

FILED: December 26, 2013

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

GABRIEL DAVID SILLS,
Defendant-Appellant.

Jackson County Circuit Court
992639FE

A146207

Raymond B. White, Judge. (Judgment)

Lorenzo A. Mejia, Judge. (Amended Judgment)

Submitted on December 28, 2012.

Peter Gartlan, Chief Defender, and Neil F. Byl, Deputy Public Defender, Office of Public Defense Services, filed the opening brief for appellant. Gabriel David Sills filed the supplemental brief *pro se*.

John R. Kroger, Attorney General, Anna M. Joyce, Solicitor General, and Janet A. Klapstein, Senior Assistant Attorney General, filed the brief for respondent.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Nakamoto, Judge.

NAKAMOTO, J.

Appeal dismissed in part; otherwise affirmed.

1 NAKAMOTO, J.

2 Defendant, who was sentenced 10 years after his trial, seeks outright
3 dismissal or a reversal of his convictions for sexual abuse in the first degree, ORS
4 163.427, and public indecency, ORS 163.465, or else resentencing on the first-degree
5 sexual abuse count. After his conviction in Oregon, defendant fled the jurisdiction.
6 Years later, he was convicted and sentenced in California for other sex offenses and then
7 extradited, sentenced in this case, and returned to continue serving his California
8 sentence.

9 Defendant now contends that he is entitled to dismissal of his convictions in
10 this case with prejudice because he was not timely sentenced under the Interstate
11 Agreement on Detainers (IAD), ORS 135.775. Defendant also argues, among other
12 things, that he is entitled to a new trial because (1) the trial court erroneously admitted
13 evidence that he had committed another crime and (2) his motion to suppress statements
14 he made after invoking his right to counsel should have been granted. Alternatively, he
15 argues that his 75-month Measure 11 sentence for first-degree sexual abuse is
16 unconstitutionally disproportionate. For the reasons stated below, we decline to consider
17 those assignments of error in which defendant requests a reversal of his convictions for a
18 new trial, based on the former fugitive doctrine, and we reject both defendant's IAD
19 argument and his sentencing argument on their merits.¹ Accordingly, we dismiss the

¹ In a supplemental brief, defendant also asserts six *pro se* assignments of error, in which he challenges (1) the denial of a motion for continuance of the trial date to allow an alibi witness to testify, (2) prosecution witnesses being allowed to see photographs of

1 appeal in part and otherwise affirm.

2 The event relating to the sexual abuse count occurred in June 1999. The
3 victim, H, was a 13-year-old girl who was walking home from school with two friends
4 when she saw defendant walking ahead of them. Defendant turned around, walked by the
5 girls, and grabbed H's breast with his hand for several seconds. The girls eventually ran
6 to a neighboring house and contacted police, and defendant ran off in the other direction.

7 The event leading to the public indecency count occurred the next day,
8 when defendant exposed himself to J, a 13-year-old girl who was walking home from the
9 school bus stop. As J walked by, defendant leaned his head out of his parked truck and
10 said something. J could not hear defendant, so she went closer to the truck. As she
11 approached, defendant showed her a pornographic magazine and asked her if she wanted
12 it. J said no and began to walk away. Defendant then put down the magazine, exposing
13 himself, rubbed his penis, and asked J, "Do you want some of this Honey?" J then fled,
14 screaming. People nearby were able to get the license plate number of the truck before
15 defendant sped away.

16 Defendant was arrested the same day and was later indicted for sexual
17 abuse in the first degree, public indecency, and furnishing obscene materials to a minor.

defendant before trial, (3) a witness identification when the witness was given an array of photographs with a spot near defendant's photograph, (4) and (5) various pretrial actions of the police and prosecutors, which he contends amounted to misconduct that impaired his right to a fair trial, and (6) an assertion as to the insufficiency of the evidence unsupported by argument. We decline to consider the first five of those assignments based on the former fugitive doctrine and reject the sixth because it is without merit.

1 Defendant pleaded guilty to public indecency, and a demurrer was granted on the
2 furnishing obscene materials count.

3 After a jury trial in 2000, defendant was found guilty of sexually abusing
4 H. In that trial, the jury heard evidence concerning the indecent exposure incident
5 involving J. However, before defendant could be sentenced, he fled the jurisdiction.
6 After fleeing, defendant lived in California under an assumed name. When he fled, the
7 \$100,000 in bail that his parents had posted was forfeited.

8 In 2006, defendant was arrested in California for possession of child
9 pornography and for sex crimes involving a four-year-old girl. The State of Oregon
10 quickly learned in 2006 that defendant had been arrested; however, the state could not
11 secure defendant's return to Oregon until after his pending charges in California were
12 resolved. After his conviction by way of a guilty plea, he was sentenced in California in
13 December 2008, with his earliest parole date in 2021.

14 After his California sentencing, the Jackson County District Attorney's
15 Office sought a detainer on defendant, and, in April 2009, defendant requested to be
16 brought to "trial" in Oregon under the IAD, although the district attorney never received
17 defendant's demand. Later in 2009, California officials told defendant that the IAD was
18 inapplicable to a sentencing proceeding, and California did not proceed under the IAD.

19 Ultimately, California returned defendant to Oregon for sentencing in this
20 case. In 2009, the district attorney's office pursued defendant's return for sentencing
21 under the Uniform Criminal Extradition Act, ORS 133.743 to 133.857. In February

1 2010, the state requested that California return defendant to Oregon in a requisition
2 signed by Governor Kulongoski. *See* ORS 133.833 (describing process for requisition).
3 Governor Kulongoski, in March 2010, and California Governor Schwarzenegger, in April
4 2010, then signed an executive agreement for defendant's extradition. It provided that
5 defendant would be transported to Oregon for sentencing and then returned to California
6 to serve the remainder of his California sentence. *See* ORS 133.835 (governing
7 extradition of person imprisoned in another state through executive authority of that state
8 and the Governor).

9 Defendant was returned to Oregon in May 2010. At his Oregon sentencing,
10 defendant acknowledged that he left the state to avoid being sentenced. On the public
11 indecency conviction, the sentencing court sentenced defendant to a jail term to run
12 concurrently with his sentence in California. On the first-degree sexual abuse conviction,
13 the court sentenced him to serve a Measure 11 sentence of 75 months, consecutive to his
14 sentence in California. Defendant--finally sentenced 10 years after his trial--now appeals
15 that judgment of conviction and his Measure 11 sentence.

16 A. *Former fugitive doctrine*

17 The state urges us to exercise our discretion to dismiss defendant's appeal
18 under the "former fugitive doctrine." Under that doctrine, an appellate court has inherent
19 judicial authority to dismiss a criminal defendant's appeal if the defendant's former
20 fugitive status significantly interfered with the operation of the appellate process. *State v.*
21 *Lundahl*, 130 Or App 385, 390, 882 P2d 644 (1994). A defendant's former fugitive status

1 significantly interferes with the appellate process when "a long escape, even if ended
2 before sentencing and appeal, * * * so delay[s] the onset of appellate proceedings that the
3 Government would be prejudiced in locating witnesses and presenting evidence at retrial
4 after a successful appeal." *State v. Ristick*, 204 Or App 626, 628-29, 131 P3d 762 (2006)
5 (internal quotation marks omitted; brackets and omission in *Ristick*).

6 The state argues that this case is substantially similar to *Lundahl* and
7 *Ristick*--two cases in which we dismissed appeals taken by defendants who had fled
8 Oregon before sentencing, eventually were caught, sentenced, and then appealed years
9 after their trials. The state contends that the same kinds of considerations in this case call
10 for us to exercise our inherent authority to dismiss defendant's appeal:

11 "Defendant's offenses occurred in 1999, and he was tried in 2000. The
12 transcripts show that the state called 21 witnesses at trial; the victims were
13 14 at the time, as were several of the eyewitnesses. The relief defendant
14 seeks is not merely resentencing, but retrial, now 12 years later.

15 "The prosecutor *was* able to locate the two victims to speak at
16 sentencing in 2010, to describe the impact of the crimes. Even so, retrial
17 would be significantly difficult at this point. Under the executive
18 agreement between the Oregon and California governors, defendant has
19 already been returned to California to complete a 12-year sentence imposed
20 there."

21 (Record citations omitted; emphasis in original.) The state argues that procuring
22 defendant for retrial from California following this appeal would require significant delay
23 and expense to the state and that it would be inequitable to order retrial after a 10-year
24 delay between trial and sentencing attributable to defendant's flight from Oregon to avoid
25 sentencing. We agree with the state that defendant forfeited the right to appeal his

1 convictions under our case law.

2 In *Lundahl*, the defendant had been tried and found guilty of multiple
3 charges for sexually molesting an 11-year-old girl. Before he could be sentenced on all
4 of the charges, however, he fled the country. Seven years later, he was recaptured when
5 he returned to the United States and was finally sentenced on the remaining charges. The
6 defendant appealed his convictions, arguing that he was entitled to a new trial based on
7 the lower court's finding that one of the jurors had been incompetent. The state argued
8 that the defendant forfeited his right to appeal his convictions when he escaped before
9 sentencing and eluded capture for seven years.

10 Relying on the United States Supreme Court's decision in *Ortega-*
11 *Rodriguez v. United States*, 507 US 234, 113 S Ct 1199, 122 L Ed 2d 581 (1993),² we

² In *Ortega-Rodriguez*, the Supreme Court addressed whether the Eleventh Circuit's adoption of a rule allowing automatic dismissal of appeals taken by former fugitives was appropriate. 507 US at 242-43. The Court explained that

"the justifications we have advanced for allowing appellate courts to dismiss pending fugitive appeals all assume some connection between a defendant's fugitive status and the appellate process, sufficient to make an appellate sanction a reasonable response. These justifications are necessarily attenuated when applied to a case in which both flight and recapture occur while the case is pending before the district court, so that a defendant's fugitive status at no time coincides with his appeal."

Id. at 244 (footnote omitted). The Court then concluded that "the same interests do not support a rule of dismissal for all appeals filed by former fugitives, returned to custody before invocation of the appellate system. Absent some connection between a defendant's fugitive status and his appeal, * * * the justifications advanced for dismissal of fugitives' pending appeals generally will not apply." *Id.* at 249. The Court emphasized that, although an automatic dismissal is not appropriate, it did "not hold that a court of appeals is entirely without authority to dismiss an appeal because of fugitive status predating the appeal." *Id.*

1 adopted the "former fugitive doctrine" and concluded that the defendant's lengthy escape
2 significantly interfered with the appellate process and therefore warranted the dismissal
3 of his appeal. *Lundahl*, 130 Or App at 390. Important to that conclusion was our
4 consideration of the amount of time that had passed since trial, the age of the victim, the
5 availability of witnesses, how the jury would react to the testimony of the victim now that
6 she was older, and the effect of the passage of time on the witnesses' memories of the
7 events. We explained:

8 "If we were to resolve the merits of this appeal in defendant's favor, he
9 would be entitled to a new trial. Because of his lengthy escape, ten years
10 will have passed between the time that he committed the charged offenses
11 and the time of his re-prosecution. The victim is now a 22-year-old woman
12 who has spent several years in counseling trying to deal with the trauma
13 that defendant now admits he inflicted upon her when she was a child.
14 Further, as the state notes, a jury may respond very differently to the
15 testimony of an adult woman than it would to the same events as recounted
16 by an 11-year-old girl. The state would also be prejudiced by having to
17 locate witnesses who testified in 1975, including a staff member of the state
18 Children's Services Division and the young boy, now age 19, to whom the
19 victim first reported that she had been molested. Even assuming that those
20 witnesses could be located, their memories of the event have likely
21 diminished."

22 *Id.*

23 *Ristick* involved similar facts, though the defendant there sought
24 resentencing on appeal--not a new trial. In that case, the defendant was convicted of two
25 counts of aggravated theft in 1995, but before he could be sentenced he fled and remained
26 a fugitive for over seven years. In 2004, the defendant was finally sentenced. The
27 defendant appealed, challenging certain sentencing determinations, but did not seek a
28 new trial. We determined that the former fugitive doctrine applied, and militated in favor

1 of dismissing the defendant's appeal. 204 Or App at 630.

2 In reaching that conclusion, we explained that, if we were to remand the
3 case for resentencing, absent a waiver by the defendant, the sentencing court would be
4 required to empanel a jury to establish findings of enhancement facts. *Id.* at 631. We
5 noted that that hearing would be impaired by the fact that almost 10 years had passed
6 since the defendant's conviction; that the state "would be prejudiced in its effort to locate
7 witnesses familiar with the crimes"; and that the victim, then 90 years old, suffered from
8 dementia. *Id.* From those circumstances, we concluded that "the condition of the
9 evidence, worsened by [the] defendant's long flight from the jurisdiction, would limit the
10 state's ability to support a recommendation of upward departure and the resentencing
11 court's ability to exercise the full range of tools at its disposal to impose an appropriate
12 sentence." *Id.*

13 We also found it significant that the legal basis for the defendant's
14 challenges on appeal had developed through a seminal United States Supreme Court case
15 decided *after* he had fled. We noted that, if we permitted the defendant's appeal, he
16 would actually benefit from the fact that he had fled the jurisdiction. *Id.* As a result, we
17 concluded that allowing the defendant's appeal in that case "would not foster respect for
18 the judicial process or promote the administration of justice," and that, "[b]ecause
19 defendant's legal support for his challenge to his sentence is available now only as a
20 consequence of his flight, entertaining those arguments would allow defendant to benefit
21 from flouting the judicial process and leave others undeterred from doing the same." *Id.*

1 As in *Lundahl* and *Ristick*, the former fugitive doctrine is applicable in this
2 case, and we conclude that defendant's fugitive status has significantly interfered with the
3 appellate process, justifying our dismissal of his appeal to the extent he seeks reversal of
4 his convictions and a new trial.³ Here, the 10-year delay between defendant's trial and
5 sentencing was the result of his fleeing from Oregon, which defendant admitted he did to
6 avoid being sentenced. Defendant was discovered in 2006 when he was arrested in
7 California, but he could not be returned to Oregon until after he was tried and sentenced
8 there. Thus, the source of the delay between defendant's trial and sentencing is traceable
9 to defendant's actions.

10 We agree with the state that a new trial would pose significant obstacles in
11 regard to the witnesses it had called in the first trial. Although the state was able to locate
12 the two victims for the sentencing hearing held in 2010,⁴ and presumably would be able
13 to find them again, the state had called a total of 21 witnesses at the original trial. Even if
14 the state could find all of those witnesses--now 13 years later--the testimony of those
15 witnesses has likely been affected by the protracted delay caused by defendant.
16 Additionally, as in *Lundahl*, if a new trial were granted, the jury may react differently to

³ Because we reject defendant's IAD argument, we do not discuss the state's argument that defendant's challenge to his public indecency conviction is not appealable under ORS 138.050.

⁴ Only one of the victims testified at the sentencing hearing in person; the other submitted a letter read into the record by the state. The statements made by the victims at the 2010 sentencing hearing described the affects that defendant's actions had on them as they aged into young women, including the effect of defendant's escape from the criminal justice system on their feelings of insecurity.

1 the testimony of the now older victims than they would have to the testimony of 14-year-
2 olds.⁵ Furthermore, a number of the eyewitnesses called to testify were also 14 years old
3 at the time of trial. We also find merit in the state's argument that arranging the transfer
4 of defendant from California to Oregon to stand trial would require delay and expense to
5 the state that is inequitable considering that defendant's fugitive status caused his
6 absence.

7 Finally, as in *Ristick*, we find it significant that our resolution of one of
8 defendant's challenges to his conviction would be affected--indeed benefited--by case law
9 that has developed since he absconded. In defendant's first assignment of error, he
10 challenges the trial court's admission of evidence of a prior bad act under OEC 404(3). In
11 his brief, defendant acknowledges that his arguments relating to his first assignment of
12 error are borrowed from the defendant's brief in *State v. Pitt*, 236 Or App 657, 237 P3d
13 890 (2010), *rev'd*, 352 Or 566, 293 P3d 1002 (2012), which was on review before the
14 Oregon Supreme Court when defendant's brief was filed in this case. In October 2012,
15 the Supreme Court reversed our decision in *Pitt*, and it adopted the arguments that
16 defendant asserts in this case regarding the preconditions to admissibility of "other acts"

⁵ Indeed, in her letter to the sentencing court, one of the victims, J, explained how her age affected how she understood what had happened to her:

 "If you go back to my statement as a child, you will understand how innocent I was. An officer came to my house and asked me multiple times if [defendant] was erect. I had no idea what he was talking about. To many of you in the court, this may not seem like a big deal, but as a child I felt violated."

1 evidence. *State v. Pitt*, 352 Or 566, 293 P3d 1002 (2012); *see also State v. Hutton*, 258
2 Or App 806, 816-17, 311 P3d 909 (2013) (when a defendant denies the alleged conduct,
3 the unconditional admission of evidence of the defendant's other bad acts is plain error).
4 Absent defendant's flight from Oregon, he would have been sentenced in 2000, and any
5 appeal relating to that judgment would have been governed by the law as it existed at that
6 time. In all likelihood, an appeal at that time would have resulted in a different outcome
7 on defendant's first assignment of error (if counsel had even thought to assert it at the
8 time). Thus, like the defendant in *Ristick*, defendant in this case would "benefit from
9 flouting the judicial process and leave others undeterred from doing the same."

10 Under those circumstances, we conclude that defendant's lengthy escape
11 from justice significantly interfered with the appellate process and forfeits his appeal
12 except for his second assignment of error, in which he contends that he had a right to a
13 speedy sentencing under the IAD, and his fourth assignment of error, in which he asserts
14 a constitutional challenge to his sentence on the first-degree sexual abuse conviction.

15 B. *The IAD and sentencing proceedings*

16 At the outset, we note that defendant's IAD and sentencing assignments
17 were not forfeited by defendant under the former fugitive doctrine because, as to those
18 assignments, we conclude that defendant's former fugitive status does not unduly
19 interfere with the appellate process. That is so given the potential of outright dismissal of
20 the charges should he prevail on his IAD argument, and despite the potential additional
21 cost to the state of resentencing in Oregon. Though we note that in *Ristick* we dismissed

1 a defendant's appeal of his sentencing determinations under the former fugitive doctrine,
2 a remand in that case would have required the sentencing court to conduct an evidentiary
3 hearing to determine enhancement factors and the state to present evidence and witnesses
4 it used at trial years before. In contrast, resolving defendant's sentencing challenge in this
5 case would not require new factual determinations in which the state would have to call
6 witnesses from the 2000 trial.

7 We proceed to the merits of defendant's second assignment of error. "The
8 IAD is a congressionally sanctioned interstate compact among 48 states, the federal
9 government, the District of Columbia, and various United States territories." *State v*
10 *Lewis*, 249 Or App 480, 489, 278 P3d 51, *rev den*, 352 Or 564 (2012). The IAD provides
11 procedures for the transfer of a prisoner in one state for "trial" in another state when that
12 state files a detainer for the prisoner because there is a pending "untried indictment,
13 information or complaint." *See* ORS 135.775, Art III(a); ORS 135.775, Art IV(a). An
14 inmate who is not brought to "trial" within the period provided in Article III or Article IV
15 of the IAD "can have his or her case dismissed 'with prejudice.'" *Lewis*, 249 Or App at
16 489 (quoting ORS 135.775, Art V(c)).

17 In 2010, defendant moved for dismissal of the charges against him,
18 asserting that the IAD applied to his sentencing and that the sentencing was untimely
19 under the IAD. The sentencing court denied defendant's motion by written order. In that
20 order, the court stated that "the length of delay in this matter is significant" but "is mainly
21 due to the actions of defendant" and that "any delay attributable to the State in this matter

1 is reasonable." As to the IAD, the court concluded that defendant had no rights under the
2 IAD to speedy sentencing "because Oregon does not provide for sentencing in absentia
3 on a felony case" and that defendant's attempted request for a speedy disposition of this
4 case while he was incarcerated in California "was ineffective under ORS 135.775
5 because the request was not forwarded to the Jackson County District Attorney."

6 In his second assignment of error, defendant contends that the sentencing
7 court erred in denying his motion to dismiss for lack of a speedy sentencing under the
8 IAD because the IAD applies to sentencing. Whether the IAD's requirement that a
9 defendant be transferred from one state and brought to "trial" in another includes transfer
10 for a sentencing is a question of statutory interpretation and one of first impression in
11 Oregon. That legal question is governed by federal, not state, law. *State v. Burss*, 316 Or
12 1, 4, 848 P2d 596 (1993).

13 Although acknowledging that "the vast majority of jurisdictions" that have
14 considered the issue have concluded that the IAD does not apply to sentencing, defendant
15 primarily relies on *Carchman v. Nash*, 473 US 716, 105 S Ct 3401, 87 L Ed 2d 516
16 (1985), as support for his contrary position that a party state must transfer a prisoner for
17 sentencing under the IAD. That position, however, runs counter to the text of the IAD,
18 and, rather than helping, *Carchman* undercuts defendant's argument.

19 Article I of the IAD sets forth its purpose:

20 "The party states find that charges outstanding against a prisoner,
21 *detainers based on untried indictments, informations or complaints*, and
22 difficulties in securing speedy trial of persons already incarcerated in other
23 jurisdictions, produce uncertainties which obstruct programs of prisoner

1 treatment and rehabilitation. Accordingly, it is the policy of the party states
2 and the purpose of this agreement to encourage the expeditious and orderly
3 disposition of such charges and determination of the proper status of any
4 and all detainees based on untried indictments, informations or complaints.
5 The party states also find that proceedings with reference to such charges
6 and detainees, when emanating from another jurisdiction, cannot properly
7 be had in the absence of cooperative procedures. It is the further purpose of
8 this agreement to provide such cooperative procedures."

9 (Emphasis added.) We conclude that the gist of Article I is that party states agree to
10 procedures to allow transfers of prisoners to secure speedy trials in other party states
11 where there are pending, untried charges.

12 The references to "untried" charging instruments found in Article I, which
13 run through the rest of the IAD, lead us to that conclusion. Specifically, Article II(c) of
14 the IAD defines a "receiving state" as "the state in which trial is to be had on an
15 indictment, information or complaint pursuant to Article III or Article IV of this
16 agreement." Article III(a) provides for a prompt "trial" when, during the prisoner's term
17 of imprisonment in a party state, "there is pending in any other party state any untried
18 indictment, information or complaint" and the prisoner properly requests a "final
19 disposition" pursuant to a detainer. That request for a final disposition operates "as a
20 request for final disposition of all untried indictments, information or complaints." ORS
21 135.775, Art III(d). Similarly, in Article IV(a) of the IAD, an "officer of the jurisdiction
22 in which an untried indictment, information or complaint is pending shall be entitled to"
23 seek temporary custody of a prisoner. And, in Article V(d), the IAD provides that the
24 temporary custody referred to in the IAD "shall be only for the purpose of permitting
25 prosecution on the charge or charges contained in one or more untried indictments,

1 informations or complaints which form the basis of the detainer or detainers or for
2 prosecution on any other charge or charges arising out of the same transaction." Those
3 references, and particularly the quoted text in Article V(d) referring to prosecution on a
4 charge in an untried charging instrument, emphasize that transfers of prisoners under the
5 IAD are reserved for trials on charges contained in untried charging instruments. Thus, a
6 sentencing in a criminal matter when there has already been a trial, as in this case, cannot
7 be a "trial" on an "untried" charge in a charging instrument under the IAD.

8 The reasoning in *Carchman* is consistent with that conclusion. In that case,
9 a prisoner in Pennsylvania brought a habeas corpus proceeding in which he sought
10 dismissal of a probation violation charge in New Jersey due to that state's alleged
11 noncompliance with the speedy-disposition requirement in Article III of the IAD. 473
12 US at 721-22. The Court held that the IAD does not apply to probation revocation
13 proceedings. *Id.* at 734.

14 That holding was based primarily on the Court's examination of the text of
15 the IAD. The Court first noted that "Article III by its terms applies to detainers based on
16 'any untried indictment, information or complaint.'" 473 US at 724. The court observed
17 that an indictment, an information, and a complaint are "documents charging an
18 individual with having committed a criminal offense." *Id.* And, the Court further noted
19 that the term "untried" "would seem to refer to matters that can be brought to full trial"
20 and determined that language in other parts of the IAD supported an interpretation that
21 Article III applies "solely to criminal charges." *Id.* The Court concluded that

1 "[a] probation-violation charge, which does not accuse an individual with
2 having committed a criminal offense in the sense of initiating a prosecution,
3 thus does not come within the terms of [Article] III. Although the
4 probation-violation charge might be based on the commission of a criminal
5 offense, it does not result in the probationer's being 'prosecuted' or 'brought
6 to trial' for that offense. Indeed, in the context of the [IAD], the probation-
7 violation charge generally will be based on a criminal offense for which the
8 probationer already was tried and convicted and is serving his sentence in
9 the sending State.

10 "Nor, of course, will the probationer be 'prosecuted' or 'brought to
11 trial' on the criminal offense for which he initially was sentenced to
12 probation, since he already will have been tried and convicted for that
13 offense."

14 473 US at 725. Thus, the Supreme Court concluded from its textual analysis that the IAD
15 reaches only criminal charges in untried indictments, informations, or complaints and
16 rejected the notion that the prisoner could be brought to "trial" because he already had
17 been tried for the criminal offense leading to his sentence of probation and would
18 generally be tried, convicted, and incarcerated in the sending state for the crimes that also
19 form the basis for the probation violation charge. The Court also examined legislative
20 history, which did not persuade it "to depart from what appears to be the plain language"
21 of the IAD. *Id.* at 726. *Carchman*, therefore, quite strongly supports the state's position
22 that a sentencing is not covered by the IAD.

23 As noted earlier, the vast majority of courts that have examined this exact
24 issue agree that the IAD does not apply to a sentencing. Some are federal courts, *see*,
25 *e.g.*, *United States v. Coffman*, 905 F2d 330 (10th Cir 1990), and others are state courts,
26 *see, e.g.*, *State v. Jimenez*, 283 Neb 95, 808 NW2d 352 (2012); *State v. Barefield*, 110
27 Wash 2d 728, 756 P2d 731 (1988). In sum, we are in agreement with those other courts

1 that have construed the language of the IAD and concluded that the IAD was not
2 intended to apply to the transfer of a prisoner for a sentencing in a matter in which he
3 already was convicted. Accordingly, we affirm the denial of defendant's motion to
4 dismiss.

5 We now turn to defendant's fourth assignment of error, in which he
6 contends that the trial court erred by imposing an unconstitutionally disproportionate 75-
7 month mandatory Measure 11 sentence on the first-degree sexual abuse count. *See Or*
8 *Const Art I, § 16* (providing, in part, that "all penalties shall be proportioned to the
9 offense"). Our analysis is guided by *State v. Rodriguez/Buck*, 347 Or 46, 217 P3d 659
10 (2009). In those consolidated cases, the Supreme Court held that it had applied three
11 nonexclusive factors to determine whether the sentences of the defendants were so
12 disproportionate as to "shock the moral sense of all reasonable [people] as to what is right
13 and proper under the circumstances." *Id.* at 57-58. Those factors were "(1) a comparison
14 of the severity of the penalty and the gravity of the crime; (2) a comparison of the
15 penalties imposed for other, related crimes; and (3) the criminal history of the defendant."
16 *Id.* at 58 (footnote omitted). As for the last factor, the court noted in both cases before it
17 that the defendants had no prior convictions. *Id.* at 77-78.

18 Defendant focuses on those three factors in *Rodriguez/Buck*. First, he
19 argues that his conduct is "slightly more serious" than the conduct at issue in
20 *Rodriguez/Buck*, yet as in those cases, his conduct involved touching over clothing that is
21 far less severe than other conduct that would be punished by the same Measure 11

1 sentence. Second, he notes that he would have received the same sentence for related and
2 far more serious crimes, such as unlawful sexual penetration in the second degree, ORS
3 163.408(1) and ORS 137.700(2)(a)(O), and rape in the second degree, ORS 163.365(1)
4 and ORS 137.700(2)(a)(K). Third, as to his criminal history, defendant acknowledges
5 that he pleaded guilty to public indecency and had prior convictions in California for the
6 offense of "lewd act upon a child."

7 The state argues that defendant's case is distinguishable from
8 *Rodriguez/Buck* and that the sentencing court did not err in imposing the 75-month
9 mandatory sentence under Measure 11. The state focuses on the third factor and notes
10 that the offenders in *Rodriguez/Buck* had no prior record of offenses committed against
11 minors, did not commit a second sex offense soon after the crime, did not flee the state,
12 and did not commit new sex offenses on abscond status. Defendant, it notes, not only
13 engaged in the crimes at issue in this case, but also was convicted of harassment in 1992
14 when he grabbed the buttocks of a 16-year-old girl in a store. Defendant's California
15 convictions involved his sexual abuse of a four-year-old in his care by fondling her
16 vaginal area. Defendant was also charged in California with many counts relating to the
17 child pornography found on his computer. The state argues that defendant has victimized
18 younger and younger children, and the sentencing court properly found that defendant
19 posed a continued danger and that a lengthy sentence was an appropriate means of
20 protecting the public.

21 We agree with the state that the sentence imposed on the sexual abuse

1 conviction did not violate Article I, section 16, of the Oregon Constitution. Defendant's
2 forceful conduct in grabbing the victim's breast on the street was more serious than the
3 conduct at issue in *Rodriguez/Buck*, and his criminal history is markedly different from
4 those of the defendants in *Rodriguez/Buck*. The trial court did not err in imposing the
5 sentence.

6 Appeal dismissed in part; otherwise affirmed.