

# SUPREME COURT

## Media Release



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Cases decided August 8, 2024.

*Inquiry Concerning a Judge, Re: The Honorable Bethany P. Flint (SC S071223)*

On review of the Commission on Judicial Fitness and Disability Stipulation to Public Censure. Respondent is censured. Opinion of the Court Per Curiam. Flynn, C.J., and DeHoog, J., did not participate in the consideration or decision of this case.

Today, the Oregon Supreme Court approved a stipulation to public censure, and imposed a censure, on the Honorable Bethany P. Flint (respondent), who is a judge on the Deschutes County Circuit Court.

Respondent and the Commission on Judicial Fitness and Disability stipulated to facts involving two separate incidents that both had occurred in Deschutes County. In the first incident, respondent had spoken to a friend about how to file for a restraining order under the Family Abuse Protection Act. The friend later filed for an order, and appeared before a different judge and obtained the order, but then recounted to respondent that she felt that the other judge had treated her poorly. The other judge later initiated a general conversation with respondent about the matter, not naming the friend, but respondent realized that the judge was referring to the friend and vouched for the friend's credibility; disclosed that observations that she had made in the friend's home were consistent with the friend's hearing testimony; and told the judge that the friend had felt ill-treated during her hearing. Thereafter, respondent complained to the presiding judge about the other judge's tone during the hearing and also wrote an opinion letter, in a different restraining order case, about the same judge.

In the second incident, which involved a different friend of respondent's, respondent received a call that the friend's husband had been found deceased, likely as a homicide victim, and that police were going to question her friend. Respondent drove to her friend's residence, asked the friend's children if they had been interviewed, and gave them advice about any future request for an interview. She then advised her friend not to speak with law enforcement without an attorney; intervened in a conversation with law enforcement; asked her friend if she wanted a lawyer, to which the friend answered affirmatively; and then told law enforcement that the friend needed to have a lawyer with

her and ended the questioning. Respondent later told the presiding judge that she had had contact with law enforcement in the homicide investigation and would need to be conflicted off of any related case.

The parties' stipulation also included an admission by respondent that the described misconduct had violated multiple rules of the Code of Judicial Conduct. It further stated that the parties agreed that the appropriate sanction would be a censure imposed by the Supreme Court, to which they consented.

In a unanimous, per curiam opinion, the Supreme Court concluded that, at a minimum, respondent had violated Rule 2.1(A), which requires a judge to observe high standards of conduct so that the integrity, impartiality, and independence of the judiciary and access to justice are preserved, and to act at all times in a manner that promotes public confidence in the judiciary and the judicial system. The court imposed a censure.

*State of Oregon v. Stephanie Andrea Ortiz* (CC 20CR23850) (CA A175738) (SC S070216)

On review from the Court of Appeals in an appeal from the Josephine County Circuit Court, Brandon S. Thueson, Judge. 325 Or App 134, 528 P3d 795 (2023). The decision of the Court of Appeals is reversed, and the case is remanded to the Court of Appeals for further proceedings. Opinion of the Court by Justice Stephen K. Bushong. Justice Rebecca A. Duncan concurred and filed an opinion. Justice Bronson D. James also concurred and filed an opinion, in which Justice Aruna A. Masih joined, and in which Justice Rebecca A. Duncan joined through "Part I."

Today, the Oregon Supreme Court held that the Court of Appeals had abused its discretion in reversing a defendant's conviction based solely on that court's determination that the unpreserved evidentiary error at issue was not harmless. That determination, the Court explained, was necessary for reversal, but it was not a sufficient basis for reversing based on an unpreserved "plain" error. Rather, reversal based on an unpreserved plain error is a discretionary decision that requires consideration of several relevant factors, as established in an existing Supreme Court case, *Ailes v. Portland Meadows, Inc.*, 312 Or 376, 381-82, 823 P2d 956 (1991). The Court remanded the case to the Court of Appeals to consider those factors.

Defendant had been charged with driving under the influence of intoxicants. At trial, the arresting officer described two field sobriety tests that she had administered to defendant -- the walk-and-turn test and the one-leg stand test -- as "standardized" tests that are "designed to determine impairment" and are supported by "studies conducted to prove their validity." Defendant did not object to that testimony, and a jury found her guilty. Defendant appealed, and a divided Court of Appeals

reversed, concluding first that allowing that officer's testimony had constituted plain error because it was scientific evidence received without an adequate foundation. The court then exercised its discretion to reverse the conviction based on that error, concluding that it had not been harmless.

In a majority opinion written by Justice Stephen K. Bushong, the Supreme Court reversed and remanded the case to the Court of Appeals for further proceedings. The Court assumed without deciding that the admission of the arresting officer's testimony without an adequate foundation constituted a plain error, concluding that the Court of Appeals had abused its discretion in reversing the conviction based solely on its determination that the error was not harmless.

In reaching that conclusion, the Court explained that, if the Court of Appeals exercises its discretion to reverse based on an unpreserved "plain" error, it must articulate its reason for doing so. The sole reason articulated in this case -- that the error was not harmless -- was not, on its own, sufficient grounds for reversal on plain-error review. Rather, the Court clarified that, to reverse based on an unpreserved, plain error, the Court of Appeals must -- in addition to determining that the error was not harmless -- consider the factors that are relevant to the court's exercise of discretion in accordance with the *Ailes* analytical framework. Accordingly, the Court reversed and remanded to the Court of Appeals, explaining that, on remand, the Court of Appeals must consider the relevant *Ailes* factors -- including the nature and gravity of the error, the purposes of the preservation requirement, and whether reversal would satisfy the ends of justice -- to decide whether to exercise its discretion to reverse and order a new trial based on the unpreserved evidentiary error that it had identified.

Justice Bronson D. James filed a concurring opinion, in which Justice Aruna A. Masih joined, and in which Justice Rebecca A. Duncan joined through "Part I." Justice James agreed with the majority's conclusion that the Court of Appeals had erred in articulating reasons sufficient to support its exercise of discretion under the plain error doctrine, but disagreed with the majority's decision to assume, without deciding, that the claimed error in this case qualified under the first prong of *Ailes* as plain and obvious error apparent on the record. Justice James then explained how Oregon courts have an enhanced gatekeeping role with respect to scientific evidence that requires trial courts to ensure, even in the absence of an objection by the parties, that an adequate foundation exists in the record to establish the reliability that evidence before it can be admitted at trial. Finally, Justice James concluded that, when faced with unpreserved evidentiary challenges on appeal, whether the evidence was scientific should therefore properly be considered by an appellate court as one, among many, factors in exercising its discretion at the second step of *Ailes*.

In a second concurring opinion, Justice Rebecca A. Duncan joined Justice James's concurrence through "Part I."