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8 IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

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11 STATE OF OREGON,  
12 Plaintiff,

13 -VS-

14 ROBERT SMITH  
15 Defendant

CASE No. 18CRXX

MEMORANDUM OF LAW IN SUPPORT OF  
DEFENDANT'S MOTION TO ADMIT  
EVIDENCE AND STATEMENTS OF  
COUNSEL REGARDING THE  
COMPLAINANT'S PERTINENT  
CHARACTER TRAITS AND BEHAVIORS

16 INTRODUCTION

17 The defense seeks pretrial rulings by the trial court regarding the admissibility  
18 of evidence of complainant's pertinent character traits and behaviors, so as to make  
19 conduct of the trial more efficient and decrease the times it may be necessary to  
20 remove the jury for these evidentiary issues to be proffered and argued. For purpose  
21 of hearing on this motion only, the defense submits the attached Exhibit 101-Pretrial,  
22 which consists of redacted witness statements from reciprocal discovery that concern  
23 these issues. Mr. Smith has timely filed his notice of defenses, raising self-defense and  
24 defense of property. He is charged with a single count of assault in the fourth degree  
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1 constituting domestic violence, allegedly committed by intentionally causing physical  
2 injury to his wife, Mrs. Smith, on XX(date), 2018.

3         The parties do not dispute the Complainant, Mrs. Smith, sustained physical  
4 injury on the date of the alleged assault, or that she had physical contact with  
5 Defendant related to the alleged assault. Complainant claims her injuries resulted from  
6 Defendant intentionally punching and striking her in the face, and throwing her to the  
7 floor where her head struck a hard object. In stark contrast, Defendant maintains that  
8 Complainant suddenly attacked him during a drunken rage, running at him and crashing  
9 into his backside while he was bent over a kitchen counter at their home, eating lunch.  
10 Instantaneous with impact, Defendant instinctively took a defensive posture to block  
11 injury to his face and his plate of food from being taken. Complainant struck  
12 Defendant's upper body with enough force to knock him sideways and for her to  
13 ricochet and stumble to the floor, then got up and ran at him again. Defendant was  
14 able to take evasive action and sidestep her lunge this time; he saw her misstep and  
15 stumble down into the family room as he dodged and exited the house. A defense  
16 medical expert has opined Complainant's injuries and Defendant's lack of injuries are  
17 not consistent with Complainant's version of events.

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20         Complainant and Defendant have been married for approximately XX years. As  
21 recounted in the reports of interviews with potential defense witnesses, Exhibit 101-  
22 Pretrial, Complainant has a long history of abusive behavior towards Defendant,  
23 including acts of violence, almost invariably when intoxicated, as well as a long history  
24 of being an alcoholic.  
25

1 DEFENSE OF SELF AND PROPERTY

2 ORS 161.209 sets forth the elements of the defense of self-defense. Among other  
3 things, it requires that a defendant reasonably believe that the degree of force  
4 employed in a particular circumstance is necessary. The statute provides:

5       Except as provided in ORS 161.215 and 161.219, a person is justified in  
6 using physical force upon another person for self-defense or to defend a  
7 third person from what the person reasonably believes to be the use or  
8 imminent use of unlawful physical force, and the person may use a degree  
9 of force which the person reasonably believes to be necessary for the  
10 purpose.

11       A defendant may deny intending or causing any of the alleged victim's injuries  
12 and properly rely on self-defense. *State v. Styre*, 273 Or.App. 365 (2015)(refusal to  
13 give self-defense instruction reversible error when defendant extended his hand  
14 towards the victim's head to keep her from coming forward and biting him, and was  
15 "not sure" if he actually touched her; evidence permitted an inference of intent to  
16 ward her off). *See also, State v. Dahrens*, 192 Or.App. 283, 286-288 (2004)(where  
17 defendant accelerated his car to escape harm from the victim who had reached inside  
18 and grabbed the steering wheel, causing injury to the victim, defendant entitled to  
19 self-defense instruction; "self-defense is available where an act is done with the  
20 knowledge or intent that it will thwart another's application of unlawful force," and the  
21 defendant need not "intend to assault another in order to claim self-defense").

22       The State is required to prove the defendant was the initial aggressor. *State v.*  
23 *Wolf*, 288 Or.App. 613, 617 (2017). A defendant need not testify in order to raise  
24 self-defense. "We have never held that a defendant must testify to raise the issue of  
25 self-defense."

1 self-defense, and we are aware of no source of law precluding a defendant from  
2 developing a theory of self-defense through circumstantial evidence.” *State v. Easley*,  
3 290 Or.App. 506, 516 (2018).

4 ORS 161.229 provides: “A person is justified in using physical force, other than  
5 deadly physical force, upon another person when and to the extent that the person  
6 reasonably believes it to be necessary to prevent or terminate the commission or  
7 attempted commission by the other person of theft or criminal mischief of property.”  
8

9 “Criminal mischief” occurs when a person, “with the intent to cause substantial  
10 inconvenience to the owner or to another person, and having no right to do so nor  
11 reasonable ground to believe that the person has such right, tampers or interferes  
12 with property of another.” ORS 164.345. “Tamper” requires conduct that alters,  
13 rearranges or changes property in a way that has an adverse effect on the property or  
14 its use. *State v. Lee*, 268 Or.App. 587 (2015). “Property of another” means  
15 “property in which anyone other than the actor has a legal or equitable interest that  
16 the actor has no right to defeat or impair, even though the actor may also have such  
17 an interest in the property.” ORS 164.305(2).  
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19  
20 COMPLAINANT’S CHARACTER FOR VIOLENCE AND PROOF BY SPECIFIC ACTS

21 OEC 404(1) provides, “Evidence of a person's character or trait of character is  
22 admissible when it is an essential element of a charge, claim or defense.” If evidence of a  
23 person's character is admissible under OEC 404(1), “proof may be made by testimony as to  
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1 reputation or by testimony in the form of an opinion,” OEC 405(1), and “proof may also be  
2 made of specific instances of conduct of the person,” OEC 405(2)(a).

3 Oregon recognizes the alleged victim’s character for violence is admissible in cases  
4 where self-defense is at issue, as an essential element of that defense, under OEC  
5 404(1). *See, State v. Thompson*, 49 Or. 46 (1907)(On a trial for homicide defended  
6 on the ground of self-defense, proof that decedent was a violent and dangerous man  
7 was competent, whether the same was known to accused or not, in determining who  
8 was the aggressor in the difficulty resulting in the homicide, and in determining the  
9 nature of the assault made by decedent on accused.). Furthermore, evidence of Mrs.  
10 Smith’s aggressive character when intoxicated is admissible in this self-defense case.  
11 *See, State v. Griffin*, 19 Or.App. 822, 832 (1974)(discussed *infra*).

13 When a defendant raises the defense of self-defense, evidence of the alleged  
14 victim’s character for violence as well as prior violent acts towards the defendant is  
15 admissible under OEC 404(1). *State v. Beisser*, 258 Or.App. 326, 334-35 (2013).  
16 This is due to the “reasonable belief” in the need to use force element of self-defense.  
17 *Id.* Because defense of property likewise requires the defendant to have a reasonable  
18 belief in the use of force, the victim’s prior acts of tampering, interfering or destroying  
19 items in which the defendant has an equitable interest is admissible on the same legal  
20 theory. Testimony that the alleged victim was “very volatile, could be very ballistic”  
21 and had a “mean” temper,” is properly admitted character evidence when relevant to  
22 a justification defense. *State v. Whitney-Biggs*, 147 Or App 509, 525-526 (1997).  
23 Evidence that the alleged victim engaged in sudden swings of mood (would “flip out”)  
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1 and potentially violent behavior while intoxicated has been held error to exclude when  
2 the defendant relied on self-defense. *Griffin, supra*, 19 Or.App. at 833.

3 The Court of Appeals has also recognized the argument that specific acts of  
4 violence by the alleged victim against the defendant may also be admissible as non-  
5 propensity character evidence under OEC 404(3), to support the defendant's  
6 reasonable belief. *Beisser, supra*. 258 Or.App. at 335 n.3.

7 Rule 404(3), OEC, provides:

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

13 Evidence may be offered under Rule 404(3) by defendants as well as by prosecutors.  
14 Kirkpatrick, §404.06[10], pp. 225-226; *State v. Prange*, 247 Or.App. 254, 262  
15 (2011). Rule 404(3) does not require that prior acts be illegal. See, *State v. Hardman*,  
16 196 Or.App. 522, 531 n.6 (2004)(this rule "is not limited to crimes or bad acts, but  
17 extends to any evidence of prior 'acts' that could be used to establish character.").

18 It is reversible error to exclude testimony by a defense witness describing a  
19 violent act by the alleged victim against the defendant who has raised self-defense,  
20 even though the defendant has testified about the same act. *Beisser, supra*, 258  
21 Or.App. at 335-36.

22 Furthermore, it is reversible error to exclude testimony of a violent act by the  
23 alleged victim against the defendant that occurred 10 years prior to the charged  
24 assault. *State v. Scott*, 265 Or.App. 541 (2014).  
25

1 Any character trait of Mrs. Smith that is relevant is admissible propensity evidence. OEC  
2 Rule 404(2)(b). That rule provides:

3 (2) Evidence of a person's character is not admissible for  
4 the purpose of proving that the person acted in conformity  
5 therewith on a particular occasion, except:

6 (b) Evidence of a pertinent trait of character of the victim  
7 of the crime offered by an accused, or by the prosecution to  
8 rebut the same or evidence of a character trait of  
9 peacefulness of the victim offered by the prosecution to  
10 rebut evidence that the victim was the first aggressor.

11 Proof of character under OEC 404(2)(b) is limited to testimony in the form of  
12 opinion or reputation. OEC 405; *see Whitney-Biggs, supra* (Defendant raising self-  
13 defense could not admit prior bad acts of victim under OEC 404(2)(b)). In *State v.*  
14 *Marshall*, 312 Or. 367 (1991), the court delineated the types of evidence that reflect  
15 a “trait of character”:

16 Character evidence, therefore, is evidence of a particular  
17 human trait, such as truthfulness, honesty, temperance,  
18 carefulness, or peacefulness, *etc.* A person's character with  
19 respect to truthfulness means that person's propensity to  
20 tell the truth in all the varying situations of life. A person's  
21 character with respect to carefulness means that person's  
22 propensity to act with care in all the varying situations of life.  
23 *Id.* at 372.

24 The fact that a defendant offers character evidence regarding the alleged  
25 victim does not open the door for the prosecution to offer character evidence  
regarding the defendant. Kirkpatrick, Oregon Evidence, §404.05[2][b], p. 216-17  
(Sixth ed. 2013)(hereafter cited as Kirkpatrick, with section and page(s) noted);  
*State v. Peacock*, 75 Or App 217 (1985)(even though defendant offered victim's  
character for violence in assault case, that did not justify prosecution offering

1 evidence of defendant's violent character when he had not placed his own character  
2 at issue).

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4 COMPLAINANT'S ABUSIVE BEHAVIOR AND HOSTILE MOTIVES TOWARDS DEFENDANT

5 The Oregon Supreme Court has recognized that prior acts of the defendant  
6 and alleged victim towards one another during their relationship are not prohibited  
7 "character evidence", when offered to show their behavior towards one another—  
8 rather than propensity in general—and relevant to explain their conduct around the  
9 time of the offense. *State v. McKay*, 309 Or 305, 308 (1990)(prior acts between  
10 defendant and alleged victim admissible to demonstrate defendant's behavior  
11 towards the victim, not his propensity in general); see also, *State v. Stevens*, 328 Or  
12 116, 126-127 & n.5 (1998)(victim's testimony regarding prior acts of abuse by  
13 defendant against her relevant to explain her behavior with respect to defendant, and  
14 supported State's general theory that her responses were shaped by the fact that  
15 she was operating under a constant threat of abuse).  
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18 Thus, Mrs. Smith's prior acts of abusive behavior towards Mr. Smith when she  
19 becomes drunk—including conduct such screaming profanities at him, throwing his  
20 food away, and "getting in his face"—that falls short of doing physical violence, is  
21 admissible to both show his state of mind and help explain his conduct towards Mrs.  
22 Smith leading up to the date of the alleged crime, and his responses towards her and  
23 others afterwards. See also, OEC 404-1 (Pattern, Practice or History of Abuse as  
24 defined by ORS 107.705 is admissible by any party in any proceeding when relevant  
25



1 and not otherwise inadmissible). The defense submits that use of prior acts to show  
2 pattern, practice or history of abuse is a permissible purpose under OEC 404(3),  
3 which sets forth analogous examples including preparation and plan and is itself a  
4 non-exclusive list of permissible purposes for prior act evidence..

5 This same evidence is admissible under alternative theories for proving both a  
6 hostile motive for Mrs. Smith to attack him on XXdate, and a motive for her to make  
7 the false accusation of assault upon which the State has brought this case.  
8

9 The Oregon Supreme Court recently discussed the admissibility of other act  
10 evidence under OEC 404(3) to show “hostile motive” for the perpetrator’s conduct  
11 in a domestic assault case. *State v. Tena*, 326 Or 514 (2018). The Court began by  
12 explaining “motive, in this context refers to a ‘cause or reason that moves the will  
13 and induces action, an inducement which leads to or tempts the mind to commit an  
14 act,” and “refers to why a defendant did what he did.” *Id.*, at 522 (citations  
15 omitted). The Court noted that there must be “an adequate logical connection”  
16 between the prior acts and the conduct at issue, and in *Tena* rejected the State’s  
17 evidence because the prior acts involved assaults against other victims. *Id.*, at 522-  
18 23. In the case at bar, Mrs. Smith’s prior abusive acts against Mr. Smith are logically  
19 connected in that they tend to prove a hostile motive to attack him without legal  
20 provocation on XXdate, 2018, given her history of past aggression towards him, and  
21 make more probable Mr. Smith’s version of what occurred. Because the State denies  
22 that Mrs. Smith attacked him on XXdate, proof of her motive to engage in such  
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1 conduct is highly relevant to the defense. OEC 404(3) fully applies to other acts of  
2 the alleged victim. *Prange, supra*.

3 Mrs. Smith's behavior of becoming mean and spiteful when drunk towards Mr.  
4 Smith may also be admissible as relevant to bias, or more particularly, a motive to  
5 make the false accusation to others as well as to the police. See, *State v. Prange,*  
6 *supra*, 247 Or.App. at 262 (victim's wife's past dispute with defendant's  
7 stepdaughter gave rise to inference of bias against defendant that tended to prove  
8 victim's motive to make false report to police). OEC Rule 609-1 permits impeachment  
9 of the credibility of a witness by evidence that the witness engaged in conduct or  
10 made statements showing bias or interest. If the witness denies or does not fully  
11 admit the facts claimed to show bias or interest, evidence of those specific acts may  
12 be introduced. To be relevant, evidence introduced to impeach a witness for bias or  
13 interest need only have a mere tendency to show the bias or interest of the witness.  
14 *Prange, supra* at 260-61.

17 "Bias may be evidenced by matters such as the following: (1) personal, family,  
18 romantic, sexual or business relationships; . . . (3) statements or conduct indicating  
19 positive or negative feelings of the witness towards a party; . . . (5) prior fights or  
20 quarrels." Kirkpatrick, §609.1.03[2], p. 548-49. Hearsay statements by the witness  
21 are admissible to show bias under the state of mind exception, OEC 803(3).  
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1 COMPLAINANT’S CHARACTER AS AN ALCOHOLIC

2           The Oregon Supreme Court in *Marshall, supra*, recognized that temperance,  
3 i.e., abstaining from alcohol consumption, is a character trait. 312 Or. at 372. It  
4 follows that lack of temperance, i.e., being a compulsive drinker or alcoholic, is  
5 likewise a character trait. Under OEC 404(2)(b), evidence that Mrs. Smith is an  
6 alcoholic is therefore a “pertinent character trait” of the alleged victim, and may be  
7 offered as relevant propensity evidence to prove that she was intoxicated at the  
8 time of the alleged offense. The defense expects the State will assert Mrs. Smith  
9 was not intoxicated at that time; Mr. Smith told police she was drunk. They are the  
10 only eye witnesses to the incident. As noted earlier in this memorandum, Mrs.  
11 Smith’s character for being mean and violent when intoxicated is admissible due to  
12 its relevance to self-defense and defense of property.  
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16 COMPLAINANT’S BEHAVIORS REGARDING CONSUMPTION OF ALCOHOL

17           Evidence of Mrs. Smith’s behaviors regarding consumption of alcohol, e.g.,  
18 drinking almost daily starting in the morning hours, and patterns of consumption  
19 including routinely drinking to the point of intoxication, may be admissible to  
20 impeach her credibility as a witness by creating defects in her capacity to perceive,  
21 recount or recall the events in question, see OEC 404(2)(c), OEC 607, OEC 701. Lay  
22 opinion testimony of the alleged’s victim’s intoxication at the time of charged crime  
23 is admissible to impeach credibility concerning victim’s ability to correctly observe,  
24 remember and recount events in question. See, *State v. Barnes*, 208 Or.App. 640  
25

1 (2006)(methamphetamine case discussing historical case law on intoxication in  
2 general). However, Oregon follows the general rule that evidence regarding any  
3 witness' dependency on intoxicants, for the purpose of discrediting the witness,  
4 cannot be introduced in the absence of evidence that the witness was under the  
5 influence at the time of occurrences to which he or she testifies, or that the witness'  
6 powers of observation were affected by the habitual use of intoxicants. See, *State v.*  
7 *Batchelor*, 34 Or.App. 47, 50 (1978); Kirkpatrick, §607.03[3][a], pp. 497-98.  
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9 As noted previously, evidence regarding Mrs. Smith's drinking habits may also  
10 be relevant as "part and parcel" of her abusive behaviors toward Defendant, and  
11 their teenaged son, and necessary to explain Defendant's state of mind and conduct  
12 in relation to her and their marriage.  
13

#### 14 COMPLAINANT'S CHARACTER FOR UNTRUTHFULNESS

15 The credibility of every witness is relevant, and the rules provide for attacking  
16 or bolstering the witness' credibility by evidence of character for truthfulness, in the  
17 form of opinion or reputation. The cross-examiner may inquire into specific acts of  
18 truthfulness or untruthfulness, but specific acts cannot be offered on direct  
19 examination of the character witness. See OEC Rules 404(2)(b) & (c), and 608. The  
20 only foundation required is that the witness have adequate contacts with the  
21 complainant to form a current personal opinion of the complainant's character for  
22 truthfulness. *State v. Colon*, 251 Or.App. 714, 721 (2012). Testimony that the  
23 complainant was a "drama queen" and "prone to exaggeration" was proper evidence  
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1 of complainant's character for untruthfulness, and reversible error to reject when the  
2 case turned on the credibility of the complainant. *Id.*

3  
4 COMPLAINANT'S PRIOR FALSE ACCUSATIONS AGAINST DEFENDANT

5 Mrs. Smith's false accusations of physical assaults pre-dating the instant  
6 offense by Defendant against her, that she made to others, may be admissible as  
7 tending to show a common scheme or plan, OEC 404(3) & 405(2); and alternatively,  
8 for impeachment showing hostility and bias, see OEC 609-1. Under OEC 609-1, if  
9 Mrs. Smith fully admits making the false accusations, additional evidence is not  
10 admissible.  
11

12 In *State v. Taylor*, 275 Or.App. 962 (2015), the defense relied only on his  
13 Confrontation Clause rights to cross-examine the domestic violence assault  
14 complainant about a prior false allegation of domestic abuse. 275 Or.App. at 966 &  
15 n.1. The Court of Appeals held the trial court did not abuse its discretion due to the  
16 prior accusation not being demonstrably false, and then excluding it under a OEC  
17 403 balancing test related to unavailability of other eye-witnesses and the need to  
18 avoid a "trial within a trial". The Confrontation Clause analysis, oft referred to as the  
19 LeClair rule, see *State v. LeClair*, 83 Or App 121 (1986), treats prior false  
20 accusations as specific acts of untruthfulness which are barred under OEC 608(2),  
21 unless trumped by application of this constitutional right. *LeClair* involved prior false  
22 accusations of rape made by the alleged victim in the past against other individuals,  
23 not the defendant, and thus did not come within an OEC 609-1 bias claim.  
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