IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. DARRON DUANE DODGE, Defendant-Appellant, Petitioner on Review.	Clackamas County Circuit Court Case No. CR1301852 CA A174232 SC S069859

PETITIONER'S BRIEF ON THE MERITS

Review of the decision of the Court of Appeals
On an appeal from a judgment of the Circuit Court for Clackamas County
Honorable Susie L. Norby, Judge

Opinion Filed: September 14, 2022
Author of Opinion: Powers, Judge
Before Ortega, Presiding Judge, and Powers, Judge, and Hellman, Judge.

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STATEMENT OF THE CASE

Nature of the Proceeding

Petitioner on review (defendant) asks this court to reverse the decision of the Court of Appeals in *State v. Dodge*, 321 Or App 775 (2022) and the judgment of the trial court and remand the case for entry of an order of dismissal with prejudice.

Defendant's appeal arises from a retrial on remand after defendant's successful appeal. In defendant's first trial, a jury acquitted him on 40 of 46 charged counts against a single victim. On remand, defendant moved to dismiss the six counts on which he faced retrial on the grounds that former and double jeopardy barred further prosecution. Defendant argued that the generic indictment and earlier trial proceedings presented an irremediable risk that he would be retried for offenses on which he was previously acquitted. The trial court denied his motion, and a jury found defendant guilty on the six counts.

On appeal, defendant reiterated his argument and the state responded that defendant's argument was unpreserved and, alternatively, that he had failed to carry his burden to establish that the double jeopardy barred reprosecution. In a nonprecedential memorandum opinion, the Court of Appeals concluded that the issue was unpreserved and affirmed. This court allowed review.

Question Presented and Proposed Rule of Law

Question Presented:

When the indictment allegations are not specific enough to enable the defendant to plead former acquittal as a bar to retrial, and the earlier trial record establishes that retrial presents an irremediable risk of retrial on conduct of which the defendant was previously acquitted, does former or double jeopardy under the state or federal constitution require dismissal?

Proposed Rule of Law:

When the state proceeds on an indictment that is not sufficiently specific to enable the defendant to plead prior acquittal, the jury finds defendant guilty of some offenses and not guilty on others, and the judgment of conviction is reversed on appeal for legal error at trial, the defendant establishes an irremediable risk that the retrial will be for offenses or conduct on which he was previously acquitted. In those circumstances, the court must dismiss with prejudice unless the state can demonstrate by the earlier trial court record that the retrial will not be for acquitted offenses, *i.e.*, that the state is continuing the prosecution *only* on those offenses on which the original jury found the defendant guilty.

Summary of Argument

This case implicates a core former and double jeopardy protection under the Oregon and federal constitutions, which prevents successive prosecutions, particularly on acquitted offenses. Article I, section 12, of the Oregon Constitution guards against successive prosecutions to protect the finality of prior acquittals and to prevent prosecutorial overreaching and harassment. The Double Jeopardy Clause of the Fifth Amendment likewise protects against successive prosecutions for the same offense.

To effectuate that protection in a case on retrial after a mixed verdict of guilty and not-guilty on identical counts, the state may not retry reversed counts when the defendant establishes an irremediable risk that he will be retried on offenses for which he was previously acquitted. Only if the state can prove by a preponderance of the evidence that it is retrying only the original counts of conviction—thus eliminating the risk of retrial on previously acquitted offenses—may the trial court allow the prosecution to proceed.

When an indictment presents only generic allegations, and the state fails to elect, seek special factual findings, or otherwise create a record of which factual occurrences pertain to which counts, a general verdict of "guilty" on some counts and "not guilty" on identical counts fails to establish the requisite record to allow a retrial.

The circumstances require application of a burden-shifting framework to effectuate former and double jeopardy protections. Article I, section 12 requires a burden-shifting framework to adequately protect against the harassment and embarrassment of successive prosecutions. That framework aligns with Oregon's jurisprudence on variance, election, and the prohibition on post-verdict factual findings regarding the scope of the defendant's criminal conduct. The Fifth Amendment also requires a burden-shifting framework to safeguard a defendant from facing retrial after an acquittal. Double Jeopardy allows the state to continue the prosecution only on counts of conviction.

Here, defendant demonstrated an irremediable risk that his retrial would be for conduct on which he was previously acquitted. The state's charging decisions and failure to seek concurrence, make an election, request special factual findings, or otherwise create a record of the jury's findings on specific factual occurrences renders it impossible to ensure that retrial was limited only to the factual occurrences underlying the original guilty verdicts. The only way to limit the scope of a second trial required the trial court (or the prosecutor) to either speculate about the jury's findings or usurp the jury's role to determine the scope of the criminal conduct. Because a defendant's right to a jury trial forbids either option, retrial was barred.

Finally, defendant addresses preservation. Here, defendant objected to the retrial on former and double jeopardy grounds and identified precisely the

issue presented on review—that the indictment and prior trial record were insufficiently precise to enable him to identify the conduct underlying the jury's acquittals, which placed him at an irremediable risk of successive prosecution on those counts. The court understood that the question before it required it to review and interpret the earlier record to attribute the counts of acquittal and conviction to specific offenses and asked the state to explain how the record would identify the offenses on which it could permit a retrial. The state responded that the convicted counts related to the factual occurrences that the victim had described in greater detail and provided record citations to those portions of the testimony. Defendant preserved the argument because he raised the constitutional issue, linked that issue to a specific argument regarding the import of the earlier trial record, and the parties understood the substance of the argument and its inflection points.

This court should determine that the issue is reviewable and hold that former jeopardy protections against retrial for acquitted conduct require reversal of defendant's convictions and remand for entry of a dismissal with prejudice.

Summary of Historical and Procedural Facts

Proceedings through first appeal

In 2013, a grand jury indicted defendant on 46 Counts, which defendant categorizes below by statutory offense and alleged means of commission. The indictment alleged each count to have occurred "on or between November 20,

1999 and November 20, 2007," and "in a criminal episode separate, apart, and distinct from that alleged in any other count." The charges were as follows:

- 5 counts of second-degree rape, ORS 163.365;
    - All five rape counts alleged sexual intercourse with the victim when she was under age 14 (Counts 1, 2, 3, 4, and 5);
- 18 counts of second-degree sexual abuse, ORS 163.395;
    - Five alleged intercourse with the victim while she was not consenting (Counts 6, 7, 8, 9, and 10);
    - Five alleged that defendant's mouth contacted the victim's vagina while she was not consenting (Counts 16, 17, 18, 19, and 20);
    - Five alleged that defendant caused the victim's mouth to touch his penis while she was not consenting (Counts 26, 27, 28, 29, and 30);
    - Five alleged that defendant penetrated the victim's vagina with his finger while she was not consenting (***Counts 34***, 35, and 36);
- 10 counts of second-degree sodomy, ORS 163.395;
    - Five alleged that defendant placed his mouth on the victim's vagina while she was under the age of 14 (Counts 11, 12, 13, 14, and 15);
    - Five alleged that defendant caused the victim to touch his penis with her mouth while she was under the age of 14 (Counts 21, 22, 23, 24, and 25);
- 3 counts of second-degree sexual penetration, ORS 163.408; and
    - All three counts alleged that defendant penetrated the victim's vagina with his finger while she was under the age of 14 (***Counts 31***, 32, and 33);
- 10 counts of first-degree sexual abuse, ORS 163.427;

- Five counts alleged that defendant touched DD's genital area while she was under the age of 14 (***Counts 37*, *38*,** 39, 40, and 41);

- Five counts alleged that defendant touched the victim's breast while she was under the age of 14 (***Counts 42***, ***43***, 44, 45, and 46).

Indictment, ER 1-10 (bold-faced italics indicate counts of conviction and retrial).

In 2015, defendant proceeded to a jury trial for the first time. In opening statement, the state alleged that sexual contact between defendant and the victim, DD, "happened periodically throughout the course of four or five or six, seven, eight years." A160194 Tr 89. The state did not identify discrete occasions of sexual contact that occurred but alleged that, over time, defendant had sexual intercourse with DD on "five different occasions;" had deviate sexual intercourse with DD ten times—five times in one manner and five in another manner; sexually penetrated DD with his finger "at least three times;" and sexually abused DD by touching her vagina five times and her breasts five times. Tr 93-97. The state argued that each instance of rape, sodomy, and sexual penetration also involved a count of second-degree sexual abuse. Tr 94-98.

DD testified that she had been adopted by Dion and Christy Dodge at age four. Tr 109-10. At age eight, the Dodges placed her with her adoptive

grandmother, with whom her adoptive uncle, defendant, also lived.[1] Tr 111-13. After a couple of years, defendant engaged in "inappropriate behavior" with DD. Tr 118. The behavior continued until "before [DD] was in high school" and happened more than five times. Tr at 118-19.

The first time, DD was playing video games while sitting in defendant's lap. Tr 119. Defendant touched her breasts and vagina and tickled her. Tr 120-21.

Another time, DD was on defendant's bed while defendant lay beside her. Tr 123. DD and defendant talked about DD's "problems," and defendant touched DD's breasts and vagina. Tr 123-24.

Another time, DD was in defendant's bedroom, sitting on defendant's lap while defendant sat in a chair, and defendant touched her breasts. Tr 126-27. She remembered wearing shorts and a tank top. Tr 127.

Another time, DD lay beside defendant on his bed when defendant removed DD's clothes, touched DD's breasts, and inserted his fingers into her vagina. *Id*. at 128-29. DD told defendant that it hurt. *Id*. at 129.

Another time, defendant was penetrating her vagina with his fingers when DD's grandmother nearly interrupted them. Tr 144, 208.

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[1] All future references to DD's family members (as mother, father, grandmother) are to the Dodges, her adoptive family.

DD also described several incidents of sexual intercourse and sodomy. Tr 123-35 (intercourse); Tr 137-39 (having DD touch his penis); Tr 141-42 (description of oral sexual activity). DD's description of intercourse detailed the physical positioning of their bodies. Tr 123-35; 191-92.

DD believed that defendant touched her "inappropriately" more than 40 times before she reached high school. Tr 130-31. He touched her vagina more than five times. Tr 131. He digitally penetrated her vagina more than once. Tr 130-31, 143. He touched her breasts more than ten times. Tr 130.

The sexual interactions stopped after defendant had moved out and was about to get married. Tr 149. DD visited defendant at his apartment. They were sitting on the couch and defendant was "touching her." Defendant said, "This is wrong, and it needs to stop." Tr 150. He did not touch her after that. Tr 152.

In closing argument, the state failed to align specific instances of conduct with specific counts:

> "Really, you guys get to deliberate any way you want. What the State proposes is that you focus in on the act and figure out if it happened, how old she was when it happened, and how many times it happened."

Tr 512. For example, the state told the jury that defendant was charged with having sexual intercourse with DD "on five separate occasions" and that the jury was to decide whether "there was sexual intercourse" and if there was, to

then decide how many times it happened. Tr 508-09 ("The real question you are going to have to ask yourself, first and foremost * * * is, did it happen, and if so, how many times?"). It argued that if defendant had intercourse with DD on any occasion, then that event also constituted second-degree sexual abuse. Tr 510.

The state's argument was identical on the sodomy charges. That is, it told the jury that DD had described one form of sodomy five times, a second form five times, and that all 10 counts also constituted second-degree sexual abuse, suggesting the jury needed to decide only whether sodomy happened, and if it did, how many times. Tr 510-511, 524-25.

And it argued identically in support of the three sexual penetration and corresponding second-degree sexual abuse counts—*i.e.*, that the jury needed to decide only whether and how many times defendant penetrated DD with his fingers. Tr 512, 524-25.

Regarding the 10 counts of first-degree sexual abuse, the state argued that the jury needed to find how many of five alleged times defendant had touched DD's breasts and how many of five alleged times defendant had touched DD's vagina. Tr 512.

The court did not provide a concurrence or unanimous guilty verdict instruction and the state did not elect a specific instance of contact tied to any specific count. Tr 563-77. The jury instructions did not otherwise convey that

the jury must find that individual counts arose from separate occurrences. *Id.* For each count, the verdict form followed a similar format:

> "We, the jury, being duly impaneled and sworn in the above-entitled court and cause, do find the defendant on count [*x*], the charge of [*name of crime*] ([*form of contact*]):
>
> "_____ Not Guilty
>
> "_____ Guilty."
>
> "This being a criminal case, 10 or more jurors must agree on your verdict."

Verdict, TCF.

The jury found defendant guilty on Count 31 (second-degree sexual penetration), Count 34 (second-degree sexual abuse, "penetration of the vagina"),[2] Count 37 and 38 (first-degree sexual abuse, "genital area"), and Counts 42 and 43 (first-degree sexual abuse, breast). The jury found defendant not guilty on the 40 remaining counts. Tr 592-95.

At sentencing, the state argued that the court could impose consecutive sentences because (1) the state had pleaded separate criminal episodes in the

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[2] The respondent's brief and nonprecedential memorandum opinion misidentified the counts of conviction as five counts of first-degree sexual abuse and a single count of second-degree sexual penetration. *State v. Dodge*, 321 Or App 775, 776 (2022); Resp Br at 3-4.

indictment, Tr 615, and (2) DD had articulated separate incidents, Tr 603.[3] The court merged the verdict on Count 34 with the verdict on Count 31. Tr 626.

The court sentenced defendant to a total of 120 months in prison and 45 months of post-prison supervision (PPS). The court imposed 75 months of imprisonment under ORS 137.700 on each of Counts 31, 37, 38, 42, and 43, ordering 45 months of the sentence on Count 42 to be served consecutively. *Original Judgment*, TCF.

Defendant successfully appealed the judgment, and the Court of Appeals reversed and remanded for a new trial based on the erroneous denial of defendant's motion to suppress his statements to law enforcement. *State v. Dodge*, 297 Or App 30, 441 P3d 599, *rev den*, 365 Or 533 (2019).

Trial court proceedings after remand

After the Court of Appeals remanded the case to the trial court, defendant moved to dismiss "on the grounds that it subjects him to double jeopardy in violation of the state and federal constitutions." *Defendant's Motion to Dismiss the Indictment on Grounds of Double Jeopardy* at 1, TCF.

In a supporting memorandum, defendant argued that the indictment presented a risk of reprosecution for crimes of which he had already been

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[3] The state inaccurately stated that DD had not testified to defendant touching her vagina on the first occasion involving video games to further its sentencing argument that the jury found separate criminal episodes. *Compare* Tr 120-21 (DD describing event) *with* Tr 603 (prosecutor's representation).

acquitted. He explained that the generic indictment and undifferentiated testimony placed him at risk of a second trial for offenses on which he had been acquitted:

> "The jury acquitted the defendant of most of the counts charged in this case, except for five counts.[4] Each of the five counts that are now pending against [defendant] is *identical* to at least one count of which he has already been acquitted by a jury.
>
> "For example, the jury acquitted defendant of Counts 32 and 34, and defendant is now to be retried on the identically worded Count 31. Because the counts in each set of charges are indistinguishable, for all anyone can tell*, the conduct underlying the pending counts may be the very same conduct that underlies the counts of which he has already been acquitted by the jury*. In other words, defendant is now being retried for criminal conduct of which he may have already been acquitted. This danger could have been averted had the indictment alleged with specificity in each count what criminal act to be introduced at trial applied to each specific count.
>
> "* * * * *
>
> "[Defendant] is exposed to the risk of double jeopardy at the moment the second trial begins because, according to the indictment, he is being charged with identical criminal conduct of which the court or the first jury may have already acquitted him. * * *
>
> "* * * * *
>
> "Second, the testimony at trial does not establish with any level of certainty that the criminal conduct underlying a particular count of which the defendant was acquitted was the same conduct that the grand jury found probable cause to assign to that count.

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[4] As noted, the jury originally found defendant guilty of six counts, not five, but the court at sentencing merged two counts, resulting in five convictions.

> To the extent the State could assign prior and expected testimony to a particular count, the prosecutor has unlawfully arrogated to himself the role of the grand jury by speculating as to what the grand jury had in mind when it returned indistinguishable counts.
> * * *
>
> "* * * [Defendant] ran the gauntlet once; the double jeopardy clause of the constitutions of Oregon and the United States protect him from having to do so again. The court should dismiss the indictment."

Defendant's Memorandum in Support of Defendant's Motion to Dismiss on Grounds of Double Jeopardy at 5-11 (emphasis added); App Br at ER 11-22.

At a hearing on defendant's motion, defendant again argued that the indictment should be dismissed because defendant "was acquitted of 41 [*sic*] counts. We don't which of those 41 counts apply to which conduct the way the evidence was introduced at trial." (A174232) Tr 16. The state responded that DD had had "a difficult time remembering things and a very, very difficult time testifying," but did "articulate enough facts sufficient to prove the charges." Tr 17.

Though the state attempted to align DD's testimony with counts of conviction, defendant asserted that the state was "cherry-pick[ing]" the transcript and merely applying the counts of conviction to the counts of counsel's choice. Tr 21. In defense counsel's view, "[I]t's very difficult to know which of those acts the jury did not believe and is he being re-prosecuted for acts that a jury has acquitted him of." Tr 22.

The court repeatedly asked the state which incidents resulted in acquittals:

- "I think we—he needs to know which of the crimes he was found not guilty of, because those crimes cannot be retried. So, which of the counts has * * * he been acquitted of by the jury?" Tr 30-31.
- "I need to know what incidences he was found not guilty of, because he was found not guilty of a lot of the crimes. And he cannot be re-tried based on double jeopardy for things that he's been found not guilty of." Tr 31.
- "[H]ow do you know, based on what happened in the previous trial specifically, which of the crimes are connected to the guilty verdicts * * *?" Tr 32.

The state responded that DD testified only "about a certain number of things[, a]nd it's not that many," that "it's clear she's testifying about one act in the bedroom that occurred," for example, making it possible to align her original trial testimony with the offenses it sought to prosecute. Tr 32-33. According to the state, "[T]he specific act[s] she testified to in detail were the ones that he was found guilty of." Tr 33.

The court asked again how the state could align the prior trial testimony with the specific counts:

> "I think that's what I'm really not understanding is how with a 10-page grand jury indictment and counts that are pled identically in succession, how it is that the State can say with certainty that when there are five counts pled in succession and that are pled identically, which of the five incidences that the State had alleged is the one that the jury found the Defendant not guilty of and which is the one that the jury found the Defendant guilty of?

> "And I don't know how you make that jump without getting in the jury's mind unless it was abundantly clear during trial that repeatedly the jury was told, ladies and gentlemen, Counts 1, 5, 7, and 12 all relate to the exact same incident. That was the green couch incident.
>
> " * * * * *
>
> "Did that happen?"

Tr 35-36.

The prosecutor did not know if that had happened but maintained that DD's testimony could be aligned with the counts of conviction. Tr 36-41. Defendant disagreed: "The notion that [DD's] testimony was limited to say six specific acts and then everything else was ambiguous, and that's why he was only convicted of six specific acts is not supported by the transcript." Tr 47.

The court proposed to review the record and took defendant's motion under advisement. Tr 50. In a letter opinion, it summarily denied the motion: "Defendant's Motion to Dismiss is denied." *Letter*, App Br at ER-23.

Historical facts from second trial

DD was born in Colombia in 1991 and was 28 years old at the time of trial. Tr 291. At age four or five, Dion and Kristi Dodge adopted her. Tr 291-92, 412. DD had a seizure disorder, cerebral palsy, and anxiety. Tr 294. At age eight, she moved in with her adoptive grandmother and defendant. Tr 296, 298, 414.

Defendant spent a lot of time with DD. Tr 299. When DD was eight or nine years old, defendant touched her breast as she sat in his lap while in his bedroom playing video games. Tr 302, 305. He touched her breast both over and beneath her clothes. Tr 304. He also touched her vagina under her clothes. Tr 304.

On another occasion, when DD was between eight and 12 years old, she laid naked on defendant's bed and defendant inserted his fingers into her vagina. Tr 306. DD pulled away because it hurt. Tr 306, 308.

On another occasion, defendant touched DD's breasts while she was on defendant's bed, clothed. Tr 310. On another occasion, defendant touched DD's breast when she on defendant's bed, nude. Tr 310. On another occasion, defendant touched DD's vagina when both were on defendant's bed, both nude. Tr 322.

Defendant moved out of the home when DD was 12 or 13 years old. Tr 327. Defendant told DD that their sexual conduct needed to stop. Tr 328. Defendant had a fiancée and had stopped spending time with DD. Tr 329-30.

Police interviewed defendant about DD's allegations on November 21, 2012. Tr 447. Defendant denied touching DD inappropriately. Tr 477, 485-89, 498-500. DD's grandmother considers DD untruthful. Tr 593.

Verdict and sentencing

The jury found defendant guilty on the six retried counts. The court merged the verdicts on Count 38 and Count 31. On Counts 31, 37, and 42, it sentenced defendant to 75 months in prison and 45 months' PPS. On Count 43, the court sentenced defendant to serve 75 months in prison—with 60 months served consecutive to the prison term on Count 31—and 45 months of PPS. *Judgment*, App Br at ER 24-30.[5]

Argument

This case requires the court to evaluate whether former jeopardy and double jeopardy under, respectively, the Oregon and federal constitutions prohibited the state from retrying defendant. Defendant argues that the state may not retry reversed counts after a mixed verdict of guilty and not-guilty when the earlier proceedings establish an irremediable risk that he will be retried on offenses for which he was previously acquitted. Only if the state can prove by a preponderance of the evidence that it is retrying only the original counts of conviction may the trial court allow the prosecution to proceed.

This court evaluates Oregon constitutional claims first, construing the pertinent provision by looking its text, history, and case law. If persuasive,

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[5] The judgment mistakenly identifies Count 34 (the merged count in the first judgment) as a count of acquittal.

federal double jeopardy cases may bear on defendant's state constitutional claim. Double Jeopardy also provides an independent basis for defendant's argument.

Following that analytical model, Section I lays out background principles of former and double jeopardy. In Section I.A., defendant discusses the principles that animate Article I, section 12. In Section I.B., defendant describes United States Supreme Court case law interpreting the Double Jeopardy Clause of the federal constitution. Section I.C. reviews the issue-preclusion doctrine established under both the state and federal constitutions.

In Section II., defendant shows that other states have interpreted the Double Jeopardy Clause to require defendant's proposed rule of law. Defendant explains why this court should adopt that reasoning and impose a similar burden-shifting framework under Article I, section 12, or, alternatively, under the Double Jeopardy Clause.

In Section III, defendant applies the proposed rule of law to his case. Former and double jeopardy barred retrial because the retrial presented an irremediable risk that he would be convicted of offenses on which he was previously acquitted.

Section IV. addresses preservation.

I. A core protection under the Oregon and federal constitutions is to prevent successive prosecutions, particularly on acquitted offenses.

Whether the state may retry defendant on the counts reversed in his first appeal turns on former jeopardy principles under Article I, section 12, of the Oregon Constitution and the Double Jeopardy Clause of the Fifth Amendment.[6] Both provisions establish the right "not to be put in jeopardy twice for the same offense." *State v. Moore*, 361 Or 205, 212-13, 390 P3d 1010 (2017) (quotation marks omitted). This court traditionally analyzes former jeopardy claims first under Article I, section 12, giving weight to relevant federal case law that it finds persuasive. *Id.* at 212.

A. Article I, section 12, of the Oregon Constitution protects against successive prosecutions to protect prior acquittals and prevent harassment.

When construing a provision of the original Oregon Constitution, this court considers "the text in its context, the historical circumstances of the adoption of the provision, and the case law that has construed it[,]" with the goal of identifying "the meaning most likely understood by those who adopted

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[6] Article I, section 12, provides:

> "No person shall be put in jeopardy twice for the same offence [*sic*] * * *."

The Fifth Amendment double jeopardy clause of the United States Constitution provides:

> "No person shall *** be subject for the same offense to be twice put in jeopardy of life or limb[.]"

the provision" and, in light of that meaning, identifying "relevant underlying principles that may inform our application of the constitutional text to modern circumstances." *State v. Savinskiy*, 364 Or 802, 807, 441 P3d 557, *adh'ed to as modified on recons*, 365 Or 463 (2019) (internal quotation marks omitted).

1. Text and context for Article I, section 12, in the 1850s demonstrate a strong protection for prior acquittals reinforced by a criminal procedure code designed to prevent successive trials.

Historical circumstances illuminate the intent behind Article I, section 12. The common law understanding of double jeopardy and Indiana roots of Oregon's provision demonstrate a strong concern for prior acquittal by a final verdict and to shield defendants from successive trials. Oregon's criminal procedural code and indictment provisions reinforced those interests by imposing heightened pleading rules and clear means by which to raise a former jeopardy claim.

The drafters borrowed the text of Article I, section 12, from a similar provision in the Indiana Constitution of 1851, and the Oregon Constitutional Convention adopted it without recorded discussion.[7] Charles Henry Carey, *The Oregon Constitution and Proceedings and Debates of the Constitutional*

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[7] In *State v. Selness*, this court undertook a similar inquiry in examining whether a civil forfeiture proceeding may give rise to former jeopardy protection. 334 Or 515, 526-27, 54 P3d 1025 (2002). However, the issue presented in *Selness* was dissimilar enough that it provides little guidance in this area.

Convention of 1857, 468 (1926); Claudia Burton and Andrew Grade, *A Legislative History of the Oregon Constitution of 1857—Part I (Articles I & II)*, 37 Willamette Law Review 519 (2001). The historical reference does not provide direct evidence of legislative intent, but historical sources provide useful context.

Double jeopardy has roots in English common law pleas of *autrefois acquit*[8] and *autrefois convict*, if not significantly earlier. Isa C. Qasim, *Navigating the Trunks and Spars: The Jury-Preservation Theory of Double Jeopardy*, 24 New Crim L Rev 518, 522 (2021). At common law, a defendant could plead former acquittal (or former conviction) only after a decision by a final verdict and judgment. Anne Bowen Poulin, *Double Jeopardy Protection from Successive Prosecution: A Proposed Approach*, 92 Geo L.J. 1183, 1198 (2004). Accordingly, the common law doctrine emphasized a finality-of-the-judgment rationale. Qasim, 24 New Crim L Rev at 528.

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[8] Black's Law Dictionary defined the plea of "autrefois acquit" as follows:

> "In criminal law. Formerly acquitted. The name of a plea in bar to a criminal action, stating that the defendant has been once already indicted and tried for the same alleged offense and has been acquitted."

Black's Law Dictionary 107 (2d ed 1910).

A former "acquittal" could be in fact or in law, but both arose from a verdict:

> "**Acquittals in fact** are those which take place when the jury, upon trial, finds a verdict of not guilty.
>
> "**Acquittals in law** are those which take place my mere operation of law; as where a man has been charged merely as an accessory, and the principal has been acquitted."

Black's at 21. Either form of acquittal presented "a bar to any future prosecution for the same offence as that contained in the first indictment." *Bouvier's Law Dictionary* 68 (14th ed 1879).

In the 19th Century, American conceptions of double jeopardy quickly grew more protective than the English common law. 1 John Prentiss Bishop, *Commentaries on Criminal Law* §§ 826-828 at pp. 476-77 (1868) (describing "unsettled" common law that unreliably enforced the maxim adopted as law by the constitutional double jeopardy provision); Qasim, 24 New Crim L Rev at 522 ("[I]t has been clear since at least 1824 * * * that the American double jeopardy protection extends further than its English ancestors."). Unlike at common law, "we have put the maxim, that there can be no second jeopardy, foremost, and left it to work out its own consequences." Bishop, *Commentaries*, § 829 at p. 477.

The most fundamental protection of the American doctrine remained judgment finality, but the protection extended to the prevention of prosecutorial overreaching. Qasim, 24 New Crim L Rev at 528. Under the Fifth

Amendment, the government "[could]not, without the consent of the party to whom the jeopardy has attached take any step in the proceedings against him backward." Bishop, *Commentaries* § 841 at p. 482.

Oregon was no exception to the American trend. When Oregon adopted Article I, section 12, in 1857, circumstances suggest that the former jeopardy provision in the Oregon constitution likewise extended beyond the common law protection.

As noted, the drafters borrowed the text in Article I, section 12, from the Indiana Constitution of 1851. Pre-1857 Indiana case law reveals the breadth of the former jeopardy provision. *State v. Selness*, 334 Or 515, 526-27, 54 P3d 1025 (2002) (looking for guidance to Indiana cases decided under Indiana's 1851 former jeopardy provision that antedated adoption of Article I, section 12). Indiana's former jeopardy provision aimed to preserve the finality of a judgment in the manner of the common law plea of *autrefois acquit* or *autrefois convict* and extended that protection to "implied" acquittals, taking close account of the indictment and verdict.

In *Weinzorpflin v. State*, 7 Blackf 186, 192 (Ind. 1844), the Indiana Supreme Court articulated the protection against the peril of successive trials in

the case of a mixed verdict.[9] There, the defendant was indicted on three counts of rape. *Id.* at 187. The defendant moved the state for election at trial, which the court denied. *Id.* at 188. The jury found defendant on Count 1, but the court discharged the jury without it making any findings on the remaining counts. *Id.* At issue on appeal was whether the defendant was entitled to a judgment of acquittal on the remaining two counts as bar to retrial despite the lack of a final "verdict." *Id.* at 189.

The court concluded that the trial had placed the defendant *in jeopardy* on all three counts and, thus, prohibited a retrial. *Id.* at 194. *Weinzorpflin* explained the jeopardy principle as follows:

> "The principle is that a man who has stood upon his defense on valid indictment, before a legal jury, which has been discharged without good cause, has incurred the first peril, and shall not incur the second by a subsequent trial."

Id. at 192. Based on that principle, the court held that the verdict amounted to an acquittal on Counts 2 and 3 and that the defendant could "plead these *proceedings* in bar of a future prosecution." *Id.* at 194 (emphasis added).

Although *Weinzorpflin* analogized to the plea of *autrefois acquit*, the court determined that such a plea introduced a factual question as to the

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[9] *Weinzorpflin* was decided before passage of the Indiana Constitutional provision but was later held to be consistent with the constitutional provision. *Gillespie v. State*, 168 Ind 298, 80 NE 829 (1907); *State v. Walker*, 26 Ind 346, 348 (1866).

resolution of the earlier trial — rather than on the existence of a lawful final verdict:

> "A modification of the usual plea of *auterfois acquit* must be the consequence of establishing this doctrine, so as to adapt the plea to the facts: or if the plea remain unaltered, the rules of evidence must so far yield as to allow an averment of an acquittal by a verdict, to be proved by a record *showing a virtual acquittal by the unnecessary discharge of a jury without a verdict*."

Id. at 192 (emphasis added).

Thus, *Weinzorpflin* showed equal concern for the prevention of harassment ("peril") as the finality of a prior verdict. Implicitly, *Weinzorpflin* established that former jeopardy protection attached to the earlier *proceedings* and had terminated with the (incomplete) verdict. The *proceedings* "amounted to an acquittal" notwithstanding the non-verdict on Counts 2 and 3. *Id.* at 194.

Indiana maintained some formalism of an "acquittal at law," hewed closely to the *indictment* in construing the verdict. *Compare Moon v. State*, 3 Ind 438, 438 (1852) (concluding a verdict of manslaughter was a valid verdict on a lesser included and implied acquittal on first-degree murder), *with Wright v. State*, 5 Ind 527, 529 (1854) (holding that a jury's guilty verdict on count that was not a correct lesser-included offense did not constitute an acquittal but a nullity).

To summarize, Indiana cases extended the former jeopardy protection to a "former acquittal" beyond a final verdict. But that protection required a

reviewing court to consider the jury's authority to act on the indictment before it. In doing so, Indiana embraced a broader right against prosecutorial harassment and used the indictment as the means to determine whether the proceedings had placed the defendant in jeopardy.

Oregon's early Article I, section 12, cases took a similar approach. Early on, this court faced the problem that arises when multiple offenses arise from a single "transaction." As explained below, this court's solution to that problem elevated the interest against successive prosecutions, and like Indiana, the court used the indictment as the instrument by which to determine whether jeopardy had attached on a particular offense.

In *State v. McCormack*, 8 Or 236, 237 (1880), a grand jury charged the defendant in two indictments for crimes related to his alleged taking of a horse with its tack, stolen from the same person at the same time and place. The first indictment charged "the larceny of saddle and bridle," and the second indictment charged larceny of the horse. *Id.*

The defendant pleaded guilty on the first indictment and received a sentence. *Id.* He then pleaded not guilty and former conviction on the latter indictment. *Id.* This court agreed that the defendant could not be retried for the theft:

> "the whole transaction constitutes but *one crime*, and but one indictment can be sustained for such taking, and the prosecution having seen proper to split up the transaction into two offenses by

> causing two indictments to be preferred against such person for that which is but one crime, a conviction or acquittal on one may be successfully pleaded as a bar to a subsequent prosecution on the other."

Id. at 239 (emphasis added).[10] *See also State v. Hinkle*, 33 Or 93, 96-97 (1898) (demurrer should have been granted duplicity when a single count stated two theories of aid and abet because it was not specific enough to allow the defendant to later plead former jeopardy in a subsequent prosecution).

The criminal procedure code in effect when Oregon adopted its former jeopardy provision reinforced the principles described in *McCormack* and *Hinkle*. *See State v. Vasquez*, 336 Or 598, 608, 88 P3d 271 (2004) (considering the criminal procedure code in force at the time that the Constitution was drafted to be helpful context in construing original constitutional provisions). Former Article VII, section 18, of the Oregon Constitution (1857) and the criminal procedure code provisions mutually reinforced the right to plead prior

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[10] Here, this court broke with one view of the historical record cited by Justice Scalia, which relied on the "English practice, as understood in 1791." *Grady v. Corbin*, 495 US 508, 530-31, 110 S Ct 2084, 109 L Ed2d 548 (1990) (Scalia, J., dissenting), *overruled by US v. Dixon*, 509 US 688, 113 S Ct 2849, 125 L Ed 2d 556 (1993) (rejecting the "same-conduct" rule for double jeopardy and relying on Justice Scalia's dissent). Scalia favorably cited a contrary example described by Sir Mathew Hale:

> "Thus it hath happened, that a man acquitted for stealing the horse, hath yet been arraigned and convict for stealing the saddle, tho both were done at the same time."

Id. (citing 2 M. Hale, Pleas of the Crown, ch 31, pp 245-46 (1736 ed)).

acquittal or conviction by imposing heightened pleading standards for indictments and clear rules regarding the effect of dispositions.

In 1857, the Oregon Constitution allowed criminal prosecutions only by grand jury indictment:

> "The Legislative Assembly shall so provide that the most competent of the permanent citizens of the county shall be chosen for jurors; and out of the whole number in attendance at the court, seven shall be chosen by lot as grand jurors, five of whom must concur to find an indictment; But the Legislative Assembly may modify or abolish grand juries."

Or Const, Art VII, § 18 (1857).

In turn, the criminal procedure code required an indictment to "charge but one crime, and in one form only" unless, "the crime may be committed by use of different means," in which case, "the indictment may allege the means in the alternative." General Laws of Oregon, Crim Code, ch. VII, § 74, p. 350 (Deady 1845-1864) (the Deady Code); *see also State v. Haji*, 366 Or 384, 415, 462 P3d 1240 (2020) (describing the history of Or Const, Art VII (Amended), section 5(6) of the Oregon Constitution). The Deady Code required an indictment to allege with "a degree of certainty, as to enable the court to pronounce judgment, upon a conviction, according to the right of the case." General Laws of Oregon, Crim Code, ch. VII, § 80, pp. 350-351. On arraignment, a defendant could enter a plea of prior acquittal or conviction "with or without the plea of not guilty." *Id.* at Ch. XII, § 132 at p. 357.

The Deady Code also described the effect of prior acquittals. Chapter XII, section 138 provided:

> "If the defendant were formerly acquitted on the ground of a variance between the indictment and the proof, or the indictment were dismissed upon a demurrer to its form or substance, of discharged for want of prosecution, without a judgment of acquittal or in bar of another prosecution, it is not an acquittal of the same crime."

Id. at pp. 358.

The Deady Code, Chapter XII, sections 139 and 140 distinguished an acquittal "on the merits" from a proceeding resolved by demurrer:

> "**§ 139.** When * * * the defendant was acquitted *on the merits*, he is deemed acquitted of the same crime, notwithstanding a defect in form or substance, in the indictment on which he was acquitted.
>
> "**§ 140.** When the defendant shall have been convicted or acquitted upon an indictment for a crime consisting of different degrees, *such conviction or acquittal is a bar to another indictment for the crime charged in the former, or for any inferior degree of that crime, or for an attempt to commit the same, or for an offense necessarily included therein*, of which he might have been convicted under that indictment * * *."

Id. at pp. 357-58 (emphasis added).[11] Those sections align with the common law prior acquittal plea and the general rule of looking to the indictment—even a defective one—to understand the nature and scope of the judgment.

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[11] The Code also allowed a prior acquittal by judicial order. *Id.* at § 150 p 359 (permitting court to enter an order of discharge and direct an acquittal if the district attorney could not proceed).

Collectively, the above sections indicate the finality of a judgment on an imperfect indictment or verdict. Bishop describes that concept as follows:

> "[O]n principle, if the defendant has a new trial after the imperfect finding and without [entry of *nolle prosequi*], he seems to stand, *in respect to those parts of the allegations on which the jury were silent*, in the same position as if the verdict were too defective in the form to sustain any judgment, liable to be retried on the whole. But the authorities, the reader perceives are not uniform to the latter effect: *the greater number of cases seem to favor the extending of the new trial only to those parts of the indictment found expressly against the defendant*."

Bishop, *Commentaries* § 850, p. 489 (footnotes omitted) (emphases added). Thus, a jury's failure to make a finding could limit the scope of a continuing prosecution because only express findings against the defendant permitted continued prosecution.

The Code also contemplated that a plea of former acquittal presents an issue of fact:

> "**§ 141** An issue of fact arises:
>
> "1. Upon a plea of not guilty; or,
>
> "2. Upon a plea of former conviction or acquittal of the same crime.
>
> "**§ 142** An issue of law arises upon a demurrer to the indictment.
>
> "**§ 143** An issue of law must be tried by the court, and an issue of fact by a jury of the county in which the action is triable."

Id. at p. 358.

Collectively, the constitution and Deady Code reinforced former jeopardy protections because an indictment could charge only a single offense; a defendant could plead prior acquittal; and between the judgment and indictment, one could ascertain the scope of the acquittal or conviction. The plea of prior acquittal introduced two types of factual questions. First, as demonstrated in *Weinzorpflin*, the "factual question" presented by a prior acquittal may involve an inquiry into the resolution of the earlier proceedings. And unresolved questions presented an implied acquittal to the defendant's benefit. Second, as in *McCormack*, a plea of former acquittal or conviction may require an inquiry into whether multiple prosecutions arose from the "same offense." Defendant describes the legal development as to both questions in the next sections.

2. Oregon's former jeopardy doctrine grew more protective in the context of retrials in order to protect against harassment caused by multiple trials.

Over the next century, former jeopardy doctrine developed consistently with its original values. The interest in limiting continuing prosecution *and* multiple prosecutions expanded and influenced two general types of jeopardy claims.

In the continuing-prosecution context, this court expressly held that jeopardy attaches when the first jury is sworn and terminates when the court discharges the jury, except in the case of necessity. *Compare State v. Reinhart*,

26 Or 466, 38 P 822 (1895) (the court's discharge of a jury that could not reach a final decision did not present a bar to retrial or a plea of former jeopardy) *with State v. Steeves*, 29 Or 85, 107, 43 P 947 (1896) (explaining that jeopardy attached "the moment the jury was sworn to try [the defendant]" and "had the jury been discharged without his consent, except upon a failure to agree upon a verdict, he would stand acquitted before the law."). A *wrongful* or unauthorized discharge of a jury presented an absolute bar to retrial, equivalent to an acquittal. *State v. Chandler*, 128 Or 204, 210, 274 P 303 (1929) (the defendant's plea of former jeopardy should have been "sustained" when the first trial ended in an unlawful discharge of the jury); *State v. Embry*, 19 Or App 934, 940, 530 P2d 99 (1974) (same; describing interest as that of having the case decided "by a jury which may be favorably disposed toward innocence"). That is, unresolved questions—including questions of fact the jury was not asked to resolve before being discharged—established former jeopardy protections.

Later, in recognition that former jeopardy flowed to those implied acquittals won not through true "not guilty verdicts" but also by standing trial, this court expressly grounded the protection in the need "to protect defendant against the harassment, embarrassment, and risk of successive prosecutions as guaranteed by Article I, section 12." *Moore*, 361 Or at 221; *accord State v. Kennedy*, 295 Or 260, 272-73, 666 P2d 1316 (1983).

3. As the harassment principle gained ground, Oregon's former jeopardy doctrine also grew more protective in the context of multiple prosecutions.

In several cases, this court addressed *multiple* prosecutions rather than continuing prosecution on the same indictment. Early cases applied inconsistent standards to determine whether multiple prosecutions arose from the "same offense." *State v. Brown*, 262 Or 442, 445-46, 497 P2d 1191 (1972) (describing inconsistency in the 1870s through 1920s); *compare State v. Sly*, 4 Or 277 (1872) (offense is "the same" only if the same "in law and in fact") *and State v. Stewart*, 11 Or 52, 238-39, 4 P 128 (1883) (applying "same evidence" test) *with State v. Howe*, 27 Or 138, 144, 44 P 672 (1895) ("offenses * * * must be * * * of the same nature or the same species, so that the proof of one involves the proof of the other, or such that one is a part or constituent element of the other" (quotation marks and citation omitted)). *See also State v. Smith*, 101 Or 127, 150, 199 P 194 (1921) (holding that the defendant had obtained former jeopardy protection from an Oregon prosecution by pleading guilty and paying his fine in federal court for "an identical thing," selling liquor, on the same day).

Brown grappled with the earlier cases' failure to follow a "logical pattern or consistent approach." 262 Or 445-46. As the state criminalized more conduct, the problem of defining the "same offense" had invited continued disagreement. *Id.* at 447 (citing *Ashe v. Swenson*, 397 US 436, 445, 90 S Ct

1189, 25 L Ed 2d 469 (1970)). And *Brown* noted the confused state of federal law on the same subject.[12] 262 Or at 454.

Forging forward under Article I, section 12, this court differentiated the defendant's interest against cumulative *punishments*, to which this court had applied the "same evidence test," and the protection against successive *prosecutions*. *Id.* at 459. *Brown* concluded that the interest against successive prosecutions was distinct from (and greater than) the risk of cumulative punishment. *Id.* at 450. The successive prosecution risk "demanded a realistic limitation" exceeding the "same evidence" test. *Id.* at 457-59.

Brown adopted the following compulsory joinder requirement to protect that interest:

> "A prosecutor who is or should be aware of the facts ought not to be able, in his sole discretion, to subject a defendant to a series of trials for violations which are part of the same course of conduct and which could be tried together. * * * [U]nder Article I, Section 12, of our constitution, a second prosecution is for the 'same offense' and is prohibited if (1) the charges arise out of the same act or transaction, and (2) the charges could have been tried in the same court, and (3) the prosecutor knew or reasonably should have

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[12] In *Blockburger v. United States*, 284 US 299, 304, 52 S Ct 180, 182, 76 L Ed 306 (1932), the Supreme Court had adopted the "same evidence test" to determine whether two offenses were the same for double jeopardy purposes. That test asks whether each charge requires proof of an additional element that the other does not. *Id.* This court declined to limit former jeopardy protection to that narrow test. *Brown*, 262 Or at 457-58.

> known of the facts relevant to the second charge at the time of the original prosecution."

Id. at 457-58.

In summary, Article I, section 12, encompasses the English common law pleas of former acquittal and conviction. At common law, such pleas were restricted to circumstances in which the jury had reached a final verdict. But Oregon, like many jurisdictions, extended former jeopardy protection beyond common law pleas. It did so by recognizing implied verdicts of acquittal in mistrial cases because former jeopardy encompasses the protection against the harassment and embarrassment of continuing, successive, prosecutions. The same principle led *Brown* to conclude that Article I, section 12, imposes a heightened joinder requirement to provide a realistic limitation on multiple prosecutions.

B. The Fifth Amendment Double Jeopardy Clause likewise protects against successive prosecutions and multiple punishments for the same offense.

Like Article I, section 12, the Double Jeopardy Clause protects double punishment for the same offense and "protects a criminal defendant from being *twice put in jeopardy* for such punishment." *Witte v. United States*, 515 US 389, 396, 115 S Ct 2199, 132 L Ed 2d 351 (1995) (emphasis in the original). Stated differently, "[t]he right not to be tried more than once and the right not to receive multiple convictions and punishments for the same offense are both protected by the double jeopardy clause, but they are conceptually distinct

rights." *United States v. Central Liquor Co*., 628 F2d 1264, 1266 (10th Cir 1980). Unlike under Article I, section 12, both contexts employ the "same-elements test" to determine whether two offenses are the "same": that test asks whether each charge requires proof of an additional element that the other does not. *United States v. Dixon*, 509 US 688, 696, 113 S Ct 2849, 125 L Ed 2d 556 (1993).

But double jeopardy's *core* protection attaches to the right not to be tried more than once after an acquittal. *Dowling v. United States*, 493 US 342, 355, 110 S Ct 668, 107 L Ed 2d 708 (1990). The primacy of acquittals has shaped several aspects of double jeopardy doctrine. In application, such cases confirm Bishop's assertion that American jurisprudence has taken the double jeopardy maxim at face value and allowed it to "work out its own consequences." Bishop, *Commentaries*, § 829 at p 477.

First, the Court has consistently construed "acquittals" broadly and in categorical terms. An acquittal "encompass[es] any ruling" that insufficient evidence exists to support a conviction, any factual finding that establishes lack of culpability, and any other ruling related to the ultimate question of guilt or innocence. *Evans v. Michigan*, 568 US 313, 319-20, 133 S Ct 1069, 185 L Ed 2d 124 (2013). And an acquittal is an acquittal even if prompted by the court's legal error. *Id.* at 318-19; *see also Fong Foo v. United States*, 369 US 141, 143, 82 S Ct 671, 7 L Ed 2d 629 (1962) (holding that double jeopardy barred retrial

following court's acquittal even though the court's decision was based "upon an egregiously erroneous foundation").

Second, an acquittal produces robust protection against the *risk or hazard* of conviction on the same offense. *Price v. Georgia*, 398 US 323, 331, 90 S Ct 1757, 26 L Ed 2d 300 (1970). A reversal of a conviction on appeal permits reconsideration (continuing jeopardy) *only* on "the conviction" itself, as narrowed by the jury's verdict and scope of the appeal, rather than the full breadth of the indictment. *Green v. United States*, 355 US 184, 187-88, 78 S Ct 221, 2 L Ed 2d 199 (1957) (rejecting argument that jeopardy on every offense alleged in the indictment continued until each had been finally adjudicated on appeal).

Upon an acquittal, the protection against retrial for the same offense is absolute. *Price*, 398 US at 324-331. In *Price*, the defendant was tried for murder and the jury returned a guilty verdict for the lesser-included crime of voluntary manslaughter. *Id.* at 324. The defendant successfully appealed that conviction. *Id.* On retrial, the state retried him on the original murder charge over his objection and plea of *autrefois acquit*. *Id.* at 324. The second jury again returned a verdict for manslaughter. *Id.*

On review, the Court held that successive prosecution *for murder* required reversal of the defendant's manslaughter conviction. *Id.* at 331. Although the state could retry the defendant for manslaughter, the retrial for the

original murder charge violated the protection against double jeopardy. *Id.* at 326-27 ("[T]he first verdict, limited as it was to the lesser included offense, required that the retrial be limited to that lesser offense. Such a result flows inescapably from the Constitution's emphasis on a risk of conviction * * *."). In rejecting the state's harmless error argument, the Court further explained that the second *trial* violated double jeopardy, even though that it ended in a conviction for the retriable lesser-included offense:

> "The Double Jeopardy Clause, as we have noted, is cast in terms of *the risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict*. To be charged and to be subjected to a second trial for first-degree murder is an ordeal not to be viewed lightly. Further, and perhaps of more importance, we cannot determine whether or not the murder charge against petitioner induced the jury to find him guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence."

Id. at 331 (emphasis added) (footnote omitted).

The third important aspect of prior-acquittal cases is that the state may not alter its charging theory to permit a continued prosecution. To determine the scope of an acquittal, the Court views the charges as framed by the indictment and the judgment—not by how the state *could* have charged the case. *Sanabria v. United States*, 437 US 54, 64, 98 S Ct 2170, 57 L Ed 2d 43 (1978). In *Sanabria*, the government charged the petitioner with participation in an illegal gambling business. *Id.* at 59. The indictment encompassed multiple legal theories in a single count (horse-betting, operating a numbers

pool, etc.). *Id.* at 57. But the trial court erroneously entered a judgment of acquittal on "the entire count" after the government failed to prove one of the several theories alleged. *Id.*

The government likely could have avoided a double jeopardy bar if it had divided the *single count* into two or more discrete theories, but the acquittal on the entire count prohibited the state from reframing the charges to continue the prosecution:

> "Legal consequences ordinarily flow from what has actually happened, not from what a party might have done from the vantage of hindsight. * * * The precise manner in which an indictment is drawn cannot be ignored, because an important function of the indictment is to ensure that, in case any other proceedings are taken against the defendant for a similar offence, the record will show with accuracy to what extent he may plead a former acquittal or conviction."

Id. at 64 (internal citation and quotation marks omitted) (internal alterations omitted).

As explained above, acquittals enjoy heightened protection under the Double Jeopardy Clause. That special protection plays out in strict interpretations of "acquittals," robust protection against successive prosecution, and construing legal consequences formalistically by reference to the indictment. The issue-preclusion doctrine, discussed below, is also a breed of special protection for acquittals protected by double jeopardy.

C. The issue preclusion component of former and double jeopardy illustrates the relationship between the jury's verdicts in a single proceeding.

Double and former jeopardy principles also encompass a form of issue preclusion. Under that doctrine, when a jury's verdict demonstrates that a particular factual issue has been decided in the defendant's favor, that issue is precluded from retrial. *Bravo-Fernandez v. United States*, 580 US 5, 7, 137 S Ct 352, 196 L Ed 2d 242 (2016). In that way, an acquittal can have a *broader* preclusive effect than the acquitted charge itself. *Id.* at 8.

The inquiry requires a "practical frame" and "with an eye to all the circumstances of the proceedings" to determine "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe*, 397 US at 444. To identify what the first jury "necessarily determined," a court analyzes only "jury's decisions, not its failure to decide." *Yeager v. United States*, 557 US 110, 122, 129 S Ct 2360, 174 L Ed 2d 78 (2009); *see Bravo-Fernandez*, 580 US at 23 (holding that a guilty verdict vacated on appeal, unlike a hung jury, *is* a jury decision that can evince the jury's rationale). A defendant bears the burden to establish that "the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding." *Dowling*, 493 US at 350.

Ashe, established the issue preclusion doctrine under the Fifth Amendment. The Court held that a prior acquittal on one robbery charge was a

bar to retrial on a separate robbery charge involving a separate victim. 397 US at 444. There, three or four masked men robbed six poker players, stealing money and personal property. *Id.* at 437. The robbers fled in a stolen car, in which three of them were arrested. *Id.* Police later arrested the defendant some distance away from the car and the state charged him with robbing one of the six poker players, Knight. *Id.* at 438.

At trial, the state's evidence identifying the defendant as one of the robbers was weak, and the defense centered on poor identification. *Id.* The trial court instructed the jury to find the defendant guilty if the defendant had participated in robbing the poker game, even if he had not personally robbed Knight. *Id.* at 439. The jury acquitted. *Id.*

Six weeks later, the defendant faced a second trial, this time for the robbery of another poker player, Roberts. *Id.* The evidence was largely the same, except that the state's identification evidence was stronger. *Id.* at 440. The second jury found the defendant guilty. *Id.*

Analyzing the facts before it, the Court held that "straightforward application" of issue-preclusion doctrine barred the second trial. *Id.* at 445. Because the only issue in dispute at the first trial was whether the defendant had been any one of the poker-game robbers, and the jury found that he was not, the subsequent prosecution that required the jury to find the opposite was impermissible. *Id.*

In that way, the theories of both the prosecution and defense may influence the scope of an *Ashe* claim. *E.g.*, *Dowling*, 493 US at 351 (holding that the defendant did not establish that a jury's acquittal was based on the jury's finding that the defendant was not present at robbery, because the record suggested that the defendant had not contested his presence but argued he lacked the culpable mental state). A mixed verdict that involves guilty verdicts on some counts and not-guilty verdicts on others also may alter the scope of an acquittal. When mixed verdicts are not "rationally reconcilable," the acquittals lack a preclusive effect on reversed and retried charges presenting the same factual issues. *Bravo-Fernandez*, 580 US at 8 (citing *United States v. Powell*, 469 US 57, 68, 105 S Ct 471, 83 L Ed 2d 461 (1984)).

In *Yaeger*, 557 US at 119-20, the Court addressed whether "an apparent inconsistency between a jury's verdict of acquittal on some counts and its failure to return a verdict on the other counts affects the preclusive force of the acquittals under the Double Jeopardy Clause of the Fifth Amendment." *Id.* at 112. There, the government had charged the defendant in 126 counts alleging commission of five types of federal crimes—conspiracy, wire fraud, security fraud, insider trading, and money laundering. *Id.* at 113.

A jury acquitted the defendant on conspiracy, wire fraud, and security fraud but hung on all remaining counts. *Id.* at 114. After the trial court

declared a mistrial on the hung counts, the government attempted to retry the defendant on the hung counts by a superseding indictment. *Id*. at 115.

The defendant argued that the jury necessarily found that he had not possessed "insider information," a shared element of the acquitted and hung counts. *Id.* at 115. He argued that the issue-preclusion component of Double Jeopardy therefore barred a second trial. *Id.* at 115.

The Court agreed. *Id.* at 120. Although continuing jeopardy would ordinarily allow retrial on the hung counts, the defendant had the right to assert finality as to the *acquittals*. *Id.* at 118-19 (holding that jeopardy had "unquestionably terminated" as to the acquittals). Thus, for claim preclusion purposes, the acquittals and *only* the acquittals could evince the jury's reasoning, even if the hung counts implicated the same factual issue as the acquittals: "Because a jury speaks only through its verdict, its failure to reach a verdict cannot—by negative implication—yield a piece of information that helps put together the trial puzzle." *Id.* at 122. The acquittals demonstrated that the jury found that the defendant did not have any insider information. Thus, issue preclusion barred retrial on the hung counts that would require the defendant to again defend that factual question. *Id*. at 123.

Notably, in *Bravo-Fernandez*, 580 US at 14, the Court recognized that the reasoning in *Yaeger* did not extend to convictions vacated for instructional error; while acquittals barred retrial on those counts, they could not undermine

the guilty findings by the same jury. The Court reiterated that defendants bear the burden of demonstrating that the jury resolved in their favor the fact that they seek to bar from relitigation. *Id.* at 19. And it agreed that convictions vacated on appeal could provide evidence of "irrationality" sufficient to overcome the defendant's *Ashe* claim:

> "*Yeager* did not rest on a court's inability to detect the basis for a jury's decision. Rather, * * * when a jury hangs, there is *no decision*, hence no evidence of irrationality. * * * A verdict of guilt, by contrast, *is* a jury decision, even if subsequently vacated on appeal. It therefore can evince irrationality."

Id. at 23 (emphasis added).

This court has applied the similar issue-preclusion rule from *Ashe*. *State v. Mozorosky*, 277 Or 493, 561 P3d 588 (1977) (applying *Ashe*). For example, in *State v. Guyton*, 286 Or 815, 817, 596 P2d 569 (1979), the state charged the defendant with reckless driving and driving under the influence of drugs (DUID). The trial court found him guilty of reckless driving but acquitted him of DUID, predicated on his alleged marijuana use. *Id.* The defendant successfully appealed the reckless driving charge. *Id.*

On remand, the defendant moved to exclude evidence that he had possessed a partially smoked marijuana cigarette on the basis that the prior acquittal on the DUID charge "foreclosed retrial of the issue whether he was affected by marijuana when he drove in the allegedly reckless manner." *Id.* The court denied his motion, the evidence was admitted, and the jury found him

guilty. *Id.* The Court of Appeals reversed and this court allowed the state's petition for review and affirmed the Court of Appeals. *Id.*

Guyton concluded that, on retrial of the reckless driving, "what could no longer be an issue in [the continued] prosecution was whether [the] defendant's driving perhaps was affected by his having recently smoked marijuana. His acquittal on the DUID charge determined that this was not the case." *Id.* at 818. Thus, the determination that he had not been driving under the influence of marijuana meant that the state could not later attempt to prove that the defendant's driving had been affected by marijuana. *Id.*

Ashe and its progeny establish several useful guideposts in interpreting an earlier jury verdict. A "not guilty" verdict (no matter how "irrational") is an acquittal on the charge itself on which prosecution is absolutely barred. The same verdict may also serve as an acquittal on any factual issue that the jury necessarily resolved favorably to the defendant in reaching that acquittal, whether or not that factual issue is an element of either the acquitted offense or the reversed and retried offense.

Those guideposts temper the competing idea that continuing prosecution is *generally* permitted as to both hung and reversed counts without violating double or former jeopardy. Moreover, guilty verdicts that have been reversed may evince juror irrationality that limits the preclusive effect of the acquittals *on other counts*, but the acquittals themselves remain final and absolutely

protected against retrial. Finally, hung counts cannot suggest or limit the rationale of a jury's acquittals because a hung jury represents a *failure* to decide rather than a jury decision.

It is against that complicated backdrop that this court must evaluate the unique question presented here—*i.e.*, when the state seeks to retry reversed guilty counts under circumstances in which *neither party* can ensure that the state is not retrying defendant for offenses that originally resulted in acquittals.

II. The state may not retry counts on a generic indictment when the defendant establishes a risk that the retrial will be for offenses or conduct on which he was previously acquitted, unless the state can prove by a preponderance of the evidence that it is retrying only the incidents found by the jury.

The principles established above play out differently when the defendant does not seek to *extend* the preclusive effect of an acquittal to *other* offenses. Here, defendant sought to enforce his right to prevent successive prosecution as to the 40 acquitted counts, an interest at the core of double jeopardy protection. Conversely, the state sought to continue prosecution on the six reversed counts. But—by no fault of the defendant—the first jury failed to decide essential factual questions, namely, *which* instances of contact constituted the six counts of conviction? Those unresolved factual questions are akin to the 19th Century scenarios in which the trial court erroneously discharged the jury even though it returned verdicts on only some charged counts. Only, in this scenario, the

unresolved factual determinations consist not of discrete counts but the discreteness *of* the counts.

Under those circumstances, defendant faced an irremediable risk of successive prosecution on 40 counts on which he had been acquitted. The verdict's ambiguity limits the defendant's ability to affirmatively preclude the state from relitigating certain facts in the issue-preclusion sense. But the jury's failure to decide *which* occurrences does not in any way undermine or diminish defendant's right to shield the 40 acquitted counts from successive prosecution.

Because the factual basis for *each* count of conviction is a necessary predicate to continuing prosecution—charged to the state in every prosecution to sufficiently define for the grand jury, the defendant, the petite jury, and the court—the burden therefore necessarily shifts to the state to demonstrate that the first jury answered that question consistently with its theory on retrial.

A. Several state courts have adopted a burden-shifting framework to address the issue presented here.

Several state appellate courts have addressed the issue presented here. Those courts have concluded that, when the indictment and trial record fail to reveal on which offenses the jury rendered guilty verdicts, and the defendant risks a new trial on conduct on which the first jury acquitted, the burden shifts to the state to establish that retrial on the reversed counts will not violate double jeopardy as to the acquitted counts. *Dunn v. Maze*, 485 SW 3d 735, 740-41 (Ky

2016) (collecting cases from Washington, Mississippi, California, Massachusetts, Ohio, and an Ohio federal district court).

The interest against successive prosecution for acquitted offenses requires the state to bear the burden in this context. *Id.*; *State v. Salter*, 425 NJ Super 504, 516-522, 42 A3d 196, 204-09 (App Div 2012); *see also Brown v. Superior Court*, 187 Cal App 4th 1511, 1513, 114 Cal Rptr 3d 804 (2010) (stating the interest as "protect[ing] a man who has been acquitted from having to 'run the gauntlet' a second time"). *Cf. State v. Alires*, 2019 UT App 206, 16 n 7, 455 P3d 636, 646 n 7 (2019) (remanding post-conviction case for further proceedings and noting potential double jeopardy risk on remand), *cert den*, 466 P3d 1076 (2020). That is because the "earlier not-guilty verdicts * * * must be given effect." *Dunn*, 485 at 749. And when the state fails to tie any charge to any specific allegation, the only way to enforce the acquittals is to treat them "as acquittals on all the counts brought at that time, just as they would if [the defendant] that been indicted for additional identical counts after the first trial had resulted in only acquittals." *Id.*

Dunn explains that the "core problem" in such a proceeding originates with an indictment that renders a court unable to ascertain the factual incidents on which the grand jury and petite jury relied. 485 SW 3d at 748 (citing

Valentine v. Konteh, 395 F 3d 626, 635 (6th Cir 2005)).[13] Such an indictment is "flawed" from the beginning, and if the error "is carried on in the instructions and resulting jury verdict, a due-process violation occurs" in the form of (1) inadequate notice and (2) a failure to protect against future double jeopardy. *Dunn*, 485 at 748. But the double jeopardy problem is only a "potential one" at the time of the first trial. *Id.* That "latent defect * * * can manifest only if there is a reversal of the convictions and a retrial in the future." *Id.* The double jeopardy claim becomes ripe when the state pursues a second attempt to convict. *Id.* at 744 & n 3.

In *Salter*, 425 NJ Super at 509, 42 A3d 196, 200, the grand jury issued a seven-count indictment against the defendant based on allegations of sexual contact with a minor that allegedly took place over a single day at different times and in different rooms of a house. *Id.* In identical language, two counts charged sexual assault by anal penetration, two counts charged sexual assault

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[13] *See also Goforth v. State*, 70 So 3d 174 (Miss 2011) (reversing defendant's convictions for evidentiary error and holding that retrial was barred by double jeopardy because the state had charged defendant with five identical counts, the evidence presented multiple incidents, and the jury returned a not guilty verdict on three of the counts without any identifiable basis for the jury's distinction among the counts). *Goforth* relied primarily on the reasoning in *Valentine*, 395 F 3d at 635, described below. 70 So 3d at 189-90. New Mexico has also applied *Valentine* in addressing objections to the sufficiency of the indictment. *E.g.*, *State v. Dominguez*, 148 NM 549, 552, 178 P3d 834 (Ct App 2008).

by oral penetration, and two counts charged aggravated criminal sexual contact. *Id.* The seventh count charged the defendant with child endangerment. *Id.*

The case proceeded to trial, and the jury instructions and verdict forms likewise used "identical language" on Counts 1 through 6. *Id.* at 512, 42 A3d at 201. The jury found the defendant not guilty on Counts 1 and 2 (alleging anal penetration). *Id.* On Counts 3 and 4 (alleging oral penetration), the jury returned mixed verdicts, not guilty on Count 3 and guilty on Count 4. *Id.* On Counts 5 and 6 (alleging "sexual contact"), the jury found the defendant guilty on both. *Id.* The jury found the defendant guilty on Count 7 (endangering). *Id.*

The defendant successfully appealed his four convictions due to evidentiary error. *Id.* On remand, the defendant moved to dismiss the indictment on double jeopardy grounds, which the trial court granted on Counts 4 and 6, and the state appealed. *Id.* at 512-13, 42 A3d at 202.

On review, the New Jersey appeals court affirmed in part but held that the trial court erred in dismissing one of the two guilty counts that had identically charged "sexual contact," Count 6. *Id.* at 516, 42 A3d at 204. The identically pleaded counts did not, *in themselves*, present an irremediable risk of multiple punishments, provided that the trial court appropriately tailored its instructions. *Id.* "Any double jeopardy concerns, or issues of non-unanimous guilty verdicts, may be addressed with carefully tailored jury instructions, a detailed verdict sheet or both." *Id.* at 516, 42 A 3d at 204.

The court then addressed the dismissal on the identically-pleaded oral-penetration counts (Counts 3 and 4), on which the jury had reached mixed verdicts of guilty and not guilty. The court acknowledged that New Jersey ordinarily places the burden upon a defendant seeking to employ a double jeopardy bar. *Id.* 520, 42 A 3d at 206. But the court "could not say with confidence that [the] defendant would not endure a second prosecution for the same offense after an acquittal," which was "categorically prohibited." *Id.* at 522, 42 A 3d at 207.

Thus, "under the unique facts" presented—in which the state had identically pleaded the same charge twice in the indictment and neither jury instructions nor verdict form identified which conduct attached to which count—the defendant had demonstrated a risk that a retrial would violate double jeopardy. *Id.* at 521, 42 A 3d at 207. It was therefore "up to the State to establish" that continued prosecution would not violate double jeopardy. *Id.* at 521, 42 A 3d at 207. Because the state had failed to identify which "specific conduct was now the [lawful] subject of the retrial," the court affirmed the dismissal. *Id.*

Salter's differential treatment of the two identical guilty counts involving "sexual contact" and mixed verdict counts involving oral penetration underscores the double jeopardy principles in play. The identical sexual contact charges represented a continuing prosecution on the former guilty verdicts.

And although the generic indictment could pose a risk of multiple punishments, adequate instructions could prevent it. On the other hand, the generic indictment *and* mixed verdict on the oral penetration counts presented an irremediable risk that the jury may convict the defendant on retrial for conduct on which he had already been acquitted in the first trial. Regarding those counts, double jeopardy required dismissal on Count 4 because the state could not identify the permissible scope of continued prosecution.

California's appellate courts have taken the same approach. In *Brown*, 187 Cal App 4th at 1513, a mandamus petitioner challenged the trial court's denial of his motion to dismiss for double jeopardy after a jury had acquitted the defendant on some counts, convicted him on a lesser-included offense on one count, and hung on the remainder. The state had brought a 23-count information alleging crimes against two minors, each count identically pleaded in "generic statutory language." *Id.*

At trial, the two victims testified to different types of conduct on separate occasions. They detailed certain incidents and estimated how often similar contact had occurred. *Id.* at 1516 (first victim describing specific acts of oral sexual activity and estimating that it occurred at least 25 times); *id.* at 1518 (second victim describing five incidents). In closing argument, the prosecutor told the jury that the state's "mindset" was that a particular count aligned with a specific incident. *Id.* at 1529. But neither the instructions nor verdict forms

limited that count or any other count to a specific factual occurrence. *Id.* at 1529-30.

Brown "heed[ed]" *Ashe*'s directive to apply a practical framework to the double jeopardy problem created by the jury's mixed verdicts in consideration of all the circumstances of the earlier trial. 187 Cal App 4th at 1528. The court held that:

> "given the unique circumstances created by the prosecutor's strategic decisions on how to charge and try the case and the nature of the charges, the interests served by the double jeopardy clause, namely, 'protect[ing] a man who has been acquitted from having to 'run the gauntlet' a second time' * * * *necessitate shifting the burden of proof to the prosecutor upon petitioner's nonfrivolous showing that he faces prosecution for an offense for which he was formerly placed in jeopardy*. To do otherwise would force petitioner to overcome the uncertainty, confusion, and procedural disadvantage attributable to the prosecutor's tactical decisions."

Id. (emphasis added) (citations omitted).

The petitioner had satisfied his burden because there was "uncertainty and confusion concerning which incidents * * * pertained to the counts" of acquittal versus conviction. Therefore, the burden shifted to the state to establish by a preponderance of evidence that the charges to be retried involved different offenses than those on which the petitioner had been acquitted. *Id*. at 1529.

Brown also provided guidance on how to undertake that inquiry. First, it rejected the prosecutor's stated "mindset" as a basis to conclude that the jury

had assigned a specific occurrence to the count selected. *Id.* at 1530. Further, because the court "could not receive evidence regarding the jury's mental processes in reaching their verdicts," it concluded that an evidentiary hearing would serve "no purpose." *Id.* Instead, the court analyzed the existing record, concluding that the petitioner could not be retried on any count because the state could not demonstrate that none of the acquittals pertained to an incident that the state intended to retry. *Id.*

Like the courts in *Brown*, *Dunn*, and *Salter*, in *State v. Heaven*, 127 Wash App 156, 159, 110 P3d 835, 837-38 (2005), the Washington Court of Appeals held that, where the first jury received a concurrence instruction but did not make special findings on the *acts* on which it found the defendant guilty and did not find the defendant guilty on all identical counts, a retrial was prohibited after a successful appeal, because "nothing would preclude a new jury from convicting [the defendant] for alleged incidents for which he already has been acquitted." *Id.* at 162, 110 P3d at 838.[14] The court described the state as having assumed the risk of a double jeopardy bar by its charging decision and failure to elect or request special findings in the verdicts. *Id*. at 164, 110 P3d at 839. *Heaven* drew the same distinction as *Brown*, which is that facing risk of

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[14] *Heaven* cited both the Washington State double jeopardy provision and the Fifth Amendment in its analysis and appeared to rely on both. *Id.* at 160-61.

conviction for a *crime* on which one has been acquitted requires greater protection than the narrower finality interest that shields a factual issue from further litigation. *Id.* at 163, 110 P3d at 839.

B. The Sixth Circuit has recognized that identically pled counts in a single indictment creates a double-jeopardy risk.

In *Valentine*, an Ohio grand jury charged the defendant with 20 counts of child rape and 20 counts of felonious sexual penetration. 395 F3d at 628. Each set of counts included identically worded "carbon-copy," undifferentiated allegations. *Id.* At trial, the victim described "typical" abuse scenarios and then "estimated the number of times the abusive offenses occurred." *Id.* The child testified that the defendant forced her to perform oral sex in the living room, "about 20 times," digitally penetrated her vagina in the living room, "about 15 times," anally penetrated her with his penis "about 10 times"; and performed similar acts in other rooms of the house. *Id.* at 629. The jury convicted the defendant on all 40 counts, and the defendant received 40 consecutive life terms. *Id.*

The Sixth Circuit held that the convictions on all but one of each count of each offense violated the Fifth, Sixth, and Fourteenth Amendment due process

principles,[15] and "regard[ed] the 20 child rape counts as charging one crime and the 20 penetration counts as charging another single crime." *Id.*

Among other problems, *Valentine* explained that the indictment presented double jeopardy concerns:

> "* * * If Valentine had been acquitted of these 40 charges, it is unclear what limitations would have been imposed on his re-indictment. Would double jeopardy preclude any prosecution concerning the abuse of this child victim, the abuse of this victim during the stated time period, the abuse of this victim at their residence, the stated sexual offenses in the indictment, the offenses offered into evidence at trial, or some group of forty specific offenses? We cannot be sure what double jeopardy would prohibit because we cannot be sure what factual incidents were presented and decided * * *. If Valentine had been found not guilty, it is not clear to what extent he could ably assert that his acquittal barred prosecution for other similar incidents."

Id. at 635.

Given the lack of distinction between the 20 counts charging each crime, in the indictment and at trial, the Sixth Circuit upheld one count each of child rape and felonious sexual penetration and affirmed the federal district court's reversal of the remaining counts. *Id.* at 632, 638-39. *Valentine* is a due process case that relied on a double jeopardy risk. *See Dunn*, 485 SW 3d at 748.

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[15] The Sixth Amendment provides in part that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation," and it applies to the States through the Fourteenth Amendment. *Duncan v. Louisiana*, 391 US 145, 149, 88 S Ct 1444, 20 L Ed 491 (1968). The Fifth Amendment requires a grand jury indictment to initiate a prosecution, but that clause has not been extended to the states. *Alexander v. Louisiana*, 405 US 625, 633, 92 S Ct 1221, 31 L Ed 2d 536 (1972).

This court need not even consider those ramifications in this case. It is enough that the hypothetical concerns raised in *Valentine*, which resulted in outright reversal of duplicate charges resulting in guilty verdicts, are manifest here—when guilty verdicts are reversed after the jury reached mixed verdicts on identically pleaded charges. The rule that defendant proposes aligns with *Valentine*'s stated concern, but it arises in the context of defendant facing a successive prosecution rather than multiple punishments. Multiple courts, including this one, recognize that that right requires heightened protection.

C. Article I, section 12, requires a burden-shifting framework to adequately protect against the harassment and embarrassment of successive prosecutions.

Under Article I, section 12, the state may not retry reversed counts on a generic indictment when the defendant establishes a risk that the retrial will be for offenses or conduct on which he was previously acquitted, unless the state can prove by a preponderance of the evidence that it is retrying only the original counts of conviction. That rule is necessary to protect a defendant's right to the finality of a prior acquittal and to prevent successive prosecutions. Defendant's proposed rule complements Oregon law designed to protect defendant's grand jury and trial rights and encourages the state to seek findings necessary to post-verdict litigation.

As explained in Section I.A., Oregon's former jeopardy doctrine emphasizes the right against the harassment and embarrassment of successive prosecutions. That principle yields two general classes of cases. The first class protects a defendant against continuing prosecution when the court wrongfully discharges a jury before it reaches a verdict. The second class protects a defendant's rights against successive prosecutions by requiring a heightened joinder requirement to reduce the risk of successive prosecutions. Both classes of cases bear on the question here.

First, early cases, such as *Weinzorpflin*, 7 Blackf at 192, recognize that the defendant has endured a first trial on the entire indictment, whether or not the jury finally resolved every necessary factual question. Here, the first jury could and should have resolved the "which incidents?" factual question. But the jury was released after reaching a verdict sufficient to *convict* but not sufficient to identify the proper scope of continued prosecution on *acquitted* offenses. Because defendant has already endured jeopardy on the entire indictment, the presumption should be that *unresolved* factual questions are the equivalent to an acquittal. *Id.* at 191 (holding that discharge of jury that reached a final verdict on one of three counts amounted to an acquittal on the third, unresolved count). Stated differently, unresolved questions should be construed against the state.

Second, Article I, section 12, prohibits the state from attempting to obtain a conviction on an offense for which the defendant has been finally acquitted. To do so violates both the common law ("autrefois acquit") protection and the broader protection against successive prosecutions for the same offense. As held in *Brown*, the risk of successive prosecutions—even on prior *convictions*—demands a "realistic limitation." *Brown* applied that limitation by requiring the prosecutor to consider the jeopardy consequences at the time of its charging decision. This context likewise requires a "realistic limitation" that requires the prosecutor to consider their charging decisions or to accept the consequences of ambiguity.

Third, defendant's test accords with the issue-preclusion doctrine. Those cases interpret the jury's verdict *and only the verdict* to determine the jury's reasoning. *Yaeger*, 557 US at 122. Just as the defendant cannot *expand* the reach of the acquittal findings to different offenses without demonstrating that the jury found an underlying fact in his favor, the state cannot expand the scope of a continuing prosecution beyond those offenses that the jury necessarily found against defendant. When state cannot accurately define the scope of a continuing prosecution, it is not the defendant's burden to reconstruct the verdict to rehabilitate the state's case.

Defendant's proposed test also aligns former jeopardy protection with Article I, section 11.[16] The right to a jury trial includes the right to jury concurrence "as to every necessary element" and as to the same factual occurrence underlying any single count of conviction. *State v. Payne*, 298 Or App 411, 421, 447 P3d 515 (2019). To impose a rule that contemplates the state will abide by the defendant's rights at the first trial by electing a factual theory of the offense does not create any *new* procedural right. It simply allows the defendant's trial and formal jeopardy rights to work in concert.

Article I, section 11 also prohibits trial courts from making their own findings regarding the basis for the defendant's guilt. Because the jury—and only the jury—can decide whether a criminal act has been proven, a court may not later make its own finding whether there are multiple "offenses" subject to multiple punishments. *State v. Dulfu*, 363 Or 647, 672-73, 426 P3d 641 (2018) ("In sentencing defendant, the trial court could not make its own finding regarding the basis for defendant's guilt; that finding was within the exclusive

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[16] Article I, section 11 provides, in pertinent part:

> "In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed* * *, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise[.]"

province of the jury."). When the state presents alternative theories to the jury, "a trial court cannot impose a sentence that is contingent upon the jury having made a particular finding regarding the defendant's guilt if the record does not reflect that the jury actually made that finding." *Id.*; *see also State v. Andrews*, 366 Or 65, 74, 456 P3d 261 (2020) (holding that the court did not have authority to impose a restitution award predicated on a finding that the defendant committed a particular act when the jury may have based its verdict on an alternative factual theory); *State v. Wedge*, 293 Or 598, 600, 652 P2d 773 (1982) (jury verdict did not allow imposition of a firearm minimum sentence because the verdict did not reflect the necessary finding that the defendant had personally used or threatened to use a firearm). In the same way, a continuing prosecution rests on the jury having made a *particular finding* to support the guilty verdict. What the court cannot do in sentencing, the state cannot do to resuscitate a continuing prosecution.

The test also comports with the defendant's right against variance, which allows a jury to find the defendant guilty *only* on the factual theory presented to grand jury and *only* on the theory that the state has elected at trial. Under

Article VII (Amended), section 5,[17] a defendant has the right to ensure that the "the grand jury, not the prosecutor," determines "whether a particular charge should be brought" and "that the charge presented against a defendant was based on facts found by the grand jury." *State v. Long*, 320 Or 361, 370, 885 P2d 696 (1994) (quoting *State v. Wimber*, 315 Or 103, 118, 868 P2d 4 (1992) (Unis, J., dissenting)). And when the state elects a particular act as constituting the crime, the jury may not find the defendant guilty based on some different act. *State v. Goddard*, 69 Or 73, 89, 138 P 243 (1914) (when state selected some particular act as constituting the crime, jury not permitted to find defendant guilty of some other criminal act).[18] Just as a prosecutor cannot alter

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[17] Article VII (Amended), section 5, of the Oregon Constitution provides that "a person shall be charged in a circuit court with the commission of any crime punishable as a felony only on indictment by a grand jury" and that "[t]he district attorney may file an amended indictment or information whenever, by ruling of the court, an indictment or information is held to be defective in form."

[18] To be clear, defendant does not propose a heightened pleading requirement. Rather, the test simply requires the state to bear the consequence of its failure to define the scope of a conviction if it wishes to continue to pursue the prosecution on remand, in the event that the inadequately guided jury reaches mixed verdicts on identically pleaded counts—indeed a rare bird. Incidentally, that increased "cost" may reduce the perceived "benefit" of overcharging. *See State v. Chitwood*, 310 Or App 22, 32-33, 483 P3d 1157 (James, J., dissenting), *rev'd*, 370 Or 305, 518 P3d 903 (2022) (footnote omitted) (describing the risks associated with "overcharging" and their relationship to juror concurrence).

the scope of an indictment to suit the facts, it cannot alter the scope of the verdict to suit its desire to continue the prosecution.

Finally, the rule promotes fundamental fairness. In *State v. Burgess*, 352 Or 499, 504, 287 P3d 1093 (2012), this court held that it is "fundamentally unfair to require a defendant to 'challenge or rebut * * * undecided factual and legal issues for the first time on appeal," or "to sustain [a] defendant's conviction on a separate factual and legal theory that has been proffered by the state for the first time on appeal." *Burgess* establishes that, even in the appellate context, the state cannot simply vacillate between theories according to its strategic interests.

In summary, former jeopardy requires the court to enforce earlier acquittals. To rely on "continuing jeopardy," the state bears the burden to prove the factual occurrences underlying the guilty verdicts. When the state gains a tactical advantage by casting a wide net, lacking specificity, to obtain as many convictions as possible, it bears the risk that its choices will limit its ability to continue the prosecution post-reversal. Former jeopardy requires shifting the burden to the state, which minimally impacts the state's ability to prosecute and correctly aligns former jeopardy law with existing procedural rights.

D. The burden-shifting framework is consistent with the Fifth Amendment protection.

As described in section I.B., the core protection of Double Jeopardy attaches to acquittals. Double Jeopardy prevents the "risk or hazard of trial or conviction," on an acquittal whereas continuing jeopardy allows the state to proceed only on the original indictment as narrowed by the verdict. *Price*, 398 US at 326.

To determine the scope of an acquittal, the Court considers the indictment *as charged* and the entry of the judgment—as opposed to the scope of the indictment as it could have been charged. *Sanabria*, 437 US at 66. The legal consequences of the state's charging decision matter precisely because "an important function of the indictment is to ensure that * * * the record will show with accuracy to what extent [the defendant] may plead a former acquittal or conviction." *Id*. As in *Sanabria*, the circumstances require a reviewing court to take the indictment and verdicts at face value. To do so means to treat the acquittal on each identically charged count as prohibiting retrial unless the state can affirmatively demonstrate that it can limit the second trial to the proper scope of a continued prosecution.

The Court has consistently read the indictment and verdicts together to determine whether the second trial created a *risk* of double jeopardy on an acquitted offense. When a jury returns a mixed verdict on identical counts and

fails to decide which occurrence attaches to which count, a defendant faces that risk when an appellate court reverses the counts of conviction and the state seeks to retry the defendant. *Dunn*, 485 at 74 (noting that a "latent defect" in an indictment may not manifest until the state chooses to retry the defendant). To preserve its ability to continue prosecution, the state can and should charge individual counts with specificity, elect a factual theory of the offense, or otherwise task the jury to decide which factual occurrence attached to which count. But when it fails to do so, the legal consequence that flows from that choice is to bar a retrial after a mixed verdict.

III. Under defendant's proposed test, former and double jeopardy barred retrial, because the generic indictment, failure to elect, seek concurrence, or request special factual findings renders it impossible for the state to demonstrate that retrial was limited only to the factual occurrences underlying the earlier verdicts.

When the defendant makes a nonfrivolous showing that he faces a risk of retrial on acquitted offenses, the burden shifts to the prosecutor to demonstrate that the retrial will constitute only "continuing jeopardy" on the same offenses found by the first jury. The state cannot meet that burden in this case.

Here, the indictment charged 46 counts involving sexual contacts over an eight-year period, with each subset of charges framed in identical terms. DD's testimony at the first trial was legally sufficient, if believed, to support a guilty verdict on each count. DD described many incidents in detail: one involved playing video games and defendant touching her breasts and vagina, Tr 120,

one involved touching her breasts and vagina while they laid in bed, Tr 123-24, one involved him touching her chest in a computer chair when she was wearing shorts and a tank top, Tr 126-27, one involved digital penetration that "hurt" and also involved caressing her breasts, Tr 129, one involved intercourse, Tr 122-23, several involved oral intercourse, Tr 142-43, and one involved him touching her when DD's grandmother nearly interrupted them. Tr 144, 208. DD believed that defendant touched her "inappropriately" more than 40 times. Tr 130-31. DD testified that he touched her vagina more than five times and penetrated her vagina with his finger more than one time. Tr 131, 143. He allegedly touched her breasts more than ten times. Tr 130.

To the extent the state "elected," it elected to ask the jury to consider every possible theory of guilt for every possible crime, suggesting to the jury:

> "Really, you guys get to deliberate any way you want. What the State proposes is that you focus in on the act and figure out if it happened, how old she was when it happened, and how many times it happened."

Tr 512. On the verdict form, each count included a sentence that, "This being a criminal case, 10 or more jurors must agree on [the] verdict." TCF. But no instruction required the jury to select a specific occurrence and tie it to a particular count.

And the first jury did not credit DD's testimony in its entirety. Instead, it found defendant guilty only on Counts 31 (second-degree sexual penetration),

34 (second-degree sexual abuse, penetration with finger), 37 and 38 (first-degree sexual abuse, "genital area"), and 42-43 (first-degree sexual abuse, breast). Each verdict was general and did not include any special findings regarding the factual occurrence found by the jury. And each guilty verdict was on a count on which the jury reached an acquittal on an identically pleaded count. !

Under those circumstances, it is optimistic to assume that the jury actually *decided* which counts pertained to which factual occurrences. But assuming that it did, there is no way to determine which were which. As a result, the state has not shown and cannot show that none of the acquittals pertained to an incident that the state presented at the second trial. Former and Double Jeopardy barred retrial. !

IV. Defendant preserved the argument that former and double jeopardy prohibited retrial on the indictment.

In the Court of Appeals, defendant assigned error to the trial court's ruling, "denying defendant's motion to dismiss on double jeopardy grounds." App Br at 10. Defendant explained that former and double jeopardy precludes the state from relitigating any issue of fact that had been previously resolved in his favor when the first jury acquitted. App Br at 15 (citing double jeopardy clause and Article I, section 12, of the Oregon Constitution).

In response, the state asserted that defendant had "abandoned his trial court argument" that retrial after his acquittals would violate the bar on successive prosecutions after an acquittal. Resp Br at 5. It also cited *State v. Savage*, 305 Or App 339, 342-43, 470 P3d 387 (2020), in which the Court of Appeals that declined to address an issue-preclusion case, and it argued that "[a]ppellate review would undermine the efficiency, fairness, and record-development purposes that underlie the preservation rule," citing *Peoples v. Lampert*, 345 Or 209, 219-20, 191 P3d 637 (2008). Resp Br at 8.

Although defendant could and should have framed the argument differently on appeal, he consistently has raised the same issue and he preserved the claim before the trial court. The record below and the case law do not support the state's argument. The prudential purposes of preservation are to (1) apprise the court of the party's position so that it can consider and rule on it, (2) ensure fairness to the opposing party by avoiding surprise, and (3) develop the record. *Id*. Preservation rules are also pragmatic—ultimately, the touchstone of preservation is procedural fairness to the parties and the court. *Id*. at 220.

Along those lines, this court has repeatedly noted:

> "We have previously drawn attention to the distinctions between raising an *issue* at trial, identifying a *source* for a claimed position, and making a particular *argument*. The first ordinarily is essential, the second less so, the third least."

State v. Hitz, 307 Or 183, 188, 766 P2d 373 (1988) (internal citation omitted).

This court applied those principles in *State v. Weaver*, 367 Or 1, 17, 472 P3d 717 (2020). In *Weaver*, the defendant attempted to call a codefendant to testify at trial. *Id.* at 3. But the codefendant had entered into a plea agreement with the state in which the codefendant was required to invoke the privilege against self-incrimination if called by the defense. *Id.* The defendant also unsuccessfully argued that the plea agreement should be admitted as evidence. *Id.*

In the trial court, the parties repeatedly litigated the defendant's attempt to obtain his codefendant's testimony. *Id.* at 8-13. The state filed a motion to prohibit the defendant from calling the witness, citing OEC 513. *Id.* at 8. The defendant objected, arguing that the codefendant no longer had a right to invoke. *Id.* at 9. Defense counsel argued that his client "[couldn't] get a fair trial," because the state was "requiring [the codefendant] to be a roadblock to finding the truth" and the state was suppressing "exculpatory evidence." *Id.* The state responded by contending that it had satisfied its obligations under *Brady*. *Id.* at 10.

Closer to trial, the defendant reiterated that the plea agreement unfairly required the codefendant to withhold "exculpatory evidence." *Id.* at 10. The defendant accused the state of "witness tampering," and quoted a New York case that described the prosecutor's actions as improper, although it did not rely

on constitutional grounds. *Id.* at 11. The state and the defendant litigated the admissibility of the plea or invocation twice more. *Id.* at 13.

On appeal, the defendant argued that the state had interfered with his compulsory process rights under Article I, section 11, of the Oregon Constitution and the Sixth Amendment. *Id.* The state argued that the defendant had failed to preserve his argument on compulsory process grounds because "although defendant raised the issue of the plea agreement in the trial court, he never argued that his compulsory process clause rights were violated; rather, * * * defendant focused on evidentiary issues and did not make a constitutional argument." *Id.* at 17.

Relying on *Hitz*, this court rejected the state's preservation argument. *Id.* at 17-18. Although the defendant never used the words "compulsory process clause" in the trial court litigation, the issue was preserved because (1) he alerted the state that to his constitutional claim by linking his concern to his right to a fair trial; (2) the substance of his argument had obvious constitutional implications; and (3) the state "picked up on those" by addressing them. *Id.*

This court also was not troubled by the defendant's failure to hitch his constitutional claim to the Compulsory Process Clause:

> "The record shows that the parties recognized that a constitutional issue was in play, and the content of the parties' arguments makes clear that the parties understood the *substance* of that issue—whether [the codefendant's] plea agreement interfered with defendant's access to exculpatory evidence."

Id. at 18 (emphasis added). Those circumstances led this court to conclude that the defendant preserved his compulsory process argument. *Id.*

State v. Savage, 305 Or App 339, 342-43, 470 P3d 387 (2020), presents an instructive counterexample. In *Savage*, the defendant went to trial in 2014 on burglary, robbery, and first-degree theft charges. *Id.* at 341. The jury acquitted the defendant on the greater offenses but convicted of theft. *Id.* The defendant appealed the theft conviction and prevailed. *Id.* On retrial, the defendant raised an "evidentiary exclusion argument" as a motion *in limine*. *Id.* at 343. Citing the Oregon Evidence Code, the defendant argued that the state should be prohibited from introducing evidence of the robbery or burglary as impermissible other acts. *Id.* at 341.

But on appeal, the defendant argued that double jeopardy issue-preclusion (*Ashe*) prevented the state from relying on facts underlying his prior acquittals to support its prosecution on the theft. *Id.* at 342. The Court of Appeals determined that the defendant failed to preserve the *Ashe* argument because he had never cited the federal or state constitutions, or "otherwise advance[d] any argument that constitutional double jeopardy principles prohibit the admission of certain evidence." *Id.* at 343. And although he mentioned double jeopardy in argument, the defendant "did not * * * inform the court or opposing counsel of *Ashe*, *Ashe*'s requirement for a record review, *Ashe*'s

analytical test, or how double jeopardy would change the analysis in any way from the OEC prior bad acts cases upon which he relied." *Id.*

This case is like *Weaver* and unlike *Savage.* Here, defendant objected to the retrial on double jeopardy grounds, cited both the Oregon and federal constitutional provisions, and identified precisely the substantive issue presented on review—that the indictment and prior trial record were insufficiently precise to enable the parties or the court to identify the conduct underlying the jury's acquittals, placing him at risk of former and double jeopardy on those counts. *Defendant's Motion to Dismiss the Indictment on Grounds of Double Jeopard*y at 1, TCF; *Defendant's Memorandum in Support of Defendant's Motion to Dismiss on Grounds of Double Jeopardy* at App Br, 5-11.

The court responded to defendant's argument on the same terms—that is, it understood that the question required the court to interpret the earlier record to determine the counts of acquittal and repeatedly asked the state to articulate its interpretation of the record. Tr 31. The state claimed that the counts of conviction were based on factual occurrences that were more "detailed" than others. Tr 33. Defendant disagreed with the prosecutor's characterization. Tr 47. And the court proposed to read the transcript of the first trial proceedings and took defendant's motion under advisement. Tr 50.

Defendant raised the constitutional issue, relied on the correct constitutional provisions, and linked his concern to a specific argument regarding the import of the indictment and the transcript. The record makes clear that the parties understood the substance of the argument and its inflection points. Further, unlike in *Savage*, the court understood the need to review the prior trial record to resolve the question presented and undertook to do so. Preservation does not prevent this court from reaching the issue on review.

The state also contended that defendant "abandoned" his argument because he focused on cases decided under the issue-preclusion doctrine in the Court of Appeals. But defendant's fundamental argument has always been that retrial was barred because it was unclear on what basis the jury had acquitted him. App Br at 3 (Summary of Argument). And, as this overlength brief on the merits demonstrates, more applicable persuasive authority exists, but the issue-preclusion doctrine cases are a close analogue illustrating a particularly thorny area of law. At most, defendant failed to completely harmonize *Ashe* with the broader double jeopardy principles that gave rise to it. He did not abandon his arguments on appeal or fail to preserve his argument before the trial court. Prudential considerations do not prevent this court from resolving the issues raised below.

CONCLUSION

For the reasons above, defendant asks this court to reverse the decision of the Court of Appeals, reverse the trial court judgment, and remand for entry of dismissal.

Respectfully submitted,

ERNEST G. LANNET
CHIEF DEFENDER
CRIMINAL APPELLATE SECTION
OFFICE OF PUBLIC DEFENSE SERVICES

Signed
By Stacy M. Du Clos at 4:23 pm, Mar 01, 2023

STACY M. DU CLOS OSB #143091
SENIOR DEPUTY PUBLIC DEFENDER
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Attorneys for Defendant-Appellant
Darron Duane Dodge

EXCERPT OF RECORD INDEX

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF CLACKAMAS

STATE OF OREGON, Plaintiff,	Court No. CR1301852
vs.	INDICTMENT
DARRON DUANE DODGE, DOB: 07/22/1966 DL: OR 8314478 Defendant.	DA No. 005252894

The above-named defendant is accused by the Grand Jury of the County of Clackamas, State of Oregon, by this Indictment as follows:

RAPE IN THE SECOND DEGREE
COUNT 1 (ORS 163.365)
Class B Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly engage in sexual intercourse with Delaney Yeliza Dodge, a child under the age of fourteen years.

RAPE IN THE SECOND DEGREE
COUNT 2 (ORS 163.365)
Class B Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly engage in sexual intercourse with Delaney Yeliza Dodge, a child under the age of fourteen years.

RAPE IN THE SECOND DEGREE
COUNT 3 (ORS 163.365)
Class B Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly engage in sexual intercourse with Delaney Yeliza Dodge, a child under the age of fourteen years.

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RAPE IN THE SECOND DEGREE
COUNT 4 (ORS 163.365)
Class B Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly engage in sexual intercourse with Delaney Yeliza Dodge, a child under the age of fourteen years.

RAPE IN THE SECOND DEGREE
COUNT 5 (ORS 163.365)
Class B Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly engage in sexual intercourse with Delaney Yeliza Dodge, a child under the age of fourteen years.

SEXUAL ABUSE IN THE SECOND DEGREE
COUNT 6 (ORS 163.425)
Class C Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly subject Delaney Yeliza Dodge to sexual intercourse, the said Delaney Yeliza Dodge not consenting thereto.

SEXUAL ABUSE IN THE SECOND DEGREE
COUNT 7 (ORS 163.425)
Class C Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly subject Delaney Yeliza Dodge to sexual intercourse, the said Delaney Yeliza Dodge not consenting thereto.

SEXUAL ABUSE IN THE SECOND DEGREE
COUNT 8 (ORS 163.425)
Class C Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly subject Delaney Yeliza Dodge to sexual intercourse, the said Delaney Yeliza Dodge not consenting thereto.

SEXUAL ABUSE IN THE SECOND DEGREE
COUNT 9 (ORS 163.425)
Class C Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly subject Delaney Yeliza Dodge to sexual intercourse, the said Delaney Yeliza Dodge not consenting thereto.

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SEXUAL ABUSE IN THE SECOND DEGREE
COUNT 10 (ORS 163.425)
Class C Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly subject Delaney Yeliza Dodge to sexual intercourse, the said Delaney Yeliza Dodge not consenting thereto.

SODOMY IN THE SECOND DEGREE
COUNT 11 (ORS 163.395)
Class B Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly engage in sexual deviate intercourse with Delaney Yeliza Dodge, a child under fourteen years of age by touching his mouth to her vagina.

SODOMY IN THE SECOND DEGREE
COUNT 12 (ORS 163.395)
Class B Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly engage in sexual deviate intercourse with Delaney Yeliza Dodge, a child under fourteen years of age by touching his mouth to her vagina.

SODOMY IN THE SECOND DEGREE
COUNT 13 (ORS 163.395)
Class B Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly engage in sexual deviate intercourse with Delaney Yeliza Dodge, a child under fourteen years of age by touching his mouth to her vagina.

SODOMY IN THE SECOND DEGREE
COUNT 14 (ORS 163.395)
Class B Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly engage in sexual deviate intercourse with Delaney Yeliza Dodge, a child under fourteen years of age by touching his mouth to her vagina.

SODOMY IN THE SECOND DEGREE
COUNT 15 (ORS 163.395)
Class B Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly engage in sexual deviate intercourse with Delaney Yeliza Dodge, a child under fourteen years of age by touching his mouth to her vagina.

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SEXUAL ABUSE IN THE SECOND DEGREE
COUNT 16 (ORS 163.425)
Class C Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly subject Delaney Yeliza Dodge to deviate sexual intercourse, the said Delaney Yeliza Dodge not consenting thereto by touching his mouth to her vagina.

SEXUAL ABUSE IN THE SECOND DEGREE
COUNT 17 (ORS 163.425)
Class C Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly subject Delaney Yeliza Dodge to deviate sexual intercourse, the said Delaney Yeliza Dodge not consenting thereto by touching his mouth to her vagina.

SEXUAL ABUSE IN THE SECOND DEGREE
COUNT 18 (ORS 163.425)
Class C Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly subject Delaney Yeliza Dodge to deviate sexual intercourse, the said Delaney Yeliza Dodge not consenting thereto by touching his mouth to her vagina.

SEXUAL ABUSE IN THE SECOND DEGREE
COUNT 19 (ORS 163.425)
Class C Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly subject Delaney Yeliza Dodge to deviate sexual intercourse, the said Delaney Yeliza Dodge not consenting thereto by touching his mouth to her vagina.

SEXUAL ABUSE IN THE SECOND DEGREE
COUNT 20 (ORS 163.425)
Class C Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly subject Delaney Yeliza Dodge to deviate sexual intercourse, the said Delaney Yeliza Dodge not consenting thereto by touching his mouth to her vagina.

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SODOMY IN THE SECOND DEGREE
COUNT 21 (ORS 163.395)
Class B Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly engage in sexual deviate intercourse with Delaney Yeliza Dodge, a child under fourteen years of age by causing her mouth to touch his penis.

SODOMY IN THE SECOND DEGREE
COUNT 22 (ORS 163.395)
Class B Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly engage in sexual deviate intercourse with Delaney Yeliza Dodge, a child under fourteen years of age by causing her mouth to touch his penis.

SODOMY IN THE SECOND DEGREE
COUNT 23 (ORS 163.395)
Class B Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly engage in sexual deviate intercourse with Delaney Yeliza Dodge, a child under fourteen years of age by causing her mouth to touch his penis.

SODOMY IN THE SECOND DEGREE
COUNT 24 (ORS 163.395)
Class B Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly engage in sexual deviate intercourse with Delaney Yeliza Dodge, a child under fourteen years of age by causing her mouth to touch his penis.

SODOMY IN THE SECOND DEGREE
COUNT 25 (ORS 163.395)
Class B Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly engage in sexual deviate intercourse with Delaney Yeliza Dodge, a child under fourteen years of age by causing her mouth to touch his penis.

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SEXUAL ABUSE IN THE SECOND DEGREE
COUNT 26 (ORS 163.425)
Class C Felony

The defendant, on or between November 20, 1999, to November 20, 2007, about October 22, 2012, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly subject Delaney Yeliza Dodge to deviate sexual intercourse, the said Delaney Yeliza Dodge not consenting thereto by causing her mouth to touch his penis.

SEXUAL ABUSE IN THE SECOND DEGREE
COUNT 27 (ORS 163.425)
Class C Felony

The defendant, on or between November 20, 1999, to November 20, 2007, about October 22, 2012, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly subject Delaney Yeliza Dodge to deviate sexual intercourse, the said Delaney Yeliza Dodge not consenting thereto by causing her mouth to touch his penis.

SEXUAL ABUSE IN THE SECOND DEGREE
COUNT 28 (ORS 163.425)
Class C Felony

The defendant, on or between November 20, 1999, to November 20, 2007, about October 22, 2012, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly subject Delaney Yeliza Dodge to deviate sexual intercourse, the said Delaney Yeliza Dodge not consenting thereto by causing her mouth to touch his penis.

SEXUAL ABUSE IN THE SECOND DEGREE
COUNT 29 (ORS 163.425)
Class C Felony

The defendant, on or between November 20, 1999, to November 20, 2007, about October 22, 2012, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly subject Delaney Yeliza Dodge to deviate sexual intercourse, the said Delaney Yeliza Dodge not consenting thereto by causing her mouth to touch his penis.

SEXUAL ABUSE IN THE SECOND DEGREE
COUNT 30 (ORS 163.425)
Class C Felony

The defendant, on or between November 20, 1999, to November 20, 2007, about October 22, 2012, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly subject Delaney Yeliza Dodge to deviate sexual intercourse, the said Delaney Yeliza Dodge not consenting thereto by causing her mouth to touch his penis.

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UNLAWFUL SEXUAL PENETRATION IN THE SECOND DEGREE
COUNT 31 (ORS 163.408)
Class B Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly penetrate the vagina of Delaney Yeliza Dodge, a person under 14 years of age, with an object other than the defendant's penis or mouth to-wit: finger.

UNLAWFUL SEXUAL PENETRATION IN THE SECOND DEGREE
COUNT 32 (ORS 163.408)
Class B Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly penetrate the vagina of Delaney Yeliza Dodge, a person under 14 years of age, with an object other than the defendant's penis or mouth to-wit: a finger.

UNLAWFUL SEXUAL PENETRATION IN THE SECOND DEGREE
COUNT 33 (ORS 163.408)
Class B Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly penetrate the vagina of Delaney Yeliza Dodge, a person under 14 years of age, with an object other than the defendant's penis or mouth to-wit: a finger.

SEXUAL ABUSE IN THE SECOND DEGREE
COUNT 34 (ORS 163.425)
Class C Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly subject Delaney Yeliza Dodge to penetration of the vagina with an object other than the penis or mouth of the said defendant, to-wit: a finger, the said Delaney Yeliza Dodge not consenting thereto.

SEXUAL ABUSE IN THE SECOND DEGREE
COUNT 35 (ORS 163.425)
Class C Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly subject Delaney Yeliza Dodge to penetration of the vagina with an object other than the penis or mouth of the said defendant, to-wit: a finger, the said Delaney Yeliza Dodge not consenting thereto.

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SEXUAL ABUSE IN THE SECOND DEGREE
COUNT 36 (ORS 163.425)
Class C Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly subject Delaney Yeliza Dodge to penetration of the vagina with an object other than the penis or mouth of the said defendant, to-wit: a finger, the said Delaney Yeliza Dodge not consenting thereto.

SEXUAL ABUSE IN THE FIRST DEGREE
COUNT 37 (ORS 163.427)
Class B Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly subject Delaney Yeliza Dodge a person under the age of 14 years, to sexual contact by touching her genital area, a sexual or intimate part of Delaney Yeliza Dodge.

SEXUAL ABUSE IN THE FIRST DEGREE
COUNT 38 (ORS 163.427)
Class B Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly subject Delaney Yeliza Dodge a person under the age of 14 years, to sexual contact by touching her genital area, a sexual or intimate part of Delaney Yeliza Dodge.

SEXUAL ABUSE IN THE FIRST DEGREE
COUNT 39 (ORS 163.427)
Class B Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly subject Delaney Yeliza Dodge a person under the age of 14 years, to sexual contact by touching her genital area, a sexual or intimate part of Delaney Yeliza Dodge.

SEXUAL ABUSE IN THE FIRST DEGREE
COUNT 40 (ORS 163.427)
Class B Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly subject Delaney Yeliza Dodge a person under the age of 14 years, to sexual contact by touching her genital area, a sexual or intimate part of Delaney Yeliza Dodge.

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SEXUAL ABUSE IN THE FIRST DEGREE
COUNT 41 (ORS 163.427)
Class B Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly subject Delaney Yeliza Dodge a person under the age of 14 years, to sexual contact by touching her genital area, a sexual or intimate part of Delaney Yeliza Dodge.

SEXUAL ABUSE IN THE FIRST DEGREE
COUNT 42 (ORS 163.427)
Class B Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly subject Delaney Yeliza Dodge a person under the age of 14 years, to sexual contact by touching her breast(s), a sexual or intimate part of Delaney Yeliza Dodge.

SEXUAL ABUSE IN THE FIRST DEGREE
COUNT 43 (ORS 163.427)
Class B Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly subject Delaney Yeliza Dodge a person under the age of 14 years, to sexual contact by touching her breast(s), a sexual or intimate part of Delaney Yeliza Dodge.

SEXUAL ABUSE IN THE FIRST DEGREE
COUNT 44 (ORS 163.427)
Class B Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly subject Delaney Yeliza Dodge a person under the age of 14 years, to sexual contact by touching her breast(s), a sexual or intimate part of Delaney Yeliza Dodge.

SEXUAL ABUSE IN THE FIRST DEGREE
COUNT 45 (ORS 163.427)
Class B Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly subject Delaney Yeliza Dodge a person under the age of 14 years, to sexual contact by touching her breast(s), a sexual or intimate part of Delaney Yeliza Dodge.

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SEXUAL ABUSE IN THE FIRST DEGREE
COUNT 46 (ORS 163.427)
Class B Felony

The defendant, on or between November 20, 1999, to November 20, 2007, in Clackamas County, Oregon, in a criminal episode separate, apart and distinct from that alleged in any other count of this Indictment, did unlawfully and knowingly subject Delaney Yeliza Dodge a person under the age of 14 years, to sexual contact by touching her breast(s), a sexual or intimate part of Delaney Yeliza Dodge.

Said act(s) contrary to statutes in such cases made and provided, and against the peace and dignity of the State of Oregon.

Dated this 28th day of October, 2013.

A TRUE BILL

Foreman of the Grand Jury

Witnesses examined before the Grand Jury (unless otherwise specified, witness gave testimony in person):
Jeffrey Burlew
Christy Dodge
Delaney Yeliza Dodge
Donald Hollis

JOHN S. FOOTE
District Attorney

By

Russell S. Amos, OSB# 035053
RussellAmo@co.clackamas.or.us
Deputy District Attorney

NOTICE: Where this accusatory instrument charges one or more misdemeanor crimes, the district attorney hereby declares that the state intends that said offense(s) proceed as a misdemeanor(s).

CONTROL #: / SID #
Agency: Clackamas County Sheriff's Office/12-031674

Clackamas County District Attorney
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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05

Brief length

I certify that the word-count of this brief is 17,936 words and submitted with this brief is a motion for overlength brief.

Type size

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.

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on March 1, 2023.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Petitioner's Brief on the Merits will be eServed pursuant to ORAP 16.45 on Benjamin Gutman #160599, Solicitor General, attorney for Respondent on Review.

Respectfully submitted,

ERNEST G. LANNET
CHIEF DEFENDER
CRIMINAL APPELLATE SECTION
OFFICE OF PUBLIC DEFENSE SERVICES

Signed
By Stacy M. Du Clos at 4:23 pm, Mar 01, 2023

STACY M. DU CLOS OSB #143091
SENIOR DEPUTY PUBLIC DEFENDER
stacy.m.duclos@opds.state.or.us

Attorneys for Petitioner on Review
Darron Duane Dodge