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 S069859

REPLY BRIEF ON THE MERITS - PETITIONER ON REVIEW

Review 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

Affirmed With Opinion: September 14, 2022
Author of Opinion: Powers, Judge
Before: Ortega, Presiding Judge, and Powers, Judge, and Hellman, Judge
Review Allowed: January 19, 2023

ERNEST G. LANNET #013248
Chief Defender
Criminal Appellate Section
STACY M. DU CLOS #143091
Senior Deputy Public Defender
Office of Public Defense Services
1175 Court Street NE
Salem, OR 97301
stacy.m.duclos@opds.state.or.us
Phone: (503) 378-3349

Attorneys for Petitioner on Review

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
DOUG PETRINA #963943
Assistant Attorney General
400 Justice Building
1162 Court Street NE
Salem, OR 97301
doug.petrina@doj.state.or.us
Phone: (503) 378-4402

Attorneys for Respondent on Review

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PETITIONER'S REPLY BRIEF

Summary of Argument

The state advances a theory of procedural default: Defendant's argument is not properly before the court, because he abandoned it in the Court of Appeals.

The state is incorrect because he never abandoned his arguments and persistently pressed a single issue. Before every court, defendant has argued for dismissal on former and double jeopardy grounds, because the indictment and verdict lacked sufficient specificity to prevent the risk that he would be—or, now, has been—retried for conduct for which he was acquitted. Defendant refines that argument in response to this court's question on review, and the state has taken full advantage of its opportunity to respond. Prudential considerations favor, rather than advise against, deciding this case on its merits.

Substantively, the state argues that the continuing prosecution exception overcomes defendant's claim. First, the state argues that defendant's proposed rule (and courts that have adopted it) "overlook" what it casts as an absolute exception. Second, the state reasserts that it could identify the conduct underlying defendant's convictions for which it reprosecuted defendant by comparing the first trial's transcript and that jury's verdict. Third, the state suggests that defendant waived the right to shield his acquittals from successive

prosecution because he did not invoke separate procedural mechanisms to seek greater specificity of charges.

Defendant responds. Defendant does not overlook the continuing prosecution exception and neither do the authorities on which he relies. Rather, the dispute is whether the state, in the name of a continuing prosecution, may put a defendant at risk of successive prosecution of acquitted counts. Because acquittals terminate jeopardy absolutely, and because the state's remedial efforts fail to establish which offenses underly the original convictions, this court should resolve this dispute in defendant's favor. Finally, earlier encroachments on defendant's notice and trial rights that defendant did not rebuff do not transmute into a waiver of his jeopardy claims, because a defendant cannot knowingly and intentionally relinquish a former jeopardy claim that does not yet exist.

Argument

I. This court should decide the case on the merits of the issue that defendant has persistently advanced.

The state suggests that the Court of Appeals "would have committed legal error" had it addressed the issue presented on review and that this court lacks authority to reach the issue. Resp BOM at 27. And, although the state concedes that defendant preserved the issue, it relies on prudential preservation

principles to contend that the development of defendant's arguments has disadvantaged the state. *Id.* at 22.

Defendant disagrees. The Court of Appeals had authority to address the issue, and this court may review it. Prudentially, this court should decide the issue, because defendant has presented it at every stage of review under the same constitutional authorities. The manner in which defendant has developed his arguments in response to this court's order neither forecloses review nor disadvantages the state.

A. The issue was properly before the Court of Appeals.

The state suggests that the Court of Appeals "would have committed error" had it granted defendant relief based on his claim. Resp BOM at 27. From that premise, the state reasons that the issue is not now properly before this court. Resp BOM at 28. The state's premise and conclusion are incorrect. ORAP 9.20(2) provides that this court "may consider other issues that were before the Court of Appeals," even if that court did not address them.

The word "issue" as used in ORAP 9.20(2) connotes preservation principles. *See State v. Link*, 367 Or 625, 637, 482 P3d 28 (2021) (employing preservation principles and ORAP 9.20(2) to determine whether a state constitutional claim was properly before the court). In that context, "[r]aising an issue at trial is ordinarily essential, whereas identifying a source is less so, and making a particular argument is the least significant." *State v. Fox*, 370 Or

456, 461, 521 P3d 151 (2022) (citing *State v. McKinney*, 369 Or 325, 332, 505 P3d 946 (2022)).

Here, defendant raised the issue in the Court of Appeals: Did the former jeopardy and double jeopardy provisions in the state and federal constitutions bar his prosecution, because he risked reprosecution on acquitted counts? In defendant's opening brief, he assigned error to the denial of his motion to dismiss. App Br at 10. In his preservation section, defendant specified when and how he raised the issue below and the trial court's ruling. App Br at 10-14; ORAP 5.45(4).[1] He then presented a constitutional argument that former and double jeopardy precluded retrial under an issue-preclusion framework. App Br at 15-23.

Although defendant presented argument on a preserved assignment of error, the state argues that the Court of Appeals lacked authority to decide the issue on the grounds that defendant advances in this court. Not so. The Court of Appeals may reframe issues and request additional arguments necessary to resolve the "issue" presented. *See*, *e.g.*, *State v. Parra-Sanchez*, 324 Or App

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[1] The state cites *State v. Wyatt*, 331 Or 335, 344-47, 15 P3d 22 (2000) for the proposition that this court cannot reach an issue not "properly before" the Court of Appeals. In that case, the question was unpreserved and reviewable only as plain error. *Id.* at 345. Similarly, *Tarwater v. Cupp*, 304 Or 639, 644 n 5, 748 P2d 125 (1988) involved an alternative basis to affirm the trial court presented for the first time in this court. *See also* Pet BOM at 68-74 (discussing preservation).

712, 775, __ P3d __ (2023) (en banc) (requesting supplemental briefing to address a different element of the crime to resolve preserved sufficiency of the evidence issue); *State v. Hubbell*, 314 Or App 844, 854, 500 P3d 728 (2021), *rev allowed*, 369 Or 504 (2022) (overruling interpretation of statute after requesting supplemental briefing); *State v. Alcaraz*, 318 Or App 179, 195, 508 P3d 13, *rev allowed*, 370 Or 197 (2022), *dismissed*, 370 Or 790 (2023) (considering but rejecting alternative basis to affirm raised in supplemental brief); *Schwartz and Battini*, 289 Or App 332, 341, 410 P3d 319 (2017) (noting request for supplemental briefing to address the "central issue on appeal"). Indeed, ORAP 5.90(3), requires the Court of Appeals to request supplemental briefing on "arguably meritorious issues" when court-appointed counsel fails to identify any potentially meritorious issue in the opening brief.

The Court of Appeals on occasion considers arguments not raised in the opening brief, typically by seeking supplemental briefing. Consequently, the Court of Appeals would not have committed "legal error" if it had reached defendant's argument, because he preserved the issue and assigned error to the pertinent ruling.

As to the scope of review under ORAP 9.20(2), this court is similarly unrestrained. For example, this court may waive ORAP 5.45 for good cause. ORAP 1.20(5). *E.g.*, *State v. Williams*, 366 Or 498-99, 466 P3d 55 (2020) (doing so). And this court has granted plain-error relief when the defendant

failed to raise an argument in the opening brief *or* in this court. *McKinney*, 369 Or at 333-34.

The scope of review includes all issues before the Court of Appeals. ORAP 9.20(2). Defendant presented the same issue before the court that he raises now. This court has authority to reach it.

B. Prudential considerations do not bar review.

In *State v. Hitz*, this court explained the distinction "between raising an *issue* at trial, identifying a *source* for a claimed position, and making a particular *argument*." 307 Or 183, 188, 766 P2d 373 (1988) (italics in original). Again, raising an issue is ordinarily essential, identifying the source less so, and making a particular argument is least important. *Id*.

When an issue requires constitutional interpretation, this court has an independent obligation to correctly construe the statutes and constitutional provisions at issue, regardless of the parties' arguments. *Engweiler v. Persson/Department of Corrections*, 354 Or 549, 559, 316 P3d 264 (2013) (court has obligation to reach correct interpretation of statutes, whether or not advanced by the parties). Thus, this court may reach an issue despite a party's failure to make a particular interpretive argument. *Stull v. Hoke*, 326 Or 72, 77, 948 P2d 722 (1997) (holding that plaintiff was entitled to raise an alternative statutory argument for the first time on review because he had preserved the broader legal issue under the same statute); *accord Gadda v. Gadda*, 341 Or 1,

7-8, 136 P3d 1099 (2006) (reaching argument raised for the first time in a supplemental memorandum when the petitioner had raised the "broad legal issue" under same sources of law in petition for review).

Here, unlike in *Link*, 367 Or at 633-36, cited by the state, defendant raised the same issue under both the state and federal constitutions throughout the proceedings. App Br at 15; App Br at ER-14 (trial memorandum). And the state met those claims. Resp Br at 6-7, 10-11. Thus, at minimum defendant raised the broad legal issue with sufficient specificity that the state addressed it. That distinction aligns defendant's case with *Stull* and *Gadda*, not *Link*.

The state also argues that review undermines prudential considerations for three reasons: (1) it did not have the opportunity to litigate the matter before the Court of Appeals; (2) it is "disadvantaged" by litigating the issue on review; and (3) this court does not have the benefit of a Court of Appeals decision. Resp BOM at 26.

First, the parties litigated the issue before the Court of Appeals. Defendant summarized the double-jeopardy-based issue preclusion framework and explained the unique problem presented in this case:

> "[T]hough it is unclear which events related at the first trial the jury disbelieved, it is clear that the jury did not believe most of DD's testimony and found defendant not guilty of most of her allegations, including some of the allegations that the state presented a second time at the second trial. Because the jury could have grounded its verdict in the second trial on factual issues that the jury in the first trial already rejected, issue preclusion

> prevented defendant's second prosecution and his motion to dismiss should have been granted."

App Br at 23.

To be sure, defendant identified a problem that the issue-preclusion framework cannot fully resolve. But he did not abandon the central issue, which is one of first impression in Oregon and which sister courts have addressed by analogy to issue-preclusion principles. *See* Pet BOM at 48-56; *Brown v. Superior Court*, 187 Cal App 4th 1511, 1528, 114 Cal Rptr 3d 804 (2010) (following issue-preclusion cases in applying a practical framework to scope of retrial after mixed verdicts); *State v. Heaven*, 127 Wash App 156, 164, 110 P3d 835 (2005) (noting similarities between issue preclusion and comparatively greater risk of retrial on an acquitted offense). The state also addressed the argument in the Court of Appeals. *Compare* Resp Br at 6 (arguing that defendant's preserved argument "would have failed" under continuing prosecution exception, citing five cases) *with* Resp BOM at 32-38 (arguing same, citing same and three additional cases).

Second, this court provided both parties the opportunity to brief the issue when it asked the parties to address

> "whether, after petitioner's criminal case was remanded for retrial, petitioner was entitled to dismissal of the indictment on former or double jeopardy grounds under the state or federal constitution, because the indictment's allegations were not specific enough to enable him to plead 'prior acquittal' as a bar to retrial, and

> therefore, a risk existed that he would be retried for conduct of which he already had been acquitted."

Order Allowing Review, ACF.

The state has ably responded in accordance with the jointly proposed briefing schedule without filing an overlength brief, seeking an extension, or moving to reschedule argument. The state cannot reasonably claim disadvantage "under these circumstances."

Third, while this court sometimes may benefit from a lower court's legal analysis, "[e]fficient procedures are instruments for, *not obstacles to*, deciding the merits" and administering justice. *Hitz*, 307 Or at 188 (emphasis added). This court is a law-announcing court ultimately responsible for constitutional interpretation, owing no deference to the Court of Appeals. It can and should decide the issue.

II. The continuing prosecution exception does not override a defendant's right against successive prosecution after acquittal.

The state's merits argument rests entirely on the continuing prosecution exception. First, the state argues that acquittals do not have a "crossover effect" on other counts and that defendant and the authority on which he relies "overlooked" the exception. Second, the state reasserts that it identified the offenses underlying the convictions by comparing the transcript to the verdicts. Third, the state invokes waiver principles to suggest that his failure to seek

greater specificity in his first trial justifies defendant's assumption of an insurmountable burden to shield his acquittals from successive prosecution.

Defendant has not overlooked the continuing prosecution exception. *See* Pet's BOM at 38-40, 44, 46-47. But that exception does not fully answer the question presented because it must be applied consistently with its animating purposes. *Cf. State v. Fulmer*, 366 Or 224, 233, 460 P3d 486 (2020) (so evaluating exception to Article I, section 9, warrant requirement).

The continuing jeopardy exception rests on the societal interest in punishing those found guilty, a reversed conviction's lack of finality, and the limited waiver of the right against retrial following an appeal. *Price v. Georgia*, 398 US 323, 329 n 4, 90 S Ct 1757, 26 L Ed 2d 300 (1970) (stating interests). That is, on appeal from a trial error, "the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished." *Burks v. United States*, 437 US 1, 15-16, 98 S Ct 2141, 57 L Ed 2d 1 (1978).

Those interests do not allow jeopardy to continue after an acquittal, *Price*, 398 US at 329, or permit retrial of a conviction overturned on insufficient evidence, because the prosecution "has been given one fair opportunity to offer whatever proof it could assemble," *Burks*, 437 US at 16. *Price* and *Burks* suggest that the continuing prosecution exception applies only within the scope of its animating principles.

For that reason, "key to the 'continuing jeopardy' principle is the identification of the circumstances that operate to terminate 'continuing jeopardy,' precluding further proceedings." *State v. O'Donnell*, 192 Or App 234, 256, 85 P3d 323 (2004). Because jeopardy may terminate, events that transpire over the course of a single prosecution may implicate the defendant's right to finality of an acquittal. *E.g.*, *Yeager v. United States*, 557 US 110, 118-19, 129 S Ct 2360, 174 L Ed 2d 78 (2009) (noting that the state has an interest in one complete prosecution notwithstanding a hung jury, but that interest does not overcome the defendant's interest in the finality of acquittal).

Arguing otherwise, the state points to *Ohio v. Johnson*, 467 US 493, 502, 104 S Ct 2536, 81 L Ed 2d 425 (1984). *Johnson* is inapposite. There, the defendant pleaded guilty to lesser-included offenses over the state's objection and then sought to avoid trial on the greater offenses. *Id.* at 495-96. *Johnson* allowed the state to continue the prosecution because the defendant "ha[d] not been exposed to conviction on the charges to which he pleaded not guilty," and the state had not yet received a full opportunity to try and convict him. *Id.* at 502. The state dismisses that context as "immaterial," Resp BOM at 34-35, but

Johnson treated that distinction as critical to its analysis and holding. 467 US at 501.[2]

Similarly, the state argues that the authorities on which defendant relies are unpersuasive, because "the courts in those cases have overlooked * * * that this is a continuation of a single prosecution, not a successive prosecution." Resp BOM at 41. Those courts did not "overlook" that exception. They determined that it did not control. *See State v. Salter*, 425 NJ Super 504, 518, 42 A3d 196 (App Div 2012) ("[I]t is axiomatic that double jeopardy does not apply after a successful appeal when the retrial is for the same offense for which a defendant was convicted at trial."); *Heaven*, 127 Wash App at 162 (recognizing that "jeopardy ha[d] not terminated" as to hung counts but that finality of acquittals nevertheless barred retrial); *Madsen v. McFaul*, 643 F Supp 2d 962, 971 (ND Ohio 2009) (noting that no one disputed the exception for continuing jeopardy, but that that "simple statement of black letter law fails to account for" the acquitted counts) (cited by *Dunn v. Maze*, 485 SW3d 735, 748 (Ky 2016)).

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[2] Oregon endorses a similar rule under a severance theory. *State v. Schaffran*, 95 Or App 329, 333, 769 P2d 230 (1989) (holding that the defendant's informed guilty plea on single count of multicount indictment constituted an election to sever that count for jeopardy purposes).

Here, the jury in the first trial returned 40 acquittals and six convictions. Defendant seeks finality on the 40 acquittals on which jeopardy terminated. In contrast, the exception that the state seeks to employ theoretically permits a continued prosecution on six, identifiable offenses reversed for trial error. The parties' positions diverge not because defendant seeks a "crossover effect," but because the state cannot tailor the continued prosecution within its proper bounds—*i.e.*, *without* risking exposing defendant to jeopardy on the acquittals.

Second, the state implies that defendant failed to establish a risk of retrial for offenses on which jeopardy terminated by acquittal. Resp BOM at 42. But he did establish such a risk. To review, of the original 46 counts, the first jury found defendant not guilty on all counts alleging sexual intercourse or sodomy. The jury found defendant guilty on one count of second-degree sexual penetration (Count 31), one count of second-degree sexual abuse by vaginal penetration (Count 34), two counts of first-degree sexual abuse involving touching the victim's genital area (Counts 37 and 38), and two counts of first-degree sexual abuse for touching the victim's breasts (Counts 42 and 43).

DD's testimony in 2015—*even* discounting estimates on the frequency of similar events and *all* instances of sodomy or sexual intercourse—could have supported at least four discrete counts involving breast touching (A160194 Tr 119, Tr 124, Tr 126-27, Tr 129), four discrete counts involving genital touching

(Tr 121, Tr 124, Tr 129, Tr 144), and two discrete counts of digital penetration (Tr 144, Tr 127-30).

Yet, for every guilty verdict, the 2015 jury acquitted defendant on more than one identically pleaded count: Counts 32 and 33 (second-degree sexual penetration); Counts 39, 40, and 41 (first-degree sexual abuse, genital area) Counts 44, 45, 46 (first-degree sexual-abuse, breast). Thus, in 2015, DD testified to a greater number of factual occurrences than the six charges on which the first jury returned guilty verdicts. But the jury considered and acquitted defendant on many of those occurrences, which terminated jeopardy. Because the indictment, instructions, and verdict forms did not tie any single count to any discrete incident, the jury never answered which count applied to which incident. The state's *post hoc* assignment of the counts of conviction to discrete incidents fails to establish that the second jury considered the "same original [six] counts of conviction" on retrial. Resp BOM at 1.

Finally, the state faults defendant for failing to demur or to seek greater specificity in 2015. Resp BOM at 47-49. The state argues that defendant thereby waived his jeopardy claim and that the availability of such tools justifies assigning the entire burden to the defense. *Id.* at 49.

The failure to assert a trial right for specificity, notice, or election does constitute a waiver of former or double jeopardy. "A waiver is an intentional relinquishment or abandonment of a known right or privilege." *Church v.*

Gladden, 244 Or 308, 312-13, 417 P2d 993 (1966). For example, under *State v. Boyd*, the state initially determines whether the charges are unitary and must charge them in a single indictment. 271 Or 558, 568-69, 533 P2d 795 (1975). In that context, joinder forces the defense to *choose* between joinder and severance, thus waiving any later objections based on that procedure. *Id.* at 569. That form of waiver requires an informed and deliberate decision. *State v. Shields*, 280 Or 471, 478-79, 571 P2d 892 (1977).

A defendant may fail to assert rights to pretrial notice, election, and juror concurrence, which arise at different procedural stages, under different constitutional provisions, and yield different remedies. *See* Pet BOM at 49-50, 61-64. Although maximizing reliance on those rights may reduce the risk of this form of jeopardy issue, a defendant's failure to assert the right to notice or concurrence is not a "waiver" of jeopardy protection. A defendant cannot knowingly waive jeopardy rights at the time of the indictment and first trial contingent on his later receiving an acquittal, because, at that time, only a *potential* jeopardy issue exists. *See Dunn*, 485 SW 3d at 744 ("[S]ince it is the

second attempt to convict that is forbidden, * * * his [jeopardy] claim is not ripe until the government actually initiates the second prosecution.").[3]

At the same time, the *state's* failure to provide greater specificity diminishes its interest in continuing the prosecution, because the lack of specificity itself undermines the presumed validity of the *guilty verdicts* on which the state seeks to continue the prosecution. As explained, the continuing jeopardy exception rests on society's concern for punishing the guilty. *Burks*, 437 US at 15. Here, the indictment was nonspecific, the state did not elect a theory as to any count, and the court did not instruct the jury to return unanimous or concurring verdicts. Those instructional errors undermine the

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[3] The state overstates the feasibility of those tools to seek specificity, at least at the time of defendant's June 2015 trial. Then, controlling case law strongly suggested that defendant was not entitled to employ pretrial mechanisms to seek specificity. *E.g.*, *State v. Hale*, 335 Or 612, 621, 75 P3d 612 (2003) (affirming denial of demurrer seeking specificity); *State v. Antoine*, 269 Or App 66, 78, 344 P3d 69 (2015), *rev den*, 357 Or 324 (2015) (same); *Antoine v. Taylor*, 368 Or 760, 785-76, 499 P3d 48 (2021) (Duncan, J., concurring) (noting right to pretrial notice has only recently been clarified). Controlling in June 2015, *State v. Ashkins*, 263 Or App 208, 224, 327 P3d 1191 (2014), *aff'd on other grounds*, 357 Or 642, 357 P3d 490 (2015), held that concurrence instructions were not required unless incidents were sufficiently specific to distinguish one occasion from another *and* supported conflicting juror conclusions. *Id.*

In any event, to be effective, the court would be required to charge the jury in a manner that identified the offenses underlying individual counts. *State v. Payne*, 298 Or App 411, 427, 447 P3d 515 (2019) (describing different methods of charging the jury). Not all such remedies for specificity would prevent the future jeopardy risk, because a concurrence instruction and general verdict do not in themselves require the jury to identify its findings. *See id.*

presumed reliability of the earlier guilty verdicts. *See Watkins v. Ackley*, 370 Or 604, 631-32, 523 P3d 86 (2022) (nonunanimous verdicts raise serious doubts about the fairness of a trial and fail to ensure the reliability of a guilty verdict); *State v. Payne*, 298 Or App 411, 421, 447 P3d 515 (2019) (explaining purpose of an "end-of-trial motion to elect" is to ensure juror concurrence on every element and same occurrence). Far from justifying the defendant carrying the entire burden, the failure to ensure unanimity and juror concurrence on discrete acts in any manner weakens the societal interest in punishing "the guilty" on which the continuing prosecution exception rests.

CONCLUSION

For the foregoing reasons and those in defendant's brief on the merits, 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 3:29 pm, May 02, 2023

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

Attorneys for Defendant-Appellant
Darron Duane Dodge

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05 and (2) the word-count of this brief is 3,961 words.

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 Reply Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on May 2, 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 Reply 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 3:29 pm, May 02, 2023

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

Attorneys for Defendant-Appellant
Darron Duane Dodge