IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. DONOVAN ROBERT CARLTON, aka Norman Spencer, Defendant-Appellant Petitioner on Review.	Josephine County Circuit Court Case No. 10CR0836 CA A150855 SC S063917

PETITIONER'S BRIEF ON THE MERITS

Review of the Decision of the Court of Appeals
on Appeal from a Judgment of the Circuit Court for Josephine County
Honorable Pat Wolke, Judge.

Opinion Filed: December 2, 2015
Author of Opinion: Ortega, Presiding Judge,
Concurring Judges: DeVore, Judge, and Garrett, Judge.

ERNEST G. LANNET #013248
Chief Defender
Criminal Appellate Section
INGRID A. MACFARLANE #863328
Chief Deputy Defender
Office of Public Defense Services
1175 Court Street NE
Salem, OR 97301
Ingrid.MacFarlane@opds.state.or.us
Phone: (503) 378-3349
Attorneys for Petitioner on Review

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
ROBERT M. WILSEY #085116
Assistant Attorney General
1162 Court Street NE
Salem, OR 97301
robert.wilsey@doj.state.or.us
Phone: (503) 378-4402
Attorneys for Respondent on Review

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Cases

Constitutional Provisions and Statutes

Other Authorities

APPELLANT'S BRIEF ON THE MERITS

Nature of the Proceeding

This case involves discretionary review of a Court of Appeals decision that affirmed a circuit court judgment imposing consecutive life sentences under ORS 137.719. The issue on review is whether defendant's two prior violations of California Penal Code (CPC) §288(a) are comparable to a "sex crime" identified in ORS 163A.005.

Question Presented

ORS 137.719 provides for a sentence of life imprisonment when a person convicted of a felony sex crime has twice before been sentenced for a felony sex crime that is listed in ORS 163A.005 or that is a foreign conviction that is comparable to an offense listed in ORS 163A.005. Defendant has twice before been sentenced for a violation of CPC §288(a). That statute prohibits physical contact with any part of a child's body when that contact is sexually motivated. Is CPC §288(a) comparable to any crime identified in ORS 163A.005?

Proposed Rule of Law

A violation of CPC §288(a) is not comparable to any sex crime listed in ORS 163A.005, including sexual abuse in the first degree and attempted sexual abuse in the first degree. A comparable offense describes a foreign conviction for a crime with elements that are, in meaning, the same as, equivalent to, or

narrower than the ORS 163A.005 offense with which it is being compared. Because CPC §288(a) is satisfied by contacting *any* part of a child with a sexual purpose, its elements are significantly broader than ORS 163.427(1)(a)(A)'s elements that require not only contact with a child that is sexually motivated but also contact with a sexual or other intimate part of the child or the offender. That gross disparity in the two statute's conduct elements renders them not "comparable."

The state may not rely on the alternative basis for affirmance that the elements of attempted sexual abuse are comparable to CPC §288(a)'s elements because, had it raised that argument in the trial court, the record may have developed differently. If the state may rely on its alternative basis for affirmance, then that argument fails as well because sexually motivated contact is not corroborative of an intent to engage in sexually motivated contact with a sexual or other intimate body part and therefore is not a substantial step toward commission of attempted sexual abuse in the first degree.

Summary of Argument

Defendant was sentenced to three life terms of imprisonment under ORS 137.719 based on having been sentenced twice before for the California felony offense of "lewd or lascivious acts upon a child" in violation of CPC §288(a). A sentence for a foreign offense qualifies as a "prior sentence" under ORS

137.719(3)(b)(B) when the sentence is for an offense that is "comparable" to an offense listed in ORS 163A.005. ORS 137.719 does not define the term "comparable offense," but the term's text, context, and legislative history suggest that a foreign offense is comparable to an offense listed in ORS 163A.005 if its elements are the same as, equivalent to, or narrower than the elements of the crime that is the basis for comparison.

If this court finds that a different construction of the phrase is available, it should adopt the construction that will avoid constitutional conflict. Construing ORS 137.719 more loosely than defendant proposes creates a likely constitutional conflict with the Sixth Amendment's jury trial guarantee and the Fourteenth Amendment's due process guarantee, which together require that any fact other than a prior conviction that increases the range of penalties to which a criminal defendant is exposed be submitted to a jury and proved beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 US 466, 490, 120 S Ct 2348, 147 L Ed 2d 435 (2000). Construing ORS 137.719 to require close element matching when identifying comparable foreign offenses brings the comparability inquiry within the narrow *Almendarez-Torres*, 523 US 224, 118 S Ct 1219, 140 L Ed 2d 350 (l998), exception to *Apprendi* for the simple fact of a prior conviction.

Comparing the elements of CPC §288(a) and ORS 163.427(1)(a)(A), the offenses are not comparable because the offenses do not share a coincidence of

elements. CPC §288(a) prohibits all physical contact with a child that is sexually motivated. That proscription includes outwardly innocuous conduct such as a pat on a child's head or placing an arm around a child's shoulder. ORS 163.427(1)(a)(A) is significantly narrower. It does not prohibit all physical contact with a child; rather, the Oregon statute prohibits physical contact of a particular nature, "sexual contact." "Sexual contact" means touching of the sexual or other intimate parts of the child or of the actor. Because the elements of the California offense are fundamentally broader than the Oregon offense, the offenses are not comparable.

In the Court of Appeals the state claimed for the first time that CPC §288(a) is comparable to *attempted* sexual abuse in the first degree. The state may not make that argument for the first time on appeal because, had it made the argument in the trial court, the record may have developed differently. Had the trial court relied on attempted sexual abuse in the first degree as a basis for the California offense's comparability, defendant could have requested a downward departure sentence under ORS 137.719(2) or could have objected to the life sentence on the basis that it violated the sentence proportionality requirement of Article I, section 16. Both arguments would have been grounded in the fact that a person eligible for a life sentence based on a criminal history of only attempting felony sexual offenses may, in the

particular circumstances at hand, deserve a sentence less harsh than that meted to a person with a history of completed felony sexual offenses.

Finally, even if the state may rely on its alternative basis for affirmance, that basis for affirmance fails because CPC §288(a) is not comparable to attempted sexual abuse in the first degree, because the elements of a CPC §288(a) offense do not establish a substantial step in committing an ORS 163.427(1)(a)(A) offense. To establish a substantial step sufficient to constitute an attempt to commit a crime, a person must engage in conduct that is corroborative of the actor's purpose to commit the completed crime. In the case of a violation of CPC §288(a), an inoffensive touch, even when sexually motivated, does not establish the actor's purpose to engage in "sexual contact." The elements of CPC §288(a) are thus not equivalent to or included in the elements of attempted sexual abuse in the first degree and the offenses are not comparable.

Summary of Facts and Procedural History

Defendant was tried by a jury and found guilty of three counts of sexual abuse in the first degree under ORS 163.427(1)(a)(A).[1] That offense is a Class B felony and carries a mandatory minimum sentence of 75 months in prison under ORS 137.700(2)(a)(P) unless ORS 137.719 applies. ORS 137.719 provides that the presumptive sentence for a felony sexual offense is life without the possibility of release if the defendant has been sentenced for felony sexual offenses "at least two times prior to the current offense." Qualifying prior felony sentences include sentences "imposed by any other state or federal court for comparable offenses." ORS 137.719(3)(b)(B).

Before sentencing, the state submitted a memorandum recommending that defendant be sentenced under ORS 137.719 to consecutive life terms on Counts 1 and 2 and to a concurrent life term on Count 3. In support of its

---

[1] ORS 163.427(1)(a)(A) provides:

"(1) A person commits the crime of sexual abuse in the first degree when that person:

"(a) Subjects another person to sexual contact and:

"(A) The victim is less than 14 years of age[.]"

ORS 163.431(3) provides that "sexual contact" as used in ORS 163.427 "has the meaning given that term in ORS 163.305." In turn, ORS 163.305(6) provides that sexual contact means "any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the actor for the purpose of arousing or gratifying the sexual desire of either party."

recommendation, the state relied on defendant having been sentenced for violating CPC §288(a) in California in 1991 and again in 1993. That statute provides in relevant part:

> "(a) Except as provided in subdivision (i), any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years."

CPC §288(a).

In the 1991 sentencing, defendant had been found guilty (in l986) in Count 1 to have committed the offense of "lewd and lascivious conduct upon a child" when he

> "did willfully and lewdly commit a lewd and lascivious act upon and with the body and certain parts and members thereof of [D], a child under the age of fourteen years, to wit: NINE (9) years of age, with the intent of arousing, appealing to and gratifying the lust, passion and sexual desires of the said defendant and of said child."

Santa Clara County Information No. 106802; State's Exhibit 1; ER 1-3.

He had been found guilty in Count 3 to have violated the same statutory provision, in the same manner, but involving a different child. *Id*. Though the court initially suspended imposition of sentence in that case, it later revoked probation and imposed a six-year prison term. Santa Clara County Order for

Probation; State's Exhibit 1; ER 4; Santa Clara County Abstract of Judgment-Prison Commitment for Case No. 106802; State's Exhibit 1; ER 5. In 1993, defendant was sentenced to another six years in prison for another violation of CPC §288(a), "lewd acts upon a child." San Joaquin County Abstract of Judgment-Prison Commitment Form for Case No. MM006926A; State's Exhibit 2; ER 6.[2]

The state's memorandum did not precisely identify the Oregon sexual offense for which CPC §288(a) was a comparable offense, but instead referred generally to the California offenses as additional instances of "sexual abuse." State's Sentencing Memorandum at 4-6.

In his responsive memorandum, defendant asserted that his California offenses are not comparable to Oregon's sexual abuse in the first degree because the Oregon offense—unlike the California offense—requires sexual contact. Defendant's Response to State's Sentencing Memorandum at 1.[3] That significant difference between the two offenses, defendant argued, made them not comparable and thus non-qualifying for ORS 137.719 purposes.

---

[2] The state offered only the judgment to prove the 1993 offense and sentence. Accordingly, no additional information about the basis for that conviction is available.

[3] Defense counsel also argued that the 1986 offense was non-qualifying because imposition of sentence had been suspended, but he withdrew that objection after learning that a prison term was later imposed. Tr 1035-41, Tr 1043.

At the sentencing hearing, the prosecutor relied on the Court of Appeals' interpretation of "comparable offenses" to argue that offenses are comparable under ORS 137.719 "if they have enough like characteristics that comparison is appropriate." Tr 1046, 1049; *see*, *State v. Escalera*, 223 Or App 26, 31, 194 P3d 883 (2008), *rev den*, 345 Or 690 (2009) (so construing the term in ORS 137.717, a statute providing for aggravated presumptive sentences for repeat property offenders). Defense counsel reiterated that the breadth of the California offense compared to the Oregon offense of sexual abuse in the first degree made the offenses not comparable. Tr 1047. Counsel again focused his argument on the fact that no sexual contact is required for the California offense. *Id*.

The trial judge found the California offense different from Oregon's sexual abuse in the first degree offense in two respects. First, the California offense does not require touching of a sexual or other intimate part of a victim, making the California offense significantly broader than the Oregon offense. Tr 1052. Second, the California offense does not require touching for the limited purpose of arousing or gratifying the sexual desire of the actor or the victim, but instead is proved if touching is made for the additional purpose of appealing to or gratifying the "passion" of the actor or the victim. Tr 1052. In that way, in the court's view, CPC §288(a) is broader than ORS 163.427(1)(a)(A) in both respects. Despite the two crimes' differences, both of

which make the California offense broader than ORS 163.427, the court found them comparable within *Escalera*'s interpretation of that term because both offenses are "aimed at the same wrong." Tr 1052.

The Court of Appeals concluded that offenses need not be identical to be comparable and that ORS 163.427(1)(a)(A) and CPC §288(a), though not identical, are comparable because they "share enough like characteristics for them to be worthy of comparison":

> "The text of ORS 163.427, read with the definition contained in ORS 163.305(6), and CPC 288 is similar in several respects. In general, both the Oregon and California statutes aim to proscribe physical contact with children under the age of 14 made with the intent of arousing or gratifying the sexual desires of the perpetrator or the victim. Furthermore, even though, unlike the Oregon statute, a conviction under CPC 288 does not require that a defendant touch a specific sexual or intimate part of a child, it nevertheless requires that the touching have a sexual purpose, *i.e.*, that it constitutes a 'lewd and lascivious act.' *See People v. Martinez*, 11 Cal 4th 434, 444, 45 Cal Rptr 2d 905, 903 P2d 1037 (l995) (explaining that 'sexual gratification must be presently intended at the time such "touching" occurs' but that a 'lewd or lascivious act can occur through the victim's clothing and can involve "any part" of the victim's body'). The statutes need not be identical given the broad definition of 'comparable.' *See Escalera*, 223 Or App at 32. It is sufficient that the statutes share enough like characteristics for them to be worthy of comparison, which they do. *Id*. (clarifying that 'comparability does not require that the foreign statute have the *same* use, role, or characteristics'

> (emphasis added)). Thus, we readily conclude that the statutes in question are comparable for the purposes of ORS 137.719."

State v. Carlton, 275 Or App 60, 66-67, 364 P3d 347 (2015).

Argument

Defendant was sentenced to three life terms of imprisonment under ORS 137.719[4] based on having been sentenced twice before for the California felony offense of lewd acts upon a child in violation of CPC §288(a).[5] Defendant objected to the court's reliance on those offenses because CPC §288(a) is not comparable to any Oregon offense to which ORS 137.719 applies. Because the California offense captures a much broader scope of conduct than any qualifying Oregon sexual offense, the trial court erred in relying on the California offenses and this case should be remanded for resentencing.

---

[4] The full text of ORS 137.719 is attached at App 1. The text of ORS 163A.005, providing the definition of "sex crime" as used in ORS 137.719(4), is attached at App 2-3.

[5] The full text of CPC §288 is attached at App 4-7.

I. Under ORS 137.719(3)(b)(B), a foreign offense is comparable to an ORS 163A.005 "sex crime" if its elements are the same as, equivalent to, or narrower than the crime it is being compared to.

A. The text and context of ORS 137.719(3)(b)(B) suggest the legislature used "comparable" to describe a basis for comparison that is grounded in the essential nature—the elements—of the offenses being compared.

The meaning of "comparable offense" in ORS 137.719(3)(b)(B) is a question of statutory interpretation. In interpreting a statute, this court's task is to ascertain the meaning of the statute most likely intended by the legislature that adopted it. ORS 174.020(1)(a); *State v. Nascimento*, 360 Or 28, 38, __ P3d __ (2016); *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009). The best evidence of legislative intent is the text of the statute itself, considered in its context and, when appropriate, this court may also consider legislative history and canons of statutory construction. *Gaines*, 346 Or at 171-73.

The text of ORS 137.719 reads:

> "(1) The presumptive sentence for a sex crime that is a felony is life imprisonment without the possibility of release or parole if the defendant has been sentenced for sex crimes that are felonies at least two times prior to the current sentence.
>
> "(2) The court may impose a sentence other than the presumptive sentence provided by subsection (1) of this section if the court imposes a departure sentence authorized by the rules of the Oregon Criminal Justice Commission based upon findings of substantial and compelling reasons.
>
> "(3) For purposes of this section:

> "(a) Sentences imposed for two or more convictions that are imposed in the same sentencing proceeding are considered to be one sentence; and
>
> "(b) A prior sentence includes:
>
> "(A) Sentences imposed before, on or after July 31, 2001; and
>
> "(B) Sentences imposed by any other state or federal court for comparable offenses.
>
> "(4) As used in this section, 'sex crime' has the meaning given that term in ORS 163A.005."[6]

ORS 137.719 does not define the term "comparable." When the legislature does not define a statutory term, courts ordinarily give words of common usage their plain, natural, and ordinary meaning. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (l993). Ordinary meanings are determined by consulting a contemporary dictionary. *See, State v. Newman*, 353 Or 632, 641, 302 P3d 435 (2013) ("We have recognized that 'conscious' as used in ORS 161.085(2) is a word of common usage. Accordingly we turn to the dictionary for further guidance.").

---

[6] At the time that defendant committed his Oregon offenses, ORS 137.719(4) referred to the definition of "sex crime" provided in ORS 181.594. Though Legislative Counsel renumbered ORS 181.594 to ORS 181.805 in 2013 and to ORS 163A.005 in 2015, the relevant text of the statute has not changed.

The dictionary definition of "comparable" is:

> "**1 :** capable of being compared: **a :** having enough like characteristics or qualities to make comparison appropriate –usu. used with *with* <differing from steel in some of the circumstances…but ~ with steel in respect of the necessity for a centralized control—Thorstein Veblen>
>
> **b :** permitting or inviting comparison often in one or two salient points only –usu. used with *to* <not too far below Jonson to be ~ to that master's work—T.S. Eliot> <hot cornbread baked with squash seeds—an Indian delicacy ~ to raisin bread—Willa Cather> **2 :** suitable for matching, coordinating, or contrasting **:** EQUIVALENT, SIMILAR <samples of subtlety…which made most of the ~ performances of the season sound clumsy—Irving Kolodin> <we have information about Arctic regions but lack ~ data for the Antarctic> **syn** see LIKE."

Webster's Third New Int'l Dictionary 461 (unabridged ed 2002).

The explanatory notes for that dictionary definition instruct that the boldface arabic numerals in the definition "separate the senses of a word that has more than a single sense" and that the boldface lowercase letters "separate coordinate subsenses of a numbered sense of a word." *Id*. at 17a (notes 12.1 and 12.2). The notes further advise:

> "The system of separating by numbers and letters reflects something of the semantic relationship between various senses of a word. It is only a lexical convenience. It does not evaluate senses or establish an enduring hierarchy of importance among them. The best sense is the one that most aptly fits the context of an actual genuine utterance."

Id. (note 12.4). And, the order of senses is merely historical; that is, "the one known to have been first used in English is entered first." *Id*. (note 12.5).

Finally, the notes explain that when two or more cross-references follow a symbolic colon, like the references to "equivalent" and "similar" above, that "indicates that there are two or more sets of definitions at other [dictionary] entries which are substitutable in various contexts" and that when a cross-reference follows "**syn** see," as does "like" above, the cross-referenced word is also synonymous with the entered word. *Id*. at 18(a) (notes 16.2, 16.2.1, and 18.2).

"Comparable" is thus generally synonymous with the word "like," and the second of its two senses is synonymous with the words "equivalent" and "similar."

As potentially applicable here, "like" is defined as:

> "**1 a :** the same or nearly the same (as in nature, appearance, or quantity) * * * **:** equal or nearly equal * * * **:** CORRESPONDING <the ~ period during the preceding year> **:** IDENTICAL, INDISTINGUISHABLE <as ~ as two peas> **:** SIMILAR <hospitals and ~ institutions for the sick or disabled> * * * **syn** ALIKE, SIMILAR, ANALOGOUS, COMPARABLE, AKIN, PARALLEL, UNIFORM, IDENTICAL[.]"

Id. at 1310.

As potentially applicable here, "equivalent" is defined as:

> "**1 :** equal in force or amount <the misery of such a position is ~ to its happiness> <a new TV film series that has the ~ footage of 13 feature pictures> * * * **2 a :** like in signification or import <~ but differently worded statements of the two writers> **:** SYNONYMOUS <substituted a term ~ with it but more familiar> * * * **3 a :** equal in value * * * **b :** corresponding or virtually identical esp. in effect or function <a bureau of the French army ~ to the intelligence

> division of the American general staff> **:** TANTAMOUNT * * * **c :** capable of being placed in one-to-one correspondence * * * **syn** see SAME."

Id. at 769.

> And, as potentially applicable here, "similar" is defined as:
>
> "**1 :** having characteristics in common**:** very much alike * * * **2 :** alike in substance or essentials **:** CORRESPONDING <no two animal habitats are exactly ~ * * * **syn** see LIKE."

Id. at 2121.

From the foregoing dictionary definitions, three things are clear. First, the term "comparable" has two senses. Using the second sense, it may describe a very high degree of similarity (virtually identical). Or, using the first sense, it may refer to a degree of similarity that makes comparison appropriate based on the commonality of salient features of the things being compared (alike in substance or essentials). Second, both senses of the term describe, at a minimum, a basis for comparison that is grounded in the closeness of the essential features of the things compared. Third, the meaning of the term may only be determined within the context of its use.

Turning, then, to other terms used in ORS 137.719, "comparable" modifies "offense." "Offense" is statutorily defined in ORS 161.505 as "conduct for which a sentence to a term of imprisonment or to a fine is provided by any law of this state or by any law or ordinance of a political subdivision of this state. An offense is either a crime, as described in ORS

161.515, or a violation, as described in ORS 153.008." ORS 161.515 provides that a "crime" is "an offense for which a sentence of imprisonment is authorized." And ORS 161.525 provides that a crime is a "felony" when "it is so designated in any statute of this state or if a person convicted under a statute of this state may be sentenced to a maximum term of imprisonment of more than one year." Thus, because ORS 137.719 applies when a person "has been sentenced for [ORS 163A.005] sex crimes that are felonies at least two times" in the past, ORS 137.719(3)(b)(B)'s reference to comparable "offenses" is a reference to felony sex crimes comparable to those listed in ORS 163A.005.

Significantly, ORS 137.719 may be invoked only when a person has prior "sentences" for comparable felony sex crimes. A person can have prior sentences only when there has been a prior conviction. *See*, ORS 137.101 (providing for duty of court to ascertain and impose punishment upon conviction for an offense). Accordingly, "comparable offenses" as used in ORS 137.719(3)(b)(B) refers to felony convictions for offenses comparable to those listed in ORS 163A.005.

Identifying and qualitatively evaluating a foreign felony conviction for comparability to an ORS 163A.005 crime requires an examination of the elements of the foreign offense of which the person was convicted. That is because it is the elements of an offense that are the "constituent parts," *i.e.* "the actus reus, mens rea, and causation," of a crime's legal definition. Black's

Law Dictionary 634 (10th ed. 2014). Thus, a foreign offense is comparable to a qualifying Oregon sexual offense when the elements of the foreign offense constitute a "comparable" offense to an offense listed in ORS 163A.005.

Defendant submits that in the context of its use to compare the likeness of two crimes, "comparable" takes its second sense. That is, comparable means that the things compared are the same or nearly the same. The more restrictive definition is meant because two crimes may not be declared comparable if only a single element overlaps. That is because the thing compared—a crime—is its elements in total and not in part. Therefore, a comparable crime is a crime with comparable elements, meaning all of its elements are like the crime it is being compared to.

Defendant's restrictive interpretation of "comparable" as used in ORS 137.719 is dictated by the context of the word's use in ORS 137.719 for the additional reason that ORS 137.719 is a conviction counting statute. If the purpose of examining a foreign conviction is to properly identify and then "count" not *general* criminal history but instead *specific* criminal history under a conviction-counting scheme, that undertaking makes sense only when the foreign offense is the same as or nearly the same as (equivalent to) the qualifying Oregon offense. Thus, "comparable" when used to describe a foreign offense describes a foreign offense with elements that are the same as or nearly the same as (equivalent to) a specified Oregon offense.

If this court disagrees and determines instead that the first sense of "comparable" is intended in ORS 137.719,[7] then defendant submits that even under that sense of the word, offenses are comparable only when the essential nature or features of the foreign offense are like the Oregon offense that is the basis for comparison. And, because an offense's essential nature or features may be discerned only through the offense's elements, a foreign offense is comparable to an ORS 163A.005 offense only when the elements of the foreign offense are the same as or more narrowly drawn than the Oregon offense. If the elements of a foreign offense are the same as or more narrowly drawn than an ORS 163A.005 offense, then the foreign offense will necessarily include the ORS 163A.005 offense and thus will logically "count" as a prior conviction for an ORS 163A.005 felony. In short, whether "comparable" in the context of its use in ORS 137.719 describes a very high degree of similarity or a similarity that is marked by an overlap of essential qualitative features, the phrase "comparable offenses" refers to foreign felony crimes with elements that are the same as or narrower than the elements of an ORS 163A.005 felony.

---

[7] The Court of Appeals in this case appears to have relied on the first sense of "comparable" when interpreting ORS 137.719 and in so doing adopted its construction of the word as used in a different conviction-counting statute, ORS 137.717. *Carlton*, 275 Or App at 64-65 (relying on *Escalera*, 223 Or App at 32). Defendant notes, however, that neither in *Carlton* nor in *Escalera* did the court acknowledge that "comparable" has more than a single sense.

B. The limited legislative history of ORS 137.719 is not inconsistent with and supports defendant's interpretation of its text and context.

ORS 137.719 was enacted in 2001 as an amendment to Senate Bill 370. Oregon Laws 2001, ch 884, §4. In addition to providing for lifelong sentences for a small class of felony sex offenders,[8] Senate Bill 370 limits the authority of the state police to post sex offender registration information on the Internet, allows certain juvenile sex offenders to petition for relief from the registration requirement, and modifies the provisions for community notification when a sex offender is released from custody. *Id*.

The text of the amendment was introduced while the bill was in the Senate Committee on Judiciary. Minutes, Senate Committee on Judiciary, SB 370, May 10, 2001, Ex N. At its introduction, committee counsel stated that the amendment "establishes [the] presumptive sentence of life imprisonment for a third conviction for a felony sex crime." Tape Recording, Senate Committee on Judiciary, SB 370, May 10, 2001, Tape 132, Side B (statement of committee counsel Craig Prins).

---

[8] A fiscal analysis of SB 370 asserted, "The Criminal Justice Commission found that 4% of the persons convicted of a felony sex crime requiring registration would be eligible for a life sentence under the provision of this bill. When this percentage was applied to the Department of Corrections intake data of eligible offenders the result was 37 offenders per year that would be eligible for life imprisonment." Fiscal Analysis of Proposed Legislation, SB 370 (2001), Exhibit 3, Ways and Means Public Safety Subcommittee, June 20, 2001.

Throughout the legislative process, the amendment was described consistently as providing for a life sentence for a "third conviction" or "for any offender who is convicted their third time." *See* Tape Recording, Joint Committee on Ways and Means, Public Safety Subcommittee, SB 370, June 20, 2001, Tape 117, Side A (statements of Larry Niswender, Legislative Fiscal Office, and Representative Hansen); Audio Recording, Senate Third Reading, SB 370, June 27, 2001 (statement of Senator John Minnis); Audio Recording, House Third Reading, SB 370, July 3, 2001 (statement of Representative Randy Leonard).

And the Staff Measure Summary for SB 370 described the portion of the bill that became ORS 137.719 as follows: "Establishes presumptive life sentence upon a person's third conviction for a felony sex offense[.]" Finally, a comment on the amendment by Legislative Fiscal Office explained that in Section 4, "the bill was also amended to create presumptive 'true' life sentences for persons convicted of sex offenses that require registration as a sex offender." Fiscal Analysis of Proposed Legislation, SB 370 (2001), Exhibit 3, Ways and Means Public Safety Subcommittee, June 20, 2001.

Admittedly, in that limited legislative history of ORS 137.719, there is no suggestion that anyone deliberated over, or even considered, the meaning of "comparable." Accordingly, there is no evidence that "comparable" was used purposively and in favor of a different descriptor. However, from the repeated

characterizations of Section 4, it is clear that the legislature intended to enact a simple conviction-counting measure that required a life sentence for a third conviction for a felony sex crime and that the legislature intended to limit the universe of qualifying felony sex crimes to the list of felony sex crimes for which registration as a sex offender is required. Because the measure was intended as a conviction-counting scheme and not a conduct-valuing scheme, and because only a limited universe of convictions were deemed eligible for counting, the legislative history of ORS 137.719 suggests that "comparable offenses" describes like offenses. And because like offenses may only describe offenses containing elements that are the same as or nearly the same as the offenses listed in ORS 163A.005, "comparable offenses" refers to foreign felony crimes with elements that are the same as or included within the elements of an ORS 163A.005 felony.

C. If there is any ambiguity in ORS 137.719's meaning, the statute should be interpreted in a way that avoids a constitutional conflict. Defendant's proposed construction of ORS 137.719 avoids such conflict.

Defendant submits that the legislature's use of "comparable" to describe a foreign qualifying offense for ORS 137.719 purposes requires close element matching between the foreign offense and a designated Oregon offense. If this court disagrees and finds a different construction of the phrase "comparable offense" available, it should adopt the construction that will avoid a

constitutional conflict. *See State v. Stoneman*, 323 Or 536, 540 n 5, 920 P2d 535 (l996) (noting maxim and that its construction of statute at issue avoided statute's constitutional invalidity); *State v. Duggan*, 290 Or 369, 373, 622 P2d 316 (l981) (noting and applying rule that in choosing between alternative interpretations of an ambiguous statute, court must choose the interpretation that avoids any serious constitutional difficulty).

The potential constitutional conflict in the construction of ORS 137.719 concerns the Sixth Amendment's jury trial guarantee and the Fourteenth Amendment's due process guarantee.[9] Those guarantees were interpreted in *Jones v. United States*, 526 US 227, 243, 119 S Ct 1215, 143 L Ed 2d 311 (1999), *Apprendi v. New Jersey*, 530 US 466, 490, 120 S Ct 2348, 147 L Ed 2d 435 (2000), and *Blakely v. Washington*, 542 US 296, 124 S Ct 2451, 159 L Ed 2d 403 (2004), and require that any fact other than a prior conviction that increases the range of penalties to which a criminal defendant is exposed be submitted to a jury and proved beyond a reasonable doubt.

The rule reflects two longstanding tenets of common-law criminal jurisprudence: "that the 'truth of every accusation' against a defendant 'should

---

[9] '"Taken together, [the Sixth Amendment and Fourteenth Amendment] indisputably entitle a criminal defendant to a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'" *Apprendi v. New Jersey*, 530 US 466, 477, 120 S Ct 2348, 147 L Ed 2d 435 (2000), *quoting United States v. Gaudin*, 515 US 506, 510, 115 S Ct 2310, 132 L Ed 2d 444 (l995).

afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours,' * * * and that 'an accusation which lacks any particular fact which the law makes essential to the punishment is ... no accusation within the requirements of the common law, and it is no accusation in reason * * *.'" *Blakely*, 542 US at 302-03 (citations omitted). The rule applies whether the fact at issue increases the statutory maximum penalty or increases the mandatory minimum penalty. *Alleyne v. United States*, 570 US __, 133 S Ct 2151, 186 L Ed 2d 314 (2013).

The "fact of prior conviction" exception identified in *Apprendi* and *Blakely* was drawn from *Almendarez-Torres v. United States*, 523 US 224, 118 S Ct 1219, 140 L Ed 2d 350 (l998), and described in *Apprendi* as "at best an exceptional departure" from the *Apprendi* rule. *Apprendi*, 530 US at 487. The *Almendarez-Torres* decision turned in part on the certainty of procedural safeguards that attach to any "fact" of prior conviction and on the fact that the prior conviction at issue in that case was obtained through a guilty plea, thereby mitigating concerns about the standard of proof and the right to a jury trial. *Id*. at 488. The decision, though, was controversial, with Justices Scalia, Stevens, Souter, and Ginsburg dissenting. *Almendarez-Torres*, 523 US at 248-71.

The *Almendarez-Torres* prior conviction exception has remained controversial[10] and has been consistently interpreted narrowly. In *Shepard v. United States*, 544 US 13, 125 S Ct 1254, 161 L Ed 2d 205 (2005), for example, the Court interpreted Title 18 USC §924(e), commonly known as the Armed Career Criminal Act (ACCA), and limited the application of the *Almendarez-Torres* exception in light of *Jones* and *Apprendi*. The ACCA mandates a minimum 15-year prison term for anyone possessing a firearm after three prior convictions for violent felonies, including a burglary committed in a building or an enclosed space (a court-termed "generic" burglary). The Court in *Shepard* adhered to its pre-*Apprendi* holding in *Taylor v. United States*, 495 US 575, 110 S Ct 2143, 109 L Ed 2d 607 (l990), that a court imposing a sentence under the ACCA may look only to the statutory elements, charging

---

[10] *See, e.g.*, *Descamps v. United States*, __ US __, 133 S Ct 2276, 2294, 186 L Ed 2d 438 (2013) (Justice Thomas concurring in a decision limiting judicial factfinding of a prior conviction on the basis that under *Apprendi*, "a court may not find facts about a prior conviction when such findings increase the statutory maximum. This is so whether a court is determining whether a prior conviction was entered * * *, or attempting to discern what facts were necessary to a prior conviction."); *Dretke v. Haley*, 541 US 386, 395-96, 124 S Ct 1847, 158 L Ed 2d 659 (2004) (describing argument that *Almendarez-Torres* should be overruled, or, in the alternative, that it does not apply because the recidivist statute at issue required finding not only the fact of a prior conviction but also the additional fact that prior convictions were sequential, "difficult constitutional questions" that "are to be avoided if possible."); King, *Sentencing and Prior Convictions: The Past, the Future, and the End of the Prior-Conviction Exception to Apprendi*, 97 Marq L Rev 523 (2014) (explaining why history, precedent, and policy fail to support the prior-conviction exception).

documents, and jury instructions to determine whether a prior burglary was a generic burglary. *Shepard*, 544 US 16. In so holding, the Court rejected the government's argument that in the case of a prior guilty plea a court could also consider police reports or complaint applications in determining whether a prior burglary was of a particular nature. *Id*. The Court noted that its decision to adhere to *Taylor* was driven in part by developments in the law, including *Jones* and *Apprendi*, and it described *Taylor* as "prescient in its discussion of problems that would follow from allowing a broader evidentiary enquiry," including the problem of "preserving the Sixth Amendment right that any fact other than a prior conviction sufficient to raise the limit of the possible federal sentence must be found by a jury, in the absence of any waiver of rights by the defendant." *Id*. at 24.

In the recent case of *Mathis v. United States*, __ US __, __ S Ct __, __ Ed 2d __ (June 23, 2016), the Court again considered the question of proof of a prior burglary for ACCA purposes in light of the Sixth Amendment. There the defendant had been convicted under a statute that listed multiple means of satisfying one or more of its elements and the Court had to decide whether that statutory structure permitted proof of the offense by means-matching instead of element-matching. *Mathis*, __ US at __. In concluding that it did not, the Court noted that under *Taylor* a state crime may not qualify as an ACCA predicate if its elements are broader than the generic version of a listed ACCA

offense and held that that determination may only be made by element-matching, even in cases where it may be discerned that as a matter of fact, the defendant's conduct was qualifying.

A primary basis for the Court's holding was that "a construction of ACCA allowing a sentencing judge to go any further would raise serious Sixth Amendment concerns." *Id*. at __. Consistent with the Sixth Amendment, a judge is prohibited from making an inquiry into the manner in which a crime was committed, but, rather, may do no more "than determine what crime, with what elements, the defendant was convicted of." *Id*.; *see also*, *Descamps v. United States*, __ US __, 133 S Ct 2276, 2281-82, 186 L Ed 2d 438 (2013) (holding that under the ACCA a prior conviction for an offense that "criminalizes a broader swath of conduct" than the relevant qualifying offense may not be used for sentence enhancement even if it may be determined factually that prior offense fell within the definition of a qualifying offense).

Defendant acknowledges that the federal constitutional conflict in this case is not the same conflict presented in *Shepard* and *Mathis*. That is, in this case the state did not seek to prove defendant's prior convictions with anything other than an indictment or a judgment. However, if this court interprets "comparable" as requiring anything less than close element matching, that interpretation effectively introduces judicial factfinding that is inconsistent with the Sixth and Fourteenth Amendments. If, in discerning whether a

foreign conviction is comparable to a designated Oregon sexual offense, a court is called upon to make a rough judgment call by comparing, for example, the *purposes* of the statutes, then the court must make a disputed finding of fact. That is, if what the court must find is debatable and must be resolved through judicial factfinding, Sixth Amendment and Due Process concerns arise.[11] And the greater the disparity is between statutes subject to comparison, the greater the constitutional problems.

If, instead, the court simply determines whether the elements of a foreign offense are the same as or narrower than the Oregon offense with which it is compared, then that inquiry is plainly within the narrow rule of *Almendarez-Torres* and no constitutional problems arise. Thus, to avoid a constitutional conflict, this court should construe "comparable" as used in ORS 137.719 as requiring a foreign offense to have elements that are the same as or narrower than an Oregon sexual offense identified in ORS 163A.005.

---

[11] *See, e.g.*, *Specht v. Patterson*, 386 US 605, 87 S Ct 1209, 18 L Ed 2d 326 (l967) (pre-*Apprendi* case finding unconstitutional, on Fourteenth Amendment grounds, the "Colorado Sex Offenders Act," which allowed a trial court to impose an indeterminate life sentence on a person convicted of a specified sex offense if the court found the person constituted a threat of bodily harm to the public or was an habitual offender and mentally ill).

II. A violation of CPC §288(a) is not comparable to any Oregon "sex crime."

A. A violation of CPC §288(a) is not comparable to ORS 163.427(1)(a)(A).

As noted above, the Court of Appeals in this case agreed with the state that CPC §288(a) is comparable to a sex crime identified in ORS 163A.005 because it is comparable to ORS 163.427(1)(a)(A),[12] sexual abuse in the first degree. *See* ORS 163A.005(5)(d) (providing that "[s]ex crime" means "[s]exual abuse in any degree"). The significantly greater breadth of the California offense, though, in comparison to ORS 163.427(1)(a)(A), makes the California offense not comparable to an ORS 163.427(1)(a)(A) offense. CPC §288(a) provides:

> "(a) Except as provided in subdivision (i), any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1,[13] upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires

---

[12] The text of ORS 163.427 is attached at App 8.

[13] Part 1, Title 8 provides for "crimes against the person" and includes "homicide," "mayhem," "kidnapping," "robbery," "attempts to kill," "assaults with intent to commit felony," "false imprisonment and human trafficking," and "assault and battery." Part 1, Title 9 provides for "crimes against the person involving sexual assault, and crimes against public decency and good morals" and includes "rape, abduction, carnal abuse of children, and seduction," "bigamy, incest, and the crime against nature," "indecent exposure, obscene exhibitions, and bawdy and other disorderly houses," and "other injuries to persons." CPC, Pt 1, T 8 and T 9.

> of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years."

The elements of a CPC §288(a) offense are thus:

*a person willfully and lewdly

*commits any lewd or lascivious act

*upon or with the body, or any part or member thereof

*upon a child under the age of 14 years

*with the intent of arousing, appealing to, or gratifying

*the lust, passions, or sexual desires

*of the person or the child

CPC §288(a) has been interpreted as requiring "no particular form of physical contact," instead proscribing "any and all sexually motivated contact." *People v. Martinez*, 11 Cal 4th 434, 438, 45 Cal Rptr 2d 905, 903 P2d 1037 (l995). That is, what constitutes a "lewd or lascivious act" upon a child's body is restricted neither by the manner of contact nor by the part of the body contacted. *Id*. at 442. Rather, the crime is committed by contacting "any part" of a child's body with the intent to sexually arouse either the defendant or the child. *Id*. The statute is a catch-all law, "intended to include sexually motivated conduct not made criminal elsewhere in the scheme." *Id*. at 443.

Significantly, the "gist" of a CPC §288(a) offense "has always been the defendant's intent to sexually exploit a child, not the nature of the offending

act." *Id*. at 444. It is the "purpose of the perpetrator in touching the child [that] is the controlling factor and each case is to be examined in the light of the intent with which the act was done." *Id*. If the intent of the act, "although it may have the outward appearance of innocence, is to arouse * * * the lust, the passion or the sexual desire of the perpetrator [or the child], it stands condemned by the statute." *People v. Hobbs*, 109 Cal App 2d 189, 192, 240 P2d 411 (l952). *See also People v. Shockley*, 165 Cal Rptr 3d 497, 500, 314 P3d 798 (2013) ("*Any* touching of a child under the age of 14 violates [section 288(a)], even if the touching is outwardly innocuous and inoffensive, if it is accompanied by the *intent* to arouse or gratify the sexual desires of either the perpetrator or the victim."(italics court's)).

In pertinent part here, ORS 163.427 provides:

> "(1) A person commits the crime of sexual abuse in the first degree when that person:
>
> "(a) Subjects another person to sexual contact and:
>
> "(A) The victim is less than 14 years of age[.]"

"Sexual contact" is defined in ORS 163.431(3) as having "the meaning given that term in ORS 163.305." In turn, ORS 163.305(6) provides that sexual contact means "any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the actor for the purpose of arousing or gratifying the sexual desire of either party."

The elements of ORS 163.427(1)(a)(A) are thus:

*a person

*subjects a child under the age of 14 years

*to touching of the sexual or intimate parts of the child or causing such child to touch the sexual or other intimate parts of the person

*for the purpose of arousing or gratifying the sexual desire of either party

The phrase "intimate parts" in ORS 163.305(6) has been interpreted as meaning "more than 'sexual parts,' but in context [referring] to parts that evoke the offensiveness of unwanted sexual intimacy, not offensive touch generally." *State v. Woodley*, 306 Or 458, 461, 760 P2d 884 (l988). The standard for establishing whether a body part is intimate is whether the body part is "subjectively intimate to the person touched, and either known by the accused to be so or to be an area of the anatomy that would be objectively known to be intimate by any reasonable person." *Id*. at 463. Under this standard, an accused does not commit sexual abuse "by touching that a reasonable person would not expect to be intimate, although the person touched so regarded it, unless this fact was known to the accused." *Id*.

Aligning the elements of ORS 163.427(1)(a)(A) and CPC §288(a), the offenses are clearly not "comparable." The Oregon offense has three conduct elements: first, an offender must touch a child; second, the touch must be of a part of the body that is sexual or that is regarded as intimate by the child and

that the offender knew or should have known was regarded as intimate; and third, the touching must be made with a sexual intent. In contrast, the California offense has only two conduct elements and may be established by *any* touching of a child, even outwardly innocent touching and touching that is perceived as innocent, so long as the touching is sexually motivated. That means that the California offense may be committed by simply placing an arm around a child's shoulder, patting the top of a child's head, or helping a child put on a pair of boots if the physical contact, though seemingly innocuous and experienced by the child as innocent and non-concerning, is made with a sexual purpose.

Because the elements of ORS 163.427(1)(a)(A) and CPC §288(a) do not align, they are not comparable. That ORS 163.427(1)(a)(A) and CPC §288(a) may share an overlapping legislative concern for the sexual exploitation of children is not sufficient to make them comparable. That is because, apart from sharing a legislative concern, the offenses do not share a coincidence of elements. CPC §288(a), though proscribing sexually motivated conduct, prohibits conduct simply by prohibiting the intent with which the conduct is undertaken. ORS 163.427(1)(a)(A) is significantly narrower. It prohibits sexually motivated conduct but is addressed to only a small class of sexually motivated conduct. Thus, the essential features of CPC §288(a)—its

elements—are not like ORS 163.427(1)(a)(A)'s elements and CPC §288(a) is therefore not comparable to ORS 163.427(1)(a)(A).

B. A violation of CPC §288(a) is not comparable to any other offense provided for in ORS 163A.005, including attempted sexual abuse in the first degree.

1. The state may not assert that CPC §288(a) is comparable to Oregon's attempted sexual abuse in the first degree as an alternative basis for affirmance.

Though in the trial court the state relied on only ORS 163.427(1)(a)(A) as an offense to which defendant's California offenses are comparable, in the Court of Appeals the state asserted for the first time that the offenses are also comparable to attempted sexual abuse in the first degree. Respondent's Answering Brief at 31-34. See ORS 163A.005(5)(x) (providing that a "sex crime" includes "[a]ny attempt to commit any of the crimes listed in paragraphs (a) to (w) of this subsection"). That argument, though, is an alternative basis for affirmance that was not raised in the trial court and may not be raised for the first time on appeal.

Under *Outdoor Media Dimensions Inc. v. State of Oregon*, 331 Or 634, 20 P3d 180 (2001), this court may affirm the ruling of a lower court on an alternative basis when certain conditions are met. First, the evidentiary record must be sufficient to support the proffered alternative basis for affirmance; second, the trial court's ruling must be consistent with the view of the evidence under the alternative basis for affirmance; and third, the record must be

materially the same one that would have developed had the prevailing party raised the alternative basis for affirmance below. 331 Or at 659-60. Under that standard, if a different record might have been created below "had the prevailing party raised [the alternative basis for affirmance], and that record could affect the disposition of the issue" a reviewing court will not consider the alternative basis for affirmance. *Id*. at 660.

Those conditions are not met in this case because the record might have developed differently had the state raised the issue of CPC §288(a)'s comparability to attempted sexual abuse in the first degree below. That is for two reasons. First, had the state raised the issue, the court may have agreed with the state that CPC §288(a) is comparable to attempted sexual abuse in the first degree and may have imposed a life sentence on that basis instead of on the basis of CPC §288(a)'s comparability to ORS 163.427(1)(a)(A). That is especially true considering that the court noted that the California offense is broader than the Oregon offense it was being compared to in two respects. *See* Tr 1052.

Had the court relied on attempted sexual abuse in the first degree as an offense to which CPC §288(a) is comparable, defendant might have sought a downward departure under ORS 137.719(2) (allowing a downward departure from the presumptive sentence of life "based upon findings of substantial and compelling reasons"). A basis for departure could have been a determination

that if a person's qualifying sex offenses under ORS 137.719 are merely attempts to commit qualifying sex offenses, that person's criminal history is significantly less serious than that of a person with a history of completed offenses, and thus merits a less serious sentence. *See* Commentary to *Oregon Sentencing Guidelines Implementation Manual* 123 (1989) ("When a case represents a truly unique set of circumstances, the sentencing judge is free to impose a[n] appropriate sentence, other than the presumptive sentence."); OAR 213-002-0001 (stating that one of the primary objectives of sentencing is "to punish each offender appropriately[.]").

Second, had the court relied on attempted sexual abuse as an offense to which CPC §288(a) is comparable, defendant could have also raised a claim that a life sentence was constitutionally disproportionate when applied to him. *See, e.g.*, *State v. Davidson*, 271 Or App 719, 353 P3d 2, *rev allowed*, 358 Or 449 (2015) (finding life sentence constitutionally disproportionate when imposed on a person convicted of public indecency for public masturbation with qualifying prior convictions only for public masturbation). That argument would have been similar to an argument for a downward departure sentence, *i.e.*, that a criminal history that includes only attempts to commit a qualifying felony sex offense is substantially less serious than a criminal history of completed felony sex offenses, making a life sentence constitutionally

disproportionate as applied when imposed on the person with the less serious history of sexually offending.

In short, if the life sentence in this case had been imposed on the basis of CPC §288(a)'s comparability to Oregon's attempted sexual abuse in the first degree offense, defendant could have either requested a downward departure sentence or challenged the life sentence on proportionality grounds. That means that the record could have developed differently had the state relied on attempted sexual abuse in the first degree below. Therefore, under *Outdoor Media*, the state is precluded from relying on that argument for the first time on appeal in support of defendant's ORS 137.719 sentence.

2. CPC §288(a) is not comparable to attempted sexual abuse in the first degree.

Even if this court may reach the state's alternative basis for affirming the trial court, it may not do so on the ground that a violation of CPC §288(a) is comparable to the Oregon offense of attempted sexual abuse in the first degree. Under ORS 161.405(1), "A person is guilty of an attempt to commit a crime when the person intentionally engages in conduct which constitutes a substantial step toward commission of the crime." To constitute a "substantial step" toward the commission of a crime, an act must be strongly corroborative of the actor's criminal purpose; that is, the actor's conduct must (1) advance the criminal purpose charged and (2) provide verification of the existence of

that purpose. *State v. Walters*, 311 Or 80, 85, 804 P2d 1164, *cert den*, 501 US 1209, 111 S Ct 2807, 115 L Ed 2d 979 (1991).[14] Mere preparation is not enough. *Id*. at n8.

Under *Walters*'s standard for identifying a substantial step toward a crime's commission, an attempt to commit sexual abuse in the first degree must be established by conduct that is corroborative of the actor's criminal purpose. In the context of ORS 163.427(1)(a)(A), that means that the defendant's conduct must be corroborative of an intent to have sexual contact with a child. Conduct is corroborative of an intent to engage in "sexual contact" if the conduct (1) advances the purpose of engaging in sexual contact and (2) provides verification that the defendant's purpose is to engage in sexual contact.

Walters's standard may not be met through the elements of CPC §288(a). That is because a person may touch a child in violation of CPC §288(a) without ever intending to have "sexual contact" with the child. In many cases, the person may satisfy a sexual motivation for physical contact with only non-sexual contact. The person may be aware of what conduct is off-limits, may draw attention, and may result in prosecution, and may

---

[14] The Ninth Circuit, later applying the same "substantial step" test to the facts in *Walters*, concluded that the evidence was not sufficient. *Walters v. Maass*, 45 F3d 1355 (9th Cir 1995). In other words, the different results stem from a disagreement on the application of an agreed-upon test.

consequently engage in only non-sexual touching. Though that touching might be in violation of CPC §288(a), it would not be in violation of ORS 163.427(1)(a)(A) and is not even a step—let alone a substantial step—to an attempted violation of ORS 163.427(1)(a)(A). Thus, because a sexually motivated touching is not corroborative of an intent to engage in sexually motivated touching of a sexual or other intimate body part, the elements of CPC §288(a) are not comparable to the elements of attempted sexual abuse in the first degree.

CONCLUSION

Because defendant's California offenses are not "comparable offenses" to any Oregon sexual offense for ORS 137.719 purposes, defendant requests that this court reverse the decision of the Court of Appeals and remand this case for resentencing.

Respectfully submitted,

ERNEST G. LANNET
CHIEF DEFENDER
CRIMINAL APPELLATE SECTION
OFFICE OF PUBLIC DEFENSE SERVICES

ESigned

INGRID A. MACFARLANE OSB #863328
CHIEF DEPUTY DEFENDER
Ingrid.MacFarlane@opds.state.or.us

Attorneys for Defendant-Appellant
Donovan Robert Carlton

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) the word-count of this brief (as described in ORAP 5.05(2)(b)) is 9,514 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 petition 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 August 11, 2016.

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 on Benjamin Gutman #160599, Solicitor General, and Robert M. Wilsey #085116, Assistant Attorney General, attorneys for Respondent on Review.

Respectfully submitted,

ERNEST G. LANNET, CHIEF DEFENDER
CRIMINAL APPELLATE SECTION
OFFICE OF PUBLIC DEFENSE SERVICES

ESigned

INGRID A. MACFARLANE OSB #863328
CHIEF DEPUTY DEFENDER
Ingrid.MacFarlane@opds.state.or.us
Attorneys for Petitioner on Review
Donovan Robert Carlton