremendous prejudicial impact." Richard Friedman, Character Impeachment Evidence: *Psycho-Bayesian [!?] Analysis and a Proposed Overhaul*, 38 UCLA L Rev 637, 666 (1991).

Given the questionable rationale behind introducing prior felony convictions as impeachment, at minimum, this Court should examine the constitutionality of a rule that mandates the admission of *all* prior convictions if a defendant testifies. To comport with due process and fundamental fairness, this Court must ensure that trial courts have discretion to weigh the probative value of a prior conviction against its prejudicial effect.

D. The admission of prior sexually based offenses are especially susceptible to the harms of undue weight on propensity rather than credibility.

In general, public attitudes toward people with prior convictions are deeply negative. This is especially true of those charged with sexually-based offenses. Laura L. King & Jennifer J. Roberts, *The Complexity of Public Attitudes Toward Sex Crimes, Victims & Offenders*, 12 Victims & Offenders 71 (2017); *see also* Julia T. Rickert, *Denying Defendants the Benefit of a Reasonable Doubt: Federal Rule of Evidence 609 and Past Sex Crime Convictions*, 100 J Crim Law and Criminology 213, 227 (2010) (noting that "repugnance, anger, and fear are the most common reactions to sex offenders.") These attitudes are reflected in the public's persistent desire to isolate those convicted of sex crimes from society by creating protracted mechanisms for supervision and control even after a person has completed a sentence. *See Smith v. Doe*, 538 US 84, 98, 123 S Ct1140, 155 L Ed 2d 164 (2003) (recognizing that there is a stigma associated with registering as a sex offender); *United States v. Jackson*, 549 F3d 963, 978 (5th Cir 2008) ("registration as a sex offender is a scarlet letter ***") (quotation marks omitted); *Hope v. Comm'r of Ind. Dep't of Corr.*, 984 F3d 532, 534 (7th Cir 2021) (noting that sex offender registry "laws impose cumbersome and often lifelong burdens on former criminal perpetrators, many of whom have finished all forms of imprisonment and post-imprisonment supervision").

While the stigma of a conviction for a sexually-based offense is often life-long, courts have long acknowledged the attenuated relationship sexual offenses have to the issue of credibility. *Christmas v. Sanders*, 759 F2d 1284, 1292 (7th Cir 1985) (explaining that "the trial judge correctly noted that a conviction for rape was not highly probative of credibility"); *United States v. Larsen*, 596 F2d 347, 348 (9th Cir 1979) ("The fact that a defendant has been convicted of child molesting bears only nominally on credibility"). Given that there are such deeply-rooted negative attitudes toward people convicted of sexual offenses yet a poor nexus to credibility, their admission creates a substantial risk that a jury will "generaliz[e] [a defendant's] earlier bad act into bad character and tak[e] that as raising the odds that he did the later bad act now charged (or, worse, as calling for preventive conviction even if he should happen to be innocent momentarily)," *Old Chief*, 519 US at 180-81.

E. Curative Instructions Have Proven Largely Ineffective.

Proponents of *per se* prior conviction impeachment may rely on the notion that curative instructions would sufficiently guard against convicting impeached defendants for improper purposes. Although juries are presumed to follow the court's instructions, that general presumption may be overcome when "there is an overwhelming probability that they were unable to do so."

State v. Langley, 363 Or 482, 526, 424 P 3d 688 (2018) (citing *State v. Terry*, 333 Or 163, 177, 37 P3d 157 (2001)).

That overwhelming probability certainly exists here. Decades of research have revealed that instructions not to draw improper conclusions from prior convictions are, at best, ignored. Larry Laudan & Ronald J. Allen, *The Devastating Impact of Prior Crimes Evidence and Other Myths of the Criminal Justice Process*, 101 J Crim L & Criminology 493, 503 (2011). At worst, they create more harm by drawing the jury's attention to the conviction. *See, e.g.,* Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 Psychol. Pub. Pol'y & L. 677, 677 (2000) (recognizing that risk). Given the demonstrated inefficacy of cautionary instructions in this context, applying a balancing test becomes even more necessary to protecting defendants' due process rights.

III. PRIOR CONVICTION IMPEACHMENT CONTRIBUTES TO THE DIMUNITION OF THE RIGHT TO TRIAL.

Today, well over 90% of criminal convictions are obtained through guilty pleas. Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 NYU L Rev 911, 912 (2006); Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WM & MARY L Rev 1225, 1228 (2016). This

"system of pleas" is "not some adjunct to the criminal justice system; it **is** the criminal justice system." *Missouri v. Frye*, 566 US 134, 144, 132 S Ct 1399, 182 L Ed 2d 379 (2012) (emphasis added) (internal quotation marks and citations omitted). This means that by and large, the criminal convictions being offered to undermine the credibility of witnesses are not the result of an adversarial system of justice; instead, they are the result of an assembly line of hasty adjudications.

The coercive nature of our criminal legal system creates incentives to plead guilty, regardless of innocence or guilt. Throughout the pretrial process, the balance of power is heavily skewed toward prosecutors. H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 Catholic U L Rev 63, 83 n 147 (2011). Prosecutors have total discretion when deciding "whether to charge the same act as a misdemeanor or a felony; whether to add an enhancement * * *; whether to add a prior conviction; or whether to allege the offense happened 'in a school zone' or another location that will increase the potential punishment." Cynthia Alkon, *The US Supreme Court's Failure to Fix Plea Bargaining: The Impact of* Lafler *and* Frye, 41 Hastings Const L Q 561, 587 (2014). Each of those "charges, enhancements, or prior convictions can substantially increase the severity of a sentence." *Id.* Importantly, prosecutors exercise this concentrated power with

virtually no judicial oversight and little public accountability. Trial Penalty Report at 24. As a result, "prosecutors possess nearly unchecked discretion in plea negotiations." *Id.* The coercive nature of the pretrial criminal process significantly contributes to the prevalence of people with felony convictions, thereby inflating the population of people who can be impeached with prior convictions, and further perpetuating a cycle of coercive pleas and convictions.

Known as the "trial penalty," the combined threats of factors such as enhanced charges, mandatory minimums, and the use of prior convictions, generate a "substantial difference between the sentence offered prior to trial versus the sentence a defendant receives after a trial [and] undermines the integrity of the criminal justice system." National Association of Criminal Defense Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It*, 1, 58 (2018), https://www.nacdl.org/Document/TrialPenaltySixthAmendmentRighttoTrialNearExtinct ("Trial Penalty Report)". One of the Trial Penalty Report's most devastating findings is the pervasiveness of innocent people who plead guilty to crimes they did not commit because losing at trial may mean an exponential increase in the so-called "trial penalty." The Report highlights "[n]umerous scholars [who] have examined the innocence problem of plea bargaining and have estimated that anywhere from 1.6% to 27% of defendants who plead guilty

may be factually innocent." *Id*. at 17 (citing Lucian E. Dervan, *Bargained Justice: Plea-Bargaining's Innocence Problem and the Brady Safety-Valve*, 2012 UTAH L Rev 51, 85 (2012)); Donald A. Dripps, Guilt, *Innocence, & Due Process of Plea Bargaining*, 57 WM & MARY L Rev 1343, 1360-63 (2016). Simply put, felony convictions, particularly those resulting from guilty pleas, do not necessarily have a direct relationship to factual guilt. Instead, guilty pleas should be viewed in context of the coercive, assembly-line system from which they are produced.

The system of pleas in turn, creates a powerful incentive for defendants with prior convictions to plead guilty regardless of whether they are factually guilty or innocent. What awaits those who wish to go to trial with prior convictions is the costly decision to testify—and if convicted—a trial penalty. But, "if both options generate powerful penalties, guilty and innocent defendants will rationally bargain away an (illusory) presumption of innocence for a modicum of mercy." Bellin, 103 Iowa L Rev at 400. With so much of the American criminal legal system reliant on the continued use of coerced pleas, a *per se* admission of a prior felony conviction to impeach credibility is a manifestly unjust proposition.

IV. PRIOR CONVICTION IMPEACHMENT INCREASES EXISTING RACIAL INEQUALITY IN THE CRIMINAL LEGAL SYSTEM.

The sheer size of US criminal legal system has increased exponentially over the course of the last half century. A recent University of Georgia study estimates that the number of adults with felony convictions increased from fewer than two million people in 1948 to nearly 20 million in 2010. Sarah K. S. Shannon et al., *The Growth, Scope, and Spatial Distribution of America's Criminal Class, 1948–2010*, 54 Demography 1795, 1806 (2017). The statistics are even more grim for African-Americans, with approximately 33 % of the African-American adult male population having a felony conviction. *Id*. at 1808. In Oregon, the disparities are likewise stark with 8% of Oregon's African-American adult population having a felony conviction. *Id*. These alarming statistics are due in large part to the well-documented legacy of mass incarceration and its correlative plea-driven method of case processing. Thus, a *per se* evidentiary rule that disregards these societal disparities leaves marginalized groups particularly vulnerable to harm.

Research has repeatedly shown that racial disparities persist in virtually all aspects of the criminal legal system, from traffic stops to arrests to sentencing. *See*, e.g., Valeria V. Weis*, Criminal Selectivity in the United States: A History Plagued by Class & Race Bias*, 10 DePaul J for Soc Just (2017). These racial disparities also exist with respect to prior conviction impeachment, due to

"race-based assumptions of guilt" and "uneven distributions of criminal convictions." Roberts, 55 BC L Rev at 576.

Other studies reveal that prosecutors' charging decisions are particularly susceptible to differential treatment based on race. Indeed, one study of criminal justice outcomes in Washington State found that prosecutors were "less likely to charge white suspects than black suspects" and that this was true "even when statistically controlled for prior criminal record." *See* Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 Seattle U L Rev 795, 806 (2012) (citation omitted). Thus, the way that racial bias manifests in the decisions of prosecutors in the pretrial process has created a two-tiered system of justice. Black defendants begin with harsher charges, which increase the likelihood of more punitive outcomes (*i.e.*, felony convictions) than their white counterparts. The use of prior convictions to impeach defendants compounds underlying racial disparities.

Another risk is not just that juries will infer guilt from the existence of a prior conviction, but also that the existence of a prior conviction itself will confirm existing stereotypes of Black pathological criminality. *See* Daniel S. Harawa, *Black Redemption*, 48 Fordham Urb LJ 701, 713 (2021) (describing the 1990s trend of characterizing Black teenagers as "super predators"). As one

scholar described, race has evidentiary value in America's courtrooms in that it "tends to prove or disprove something in the American justice system just as it does in society at large." Montre D. Carodine, "The Mis-Characterization of the Negro": *A Race Critique of the Prior Conviction Impeachment Rule*, 84 Ind L J 521, 567 (2009). As a result, a defendant's race may add more "weight [to] the accusation of criminality," and frustrate the presumption of innocence. *Id*. at 568. The effect of prior conviction impeachment evidence on Black defendants is "self-perpetuating" because "[e]very new conviction leads to a decreased likelihood of success in a subsequent trial and a stronger incentive to plead guilty." Bellin, 103 Iowa L Rev at 433. Ultimately, the mere existence of a felony conviction represents the culmination of numerous events, each with its own danger of racial bias, in a larger system riddled with well-known inequalities. Thus, an evidentiary rule that grants prosecutors the liberal admission of these untried convictions warrants critical examination.

CONCLUSION

For the above reasons, the decision of the Court of Appeals, *State v. Aranda*, 319 Or App 178 (2022), should be affirmed.

Respectfully Submitted,

/s/ Rosalind M. Lee

Rosalind M. Lee, OSB 055566
Chair, OCDLA Amicus Committee
ros@mansonlee.com

Attorney for *Amici*
Oregon Criminal Defense Lawyers Association and
National Association of Criminal Defense Lawyers

/s/ Monica Milton

MONICA J. MILTON, DC#100775
Public Defense Counsel
Attorney for Amicus Curiae
National Association of Criminal Defense Lawyers

CERTIFICATE OF COMPLIANCE

I certify that (1) BRIEF OF *AMICI CURIAE* complies with the word count limitation in ORAP 5.05(1)(b) and (2) the word count of this brief, as described in ORAP 5.05(1)(a), is 8170 words.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(3)(b).

Respectfully Submitted,

/s/ Rosalind M. Lee

Rosalind M. Lee, OSB 055566
ros@mansonlee.com
Attorney for *Amici*
Oregon Criminal Defense Lawyers Association and
National Association of Criminal Defense Lawyers

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on January 6, 2023, I filed Brief of *Amici Curiae* to be electronically filed with the Appellate Court Administrator, Appellate Records Section, by using the electronic filing system.

I further certify that counsel for the petitioner, Patrick Ebbett, and counsel for respondent, David Sherbo-Huggins, will be served via the efiling system once this motion is accepted for filing.

Respectfully Submitted,

/s/ Rosalind M. Lee

Rosalind M. Lee, OSB 055566
ros@mansonlee.com

Attorney for *Amici*
Oregon Criminal Defense Lawyers Association and
National Association of Criminal Defense Lawyers