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Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE ex rel. TREVOR TROY WALRAVEN, Plaintiff-Relator, v. DEPARTMENT OF CORRECTIONS, Defendant.	SC S062747 **MANDAMUS PROCEEDING**

BRIEF ON THE MERITS OF DEPARTMENT OF CORRECTIONS

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ADVERSE PARTY DEPARTMENT OF CORRECTION'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

Except in one respect, Adverse Party Oregon Department of Corrections ("DOC") accepts relator's statement of the case. Relator incorrectly asserts that the state in *State v. Walraven*[1] has appealed "from an order issued pursuant to ORS 420A.206(1)(a) that directs DOC to submit a release plan." (Relator's BOM 1). The state's appeal, which is based on ORS 420A.203(6), is from the order issued pursuant to ORS 420A.203(4)(a)(B) that ruled that relator should be granted conditional release.

ISSUE PRESENTED

In *State v. Walraven*, relator was convicted of aggravated murder and was sentenced to imprisonment for life with a 30-year minimum sentence. After relator had served 15 years on that sentence, he moved for a "second look" hearing under ORS 420A.203, and the circuit court granted his motion, over the objection of DOC and the district attorney. At the close of the hearing, the court ruled, under

[1] *State v. Walraven*, Josephine County Circuit Court, case no. 99CR0013. *See State v. Walraven*, 187 Or App 728, 730, 69 P3d 835, *rev den*, 335 Or 656 (2003) (*Walraven I*); *State v. Walraven*, 214 Or App 645, 167 P3d 1003 (2007), *rev den*, 344 Or 280 (2008) (*Walraven II*).

ORS 420A.203(4)(a)(B), that relator should be granted conditional release. In accordance with ORS 420A.206(1)(a), the court then directed DOC to prepare a release plan. Pursuant to ORS 420A.203(6), the state has appealed from the order entered under ORS 420A.203(4)(a)(B). Does ORS 138.160 stay the effect of the circuit court's order during that appeal?

PROPOSED RULE OF LAW

ORS 138160 provides: "An appeal taken by the state stays the effect of the judgment or order in favor of the defendant * * * until the final determination of the appeal and the proceedings consequent thereon[.]" That provision is not limited—either expressly or implicitly—by the nature of the proceeding or by the statutory basis for the state's appeal. Consequently, the automatic-stay rule in ORS 138.160 applies when, as in this case, the state appeals pursuant to ORS 420A.203(6) from an order entered after a "second look" hearing.

ARGUMENT

A. Introduction

ORS 420A.203 provides a means by which certain defendants, who have been convicted of a criminal offense, may ask the circuit court to take a "second look" at their sentence and to order their conditional release. To be eligible for such a "second look," the defendant must have been under 18 years of age when he or she committed the offense, must have been sentenced to a term of incarceration

of at least 24 months, and must have served half of the sentence imposed. ORS 420A.203(1). If the circuit court holds a "second look" hearing and makes certain findings, the court has authority under ORS 420A.203(4)(a)(B) to order that the defendant "be conditionally released under ORS 420A.206." The state may appeal from such an order pursuant to ORS 420A.203(6) ("The person or the state may appeal an order entered under this section."). ORS 420A.206(1)(a) provides that when the circuit court has ordered that the defendant be released, DOC must "prepare a release plan":

> "If, after the hearing required by ORS 420A.203, the court determines that conditional release is the appropriate disposition, *the court shall direct the Department of Corrections to prepare a proposed release plan*. The Department of Corrections shall submit the release plan to the court no later than 45 days after receipt of the court's direction to prepare the plan. The Department of Corrections shall incorporate any conditions recommended by the court and shall consider any recommendations made by the Oregon Youth Authority. The release plan submitted to the court must include: [specifying required provisions]."

ORS 420A.206(1)(a) (emphasis added).

In the *State v. Walraven* case underlying this mandamus proceeding, the circuit court held such a "second look" hearing, it ordered that relator should be granted conditional release, and the state has appealed from that order. For purposes of this mandamus proceeding, the pertinent procedural facts are not in dispute and may be briefly summarized:

• In *State v. Walraven*, relator asked the circuit court to grant him a "second look" hearing on the life sentence that was imposed on his conviction for aggravated murder.

• Over the objection of the district attorney and DOC, the court granted relator's motion and held a "second look" hearing.

• At the conclusion of the hearing, the court ruled, in accordance with ORS 420A.203(4)(a)(B), that relator should be granted conditional release.

• Based on that ruling and pursuant to ORS 420A.206(1)(a), the court ordered DOC to prepare a release plan.

• Pursuant to ORS 420A.203(6), the state appealed from the circuit court's conditional-release order. That appeal currently is pending before the Court of Appeals.[2]

• The state and DOC contend that, due to ORS 138.160, the state's appeal stays the effect of the circuit court's conditional-release order pending appeal.[3]

Consequently, the narrow legal issue that is before this court in this mandamus proceeding is whether ORS 138.160 applies when the state has appealed pursuant to ORS 420A.203(6) from a conditional-release order entered

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[2] *State v. Walraven*, A158001. In that appeal, relator filed a motion in the Court of Appeals, pursuant to ORS 19.235(3) and ORAP 2.35(2), asking for a determination whether the court has appellate jurisdiction over the state's appeal. By an order dated April 23, 2015, the Appellate Commissioner ruled that the appeal is properly before it. Relator has not asked this court to review that order.

[3] Relator filed a motion in the circuit court seeking release pending the state's appeal, but the court denied his request, agreeing with the state that ORS 138.160 automatically stays the effect of its conditional-release order pending appeal. Relator has not asked the Court of Appeals to review that ruling.

under ORS 420A.203(4).[4] As explained below, ORS 138.160 does apply to the state's appeal in *State v. Walraven* and thus has automatically stayed, during the appeal, the effectiveness of the conditional-release order at issue in that appeal.

ORS 138.160 provides:

> "*An appeal taken by the state stays the effect of the judgment or order in favor of the defendant*, so that the release agreement and, if applicable, the security for release, is held for the appearance and surrender of the defendant *until the final determination of the appeal and the proceedings consequent thereon, if any*; but if the defendant is in custody, the defendant may be released by the court subject to ORS 135.230 to 135.290, pending the appeal."

(Emphasis added.) Despite the unqualified language in the opening clause, relator contends before this court that this statute should be construed to apply only when the state takes an appeal under the general statute that governs a state's appeal in a criminal action—*viz.*, ORS 138.060—and not when the state's appeal is based on

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[4] In its appeal in *State v. Walraven*, the state will argue that relator is not eligible for a "second look" on his conviction and sentence and that, as a result, the circuit court erred when it ordered, pursuant to ORS 420A.203(4)(a)(B), that he be granted conditional release. That issue is not now before this court in this mandamus proceeding. But relator has filed a motion in the Court of Appeals, pursuant to ORS 19.405 and ORAP 10.10, asking that court to certify the state's appeal to this court for briefing and argument. The state opposed that motion. As of the date this brief is filed, the Court of Appeals has not yet ruled on relator's motion.

any other statute.[5] (Relator's BOM 11). His claim thus turns on the proper construction of the opening clause of ORS 138.160. Under this court's established statutory-construction methodology, the proper inquiry is to discern legislative intent by examining the text, context, and history of the statute, beginning with the text. *See, e.g.*, *State v. McAnulty*, 356 Or 432, 441-42, __ P3d __ (2014); *State v. Gaines*, 346 Or 160, 171-73, 206 P3d 1042 (2009) (describing methodology).

B. ORS 138.160 applies to the state's appeal in *State v. Walraven*.

1. By its plain text, ORS 138.160 applies to any state's appeal.

By its plain text, ORS 138.160 is a statute of general applicability—*i.e.*, it applies whenever "an appeal is taken by the state" from a "judgment or order in favor of the defendant." The text of the statute is not limited just to appeals taken under any specific statute that may authorize a state's appeal, nor does the text limit its application just to specific types of proceedings that may result in a state's

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[5] Although relator does not expressly argue the point, he appears to assume that if ORS 138.160 does not apply to the state's appeal in *State v. Walraven*, the appeal is governed instead by ORS 19.330, which provides:

> "The filing of a notice of appeal does not automatically stay the judgment that is the subject of the appeal. A party may seek to stay a judgment in the manner provided by ORS 19.335, 19.340 or 19.350, or as provided by other law."

appeal and thus trigger the stay.[6] And no other statute elsewhere within the Oregon Criminal Code or in ORS chapter 420A appears to limit the potential scope of the statute's application. In short, relator's proposed construction of ORS 138.160 would require this court to insert a narrowing qualification into the statute.[7]

The state's appeal in *State v. Walraven* comes squarely within the textual scope of ORS 138.160. That case is a criminal action in which relator is "the defendant"; he was prosecuted for a crime by "the state"; the proceeding resulted in his conviction for aggravated murder and imposition of a sentence of imprisonment for life; the circuit court issued an order "in favor of the defendant," granting him conditional release on that sentence; and, the state has filed "an appeal" from that order. There is no plausible ambiguity in the express terms of

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[6] The only text-based limitation on the scope of application of the statute is that it appears to apply only to an appeal taken by the state in a *criminal action*, given its placement in ORS chapter 138 and its express references to "the state," to "the defendant," and to the release provisions in "ORS 135.230 to 135.290." Because *State v. Walraven* is a criminal action, it is not necessary for this court to consider whether ORS 138.160 applies when the state appeals in a proceeding that is not a criminal action.

[7] For example, ORS 138.160 does not provide: "An appeal taken by the state *pursuant to ORS 138.060* stays the effect of the judgment or order in favor of the defendant * * * ." Nor does it state: "An appeal taken by the state *from an order or judgment entered prior to trial* stays the effect of the judgment or order in favor of the defendant * * * ."

the statute with respect to its application to a state's appeal pursuant to ORS 420A.203(6). As relator candidly concedes: "At first blush, the text of ORS 138.160 could, at least arguably, support DOC's construction." (Relator's BOM 10).

2. The history of ORS 138.160 does not provide a basis for limiting the plain text.

Despite the broad and unambiguous text of ORS 138.160, relator contends that the legislative history of the statute provides a basis for this court to impose a significant limitation the scope of its application—by construing it to apply only when the state has appealed pursuant to some provision in ORS 138.060. That argument has no merit.

Relator points out that ORS 138.160 had its genesis in section 235 of the Deady Code (1864), and he notes that at that time the state was allowed only a very limited right to appeal in a criminal action—*i.e.*, at that time, section 227 allowed an appeal by the state in a criminal action only in those circumstances that are now covered by ORS 138.060(1)(a) and (b).[8] (*See* Relator's BOM 11-12). Relator then notes that, over the past 150 years, what had been section 235 of the Deady Code has become ORS 138.160, with only a few modifications, and what had been

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[8] ORS 138.060(1)(a) allows the state to appeal from pretrial order "dismissing or setting aside an accusatory instrument," and ORS 138.060(1)(b) allows the state to appeal from a post-trial order "arresting the judgment."

section 227 of the Deady Code has been significantly expanded and is now ORS 138.060. (Relator BOM 12-14). He notes that the legislature in 1973 amended both statutes in the same bill (Or Laws 1973, ch 836, §§ 276, 278), and he concludes that "the legislature's amendment of both ORS 138.060 and ORS 138.160 in the same bill evinces the legislature's intent that the reach of ORS 138.160 was still tied to the kinds of appeals enumerated in its coevolved statute that lists the specific judgments and orders that the state could appeal." (Relator's BOM 13-14).

Relator then notes that the "second look" statutes were not enacted until 1995,[9] that they were codified into ORS chapter 420A (rather than into the Criminal Code), that they contain their own appeal provisions, and that the legislature did not amend either ORS 138.060 or ORS 138.160 to cross-reference or otherwise incorporate those new provisions. (Relator's BOM 14-17). From that history, he concludes that the legislature did not intend that ORS 138.160 should apply to a state's appeal from an order issued under the "second look" statutes.

Although relator's summary of the legislative history of ORS 138.160, ORS 138.060, and ORS 420A.203, is accurate as far as it goes, it does not support the conclusion that he attempts to draw from it. What his argument fails to

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[9] Or Laws 1995, ch 422, §§ 52-56.

appreciate is that ORS 138.160 is a statute of *general applicability* that is not limited in scope only to specified appeals and hence applies whenever the state takes "an appeal" in a criminal action. Consequently, when the legislature enacted the "second look" provisions, it was not necessary to amend ORS 138.160 to incorporate or to cross-reference the new appeal provisions in ORS 420A.203(6) and ORS 420A.206(6), because the text of ORS 138.160 already is broad enough to encompass those new provisions.

The special appeal provisions in ORS 420A.203(6) and ORS 420A.206(6) are not unique or even unusual. Since 1864, numerous statutes have been enacted that allow the state to take an appeal in a criminal action, and many of those provisions have been codified into statutes other than ORS 138.060. For examples: OEC 412(4)(d) allows the state to appeal from a pretrial order that admits evidence of a victim's prior sexual history; OEC 510(4)(b) allows the state to appeal from a pretrial order that requires the disclosure of the identity of a confidential informant; ORS 133.653(2) allows the state to appeal from an order that requires restoration of evidence seized; ORS 138.222(7) allows the state to appeal from a judgment that imposes a sentence on a felony conviction; and ORS 147.535 allows the state to appeal from certain orders that affecting a crime victim's rights. As a result, ORS 138.060 no longer describes the universe of orders or judgments entered in a criminal action from which the state may appeal. Nothing in the text or context of ORS 138.160 suggests a basis for construing it to

apply to a state's appeal under ORS 138.060 but not to a state's appeal taken under OEC 412(4)(d), ORS 133.653(2), or ORS 420A.203(4). That is, regardless of the statutory basis for the state's appeal, if the state in a criminal action takes "an appeal" from a "judgment or order in favor of the defendant," the automatic-stay provision in ORS 138.160 is triggered by that appeal.

Relator's argument based on the history of the various statutes necessarily is premised on the notion that when the legislature first enacted what is now ORS 138.160, it did so with the intent that it be applied specifically to a state's appeal taken under what is now ORS 138.060. From that premise, he asserts that even though the text of ORS 138.160 does not limit its scope solely to an appeal based on ORS 138.060, and even though numerous other statutes have been enacted in the intervening 150 years that also grant the state the right of appeal in a criminal action, ORS 138.160 now must be construed to be still limited only to that original, specific scope of application. Relator does not cite any case, statute, or general rule of statutory construction that would support—much less compel—construing ORS 138.160 in that narrow manner despite its broad text.[10]

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[10] What is now ORS 138.160 has been cited in an appellate opinion only a few times over the past 150 years. Although each of those citations has been in the context of a state's appeal that was taken under some provision in ORS 138.060—*see, e.g., State v. Hoare*, 20 Or App 439, 445-46, 532 P2d 240 (1975) (state's appeal from pretrial order suppressing evidence)—no such opinion has suggested,

Footnote continued…

To the contrary, relator's argument that ORS 138.160 should be construed to include such an unstated and significant limitation in its scope of application directly conflicts with the primary rule of statutory construction:

> "In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, *not to insert what has been omitted*, or to omit what has been inserted[.]"

ORS 174.010 (emphasis added). Had the legislature in 1864, or 1973, or 1995 intended that the scope of ORS 138.160 should be limited only to a state's appeal taken under ORS 138.060, it could have added appropriate words of limitation to that statute.[11] But the statute remains stated in broad, unlimited terms. Consequently, ORS 174.010 precludes this court from now adding, by way of judicial construction, words of limitation that the legislature never has seen fit to add to the text of ORS 138.160. *See, e.g., State v. Vasquez-Rubio*, 323 Or 275, 283, 917 P2d 494 (1996) (noting that "it would be inappropriate" for the court to rewrite "a clear statute based solely on our conjecture that the legislature could not have intended a particular result"); *Young v. State of Oregon*, 161 Or App 32, 41,

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(…continued)
much less held, that ORS 138.160 applies only to a state's appeal taken under ORS 138.060.

[11] *See* note 7, above, for examples of how the scope of ORS 138.160 might have been amended to limit its scope only to an appeal based on ORS 138.060 or to avoid its application to a state's appeal under ORS 420A.203(6).

983 P2d 1044, *rev den*, 329 Or 447 (1999) (Landau, J., concurring, noting, "Bedrock principles of the separation of powers long have been recognized to constrain the judiciary from expanding on, or ignoring, statutory language.").

In summary, relator's proposed construction of ORS 138.160—*i.e.*, that it should be construed to be limited in scope only to a state's appeal taken under ORS 138.060—suffers from both a logical and a legal flaw. Even if the legislature, when it originally enacted what is now ORS 138.160, did so with an intent that it be applied to a state's appeal taken under what is now ORS 138.060, that does not mean that the legislature also intended to preclude ORS 138.160 from ever being be applied in the future to a state's appeal taken under a later-enacted statute that also allows the state to appeal in a criminal action. The original legislative intent that ORS 138.160 be applied to an appeal taken under the then-existing ORS 138.060 does not imply the negative—*i.e.*, that the legislature intended that ORS 138.160 cannot be applied in the future to state's appeal taken under a later-enacted statute. But even if that had been the legislature's original intent, it did not choose to express that intent in the text of the statute by expressly limiting the scope of ORS 138.160 only to an appeal taken under ORS 138.060. And when subsequent legislative assemblies enacted new statutes that authorize a state's appeal in a criminal action, they did not choose to narrow the scope of ORS 138.160 to exempt such appeals from the automatic-stay rule in that statute. That legislative choice not to limit the scope of ORS 138.160—regardless of

whether it may have been a considered choice or an inadvertent oversight—is an omission that ORS 174.010 precludes this court from now correcting by way of statutory construction.

3. Applying ORS 138.160 according to its express, unqualified terms would not lead to an absurd result.

Finally, relator contends that even though the text of ORS 138.160 does not limit its application only to a state's appeal taken under ORS 138.060, applying the statute broadly according to its express terms would lead to an absurd result: "It is inconceivable that the legislature gave DOC the right to appeal an order [granting conditional release] but did not intend for DOC to be required to comply with that order during an appeal when DOC elected not to exercise its own right of appeal." (Relator's BOM 18). Relator's argument appears to be based on a false premise—*i.e.*, he wrongly assumes that DOC *could* have appealed and chose not to.[12] But

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[12] Relator's argument is not entirely clear, but it appears to be based on a misunderstanding of the applicable statutes. As explained above, the state's appeal in *State v. Walraven* is from the circuit court's order that was entered under ORS 420A.203(4), and hence the appeal is based on ORS 420A.203(6). That statute provides that either the defendant "or the state" may appeal from an order entered under ORS 420A.203(4)—it does not also authorize DOC to appeal separately from such an order. To be sure, ORS 420A.206(6)(a) provides that either the defendant, the state, or "the Department of Corrections" may appeal from "an order of conditional release under this section." Such "an order of conditional release" may be issued under ORS 420A.206(2), which would impose supervision and reporting obligations on DOC and thus provide a basis for DOC o challenge the order on appeal. But the order that was issued by circuit court in *State v. Walraven* that is based on ORS 420A.206(1)(a) is not such "an order of

Footnote continued…

even if that were "inconceivable," that would not provide this court with a valid basis "to insert what has been omitted." *See, e.g.*, *Greenway v. Parlanti*, 245 Or App 144, 150, 261 P3d 69 (2011) (noting that "a court cannot subvert the plain meaning of a statute, even to avoid a supposedly absurd result").

In any event, construing ORS 138.160 in accordance with its clear, unqualified terms would not be unreasonable or contrary to legislative intent. The basic principle that is embodied in ORS 138.160 may be simply stated: when the trial court in a criminal action enters an order in the defendant's favor and the state then exercises its statutory right to appeal and obtain appellate review of that order, the filing of the state's appeal preserves the status quo, by automatically staying the effect of that order until the appeal is resolved, particularly with respect to the defendant's custody status. That general principle applies with equal force regardless of whether the state's appeal is pursuant to OEC 412(4)(d), OEC 510(4)(b), ORS 133.653(2), ORS 138.060, ORS 138.222(7), ORS 147.535, or ORS 420A.203(6). That is, there is nothing unreasonable—much less absurd or

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(…continued)
conditional release." As a result, DOC does not yet have a right to appeal in that case. It appears that relator's "it is inconceivable" argument is based on the notion that DOC should not be allowed to refuse to comply with an order from which it could have appealed but chose not to appeal. If so, his argument is based on a false premise: DOC could not have appealed separately under ORS 420A.206(6)(a) from the order that is at issue in the state's appeal, and hence DOC did not choose to forgo filing an appeal to challenge that order.

"inconceivable"—about applying ORS 138.160 according to its broad and express terms when the state exercises its right to appeal under any of those provisions. Such an application would not conflict with any provision in ORS 420A.203 or with the public policy reflected in that statute.

Moreover, as noted above, ORS 138.160 provides that if the state files an appeal, thus triggering the automatic stay, and the defendant is in custody, "the defendant may be released by the court subject to ORS 135.230 to 135.290, pending the appeal." In other words, when the state takes an appeal in a criminal action in such circumstances, the trial court generally has the discretion to order that the defendant will be released pending the appeal, subject to appropriate conditions. In light of that escape clause there is nothing absurd, "inconceivable," or even unreasonable about applying ORS 138.160 to a state's appeal taken under ORS 420A.203(6).[13] Therefore, there is no basis for this court to disregard the rule

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[13] In the underlying criminal action, the circuit court ruled that relator is not eligible for release under the escape clause in ORS 138.160, because he has been convicted of aggravated murder. *See* Or Const, Art. I, § 43(1)(b) ("aggravated murder * * * shall not be bailable when the proof is evidence and the presumption strong that the person is guilty"); ORS 137.240(2)(a) (precluding conditional release when "the defendant is charged with * * * aggravated murder * * * and the proof is evident or the presumption strong that [he] is guilty"). Relator did not challenge that ruling in the Court of Appeals in the context of the state's appeal, nor does he challenge the correctness of that ruling before this court. As a result, relator remains in DOC's custody despite the circuit court's ruling that he should be granted conditional release. But his particular predicament—which is the result

Footnote continued…

in ORS 174.010 and to insert into ORS 138.160 words of limitation that the legislature never has chosen to add to the text.

4. ORS 138.160 stays DOC's obligation to prepare a release plan.

As explained above, the express and unqualified terms of ORS 138.160 require its application to the appeal taken by the state under ORS 420A.203(6) in *State v. Walraven*. ORS 138.160 provides that the state's appeal "stays the effect of the judgment or order in favor of the defendant * * * until the final determination of the appeal and the proceedings consequent thereon[.]" That necessarily means that the circuit court's order in defendant's favor that provided, pursuant to ORS 420A.203(4)(a)(B), that he should be granted conditional release is now stayed for the remainder of the state's appeal. As a result of that stay, DOC's obligation under ORS 420A.206(1)(a) to prepare a "release plan" for his conditional release is also stayed. Therefore, this court should dismiss relator's petition without granting him any relief.

(…continued)
of the nature of his conviction—does not provide a basis for this court to conclude that applying ORS 138.160 to an appeal based on ORS 420A.203(6) is somehow at variance with the legislative intent behind those statutes.

CONCLUSION

This court should deny relator's petition for a writ of mandamus.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on May 14, 2015, I directed the original Brief on the Merits of Department of Correction's to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Andy Simrin, attorney for plaintiff, by using the court's electronic filing system.

I further certify that on May 14, 2015, I directed the Brief on the Merits of Department of Correction's to be served upon Peter Fahy, attorney for plaintiff, by mailing 2 copies, with postage prepaid, in an envelope addressed to:

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

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 4521 words. I further 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(2)(b).

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