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IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review v. MICHAEL PAUL LYKINS, Defendant-Appellant, Petitioner on Review,	Washington County Circuit Court Case Nos. C100530CR, D101103M CA A146498 (Control), A146499 SC S061997

APPELLANT'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 Washington County
Honorable Steven L. Price, Judge

Opinion Filed: November 20, 2013
Author of Opinion: Ortega, P.J.
Before Ortega, Presiding Judge, and Haselton, Chief Judge, and Sercombe, Judge.

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PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

This case involves two issues of statutory interpretation. First, what is the definition of "victim" for purposes of the rules governing the imposition of departure sentences? And second, who is the victim of the crime of tampering with a witness, ORS 162.285, the State of Oregon or the witness?

Questions Presented and Proposed Rules of Law

First Question Presented. What is the definition of "victim" for purposes of the rules governing the imposition of departure sentences?

First Proposed Rule of Law. For purposes of the rules governing the imposition of departure sentences, the term "victim" refers to the victim within the meaning of the substantive statute that defines the relevant crime.

Second Question Presented. Is the victim of the crime of tampering with a witness, ORS 162.285, the State of Oregon or the witness?

Second Proposed Rule of Law. The state is the victim of the crime of tampering with a witness. The legislature intended ORS 162.285 to protect the administration of the court (*i.e.*, the State of Oregon) from outside interference by prosecuting those who induced or attempted to induce others to give false testimony or fail to appear when summoned.

Summary of Historical and Procedural Facts

Historical Facts

On April 8, 2007, defendant assaulted after a domestic dispute. (Tr 188, 331). Portland police officers arrested defendant. (Tr 334).

On April 16, 2007, defendant was released from jail and went to apartment early the next morning. (Tr 162, 190). Defendant punched kicked her, and locked himself in the bathroom. (Tr 191). The police received conflicting reports about what had happened, so they did not arrest defendant. (Tr 160-61).

Defendant was in and out of jail several times from that April 17, 2007, incident until February 3, 2010. (Tr 172-77). Defendant stayed with most nights after he was released from jail on February 3, 2010. (Tr 283). On February 19, 2010, told defendant that he could not stay with her any longer. (Tr 200, 322). She told defendant that she was going to Los Angeles, grabbed her suitcase, and they both exited the apartment at the same time. (Tr 200-01). Defendant did not have a key, and did not intend for him to enter the apartment while she was gone. (Tr 201).

When returned to the apartment the following Monday, she noticed that the screen was gone, the door was ajar, and she saw defendant come out of the bedroom. (Tr 204). She called the police. (Tr 204).

The police arrested defendant, and defendant called twice the following day from jail. (Tr 221). In the first call, asked defendant why he broke into her house. (Tr 223). Defendant told her that he was facing five to seven years for burglary and apologized to her. (Tr 223-24). Defendant told her that she needed to tell the state that he had been living in her apartment since February 2nd, that he had moved his property there in October, and that he had permission to be there. (Tr 224). He offered to help pay her rent. (Tr 227).

said that is not what really happened. (Tr 228). told defendant that she would tell the state that he did not rob her but that he did break into her apartment. (Tr 228). Defendant told her that he had left the sliding glass door open when she left. (Tr 229). said that she had checked and that was not true. (Tr 229). Defendant told that she had told him that he could stay there until March. (Tr 229). told him that he was making stuff up. (Tr 229).

Ten minutes later, defendant called a second time from jail. (Tr 231). Defendant told her that the police were saying that he broke into her apartment. (Tr 232). Defendant told to tell them that she might have left the screen door open and that she might have said that it was okay for him to stay there. (Tr 232). Defendant told her that he wanted them "to be together on this * * * so that I can tell them something, you know, to get me out of

trouble * * *." (Tr 234). Defendant told that he was going to tell the police that he was staying at her place since February 2nd and that he had all of his stuff there and that she had told him that he could unlock the back porch if he had to come in. (Tr 240).

said that she was not going to tell the state that she told him that he could come in, she was not going to lie, and told defendant, "I'm not a fucking crazy person." (Tr 240). Defendant responded, "Well, you are, even after taking your shit, you stopped taking your Seroquel last week, --[.]" (Tr 240).[1]

Five days later, defendant called again from jail. (Tr 246). At the start of the conversation, defendant asked if had been taking her Seroquel. (Tr 247). responded that she always takes it. (Tr 247). Defendant replied, "Okay, good. Well, you told me that you were going to stop taking it, I was wondering if that's, you know, why you started freaking out." (Tr 247). said she "freaked out because you were in my house, when I locked the door and left." (Tr 247).

Defendant asked if she was going to help him out. (Tr 247-48). She said yes, she was coming tomorrow and that she had been served a subpoena. (Tr 248). She said that she was going to say that he did not steal anything and that

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[1] testified at trial that Seroquel is an "antipsychotic medication." (Tr 286).

she got confused. (Tr 248). She told defendant that she was going to say that he could stay at her apartment for a few days and that she had left for a hotel because he was not leaving. (Tr 251). told defendant that she did not want to see him get 48 months for breaking in. (Tr 252).

Procedural Facts

A jury found defendant guilty of two counts of tampering with a witness and one count each of criminal trespass in the first degree and criminal mischief in the second degree.

At a bench trial on sentence enhancement facts, the state asked the court to apply the "vulnerable victim" aggravating factor under OAR 213-008-0002(1)(b)(B) and impose a departure sentence for the tampering with a witness conviction. The state argued that was the victim and that in the telephone calls defendant mentioned that he knew that had physical disabilities and limitations or mental health issues. (Tr 424). The state argued:

> "[T]he defendant was clearly in a position that he knew that [was of a both mental and physical, fragile, or limited state during this time period and took advantage of that, when he committed these particular crimes against her. But in particular note of the Tampering with a Witness and using those comments when - - and in conjunction with trying to coerce her into doing the crime, which he was - - had been found guilty of committing."

(Tr 424).

Defense counsel argued that the state, not was the victim for purposes of tampering with a witness, stating, "Ms. is certainly the

victim of the Criminal Trespass and the Criminal Mischief, but not of the Tampering with the Witness." (Tr 430). Defense counsel explained that "the thrust of the legislation is to prevent interference in the judicial process, interference in getting truthful testimony from witnesses, and getting compliance with the subpoena process in court orders. Not in protecting witnesses from crimes by defendants." (Tr 431).

The state replied by requesting that the court find that was a victim of the crime of tampering with a witness. (Tr 437).

In an opinion letter issued after the hearing, the trial court determined that the vulnerable victim enhancement factor was applicable, and used it as the only factor to impose a 48-month durational departure sentence on the merged tampering with a witness conviction. *See* ER-1-2 (Letter Opinion). The trial court concluded that both the state and were victims of the crime and that they were both particularly vulnerable victims.[2]

On appeal, defendant argued that the trial court erred in applying the vulnerable victim sentencing enhancement factor to his tampering with a

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[2] The state never argued that the state was a vulnerable victim. Its entire argument that OAR 213-008-0002(1)(b)(B) applied to defendant's sentence was based on the premise that was a particularly vulnerable victim. The trial court came up with the theory that the state was a particularly vulnerable victim on its own, after arguments. Therefore, defendant never had the opportunity to object to that theory prior to the trial court issuing its decision.

witness conviction. He argued that the state, not was the victim for purposes of the vulnerable victim aggravating factor, that the state could not be a particularly vulnerable victim for purposes of the sentencing guidelines, and that even if the state could be considered a particularly vulnerable victim, the "vulnerability" that the trial court identified with respect to the state was not a vulnerability at all and played no role in the commission of the offense.

The Court of Appeals' Opinion

In a written opinion, the Court of Appeals disagreed with defendant. *State v. Lykins*, 259 Or App 475, 14 P3d 704 (2013). In so doing, the Court of Appeals relied on *State v. Teixeira*, 259 Or App 184, 313 P3d 351 (2013). *Teixeira* interpreted the word "victim" for purposes of the multiple victims enhancement factor, OAR 213-008-0002(1)(b)(G). In that case, the defendant made the same argument that defendant makes here, that in the sentencing guidelines system, the term "victim" refers to the victim within the meaning of the substantive statute that defines the relevant crime. The Court of Appeals disagreed and crafted its own definition of "victim" for purposes of OAR 213-008-0002(1)(b)(G) based on a *PGE/Gaines* analysis of that particular rule.[3]

After reviewing the text, context, and legislative history of OAR 213-008-0002(1)(b)(G), the Court of Appeals determined that the definition of

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[3] *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993); *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009).

"victim" proffered by the defendant was too narrow, and concluded that, for purposes of OAR 213-008-0002(1)(b)(G), "victim" means "a person who is directly, immediately, and exclusively injured by the commission of the crime" "including those injuries that are an element of the offense." *Teixeira*, 259 Or App at 193, 199.

In *Lykins*, the Court of Appeals decided without explanation that the *Teixeira* court's interpretation of "victim" for purposes of the multiple victims enhancement factor, OAR 213-008-0002(1)(b)(G), should also apply to the vulnerable victim enhancement factor, OAR 213-008-0002(1)(b)(B). 259 Or App at 479. The Court of Appeals then applied that interpretation to defendant's case, determined that was a victim for purposes of the vulnerable victim enhancement factor, OAR 213-008-0002(1)(b)(B), and concluded that the evidence supported the trial court's conclusion that was a particularly vulnerable victim. *Id*. at 480-81.

Summary of Argument

This case involves two issues of statutory interpretation. First, what is the definition of "victim" for purposes of the rules governing the imposition of departure sentences? And second, who is the victim of the crime of tampering with a witness, ORS 162.285, the State of Oregon or the witness?

Although the drafters of the sentencing guidelines defined many terms, they did not define the term "victim." The definition of "victim" therefore must be found elsewhere. Because "victim" is a legal term of art, dictionary definitions do not resolve the issue. Absent the drafters explicitly defining the term "victim," the most reasonable place to look is the substantive statute defining the relevant crime. And when viewed in the context of the principles underlying the sentencing guidelines, and the drafters' general approach to constructing the guidelines, the text, context, and legislative history reveal that the drafters intended the term "victim" to be the victim for purposes of the substantive criminal statute the defines the relevant crime. The drafters did not intend to implicitly expand the definition of "victim" beyond the scope of the substantive offense.

First, a definition of victim that corresponds with the victim for purposes of the substantive criminal statute defining the relevant offense is consistent with the principles underlying the sentencing guidelines. The legislature intended the sentencing guidelines to establish a felony sentencing system that conserved correctional resources, achieved truth-in-sentencing, and fostered sentencing consistency. Consistent with those purposes, the drafters constructed a system of presumptive sentences determined by crime severity and an offender's criminal history. Also consistent with those purposes, they intended that departure sentences rarely be imposed.

Contrary to the drafters' intent, departure sentences would become much more common if "victim" was interpreted more broadly than what is contemplated by the substantive criminal statute. And in fact, the legislative history shows that the drafters considered and chose not to adopt an aggravating factor that would have authorized a departure sentence based on harm caused to persons associated with the victim, revealing that the drafters did not intend "victim" to be defined broadly to include those proximately harmed by defendant's criminal conduct.

Second, a definition of victim that corresponds with the victim for purposes of the substantive criminal statute defining the relevant offense is consistent with the drafters' approach to constructing the sentencing guidelines. The drafters independently rated crime severity by reference to the societal interests threatened or harmed by the substantive statute defining the criminal offense. And because the drafters explicitly referenced the substantive criminal statute to determine the type of harm or threat of harm produced by an offender's criminal conduct, it would also make sense for the drafters to reference the substantive criminal statute when determining *who was harmed*, *i.e.*, the victim, for sentencing purposes. Absent evidence that the drafters had another specific definition in mind, this court should follow the drafters' lead and look to the substantive criminal statute to determine who or what is the

victim for purposes of the rules governing the imposition of departure sentences.

If the legislature intended the victim for purposes of the rules governing the imposition of departure sentences to be the victim for purposes of the substantive criminal statute defining the offense, this court must determine who the victim is for purposes of the crime of tampering with a witness, ORS 162.285.

The State of Oregon is the victim for purposes of the crime of tampering with a witness, not the witness. Although the text of the witness tampering statute does not clearly indicate who qualifies as the victim, the context and legislative history of the statute suggests that the legislature intended the statute to protect the administration of the court (*i.e.*, the State of Oregon) from outside interference by prosecuting those who induced or attempted to induce others to give false testimony or fail to appear when summoned. The legislature placed the statute among other statutes prohibiting the obstruction of governmental administration and the legislative committee viewed the statute as furthering that purpose. In discussing the crime of tampering with a witness, the committee did not voice a concern about protecting the witnesses from any collateral consequences that they might personally suffer as a result of the tampering. Those concerns could be captured in a prosecution for coercion or other person crimes.

Finally, if this court agrees that the State of Oregon is the victim, it must determine whether the trial court erred in using the vulnerable victim aggravating factor to enhance defendant's sentence on the basis that the state was a particularly vulnerable victim. The trial court erred for three reasons. First, the State of Oregon cannot be a particularly vulnerable victim for purposes of OAR 213-008-002(1)(b)(B). The examples cited in the rule as "vulnerabilities," such as "extreme youth, age, disability or ill health of the victim," are all examples of inherent physical or mental qualities of a human being. That suggests that the drafters did not intend the rule to extend to non-human "persons" such as the State of Oregon.

Second, even if the State of Oregon could be considered a particularly vulnerable victim for purposes of the rule, the "particular vulnerability" that the trial court identified was not a "vulnerability." The trial court concluded that the State of Oregon was particularly vulnerable because if defendant had been successful in convincing to testify falsely, the prosecution would have had a difficult time succeeding. However, that is not a unique characteristic attributable to the State of Oregon that made it more defenseless to defendant's attempts to induce Instead it was a potential consequence that could have resulted if testified falsely.

Finally, even if the trial court correctly identified a "vulnerability" in the prosecution's relative ability to obtain a conviction, that "vulnerability" played

no role in the commission of the offense. Here, defendant was convicted of attempting to induce to testify falsely. The relative strength of the prosecution's case did not in any way render the State of Oregon more defenseless to defendant's attempts to induce to testify falsely. It was simply a circumstance that could have contributed to additional harm if defendant had succeeded in his attempts.

Argument

I. For purposes of the rules governing the imposition of departure sentences, the term "victim" refers to the victim within the meaning of the substantive statute that defines the relevant crime of conviction.

In 1987, the Oregon Legislative Assembly directed the Oregon Criminal Justice Council ("council") to develop a set of felony sentencing guidelines. *Oregon Sentencing Guidelines Implementation Manual* 3 (citing Or Laws 1987, ch 619). Those proposed guidelines were delivered to the State Sentencing Guidelines Board ("board") in 1988. *Id*. After making some revisions, the board presented the guidelines to the Oregon Legislative Assembly for approval. *Id*. In 1989, the Assembly expressly approved the guidelines. Or Laws 1989, ch 790, § 87 ("The Sixty-fifth Legislative Assembly approves the sentencing guidelines as developed by the State Sentencing Guidelines Board * * *."). Because the guidelines were expressly approved by the Oregon Legislative Assembly and have the force of statutory law, this court must

analyze the text, context, and legislative history of the guidelines to determine what "victim" means for purposes of the rules governing the imposition of departure sentences. *State v. Langdon*, 330 Or 72, 74, 999 P2d 1127 (2000); *PGE*, 317 Or 606; *Gaines*, 346 Or 160.

A. Text and Context

The specific aggravating factor at issue in this case is OAR 213-008-0002(1)(b)(B), which states: "The offender knew or had reason to know of the victim's particular vulnerability, such as the extreme youth, age, disability or ill health of victim, which increased the harm or threat of harm caused by the criminal conduct."

The drafters of the sentencing guidelines defined many terms, but they did not define the term "victim." *See* OAR 213-003-0001 (Definitions). The definition of "victim" therefore must be found elsewhere. Normally this court would look to the dictionary for the ordinary meaning of an undefined term; however, the term "victim" is a legal term of art that depends on the context in which it is being used. For example, compare the broad definitions of "victim" set forth in the statute defining "victim" for purposes of delineating the rights of

victims in criminal proceedings, ORS 131.007[4], and the statute defining "victim" for purposes of restitution, ORS 137.103(4)[5], with the more specific meaning of "victim" intended in the statute governing the merger of convictions, ORS 161.067(2). *See State v. Glaspey*, 337 Or 558, 563, 100 P3d 730 (2004) (holding that "victim" for purposes of ORS 161.067(2) is whoever

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[4] ORS 131.007 states:

> "As used in ORS 40.385, 135.230, 147.417, 147.419 and 147.421 and in ORS chapters 136, 137 and 144, except as otherwise specifically provided or unless the context requires otherwise, 'victim' means the person or persons who have suffered financial, social, psychological or physical harm as a result of a crime and includes, in the case of a homicide or abuse of corpse in any degree, a member of the immediate family of the decedent and, in the case of a minor victim, the legal guardian of the minor. In no event shall the criminal defendant be considered a victim."

[5] ORS 137.103(4) states:

> "(4) 'Victim' means:
>
> "(a) The person against whom the defendant committed the criminal offense, if the court determines that the person has suffered economic damages as a result of the offense.
>
> "(b) Any person not described in paragraph (a) of this subsection whom the court determines has suffered economic damages as a result of the defendant's criminal activities.
>
> "(c) The Criminal Injuries Compensation Account, if it has expended moneys on behalf of a victim described in paragraph (a) of this subsection.
>
> "(d) An insurance carrier, if it has expended moneys on behalf of a victim described in paragraph (a) of this subsection."

or whatever is the victim within the meaning of the substantive statute that defines the offense).[6] The dictionary definitions of "victim" therefore do not resolve what the drafters intended "victim" to mean for purposes of the rules governing the imposition of departure sentences.[7] *See Tharp v. PSRB*, 338 Or 413, 423, 110 P3d 103 (2005) (terms of art are not given their plain, natural, and ordinary meaning).

Absent the drafters explicitly defining the term "victim," the most reasonable place to look is the substantive statute defining the relevant crime being sentenced. And there are textual and contextual clues that the drafters intended "victim" to mean the victim contemplated by the substantive criminal

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[6] See also the broad definition of "victim" for purposes of the constitutional provisions guaranteeing the rights of victims in criminal proceedings. Or Const, Art I, § 42(6)(c) ("'Victim' means any person determined by the prosecuting attorney or the court to have suffered direct financial, psychological or physical harm as a result of a crime and, in the case of a victim who is a minor, the legal guardian of the minor.").

[7] Webster's defines "victim" as:

> "**1 :** a living being sacrificed to some deity or in the performance of a religious rite **2 :** someone put to death, tortured, or mulcted by another **:** a person subjected to oppression, deprivation, or suffering * * * **3 :** someone who suffers death, loss, or injury in an undertaking of his own * * * **4 :** someone tricked, duped, or subjected to hardship : someone badly used or taken advantage of * * *."

Webster's Third New Int'l Dictionary 2550 (unabridged ed 2002). Black's defines "victim" as: "A person harmed by a crime, tort, or other wrong." *Black's Law Dictionary* 1703 (9th ed 2009).

statute. First, with the exception of the "multiple victims" enhancement factor, all of the enumerated departure factors use the term "victim," not "victims," suggesting that the drafters intended that there would be only one victim per sentence imposed.[8] Those factors include:

- OAR 213-008-0002(1)(a)(A) ("The *victim* was an aggressor or participant in the criminal conduct associated with the crime of conviction")

- OAR 213-008-0002(1)(a)(D) ("The offense was principally accomplished by another and the defendant exhibited extreme caution or concern for the *victim*")

- OAR 213-008-0002(1)(b)(A) ("Deliberate cruelty to the *victim*");

- OAR 213-008-0002(1)(b)(B) ("The offender knew or had reason to know of the *victim's* particular vulnerability, such as the extreme youth, age, disability or ill health of *victim*, which increased the harm or threat of harm caused by the criminal conduct")

- OAR 213-008-0002(1)(b)(C) ("Threat of or actual violence toward a witness or *victim*")

- OAR 213-008-0002(1)(b)(G) ("The offense involved multiple *victims* or incidents")

- OAR 213-008-0002(1)(b)(I) ("The offense resulted in a permanent injury to the *victim*")

- OAR 213-008-0002(1)(b)(K) ("The offense was motivated entirely or in part by the race, color, religion, ethnicity, national origin or sexual orientation of the *victim*")

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[8] As will be explained below, the drafters understood "multiple victims" to refer to victims of separate crimes committed by the offender in a continuous and uninterrupted course of conduct.

(Emphasis added).[9]

Second, most of the rules, including the one at issue here, use the definite article "the" in referring to "*the* victim." The drafters' use of the definite article "the" instead of the indefinite article "a" suggests an intention to specify a single victim per crime sentenced. *See Osborn v. PSRB*, 325 Or 135, 142-43 n 7, 934 P2d 391 (1997) (discussing the use of the definite article "the").

Third, OAR 213-008-0002(1)(b)(C) provides for a departure sentence in the event that there was a "[t]hreat of or actual violence toward *a witness or victim*." (Emphasis added). That factor is intended to be used "when the offender seeks to avoid prosecution by threatening or harming *a witness or the victim*." *Oregon Sentencing Guidelines Implementation Manual* 130 (1989) (emphasis added).

That rule and its commentary distinguish between a witness and *the* victim. Under the broad definition of "victim" advanced by the state previously on appeal, the "witness" cited in the rule would already be considered a victim because that witness would have suffered harm as a result of a crime. Therefore, by distinguishing between a "witness" and "*the* victim,"

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[9] There is nothing in the text of the rules that shows that the drafters intended the meaning of "victim" to vary from rule to rule. Therefore, this court should interpret "victim" as having the same meaning for each of those rules. *See Tharp*, 338 Or at 422 ("When the legislature uses the identical phrase in related statutory provisions that were enacted as part of the same law, we interpret the phrase to have the same meaning in both sections.").

the drafters must have meant "victim" to mean something narrower than anyone or anything that has suffered harm as a result of the crime.

B. Broader Context and Legislative History

1. A definition of victim that corresponds with the victim for purposes of the substantive criminal statute defining the relevant offense is consistent with the principles of sentencing consistency and conservation of correctional resources.

The rules setting forth the principles behind the sentencing guidelines provide important context to what the drafters meant by "victim" for purposes of the rules governing the imposition of departure sentences. Those rules and their corresponding commentary reveal that a definition of "victim" that corresponds with the victim for purposes of the substantive statute defining an offender's crime of conviction is consistent with the purposes and principles underlying the sentencing guidelines. Conversely, a broader definition of "victim" is inconsistent with those principles.

The sentencing guidelines contain a statement of purposes and principles. The basic principles that underlie the guidelines include conservation of correctional resources, truth-in-sentencing, and consistency in sentencing. *See* OAR 213-002-0001; App-1-2; *see also, Oregon Sentencing Guidelines Implementation Manual* 6-7.

To achieve consistency in sentencing and the conservation of correctional resources the drafters intended departure sentences to be imposed rarely and

only in unusual cases. And to ensure that departure sentences would be imposed rarely, the drafters authorized departure sentences only when there are "substantial and compelling reasons for the departure." OAR 213-002-0001. The drafters noted that the rule authorizing departure sentences "introduces the authority of sentencing judges to depart from the presumptive guidelines sentence in *unusual* cases" involving "*unusual* facts[.]" *Oregon Sentencing Guidelines Implementation Manual* 123, 125 (emphasis added).

The drafters intended that under the guidelines system, trial courts would impose departure sentences no more than ten percent of the time:

> "The experience in Minnesota has been that departures have ranged from *5% to 8%* over the past eight years. Minnesota judges and practitioners agree that departures provide an essential mechanism for judges to deal with cases that do not fit into the presumptive sentence established for the crime and the criminal history in *a small percentage of the cases*. *The consensus of experienced practitioners in Minnesota is that ten percent should be the upper limit; otherwise the predictability of the system is jeopardized*."

Oregon Felony Sentencing Guidelines and Commentary, Discussion Draft No. 6, August 2, 1988, at 9-10 (emphasis added); App-3-4; *see also*, Minutes, Oregon Criminal Justice Council, October 10, 1988, 6 ("Based on a review of the departure experience in Minnesota and Washington, the model assumes that 10% of offenders sentenced to prison will receive a departure sentence of 200% of the presumptive sentence. * * * The model also assumes that 7.5% of all offenders will receive a sentence disposition other than the presumptive

sentence"); App-5-6; *see also*, Tape Recording, House Committee on Judiciary, Subcommittee on Crime and Corrections, SB 1073, June 19, 1989, Tape 98, Side B (statement of Kathleen Bogan, Executive Director Oregon Criminal Justice Council, reiterating the ten percent upper limit goal).

The legislative history of the aggravating and mitigating factors also reveal that the drafters intended "victim" to be defined narrowly and departure sentences to be imposed rarely. For example, on September 17, 1988, the council drafted Working Paper 4 which, together with some attachments, addressed departures from presumptive sentences. Working Paper 4 and Attachments, Oregon Criminal Justice Council, September 17, 1988; App-7-22. In one attachment to that paper, the council compiled aggravating and mitigating factors from the Minnesota and Washington sentencing guidelines, as well as the Oregon Parole Matrix. One of those factors included what the council referred to as the "SPECIAL VICTIM VULNERABILITY" factor, which is the factor at issue in this case. It listed three examples, from Minnesota, Washington, and the Oregon parole matrix:

> "Minnesota: The victim was particularly vulnerable due to age, infirmity, or reduced physical or mental capacity, which was known or should have been known to the offender.
>
> "Washington: The defendant knew or should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to extreme youth, advanced age, disability, or ill health.

> "Parole Matrix: Knew or had reason to know the victims were particularly vulnerable (i.e., aged handicapped, very young)."

Aggravating and Mitigating Factors & Departures from the Guidelines, Attachment to Working Paper 4, Oregon Criminal Justice Council, September 17, 1988, 3; App-14. Importantly, the Oregon parole matrix example refers to "victims" while the Washington and Minnesota examples refer to "the victim." The drafters ultimately chose to adopt a version of the factor that used "the victim," suggesting that they, at least for purposes of the vulnerable victim factor, did not intend "victim" to refer to more than one person or thing.

More importantly, the drafters considered and decided not to adopt an aggravating factor that would have authorized departure sentences based on the harm caused to persons associated with the victim. A supplement to Working Paper 4 listing proposed departure factors includes an aggravating factor from Minnesota case law that would have authorized a departure sentence based on, "Impact on persons associated with victim (i.e., business clients, family of child victim (minor))." Working Paper 4: Supplement, Oregon Criminal Justice Council, September 17, 1988, 4; App-22. It also contains a comment stating, "This is a broad factor since most person crimes affect the family and friends of the victim." *Id*. The council chose not to adopt that factor.

It is likely that the drafters recognized that adopting such a broad rule would have been inconsistent with the principles of consistency in sentencing

and conservation of correctional resources, because such a "broad factor" could lead to the frequent imposition of departure sentences, far in excess of their ten percent limit goal, especially in the case of person crimes. Furthermore, the drafters' implicit understanding that the factor would lead to more frequent imposition of departure sentences also illustrates that the drafters did not consider persons associated with the victim to be included in what they understood "victim" to mean for purposes of the guidelines. In short, the drafters' decision not to adopt that factor further suggests that they did not intend the rules governing the imposition of departure sentences to include victims other than the victim contemplated by the substantive criminal statute defining the offense.

2. A definition of victim that corresponds with the victim of the substantive criminal statute defining the relevant offense is consistent with the drafters' approach to constructing the sentencing guidelines.

Not only is a definition of victim that corresponds with the substantive statute defining the relevant crime consistent with the purposes and principles of the guidelines, it is also consistent with the drafters' approach to constructing the sentencing guidelines. That approach centered on rating crime severity based on the societal interests implicated by the substantive criminal statute defining the relevant offense.

The drafters determined early in the process that the crime's serious ranking and the offender's criminal history would be the primary determinates of an offender's sentence under the guidelines. For example, on March 30, 1988, the Sentencing Guidelines Committee issued a report on the status of the crime seriousness ratings development process. That memo stated that, "The relative seriousness of the offense of conviction and the offender's criminal record will be the primary determinates of the offender's sentence under the guidelines system." Crime Seriousness Ratings – Development Process, Sentencing Guidelines Committee, March 30, 1988, 1; App-23-30. The drafters then ranked most criminal offenses according to their crime severity. In ranking the offenses, they referenced the societal interests implicated by the substantive criminal statute defining the offense.

The drafters determined that "[t]he primary determinate of crime severity is the harm or threat of harm produced by the criminal conduct" and that "[h]arm is defined as the damage or threat of damage to protected societal interests." *Id*. at 2; App-24. And furthermore, "*The statute describing the criminal offense* shall be used to define the protected societal interest." *Id*. (Emphasis added). The drafters ranked societal interests in order of importance:

> "Different societal interests have different weights with respect to assessing offense seriousness.

> "a. Society's greatest interest is to protect the individual from personal assaults.
>
> "b. The next most important societal interest is to protect the individual's right to property.
>
> "c. The third most important societal interest is to protect the integrity of governmental institutions."

Id.

This shows that the drafters intended the substantive criminal statute to be the reference point in determining the type of harm produced or threatened by the offender's criminal conduct, which would primarily determine the crime severity rating. And if the drafters explicitly referenced the substantive criminal statute to determine the type of harm or threat of harm produced by a defendant's criminal conduct, it would also make sense for the drafters to reference the substantive criminal statute when determining *who was harmed*, *i.e.*, the victim, for sentencing purposes. That is because the victim of the crime for purposes of the substantive criminal statute most closely reflects the societal interest protected by the statute.

In short, the drafters specifically looked to the substantive criminal statute defining the offense to determine the societal interest protected, and in turn, the crime severity for purposes of the guidelines. Looking to the substantive criminal statute to determine who was harmed (the victim) for purposes of the guidelines would be consistent with the drafters' overall

approach to constructing the guidelines. Absent evidence that the drafters had another specific definition in mind, this court should follow the drafters' lead and look to the substantive criminal statute to determine who or what is the victim for purposes of the rules governing the imposition of departure sentences.

C. ORS 131.007 does not define "victim" for purposes of the rules governing the imposition of departure sentences.

Contrary to what the state argued before the Court of Appeals, ORS 131.007 does not define "victim" for purposes of the rules governing the imposition of departure sentences. ORS 131.007 defines "victim" "*as used*" in specifically enumerated statutory chapters and sections, "except as otherwise specifically provided or unless context requires otherwise":

> "As used in ORS 40.385, 135.230, 147.417, 147.419 and 147.421 and in ORS chapters 136, 137 and 144, except as otherwise specifically provided or unless the context requires otherwise, 'victim' means the person or persons who have suffered financial, social, psychological or physical harm as a result of a crime and includes, in the case of a homicide or abuse of corpse in any degree, a member of the immediate family of the decedent and, in the case of a minor victim, the legal guardian of the minor. In no event shall the criminal defendant be considered a victim."

Although it is true that ORS 137.671[10] grants trial courts the authority to impose departure sentences in a manner required by the rules of the Oregon Criminal Justice Commission, that statute does not *use* the term "victim." Therefore, by its own terms, ORS 131.007 does not define "victim" *as used in the rules promulgated by the Oregon Criminal Justice Commission*.

Furthermore, ORS 131.007 is not closely related to the rules governing the imposition of departure sentences and therefore does not provide context for determining the meaning of "victim" for purposes of those rules. ORS 131.007 and the rules governing the imposition of departure sentences were drafted by separate entities to serve two unrelated purposes.

ORS 131.007 was enacted as part of the "Crime Victims' Bill of Rights," legislation adopted by the voters in 1986. Or Laws 1987, ch 2, § 17. The purpose of that legislation was "to declare to [the] legislature and [the] courts that victims' rights shall be protected at each stage of the criminal justice system." Or Laws 1987, ch 2, § 2. Consistent with that purpose, the laws

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[10] ORS 137.671 states:

> "(1) The court may impose a sentence outside the presumptive sentence or sentence range made presumptive under ORS 137.669 for a specific offense if it finds there are substantial and compelling reasons justifying a deviation from the presumptive sentence.
>
> (2) Whenever the court imposes a sentence outside the presumptive sentence it shall set forth the reasons for its decision in the manner required by rules of the Oregon Criminal Justice Commission."

enacted as part of Crime Victims' Bill of Rights in large part proscribe victims' rights at each stage of a criminal justice proceeding. The laws included provisions defining victims' rights to be protected from the criminal defendant (Or Laws 1987, ch 2, § 3), victims' rights at trial (Or Laws 1987, ch 2, §§ 4-9), victims' rights at sentencing (Or Laws 1987, ch 2, §§ 10-13), and victims' rights after sentencing (Or Laws 1987, ch 2, §§ 14-16).[11] The broad definition of "victim" defined in ORS 131.007 is consistent with the voters' sweeping intent to protect those harmed by criminal conduct at each stage of a criminal justice proceeding.

On the other hand, the rules governing the imposition of departure sentences relate to sentencing decisions and serve a different purpose: to define "the authority of sentencing judges to depart from the presumptive guidelines sentence in unusual cases." *Oregon Sentencing Guidelines Implementation Manual* 123 (1989). Although enacted in the same year as the Crime Victims' Bill of Rights, the statute granting the trial courts authority to impose departure

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[11] Or Laws 1987, ch 2, § 14 amended ORS 144.120 to define victims' rights in the parole hearing context. Consistent with that statutory change, the board amended its rules to include a definition of "victim" that included, "The actual victim of the crime, a representative selected by the victim, or the victim's next of kin. In the case of a minor or incompetent victim, this term shall include the guardian of the victim." OAR 255-05-005(38)(3/15/88). The legislature did not incorporate that definition of "victim" into the sentencing guidelines.

sentences was initiated by the legislature and contained in a separate bill. The stated purpose of that bill was to ensure that

> "the decision to imprison offenders and decisions as to the period of such imprisonment [would] be made on a systematic basis that [would] maintain institutional populations within a level for which the Legislative Assembly and the people of the state are prepared to provide, while, at the same time allowing for the judicial discretion necessary for appropriate sentencing in individual cases[.]"

Or Laws 1987, ch 619.

In sum, because ORS 131.007 does not specifically reference the rules governing the imposition of departure sentences, and because ORS 131.007 and the rules governing the imposition of departure sentences were drafted by separate entities, in separate bills, and for different purposes, ORS 131.007 neither directly nor contextually informs what "victim" means for purposes of the rules governing the imposition of departure sentences.

D. The multiple victims enhancement factor was intended to provide sentencing courts the discretion to enhance concurrently imposed sentences for multiple crimes arising out of a continuous and uninterrupted course of conduct; it was not intended to expand the definition of victim to include more than one victim per crime sentenced.

In *Teixeira*, the Court of Appeals interpreted the multiple victims departure factor, OAR 213-008-0002(1)(b)(G), and concluded that for purposes of that rule, "victim" means "a person who is directly, immediately, and exclusively injured by the commission of the crime" "including those injuries

that are an element of the offense." *Teixeira*, 259 Or App at 193, 199. In other words, "victim" meant not only the victim for purposes of the substantive criminal statute defining the offense, but also any other person directly, immediately, and exclusively injured by the commission of the crime. In this case, the Court of Appeals applied that definition of victim to the vulnerable victim enhancement factor.

The Court of Appeals interpretation is incorrect, because it erroneously interpreted what the legislature intended to accomplish through the multiple victims departure factor. The legislative history of that factor reveals that the drafters did not intend to broaden the definition of "victim" to include more than one victim per crime sentenced. Instead, the drafters intended to provide sentencing courts with the means to enhance concurrently imposed sentences for multiple crimes committed in a continuous and uninterrupted course of conduct.

OAR 213-008-0002(1)(b)(G) states in its entirety: "The offense involved multiple victims or incidents. This factor may not be cited when it is captured in a consecutive sentence." Read plainly, it is understandable how the Court of Appeals interpreted that rule as contemplating more than one victim per crime (offense) sentenced. However, a proper interpretation of the rule turns on a proper understanding of what the drafters meant by the term "involved." The context and legislative history reveals that the drafters understood an offense to

"involve" multiple victims or incidents if the crime being sentenced was committed along with other crimes (each with their own victims) during a continuous and uninterrupted course of conduct.

When the drafters were creating the guidelines, former ORS 137.123(4) (1985), the consecutive sentences statute, allowed a sentencing court to impose consecutive sentences for separate convictions arising out of a continuous and uninterrupted course of conduct in the following circumstances:

> "(4) The court has discretion to impose consecutive terms of imprisonment for separate convictions arising out of a *continuous and uninterrupted course of conduct* only if the court finds:
>
> "(a) That the criminal offense for which a consecutive sentence is contemplated was not merely an incidental violation of a separate statutory provision in the course of the commission of a more serious crime but rather was an indication of defendant's willingness to commit more than one criminal offense; or
>
> "(b) The criminal offense for which a consecutive sentence is contemplated caused or created a risk of causing greater or qualitatively different loss, injury or harm to the victim *or caused or created a risk of causing loss, injury, or harm to a different victim than was caused or threatened by the other offense or offenses committed during a continuous and uninterrupted course of conduct*."

(Emphasis added). The drafters understood that statute to allow for the imposition of consecutive sentences if "multiple victims were involved." And multiple victims were "involved" if there were other offenses committed

against different victims during a continuous and uninterrupted course of conduct:

> "[OAR 213-008-0002(1)(b)(G)] will not support a departure sentence for any offense for which consecutive sentences are imposed if the basis for the consecutive sentences is the fact that *multiple victims were involved*."

Oregon Sentencing Guidelines Implementation Manual 131; *see also*, Working Paper 7, Oregon Criminal Justice Council, September 18, 1988, 1 (describing how consecutive sentences are authorized by statute for more than one offense arising out of a continuous and uninterrupted course of conduct when "The multiple offenses *involved multiple victims* * * *") (emphases added); App-31-36.

Therefore, under the departure scheme, the drafters understood the phrase "involved multiple victims" to mean the same as it means in the consecutive sentencing context. In short, an offense "involve[s]" multiple victims when an offender commits multiple crimes against multiple victims in a continuous and uninterrupted course of conduct. Contrary to the Court of Appeals interpretation, the drafters did not understand the phrase to broaden the definition of victim to include multiple victims per offense sentenced.

The legislative history supports that interpretation. In the supplement to Working Paper 4, cited earlier in this brief, the council listed proposed aggravating and mitigating factors along with their source and commentary.

Working Paper 4: Supplement, Oregon Criminal Justice Council, September 17, 1988; App-19-22. The council listed as proposed aggravating factor #11, "The offense involved multiple victims or incidents" and listed its source as "Matrix, Committee." *Id*. at 4; App-22. In the comment on that factor, the council observed that that factor was already covered by policies governing the imposition of multiple sentences: "Comment: This factor is captured in the multiple sentencing policy of sentencing systems." *Id*.

By "multiple sentencing policy of sentencing systems" the council meant the policy of imposing multiple sentences for multiple crimes, each with its own victim. For example, in Working Paper 7, prepared at the same time as Working Paper 4, the council described its understanding of when multiple sentences were allowed. Working Paper 7, Oregon Criminal Justice Council, September 18, 1988; App-31-36. Those circumstances included multiple offenses against a single victim, multiple offenses against multiple victims, and separate crimes prosecuted at separate proceedings:

"**IV. MULTIPLE-SENTENCE SCENARIOS**

"A. MULTIPLE CURRENT CONVICTIONS

"1. Multiple Offenses -- Single Victim

"a. Single Episode
"b. Interrupted Criminal Conduct

"2. Multiple Offenses -- Multiple Victims

"a. Single Episode
"b. Interrupted Criminal Conduct
"B. MULTIPLE PROCEEDINGS

"1. Contemporary Proceedings

"a.) Single County
"b.) Multiple Counties

"2. Prior Sentences

"a) Prior Probationary Sentence
"b.) Remaining Prison Term
"c.) Prior Post-Prison Supervision Status"

Id. at 3-4; App-33-34.

The drafters therefore understood the multiple victims departure factor to apply in circumstances where multiple sentences were imposed for separate crimes, each with its own victim. In other words, the drafters understood the term "victims" to refer to multiple victims of separate crimes, sentenced separately, and not to multiple victims (defined broadly) of a single crime.

That understanding of the multiple victims departure factor was also noted in the council's minutes from their September 24, 1988, meeting in which the council approved a list of aggravating and mitigating factors. The council noted that it should not be used when captured in a consecutive sentence:

> "11. The offense involved multiple victims or incidents. (This factor may not be cited *when it is captured in a consecutive sentence*.)"

Minutes, Oregon Criminal Justice Council, September 24, 1988, 13; App-39. (emphasis added).

In sum, the drafters did not intend for the multiple victims departure factor to broaden the definition of victim to include more than one victim per crime sentenced. Instead, the drafters intended that factor to give the sentencing court discretion to enhance an offender's sentence if the offender, in a continuous and uninterrupted course of conduct, committed other crimes, each with their own separate victims.

II. The State of Oregon is the victim of the crime of tampering with a witness, ORS 162.285.

A. Text and Context

ORS 162.285, the statute defining the crime of tampering with a witness, states:

> "(1) A person commits the crime of tampering with a witness if:
>
> "(a) The person knowingly induces or attempts to induce a witness or a person the person believes may be called as a witness in any official proceeding to offer false testimony or unlawfully withhold any testimony; or
>
> "(b) The person knowingly induces or attempts to induce a witness to be absent from any official proceeding to which the person has been legally summoned.
>
> "(2) Tampering with a witness is a Class C felony."

Although the text of ORS 162.285 does not clearly indicate who qualifies as the victim, the context of the statute reveals that the legislature intended the

statute to protect the administration of the court (*i.e.*, the State of Oregon) from outside interference by prosecuting those who induced or attempted to induce others to give false testimony or fail to appear when summoned. In other words, the gravamen of tampering with a witness is the tamperer's attempted or successful effort to interfere with the administration of the court by attempting to or inducing a witness to give false testimony or fail to appear when summoned. *See Glaspey*, 337 Or at 565-66 (applying the principle that where a statute defining a crime does not expressly identify the person who qualifies as a victim, the court examines the statute to identify the gravamen of the crime and determine the class of persons whom the legislature intended to directly protect by way of the criminal proscription.).

For example, ORS 162.285 is included in a chapter with other statutes that criminalize conduct that obstructs governmental administration. Those other statutes include the crimes of bribery, ORS 162.015-025, perjury and related offenses, ORS 162.065-199, escape, supplying contraband, and failure to appear, ORS 162.145-205, obstructing governmental administration, ORS 162.235-385, abuse of public office, ORS 162.405-425, and interference with legislative operations, ORS 162.455-465. ORS 162.285's location in the criminal code suggests that the legislature did not view tampering with a witness to be a person crime, but instead a crime against the state achieved through the obstruction of governmental administration. That view is supported

by the statute's absence from OAR 213-003-0001(14), the rule defining what constitutes "person felonies" for purposes of calculating a person's criminal history score.

B. Legislative History

The legislative history of ORS 162.285 further reveals that the legislature intended to directly protect the state courts from interference through criminalizing witness tampering. Specifically, the legislative committee compared ORS 162.285 to other statutes intended to protect government administration.

The tampering with a witness statute was introduced at a Criminal Law Revision subcommittee meeting on October 9, 1969. The proposed statute was considered as one section of proposed statutes addressing "Obstructing Governmental Administration." Minutes, Criminal Law Revision Commission, Subcommittee #1, October 9, 1969, 6, 10-13; App-43-46. During that meeting, the subcommittee compared the crime of tampering with a witness to the crimes of perjury and bribery. *Id*.

Regarding perjury, "Mr. Paillette explained that perjury was only related to the individual who gives a false statement; there is no subornation section in the Perjury Article, he said." *Id*. at 11. Chairman Burns "contended that there should be a subornation section in Perjury and was of the opinion that that was what [the tampering with a witness] section actually stated." *Id*. at 11.

However, Don Paillette disagreed, contending, "Although *this section relates to an interference with the administration of the court*, he thought it fit here as well as in Perjury, since Perjury is related to the false statement of the actor himself." *Id*. (emphasis added).

Regarding bribery, "Mr. Paillette pointed out that in [the case of tampering with a witness], there would be no element of actual bribery; it would be more of an inducement or persuasion." *Id*. at 11. Paillette explained that in bribery "there needs to be an agreement or understanding between parties; in [tampering with a witness], there is no element of agreement or understanding." *Id*. at 12. Mr. Chandler inquired "if the term 'induce' implied an agreement" but "the other members were of the opinion that that would not constitute an agreement." *Id*.

Mr. Chandler then summarized his understanding of the purpose behind the crime of tampering with a witness. In the context of arguing that the crime should extend to advising another to avoid service of process, he emphasized the need to preserve the integrity of court proceedings:

> "Mr. Chandler maintained that the purpose of the court proceeding was to try to arrive at the truth. He thought it was bad policy for anyone to attempt to keep some portion of the truth out of the court process whether by actually bribing someone to leave town by offering money, or by suggesting that he leave town to avoid process. The net effect is that the testimony, which is of some value to one side or the other, belongs in the proceeding. He concluded that a citizen had an affirmative duty to make himself

> available if he has reason to know that he may be asked to appear as a witness in any court proceeding."

Id. at 12-13.

The subcommittee's association of the crime of tampering with a witness with the crimes of perjury and bribery reveals that the subcommittee was concerned with criminalizing tampering with a witness because it "interfere[d] with the administration of the court," and not because those actions harmed the witness. That conclusion is also apparent from the commentary, which states that the closest crime associated with tampering with a witness prior to the criminal law revision was civil and criminal contempt. *See* Commentary to Criminal Law Revision Commission Proposed Criminal Code, Final Draft and Report § 203 (July 1970) (stating, "No existing Oregon statute is directly on point. Violations would probably be punished under ORS 33.010 and 33.020, the civil and criminal contempt provisions.").

In sum, the context and legislative history of the tampering with a witness statute reveal that the legislature was concerned with the harm caused to the state court system if a witness was induced to testify falsely or failed to appear when summoned. The legislature placed the statute among other statutes prohibiting the obstruction of governmental administration and the committee viewed the statute as furthering that purpose.

Certainly, it is true that in the course of tampering with a witness, the witness may be harmed or placed in legal jeopardy. For example, an offender could coerce, threaten, or cause physical injury to a witness in an effort to get the witness change his or her testimony or fail to appear. That offender would also be liable for prosecution for other person crimes. But for the limited purposes of the crime of tampering with a witness, the committee did not voice a concern about protecting witnesses from any collateral consequences that they might personally suffer as a result of the tampering. *See Glaspey*, 337 Or at 566-67 (holding that although child witnesses of an assault may suffer psychological harm, the sole victim for purposes of ORS 163.160(3)(c) is the person that is directly assaulted). Consistent with the principles announced in *Glaspey*, the State of Oregon is the victim for purposes of the tampering with a witness statute, not the witness.

Therefore, to the extent the trial court imposed the aggravating factor based on a theory that was a particularly vulnerable victim, it erred, because was not a victim of the crime of tampering with a witness. *See* ER-2 (court's decision stating, "Ms. is also a victim because she suffered psychological and social harm as a result of [defendant's] attempts to pressure her.").

C. The State of Oregon cannot be a particularly vulnerable victim, and even if the State of Oregon could be a particularly vulnerable victim, the "vulnerability" proffered by the trial court was not a vulnerability and did not play a role in the offense.

The trial court concluded in a letter decision that the state "was particularly vulnerable to [defendant's] tampering with Ms. because "[defendant] was aware that it would be difficult, if not impossible, for the State to obtain a conviction without the cooperation of Ms. ER-1. It further reasoned that there was an increased threat of harm to the state because "the State was more vulnerable to a successful tampering in this case than in a case where the witness was not so much under the sway of the tamperer" and "a thwarted prosecution in this case would make Ms[.] more vulnerable to further domestic abuse by [defendant]." ER-1. In other words, according to the trial court, the State of Oregon was particularly vulnerable because

testimony was important to the prosecution's case and had defendant's inducement succeeded, there was an increased likelihood that the prosecution would be unsuccessful.

The trial court's conclusion is erroneous for several reasons. First of all, the State of Oregon cannot be a particularly vulnerable victim for purposes of OAR 213-008-002(1)(b)(B). The plain text of the rule illustrates that whether a victim has a "particularly vulnerability" depends on the inherent physical or mental condition of the victim. Although the State of Oregon may qualify as a

"person" for purposes of the criminal code, it possesses none of the mental or physical attributes enumerated in the rule as examples of "vulnerabilities." *See* ORS 161.015(5) (defining "person" as including "where appropriate, * * * a government or governmental instrumentality").

For example, "Vulnerability" is defined as "the quality or state of being vulnerable." *Webster's Third New Int'l Dictionary*, 2566 (unabridged ed 2002). "Vulnerable," in turn, is defined in relevant part as "capable of being wounded : defenseless against injury." *Webster's Third New Int'l Dictionary*, 2567. "Particular" is defined in relevant part as "of, relating to, or being a single definite person or thing as distinguished from some or all others—opposed to general" and "distinctive among others of the same kind : out of the ordinary : markedly unusual : worthy of notice * * *." *Webster's Third New Int'l Dictionary*, 1646-47. When used in conjunction with the term "victim," as in "the victim's particular vulnerability," the words "particular" and "vulnerability" refer to whether some specific, unique or unusual inherent quality of the victim makes him or her more "capable of being wounded" or more "defenseless against injury" than an average person. *See Oregon Sentencing Guidelines Implementation Manual* 130 (1989) (the vulnerable victim factor "should only be cited as an aggravating factor when the court determines that the offender's knowledge of or disregard for the victim's

vulnerability increased the potential harm attributed to the offender's criminal conduct.").

The examples set out in the rule itself confirm that interpretation. "[W]hen the legislature chooses to state both a general standard and a list of specifics, the specifics do more than place their particular subjects beyond the dispute; they also refer the scope of the general standard to matters of the same kind, often phrased in Latin as '*ejusdem generic*.'" *Bellikka v. Green*, 306 Or 630, 636, 762 P2d 997 (1988). OAR 213-008-0002(1)(b)(B) lists "extreme youth, age, disability or ill health of the victim" as examples of a "victim's particular vulnerability." Those examples are all inherent physical or mental qualities of a human being. That suggests that the legislature did not intend the rule to extend to non-human "persons" such as the State of Oregon.

Second, even if the State of Oregon could be considered a vulnerable victim, the trial court's conclusion is erroneous because the "vulnerabilities" it identified are not unique characteristics attributable to the State of Oregon that made it more defenseless to defendant's attempts to induce to testify falsely. Instead, they were *potential consequences* that *could have* resulted *if* testified falsely. In other words, the relative strength of the prosecution's case had nothing to do with the State of Oregon's relative ability to prevent defendant from *attempting* to induce to testify falsely.

Perhaps the relative strength of the prosecution's case was a circumstance that could have made the degree of harm significantly greater than typical *if* defendant had successfully induced to testify falsely, but it was not an inherent characteristic of the State of Oregon that made it more defenseless against the injury in this case. *See* OAR 213-008-002(1)(b)(J) (aggravating factor stating, "The degree of harm or loss attributed to the current crime of conviction was significantly greater than typical for such an offense.").

Third, even if the trial court correctly identified a "vulnerability" in the prosecution's relative ability to obtain a conviction, that "vulnerability" played no role in the commission of the offense. According to the Implementation Manual, the "vulnerable victim" aggravating factor may only be applied if the vulnerability played a role in the commission of the offense. *Oregon Sentencing Guidelines Implementation Manual* 130 (1989). It cites this example to illustrate that point:

> "EXAMPLE: The offender embezzles $58,000 from his employer who has been confined to a wheelchair for the last twenty years. The victim's disability should not be cited as an aggravating factor if it did not play a role in the commission of the offense."

Id. In other words, unless the victim's disability somehow rendered him more defenseless to the offender's embezzlement, it would not qualify as a particular vulnerability for purposes of that case. That would depend on how the money was embezzled.

Here, the offense that was proven at trial was that defendant *attempted* to induce to testify falsely. *See* Tr 391 (prosecutor stating in closing, "That, ladies and gentlemen, is what the defendant is charged with for attempting on those three days trying to get Ms. to change her story.") The relative strength of the prosecution's case did not in any way render the State of Oregon more defenseless to defendant's *attempts* to induce to testify falsely. Again, it was simply a circumstance that *could have* contributed to additional harm *if* defendant had been successful in his attempts.

In sum, the State of Oregon cannot be a vulnerable victim for purposes of the rule, and even if it could, the "vulnerability" cited by the trial court was not a vulnerability but a circumstance that perhaps could have made the degree of harm significantly greater than typical if defendant had successfully induced to testify falsely. Finally, even if the trial court correctly identified a "vulnerability" in the prosecution's relative ability to obtain a conviction, that "vulnerability" played no role in the commission of the offense and therefore cannot be used to apply the "vulnerable victim" aggravating factor in this case.

CONCLUSION

For the above reasons, defendant respectfully requests this court reverse the decision of the Court of Appeals and remand the case to the circuit court for resentencing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 10,408 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 as required by ORAP 5.05(4)(f).

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 May 8, 2014.

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 (regarding electronic service on registered eFilers) on Anna Joyce, #013112, Solicitor General, attorney for Plaintiff-Respondent.

Respectfully submitted,

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