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

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11 STATE OF OREGON,
12 Plaintiff,

CASE No. 16CRXXXXX

13 -VS-

14 MR. DEFENDANT

MEMORANDUM OF LAW FOR ADMISSION
OF 404(4) PROPENSITY EVIDENCE

15 Defendant

16 Defendant, by and through undersigned counsel, respectfully submits the
17 following memorandum of law in support of his oral motion to admit certain evidence
18 at trial.

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21 **MEMORANDUM OF LAW**

22 “OEC 404(4) . . . effects a significant change in the law. Before
23 the legislature enacted OEC 404(4), “other acts” evidence offered to
24 prove a defendant’s character and propensity to act accordingly was
25 categorically inadmissible under OEC 404(3). That is no longer the rule.”
State v. Williams, 357 Or 1, 20 (2015)(*en banc*).

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2 **I. OEC 404(4)**

3 OEC 404(4) authorizes admission, in criminal cases only, of “evidence of
4 other crimes, wrongs or acts by the defendant . . . if relevant,” subject to exclusion
5 on other specified grounds to be addressed *infra*. This rule carves out an exception
6 to the inadmissibility of prior act evidence to prove a person’s character or
7 propensity to act accordingly, see OEC 404(3), only when the prior act is by the
8 defendant—not by the alleged victim nor any other person. The Supreme Court
9 recently decided whether “OEC 404(4) supersedes OEC 404(3) and makes relevant
10 ‘other acts’ evidence admissible for *all* purposes.” *State v. Williams*, 357 Or 1, 5
11 (2015)(*en banc*). The Court held that it did. *Id.*, at 15.
12

13 Although *Williams* dealt with prior bad act evidence offered by the State
14 against a defendant, OEC 404(4) is not that narrow. The plain language of the rule
15 embraces “other . . . acts by the defendant,” without regard to which party offers
16 such evidence. Likewise, no restriction as to the proponent is contained in OEC
17 404(3) regarding admissibility of other act evidence as to all persons, including
18 criminal defendants: “Evidence of other crimes wrongs or acts . . . [may be]
19 admissible for other purposes, such as proof of motive, opportunity” That rule
20 has been interpreted by the Courts to apply to other act evidence offered by the
21 defendant against the State. Kirkpatrick, Oregon Evidence §404.06[10], (6th ed.
22 2013); *State v. Prange*, 247 Or App 254, 262 (2011); *State v. Salas-Juarez*, 349
23 Or. 419, 428-31 (2010).
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1 Furthermore, other provisions of OEC 404 do contain express restrictions as
2 to the proponent of the evidence, see OEC 404(2)(a)&(b)(permitting evidence of
3 pertinent character traits of the accused or victim, to prove conduct in conformity
4 therewith on a particular occasion, when offered by the defendant in a criminal case,
5 or by the prosecution in rebuttal). Thus, had the legislature intended OEC 404(4) to
6 apply solely to evidence offered by the State against the defendant, it would have
7 been simple enough and consistent with other provisions of Rule 404 to expressly so
8 provide. *See, State v. Newell*, 238 Or App 385, 382 (2010)(“If the legislature uses
9 different terms in statutes, we generally will assume ‘that the legislature intends
10 different meanings’ for those terms.”).

12 *Williams* discussed the legislative history of OEC 404(4), noting that the
13 legislature enacted it in response to the anticipated judicial invalidation of Ballot
14 Measure 40, which among other provisions gave crime victims “the right to have all
15 relevant evidence admitted *against* criminal defendants.” 357 Or at 14 (emphasis
16 supplied). A senate version of the bill that resulted in 404(4) likewise permitted all
17 relevant evidence admitted *against* criminal defendants; opponents criticized the
18 senate bill as unconstitutional. *Id.* The rewording of the provision that was passed
19 into law eliminated the “against defendants” terminology that would have created a
20 rule benefiting only one party, and not subject to rebuttal by the same type of
21 evidence. *Compare*, OEC 404(2)(a)&(b)(providing rebuttal to the prosecution to
22 offer contrary character evidence); *see generally, Wardius v. Oregon*, 412 US 470,
23 475 (1973)(Reviewing Oregon rules barring exclusion of defense alibi evidence;

1 “[W]e hold that in the absence of a strong showing of state interests to the
2 contrary, discovery must be a two-way street.”).

3 The Oregon Supreme Court, in addressing the balancing that is
4 constitutionally required under 404(4)(a), used no language even suggesting that
5 only the State could offer evidence of other acts by the defendant:

6 When a party objects, under OEC 403, to ‘other acts’ evidence offered
7 under OEC 404(4), a trial court must engage in the balancing anticipated
8 by OEC 403. . . . When ‘other acts’ evidence goes ‘only to character and
9 there are *no* permissible inferences the jury may draw from it,’ it is more
10 likely that the evidence will be excluded. Such evidence generally will
11 have little or no cognizable probative value, and the risk that the jury
12 may conclude improperly that the defendant had acted in accordance
13 with past acts on the occasion of the charged crime will be substantial.
14 357 Or at 19.

15 *Williams* addressed “[w]hether the Due Process Clause requires the application
16 of OEC 403,” because OEC 404(4) does not require consideration of the prejudicial
17 impact of evidence unless constitutionally required. See OEC 404(4)(a). While
18 *Williams* did not decide whether Due Process balancing is the same as “traditional” or
19 “subconstitutional” balancing under 403, *id.*, at 19 n.17, clearly OEC 403 is not an
20 independent restriction on admissibility of “other act” evidence set forth in OEC
21 404(a)-(d).

22 The Due Process Clause is part of the Bill of Rights in the federal constitution,
23 i.e., a protection of individual rights against the power of government; a shield for
24 the criminal defendant against the sword of the prosecution. Thus, whether Due
25 Process balancing is required when requested by the State as to “other act”
evidence offered by the defendant under 404(4) appears highly dubious. *See also,*

1 *State v. Turnidge*, 359 Or 364 (2016)(stating that *Williams* left undecided whether
2 Due Process balancing is required when the State offers “prior bad act” evidence
3 solely for propensity purposes in cases other than ones involving child sex abuse,
4 where historically such evidence was admitted; and declining to reach the issue
5 there). *Dicta* in *Williams* discussing federal law suggests that admitting “other
6 crimes” evidence against a defendant to prove propensity in cases not involving sex
7 crimes could be barred by Due Process as “fundamentally unfair,” rendering such
8 evidence inadmissible even if its probative value was not outweighed by prejudice.
9
10 357 Or at 17-18. No provision of the U.S. Constitution nor Oregon Constitution
11 guarantees “fundamental fairness” to the State.

12 “Other act” evidence by the defendant is not limited to conduct, i.e., physical
13 actions or non-verbal behavior. A defendant’s past statements to the alleged victim
14 or others may constitute “other acts” evidence. *E.g.*, *State v. Kaylor*, 252 Or App
15 688, 700-01 (2012); *see also*, *Salas-Juarez, supra* at 429 (assuming, without
16 deciding, that a participant’s prior statement offered by the defendant was an “act”
17 under OEC 404(3)).
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s/ Terri Wood

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