IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. ALEN VLADIMIR SIMONOV Defendant-Appellant Respondent on Review.	Umatilla County Circuit Court Case No. CF110325 CA A151415 SC S063135

RESPONDENT'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 Umatilla County
Honorable CHRISTOPHER BRAUER, Judge

Opinion Filed: March 18, 2015
Author of Opinion: Sercombe, P. J.
Before Sercombe, Presiding Judge, Hadlock, Judge, and Tookey, Judge

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INTRODUCTION

The offense of unauthorized use of a motor vehicle (UUV), ORS 164.135, prohibits a particular conduct: *unauthorized* use of a vehicle, or joyriding. To obtain a conviction for UUV, the state must prove that the defendant knew that the owner of the vehicle did not consent to his use of it. The trial court in this case erred by instructing the jury that it could convict defendant of UUV if it found that defendant was criminally negligent as to whether the owner of the 1983 Datsun pickup that he rode in as a passenger had consented to his use. Defendant asks this court to affirm the decision of the Court of Appeals and reverse and remand for a new trial.

REVISED QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question Presented

A person commits UUV when he "takes, operates, exercises control over, rides in or otherwise uses another's vehicle, boat or aircraft without consent of the owner." ORS 164.135. What mental state must the state prove to obtain a conviction for UUV?

Proposed Rule of Law

The UUV statute prohibits a person's use of a vehicle without the owner's consent. The essential nature of a joyrider's conduct is use of a vehicle without the owner's permission. And it is the owner's lack of consent to the use that converts innocent conduct, like riding in a car as a passenger, into blameworthy conduct. For that and other reasons, the owner's lack of consent is part of the conduct element of UUV. The minimum permissible mental state for a conduct element is "knowingly." Therefore, to obtain a conviction for UUV, the state must prove that the defendant knew that the owner did not consent to his use of the vehicle.

SUMMARY OF ARGUMENT

This case requires the court to identify the culpable mental state for the prohibited conduct or "conduct element" of UUV. The state focuses on the meaning of "circumstance," supposing that a conduct element (the facts to which the culpable mental state for conduct must apply) is merely a bodily movement represented by a verb in the definition of an offense. That construction is improperly narrow. The conduct element of a criminal offense includes the essential nature of the prohibited conduct, including those aspects of the conduct that render otherwise innocent acts criminal.

The statutory text, including the definition of "conduct," indicates that the culpable mental state for conduct elements reaches the essential nature of the prohibited conduct described by the statute defining the offense. And context reveals that the drafters of the Criminal Code employed the term "conduct" to describe the underlying criminal behavior for which criminal punishment is appropriate.

In contrast, a circumstance element is "an accessory fact" that exists apart from or outside of a defendant's conduct. Examples from this court's case law include a status—like the fact that the defendant is a felon or the victim's age—when the underlying conduct—like delivering illegal drugs—is criminal. Those facts are collateral to the criminal nature of the defendant's conduct. But a defendant's failure to obtain permission from the owner of a car does not exist apart from or outside the conduct prohibited by the UUV statute. Rather, when a fact—like the owner's lack of consent—transforms otherwise innocent activity—like riding in someone else's car—into criminal activity, that fact describes the essential nature of the conduct, and it is part of the conduct element of the offense.

Under the state's interpretation, the default culpable mental state for all non-verbs in the definition of an offense is criminal negligence. That construction is inconsistent with the Criminal Code's broad conception of conduct elements. Although the state offers a simple analytical framework, its

approach reduces the default culpable mental state for all but the verb of an offense to criminal negligence. Under the state's interpretation, the verb still receives the "knowingly" mental state, but the conduct element is so truncated that it overlaps with the basic voluntary act requirement. That is not the culpability scheme that the legislature envisioned. The drafters of the Criminal Code intended to limit the use of criminal negligence to rare crimes in which awareness of the criminal nature of one's conduct is unnecessary to the question of criminal culpability.

Ultimately, the legislature's purpose in enacting the UUV statute was to criminalize joyriding. To accomplish that purpose, the legislature enacted a statute that prohibits a particular type of conduct: *unauthorized* use. The role of the phrase "without the consent of the owner" in the definition of the offense is to modify the listed verbs. For that reason, the owner's lack of consent is not *collateral* to the prohibited conduct. Instead, the owner's lack of consent *describes* the specific conduct prohibited by the legislature. Put another way, the essential nature of a joyrider's conduct is using a vehicle without the owner's permission. It is that lack of permission that creates criminal culpability, and, accordingly, the lack of consent is part of the conduct element of UUV, to which a knowing mental state must apply.

ARGUMENT

The state charged defendant with UUV after he rode as a passenger in his neighbor's 1983 Datsun pickup without her consent. ORS 164.135, the statute defining UUV, provides,

> "(1) A person commits the crime of unauthorized use of a vehicle when:
>
> "(a) The person takes, operates, exercises control over, rides in or otherwise uses another's vehicle, boat or aircraft without consent of the owner;
>
> "* * * * *
>
> "(2) Unauthorized use of a vehicle, boat, or aircraft is a Class C felony."

UUV is inside the Criminal Code. ORS 161.005 ("ORS 164.015 to ORS 164.135 * * * shall be known and may be cited as Oregon Criminal Code of 1971"). The state concedes that a culpable mental state applies to the owner's lack of consent. At issue is the scope of the conduct element of UUV.

To resolve that question, this court must examine both the Criminal Code's general culpability provisions and the UUV statute. The meaning of the culpability provisions as they apply to UUV is a question of legislative intent. To determine legislative intent, this court considers statutory text, *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-11, 859 P2d 1143 (1993), statutory context, *State v. Toevs*, 327 Or 525, 532, 964 P2d 1007 (1998), and legislative history, *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009).

The argument has five parts. In Part I, defendant provides a brief overview of the Criminal Code's culpability scheme. In Part II, he interprets the culpability provisions to determine which parts of a criminal offense the legislature intended to include within a "conduct element." In Part III, he responds to the state's first question presented, which asks this court to recognize a *per se* rule for elements related to lack of consent. In Part IV, he analyzes the UUV statute. In Part V, he applies the preceding analyses to the trial court's instructions in this case, concluding that the trial court misinstructed the jury on the mental state for UUV.

I. The parties agree that the state must prove a culpable mental state for the owner's lack of consent; at issue is the level of culpability the legislature intended to require.

"In Oregon, criminal liability generally requires an act that is combined with a particular mental state." *State v. Rutley*, 343 Or 368, 373, 171 P3d 361 (2007). The prohibited act is provided by the statute defining the offense. The statute defining the offense also determines the applicable mental state (or mental states), as informed by the Criminal Code's general culpability provisions. *Id.*

The culpability provisions start with the presumption that, for crimes inside the Criminal Code, every "material element" requires proof of a culpable mental state. ORS 161.095(2) ("Except as provided in ORS 161.105 [governing violations and crimes outside the Criminal Code], a person is not

guilty of an offense unless the person acts with a culpable mental state with respect to each material element of the offense that necessarily requires a culpable mental state."). An element is "material" unless it relates "solely to the statute of limitations, jurisdiction, venue" or similar matters. *State v. Blanton*, 284 Or 591, 595, 588 P2d 28 (1978). In practice, as the state notes, "most elements require proof of a culpable mental state." Pet BOM at 7.

The culpability provisions also determine *which* mental state applies. If the statute defining the offense includes a mental state "but does not specify the element to which it applies, the prescribed culpable mental state applies to each material element of the offense[.]" ORS 161.115(1). If the statute does not prescribe a culpable mental state for all or some of the material elements of the offense, "culpability is nonetheless required and is established only if a person acts intentionally, knowingly, recklessly or with criminal negligence." ORS 161.115(2).

But the four enumerated mental states do not arbitrarily apply to any element; they each apply only to particular *types* of elements. *State v. Crosby*, 342 Or 419, 428-29, 154 P3d 97 (2007). The definition of each mental state specifies the two types of elements to which the mental state applies:

> "(7) 'Intentionally' or 'with intent,' when used with respect to a *result* or to *conduct* described by a statute defining an offense, means that a person acts with a conscious objective to cause the result or to engage in the conduct so described.

> "(8) 'Knowingly' or 'with knowledge,' when used with respect to *conduct* or to a *circumstance* described by a statute defining an offense, means that a person acts with an awareness that the conduct of the person is of a nature so described or that a circumstance so described exists.
>
> "(9) 'Recklessly,' when used with respect to a *result* or to a *circumstance* described by a statute defining an offense, means that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.
>
> "(10) 'Criminal negligence' or 'criminally negligent' when used with respect to a *result* or to a *circumstance* described by a statute defining an offense, means that a person fails to be aware of a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such a nature and degree that the failure to be aware of it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation."

ORS 161.095(7)-(10) (emphasis added). Unless otherwise provided in a particular offense, conduct elements (the facts to which the culpable mental state for conduct apply) require proof of an intentional or knowing mental state, result elements require proof of an intentional, reckless, or criminally negligent mental state, and circumstance elements require proof of a knowing, reckless, or criminally negligent mental state. *Id.*

In order to determine which mental state applies, one must first determine what type or types of elements the statute defining the offense contains.[1] The state may plead and prove the lowest of the applicable mental states for the particular element and offense. ORS 161.115(3). As a result, the default culpable mental state for conduct elements is knowledge, and the default culpable mental state for result and circumstance elements is criminal negligence. Therefore, in this case, if the conduct element of UUV includes the owner's lack of consent, the correct mental state was knowingly, and the trial court improperly instructed the jury.

II. Conduct elements include the essential nature of the prohibited conduct that renders the conduct criminal.

The state's position that conduct elements are limited to the verb or verbs in the statute defining the offense is inconsistent with the legislature's intent. Instead, the text, context, and legislative history of the culpability provisions indicate that the Criminal Law Revision Commission intended to create a broad definition of conduct: one that includes the particular aspects of the conduct—the essential "nature" of the conduct—that render the conduct criminal or blameworthy.

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[1] The drafters of the Model Penal Code cautioned against such an approach, warning that assigning differing mental states to different types of elements would raise precisely the sort of complications at issue here. Model Penal Code and Commentaries (Official Draft and Revised Comments) § 2.02(3), 239-40 (1985) (footnotes omitted). The pertinent text from that subsection is provided in an appendix. App 1.

A. The text of the culpability provisions establish that conduct includes more than a bodily movement.

At its most basic, a "conduct element" includes the facts to which the culpable mental state for conduct must apply. Unlike "result" or "circumstance," "conduct" is defined within the Code: "'Conduct' means an act or its omission and its accompanying mental state." ORS 161.085(4). The definition has two components: (1) an act or omission and (2) an "accompanying mental state."

An "act" is "a bodily movement." ORS 161.085(1). And an "omission" is "a failure to perform an act the performance of which is required by law." ORS 161.085(3). A conduct element therefore *includes* a bodily movement (or omission), but it does not wholly consist of the bodily movement. Were that the legislature's intent, the Criminal Code would include "act" elements rather than "conduct" elements. Instead, to form a conduct element, a bodily movement is combined with the "accompanying mental state." In that regard, the applicable mental state necessarily shapes the meaning of "conduct."

The applicable "accompanying mental state" is assigned by the statute defining the offense. If no mental state is provided in the statute defining the offense, the applicable mental state is "knowingly." ORS 161.085(8); ORS 161.115(2). The definition of "knowingly" provides, "'Knowingly' or 'with knowledge,' when used with respect to conduct * * * means that a person acts

with an awareness that the *conduct* of the person is *of a nature so described*." *Id.* (emphasis added). Here again, the legislature codified its intent to capture more than a bodily movement within the definition of conduct elements; the pertinent "conduct" must be "of a nature" "so described."

"Nature" means "the essential character or constitution of something * * *; *esp* **:** the essence or ultimate form of something." *Webster's Third New Int'l Dictionary*, 1507 (unabridged ed 2002). At the very least, the essential character of a prohibited conduct is more than the bodily movement described in the offense. And as discussed below, the Criminal Code broadly refers to "conduct" as constituting the underlying behavior for which punishment is deemed appropriate. Given that broad understanding of what constitutes conduct, it is likely that the legislature intended the "nature" of the conduct to capture the essence of the conduct that makes it criminal.

The phrase "so described" is also significant. In context, the phrase "so described" directs the reader to the statute defining the offense. And the statute defining the offense defines the entire conduct targeted by the legislature. *See infra* Part IV (analyzing text and context of UUV statute). The other mental state that applies to conduct elements, "intentionally," includes similar phrasing. ORS 161.085(7) ("'Intentionally' * * * means that a person acts with a conscious objective * * * to engage in the conduct *so described*. (emphasis added))." Read together, the textual ingredients of the definition of "conduct"

indicate that a conduct element consists of the components of the offense that describe the essential nature of the prohibited conduct.

For example, when the legislature prohibited simple trespass, or entering or remaining unlawfully on another's premises,[2] it is unlikely that it intended to require only that the trespasser be aware of the nature of the fact that he entered or remained. Instead, the legislature intended to require the state to prove that the trespasser was aware of the *nature* of his decision to enter or remain: that it was without permission. Similarly, the trespasser must be aware that he is entering or remaining in or upon premises. Put another way, entering in or upon premises is not criminal "conduct." The physical act of walking inside a house does not subject a person to criminal liability, and it does not constitute the *actus reus* of a criminal offense. But the same act may become criminal when the actor takes it without permission. That lack of permission is essential to describe the prohibited conduct, and it is therefore included within the conduct element of the offense.

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[2] ORS 164.245, defining criminal trespass in the second degree, provides, "(1) A person commits the crime of criminal trespass in the second degree if the person enters or remains unlawfully in a motor vehicle or in or upon premises." "Enter or remain unlawfully" means "[t]o enter or remain in or upon premises when the premises, at the time of such entry or remaining, are not open to the public or when the entrant is not otherwise licensed or privileged to do so[.]" ORS 164.205(3)(a).

B. Context reveals that the legislature understood "conduct" to include the qualities of the conduct that render it criminal.

The state's position on the meaning of conduct begins and ends with an "act," or bodily movement; in the state's view, a bodily movement (represented by a verb) is conduct, and all else is a circumstance or result. Although the bare definition of "act" may support that narrow construction, the larger context of the culpability statutes does not. *See Vsetecka v. Safeway Stores, Inc.*, 337 Or 502, 508, 98 P3d 1116 (2004) ("Viewed in isolation, that text provides support for employer's position. Ordinarily, however, text should not be read in isolation but must be considered in context." (citation and internal quotation marks omitted)).

Context supports defendant's broader construction of conduct. To subject a person to criminal liability, an act must be voluntary. *Rutley*, 343 Or at 373. "'Voluntary act' means a bodily movement performed consciously and includes the conscious possession or control of property." ORS 161.085(2). An act is not voluntary if it is performed unconsciously or reflexively or if it is physically forced. *See State v. Newman*, 353 Or 632, 646, 302 P3d 435 (2013) (holding that "sleep driving" in a driving under the influence of intoxicants case would not satisfy the voluntary act requirement). If conduct is interpreted too narrowly—as narrowly as the state posits—the "knowing" conduct requirement overlaps with the voluntary act requirement, rendering one or the other

surplusage. *See* ORS 174.010 ("In the construction of a statute * * * where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.").

For example, the state's interpretation of the conduct element of UUV solely requires proof that a person acted with awareness that he was *riding* (or taking, operating, exercising control over, or using). Pet BOM at 19. That mirrors the voluntary act requirement, which is satisfied by proof that the riding was performed consciously. The better interpretation gives effect to both provisions, requiring proof that the offender was consciously riding in another's vehicle and that he was aware that he did so without the owner's consent. Because the owner's lack of consent is the essence of the prohibited conduct in UUV, it is included within the conduct element of the offense.

The legal concept codified in the definition of conduct—"the requirement of both an act and a culpable mental state for criminal liability"—"is not new." *Rutley*, 343 Or at 373 n 3 (citing William Blackstone, 4 *Commentaries on the Laws of England* 21 (1769) ("[T]o constitute a crime against human laws, there must be first, a vicious will; and secondly, an unlawful act consequent upon such vicious will.")). And the statutory definition of conduct mirrors the traditional formulation for criminal liability: the concurrence of *mens rea* (a guilty mind) with an *actus reus* (the physical aspect of the crime). *See State v.*

Hampton, 317 Or 251, 258, 855 P2d 621 (1993) (defining *mens rea* and *actus reus*).

That broad conception of conduct appears throughout the Code. For example, ORS 161.025(1), which states the purposes of the Criminal Code, provides:

> "(1) The general purposes of chapter 743, Oregon Laws 1971, are:
>
> "(a) To insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the correction and rehabilitation of those convicted, and their confinement when required in the interests of public prevention.
>
> "(b) To forbid and prevent *conduct* that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests.
>
> "(c) To give fair warning of *the nature of the conduct declared to constitute an offense* and of the sentences authorized upon conviction.
>
> "(d) To define the *act or omission and the accompanying mental state that constitute each offense* and limit the condemnation of *conduct* as criminal when it is without fault.
>
> "(e) To differentiate on reasonable grounds between serious and minor offenses.
>
> "(f) To prescribe penalties which are proportionate to the seriousness of offenses and which permit recognition of differences in rehabilitation possibilities among individual offenders.
>
> "(g) To safeguard offenders against excessive, disproportionate or arbitrary punishment."

(emphasis added). By its own terms, a primary purpose of the Criminal Code is to define and prohibit criminal conduct and to provide fair warning of the *nature of that conduct* that *constitutes* an offense. The drafters thus perceived "conduct" as constituting the underlying criminal activity for which punishment is appropriate. That understanding of the meaning of conduct informs the drafters' use of the term throughout the Code. *Tharp v. PSRB*, 338 Or 413, 422, 110 P3d 103 (2005) ("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.").

Other provisions of the 1971 Criminal Code include the same broad understanding of "conduct." For example, ORS 161.150, defining criminal liability, provides, "A person is guilty of a crime if it is committed by the person's own *conduct* or by the *conduct* of another for which the person is criminally liable, or both." (emphasis added). And ORS 161.095, which defines the minimum requirements of criminal liability provides, "(1) The minimal requirement for criminal liability is the performance by a person of *conduct* which includes a voluntary act or the omission to perform as act which the person is capable of performing." (emphasis added). In each of those examples, "conduct" is the foundation for criminal liability. It follows that the legislature intended conduct elements to capture the essential criminal nature of

the prohibited conduct, not just the bodily movement included within the definition of the offense.

C. A "circumstance" is a collateral fact that accompanies, not modifies, the defendant's conduct.

A broad construction of conduct is consistent with this court's illustrations of circumstance elements. In *State v. Rainoldi*, 351 Or 486, 488, 268 P3d 568 (2011), this court interpreted ORS 166.270(1) (defining felon in possession of a firearm) to determine whether the element that the defendant had previously been convicted of a felony required proof of a culpable mental state. Felon in possession is outside the Criminal Code, and this court held that the legislature "clearly intended to dispense"[3] with a culpable mental state for the felon element. *Rainoldi*, 351 Or at 496-505.

Rainoldi outlined a four-factor test for determining whether the legislature clearly intended to dispense with a culpable mental state for an element of an offense outside the Criminal Code. *Id.* at 493-94. The second factor of the analysis requires the court to determine "the nature of element at issue." *Id.* In explaining that analysis, this court drew a line between conduct

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[3] ORS 161.105(1)(b) provides, in pertinent part,

> "Notwithstanding ORS 161.095, a culpable mental state is not required if: * * * (b) An offense defined by a statute outside the Criminal Code clearly indicates a legislative intent to dispense with any culpable mental state requirement for the offense or for any material element thereof."

elements and "statuses," noting that conduct elements historically required proof of a culpable mental state, while mere statuses, like the fact that a person is a felon, did not. *Id.* at 497 ("[W]e note that proof that the defendant 'has been convicted of a felony' refers to an established class of persons who are not permitted to possess firearms. As such, the element refers to a status, as opposed to conduct, which ordinarily does not require proof of a culpable mental state.").

When a status in included in the definition of an offense that is *inside* the Criminal Code, the status is likely a circumstance element. *See Crosby*, 342 Or at 429 (describing statute at issue in *Blanton*, which made it a felony to knowingly give illegal drugs to a person under the age of 18, as "requir[ing] defendant to act knowingly as to a *circumstance*—specifically the purchaser's age." (emphasis in original)). Elements upon which criminal culpability depend are more likely to be conduct elements, and collateral elements, like a status, are more likely to be circumstance elements.[4]

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[4] It is important to note that defendant describes the general rules of culpability. Exceptions are not hard to come by. Statutory rape, for example, describes otherwise lawful conduct (sexual intercourse) and a victim's status (age) that renders the conduct unlawful. *See* ORS 163.375. In the statutory rape context, the legislature likely intended the victim's age to be an independent circumstance, to which special culpability defenses (and limitations) apply. ORS 163.325. Defendant discusses both statutes in full in Part III, *infra*.

In *Crosby*, this court recognized that, "without definitions, it is not always easy to determine how to categorize a specific material element of a crime." 342 Or at 429. There, this court analyzed whether "death" in ORS 163.118(1)(c) (defining first-degree manslaughter),[5] is a circumstance or a result. *Id.* at 430-31. The court concluded that death is a result:

> "Death *is not merely an accessory fact that accompanies the defendant's conduct.* The object of the mental state 'recklessly' is 'causes death.' That object, 'death,' is not a 'circumstance' here; no defendant could be reckless 'that the circumstance [death] exists.' ORS 161.085(9). Instead, death is a *result*; a defendant *can* be reckless 'that the result [death] will occur. *Id.* For a defendant to have committed manslaughter under ORS 163.118(1)(c), then, the defendant must have been 'aware of and consciously disregard[ed] a substantial and unjustifiable risk' of causing a result: death."

Crosby, 342 Or at 430-31 (first emphasis added, subsequent emphasis and alterations in original).

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[5] ORS 163.118(1)(c) provides, in part,

> "(1) Criminal homicide constitutes manslaughter in the first degree when:
>
> "* * * * *
>
> "(c) A person recklessly causes the death of * * * a dependent person, as defined in ORS 163.205, and:
>
> "(A) The person has previously engaged in a pattern or practice of assault or torture of the victim * * *; or
>
> "(B) The person causes the death by neglect or maltreatment, as defined by ORS 163.115[.]"

The state notes that this court's apparent definition of circumstance in *Crosby* as "an accessory fact that accompanies the defendant's conduct" is consistent with the dictionary definition of that term. Pet BOM at 15. *See also Black's Law Dictionary* 296 (10th ed 2014) (defining "attendant circumstance" as, "A fact that is situationally relevant to a particular event or occurrence. A fact-finder often reviews the attendant circumstances of a crime to learn, for example, the perpetrator's motive or intent."). Defendant takes no issue with that definition. But the parties part ways when applying it.

Crosby offers a clue to resolution of that disagreement. When discussing the difficult task of characterizing a particular element, the court offered the following hypothetical: "[I]f a hunter aims and fires at a creature moving behind cover, he, no doubt, intends to cause death. If, in fact, he kills a fellow hunter, his culpability depends on his awareness of the creature's status as a human being." *Crosby*, 342 Or at 429 n 8 (quoting Paul H. Robinson and Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 Stan L Rev 681, 690 n 39 (1983)). That example illustrates the premise that conduct includes those aspects of the offense that convert otherwise innocent action into criminal conduct—for example, from hunting an animal to shooting a human being. Put another way, a fact is not an "accessory fact" that merely "accompanies the defendant's conduct" if it is the

nature of the conduct that renders the conduct blameworthy and, ultimately, a criminal offense.

The theft statutes provide a ready example of the role of circumstance elements in a criminal offense. A person commits first-degree theft when she commits theft as defined in ORS 164.015, and the value of the property is $1,000 or more. ORS 164.055.[6] If the value of the property is $100 or more and less than $1,000, she commits second-degree theft, and if the value of the property is less than $100, she commits third-degree theft. ORS 164.045 (second-degree theft);[7] ORS 164.043 (third-degree theft).[8] "Theft," in any degree, is defined by ORS 164.015, which provides, in pertinent part,

> "A person commits theft when, with intent to deprive another of property or to appropriate property to the person or to a third person, the person:

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[6] ORS 164.055 provides, in pertinent part, "(1) A person commits the crime of theft in the first degree if, by means other than extortion, the person commits theft as defined in ORS 164.015 and: (a) The total value of the property in a single or aggregate transaction is $1,000 or more[.]"

[7] ORS 164.045 provides, in pertinent part, "(1) A person commits the crime of theft in the second degree if: (a) By means other than extortion, the person commits theft as defined in ORS 164.015; and (b) The total value of the property in a single or aggregate transaction is $100 or more and less than $1,000."

[8] ORS 164.043 provides, in pertinent part, "(1) A person commits the crime of theft in the third degree if: (a) By means other than extortion, the person commits theft as defined in ORS 164.015; and (b) The total value of the property in a single or an aggregate transaction is less than $100."

> "(1) Takes, appropriates, obtains or withholds such property from an owner thereof[.]"

"Property," in turn, is defined as "any article, substance or thing of value * * *." ORS 164.005(5). ORS 164.015 therefore defines the prohibited conduct (theft) and the applicable mental state (intent to deprive another of property).

The nature of the prohibited conduct for theft in any degree is that a person takes another's property with the intent to deprive the owner of it. The *specific value* of the stolen property does not change the essential nature of the prohibited conduct; taking another's property is criminal conduct, regardless of the value of the property stolen. Accordingly, the dollar value of the stolen property for purposes of any degree of theft is a circumstance; it is an accessory fact that accompanies, not modifies, the defendant's conduct. *See State v. Jones*, 223 Or App 611, 621, 196 P3d 97 (2008), *rev den*, 345 Or 618 (2009) (holding that, under a prior version of the first-degree theft statute requiring proof that the value of the property was over $750, the state was not required to prove that the defendant *knew* that the value of the property exceeded $750). But when a fact—like owner's lack of consent—transforms otherwise innocent activity—like riding in a car—into criminal activity, that fact describes the essential nature of the offense, and it is included within the conduct element.

D. Legislative history is of limited utility, and, in any event, does not support the state's narrow construction of conduct.

The Criminal Code of 1971 was the product of a years-long revision of Oregon's criminal laws by the Criminal Law Revision Commission. The Commission's discussions regarding the early drafts of the Criminal Code reveal that the drafters were deeply divided about the meaning of conduct and circumstance. *See, e.g.*, Tape Recording, Criminal Law Revision Commission, Subcommittee No. 1, December 18, 1968, Tape 29, Side 1 (Commission members disagreeing over the meaning of "attendant circumstance" in a variety of hypotheticals).

The state points to the "Derivation" section of the Commentary to the Criminal Code as offering examples of circumstance elements. Pet BOM at 16. That section provides,

> "Section 7 is based on the definitions formulated in New York Revised Penal Law §§ 15.00-15.05. Similar definitions appear in the Michigan Revised Criminal Code §§ 301, 305. The key definitions, i.e., the culpable mental states set out in subsections (7), (8), (9), and (10) [of what became ORS 161.085], follow the same rationale as § 2.02 of the Model Penal Code with one exception. The definition of 'knowingly' or 'with knowledge' in subsection (8) was changed by the New York reporters to eliminate any reference to result of conduct and to restrict the term to awareness of specified circumstances (e.g., *that property is stolen, that one has no right to enter a building, etc.*)."

Commentary to Criminal Law Revisions Commission Proposed Oregon Criminal Code, Final Draft and Report, §§ 7-11 (July 1970) (hereinafter

Commentary) (emphasis added). But that text does not support the weight that the state places on it.

In context, the parenthetical upon which the state relies refers to *New York's* treatment of "awareness of specified circumstances." As discussed, the text and context of Oregon's culpability provisions establish that Oregon's drafters would view the examples in the derivation section as included within the prohibited criminal conduct. *See State v. Walker*, 356 Or 4, 13, 333 P3d 322 (2014) ("We begin with the text and context of the statute, which are the best indications of the legislature's intent."). That premise is evidenced by the fact that the examples are provided as part of a discussion of "knowingly." In Oregon, circumstance elements only receive a knowing mental state if the particular statute so provides or if the prosecutor so elects to charge the case. Knowingly is the default mental state for the two examples in the derivation section—that property is stolen or that one has no right to enter a building—only if *defendant's* construction of conduct and circumstance is correct.

The Commission's ultimate inclusion of the mental state of criminal negligence for circumstance elements also detracts from the state's narrow interpretation of conduct. The drafters of the Criminal Code, like the drafters of the Model Penal Code, disfavored criminal negligence as a basis for criminal liability. However, without explanation, the Commission made criminal negligence the lowest default mental state for circumstance and result elements.

In Subcommittee One's first discussion regarding culpability under the Code, Professor Courtney Arthur explained that selecting the mental state of criminal negligence meant punishing individuals who were not aware that they created the risk for which they were punished. Tape Recording, Criminal Law Revision Commission, Subcommittee No. 1, Dec 18, 1968, Tape 29, Side 2. Punishment for negligent behavior, Arthur reasoned, could not lead to reform or deterrence of future criminal conduct. *Id.* For that reason, the lowest default mental state under the proposed Code was recklessly. *Id.*

Negligence was "viewed as an exceptional basis for liability," and would only apply if a specific statute included criminal negligence as the applicable mental state. *Id.* (statement of Project Director Donald Paillette). That understanding continued through the final discussions regarding the Code, including at the presentation of the final draft to the full Commission. Preliminary Draft No. 4, Criminal Law Revision Commission, Article 2, § 3 (April 1969). Paillette explained the provision to the full Commission, stating, "The use of 'criminal negligence' has been limited so that it will not generally apply; in fact, it is specifically said that it will not apply unless it clearly appears by wording of the statute defining the crime. This does not depart from the MPC." Minutes, Criminal Law Revision Commission, June 17, 1969. The Commission approved the draft. *Id.*

Then, apparently without discussion or a vote, the default culpable mental states provision was amended to its current form, which provides,

> "(2) Except as provided in ORS 161.105 [related to violations and strict-liability offenses], if a statute defining an offense does not prescribe a culpable mental state, culpability is nonetheless required and is established only if a person acts intentionally, knowingly, recklessly or *with criminal negligence*."

ORS 161.115 (emphasis added). The Commentary offers little insight on why such a drastic change appeared or how the change came about, providing only that "[t]his section provides a statutory framework for construing penal statutes as regards their culpability content, and the application of the culpable mental state requirement to specific offenses." Commentary, § 10, 9. That was a marked departure from the MPC approach. Model Penal Code (Official Draft and Explanatory Notes) American Law Institute, § 2.02(3).

The significance of the final change is indisputable, even if the intent behind it is uncertain. Under the current default culpability provision, ORS 161.115(2), the lowest permissible mental state is criminal negligence, not recklessness. Yet the drafters' reluctance to make criminal negligence the default is still important. Indeed, their willingness to make criminal negligence the default culpable mental state despite their misgivings about criminalizing mere negligence accentuates the limited role that the drafters intended circumstance elements to play in the definition of criminal offenses. At the very least, the drafters did not intend to make criminal negligence the default

mental state for elements that make otherwise innocent conduct criminal. Instead, it is more likely that the drafters intended for the elements that comprise the criminal conduct of the stated offense to be analyzed as conduct elements, requiring proof of a knowing mental state.

Finally, the drafters intended the specific provisions outlining the elements of a particular crime to resolve questions regarding the statute's culpability requirements. When Professor Arthur explained the Commission's role in proposing and amending the culpability provisions, he reminded the subcommittee that it wasn't "necessarily chang[ing] the law in Oregon." Minutes, Criminal Law Revision Commission, Dec 18, 1968, 1. He explained that "we're simply setting up four different mental elements and you can plug any crime you want to in at any level on these mental elements. It might seem at first blush that we're changing the law, but it's when you draft the individual crimes and say what mental element is required for that crime and when you assign punishment for that crime [that any change would occur]." Tape Recording, Criminal Law Revision Commission, Subcommittee No. 1, December 18, 1968, Tape 29, Side 2.

The drafters of the culpability provisions thus acted with the understanding that their colleagues parsing out the specific elements of each offense would have the final say as to the culpability requirements of that offense. For that reason, interpretation of the elements of a specific offense

depends as much on the words of that offense as the application of the general culpability provisions. *See* ORS 161.025(2) ("The rule that a penal statute is to be strictly construed shall not apply to chapter 743, Oregon Laws 1971, or any of its provisions. Chapter 743, Oregon Laws 1971, shall be construed according to the fair import of its terms, to promote justice and to effect the purposes stated in subsection (1) of this section.").

III. The state's *per se* rule conflicts with legislative intent.

Although unnecessary to resolve in this case, the state's first question presented, asking this court to consider whether, as a matter of law, a victim's lack of consent is a circumstance element, warrants a response. Pet BOM at 2. The state proposes a *per se* rule for the victim's lack of consent when it is included within the definition of a criminal offense: "Because a victim's lack of consent to a defendant's conduct is an accessory fact that accompanies the defendant's acts, the lack of consent is a 'circumstance.'" Pet BOM at 2.

To support its rule, the state relies on the drafters' discussions of the crimes of statutory and forcible rape. Pet BOM at 17. However, as discussed in Part II B, *supra*, any reliance on the drafters' discussion of the classification of particular types of elements is tenuous, given the drafters' inability to agree on the difference between conduct and circumstance elements. More to the point, the rape statutes themselves illustrate the futility of imposing *per se* rules with regard to the victim's lack of consent.

First-degree rape consists of the following elements:

> "(1) A person who has sexual intercourse with another person commits the crime of rape in the first degree if:
>
> "(a) The victim is subjected to forcible compulsion by the person;
>
> "(b) The victim is under 12 years of age;
>
> "(c) The victim is under 16 years of age and is the person's sibling, of the whole or half blood, the person's child or the person's spouse's child; or
>
> "(d) The victim is incapable of consent by reason of mental defect, mental incapacitation or physical helplessness."

ORS 163.375. "In enacting the 1971 Criminal Code, the legislature used the phrase 'does not consent' to refer to instances in which the victim does not actually consent and also to instances in which the victim lacks the capacity to consent." *State v. Ofodrinwa*, 353 Or 507, 511, 300 P3d 154 (2013). Each of the four theories of first-degree rape includes as an element that the victim does not consent: for forcible compulsion, the victim's lack of consent is factual, and the victim's lack of consent due to age occurs as a matter of law.

When the victim's lack of consent is the product of forcible compulsion, lack of consent is included within a conduct element, and the applicable mental state is knowingly. *See State v. Nelson*, 241 Or App 681, 687, 251 P3d 240 (2011), *rev dismissed as improvidently allowed*, 354 Or 62, 308 P3d 206 (2012). And the remaining theories of consent, whether properly described as

conduct, circumstance, or result, are subject to specific mental state rules. ORS 163.325 provides,

> "(1) In any prosecution under ORS 163.355 to 163.445 in which the criminality of conduct depends on a child's being under the age of 16, it is no defense that the defendant did not know the child's age or that the defendant reasonably believed the child to be older than the age of 16.
>
> "(2) When criminality depends on a child's being under a specified age other than 16, it is an affirmative defense for the defendant to prove that the defendant reasonably believed the child to be above the specified age at the time of the alleged offense.
>
> "(3) In any prosecution under ORS 163.355 to 163.445 in which the victim's lack of consent is based solely upon the incapacity of the victim to consent because the victim is mentally defective, mentally incapacitated or physically helpless, it is an affirmative defense for the defendant to prove that at the time of alleged offense the defendant did not know of the facts or conditions responsible for the victim's incapacity to consent."

The appropriate mental state depends on the state's theory of lack of consent. If lack of consent is because the victim is under the age of 16, no mental state applies, creating the strict-liability offense of statutory rape. ORS 163.325(1). If lack of consent is because the victim is under a specified age other than 16, only a reasonable mistake will excuse the defendant's conduct, and the applicable mental state is criminal negligence. *See* Model Penal Code and Commentaries § 2.02, 271 (only a reasonable mistake of fact will negate the mental state of criminal negligence). But if lack of consent is based on the victim's incapacity, an honest mistake, even if unreasonable, will excuse the defendant's conduct, meaning that the applicable mental state is knowingly (or

at the very least, recklessly, which does not apply to conduct under the Criminal Code). *Id.*

Ultimately, whether a component of a criminal offense is a conduct, result, or circumstance element depends on its role in the offense and its relationship to the other components. The pertinent analysis is averse to the creation of bright line rules for particular elements, like the victim's lack of consent. But certain principles guide the analysis. When the component in question comprises the essential nature of the prohibited conduct, the component is included within the offense's conduct element.

IV. The owner's lack of consent is part of the conduct element of unauthorized use of a motor vehicle, which criminalizes joyriding.

Returning to the matter at hand, the text, context, and legislative history of the UUV statute establish that "without the consent of the owner" is included within the statute's conduct element. The statute provides,

> "(1) A person commits the crime of unauthorized use of a motor vehicle when:
>
> "(a) The person takes, operates, exercises control over, rides in or otherwise uses another's vehicle, boat, or aircraft without the consent of the owner[.]
>
> "* * * * *
>
> "(2) Unauthorized use of a vehicle, boat, or aircraft is a Class C felony."

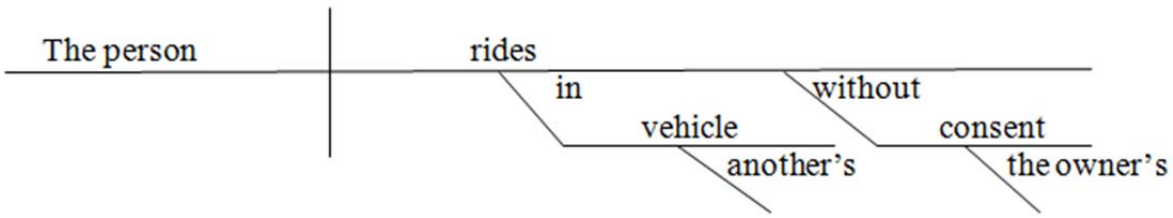
ORS 164.135. The state's contrary construction does not reflect the legislature's intent.

A. Text and context establish that "unauthorized use," or use without the owner's consent, is a particular form of conduct.

The grammatical role of each of the phrases in subsection (1)(a) of the UUV statute is instructive. "The person" is the subject of the sentence, and "takes," operates," "exercises," "rides, and "uses" are verbs. "Another's vehicle, boat or aircraft" is the direct object of some of the listed verbs (takes, operates, uses) and the object of a prepositional phrase in the others (exercises control over and rides in). "Without the consent of the owner" is an additional prepositional phrase (actually two prepositional phrases: "without the consent" and "of the owner"), regardless of which alternative verb applies.

"Prepositions are words that show relationships." *Marcilionis v. Farmers Ins. Co. of Oregon*, 318 Or 640, 645, 871 P2d 470 (1994). Prepositional phrases can be used as a noun, an adverb, or an adjective. *The Chicago Manual of Style* § 5.166, 188 (15th ed 2003). When used an as adverb, prepositional phrases are called adverbial phrases, and they modify verbs. *Id.* (providing as an example, "we strolled *through the glade*"). "Without the consent of the owner" is an adverbial phrase, and it modifies the verb. That relationship is reflected in a diagram of the sentence, "The person rides in another's vehicle

without the owner's consent":



As the diagram illustrates, "without the owner's consent " modifies "rides." The adverbial phrase changes the meaning of the verb rides.[9] It describes *how* the person rides; he does so without the owner's consent. The text therefore describes a particular form of conduct: *unauthorized* use.

Had the legislature intended to criminalize riding in another's vehicle, regardless of whether the actor knew that the owner did not consent, it could have employed various drafting techniques. For example, the structure of UUV could have mirrored that of the theft statutes, where the legislature described a particular conduct and then, in a series of separately numbered statutes, described the circumstance elements. *Supra*, Part II A. Even separating the owner's lack of consent from the verb in independent clauses may have signaled a legislative intent to create an independent circumstance element. In the sentence, "The person rides in another's vehicle, and the owner did not consent," the owner's lack of consent no longer modifies the act of riding. But

[9] The adverbial phrase "in another's vehicle" also modifies "rides;" it describes *where* the action occurs.

where the owner's lack of consent changes the meaning of ride, there is but a single conduct element. And again, the owner's lack of consent does not merely change the meaning of ride (or the other verbs listed in the UUV statute). Rather, it is the owner's lack of consent that renders otherwise innocent conduct blameworthy.

That the crime of unauthorized use of a motor vehicle criminalizes a particular form of conduct—*unauthorized* use—borders on the self-evident. Perhaps for that reason, Oregon courts have construed the statute that way since enactment. For example, in *State v. Jordan*, 79 Or App 682, 685, 719 P2d 1327, *rev den*, 301 Or 667 (1986), the court simply cited the UUV statute for its rule that "[u]nauthorized use requires only that the defendant ride in a vehicle that he knows is stolen." (citing ORS 164.135(1)(a)).

The state's construction requires proof only that a person was criminally negligent as to whether the owner of the vehicle that he rode in consented to the use. Thus, under the state's interpretation, every person who rides in a vehicle has an affirmative duty to determine whether a vehicle is stolen before he or she rides in it. And gross naivety or guileless trust could subject a person to significant legal consequences; a person who is actually unaware that the vehicle was stolen could be convicted under the state's theory. UUV is a felony offense. ORS 164.135(2). In addition, UUV is a predicate offense for the repeat property offender enhancement, which entitles the state to seek

substantially longer sentences upon a person's second or third property offense. ORS 137.717. The severity of those consequences indicates that the legislature did not believe that mere criminal negligence would suffice to subject a person to criminal liability for UUV.

B. Legislative history reveals that the legislature enacted the unauthorized use of a motor vehicle statute to criminalize joyriding.

The purpose of the UUV statute was to prohibit joyriding. The first sentence of the Commentary to the Criminal Code's UUV section provides, "This section covers the 'joy-riding' type of offense where the actor makes unauthorized use of another's vehicle but without the intent to steal it or permanently deprive the owner of its use." Commentary, § 134, 142. The legislature thus targeted a particular type of unlawful conduct—joyriding, or unauthorized use.

At the time of the Criminal Code's enactment, joyriding was already criminalized under Oregon law. The crime of UUV dates back to 1911, when the General Laws of Oregon provided,

> "Every person who takes or uses without authority any vehicle without intent to steal the same, or who shall be a party to such unauthorized taking or using, upon conviction thereof, shall be punished by imprisonment in the State prison for not more than two years or by a fine of not more than five hundred dollars."

Lord's Oregon Laws, ch 174, § 24, 275 (1911). The inclusion of UUV in the Criminal Code was "meant to include the kinds of acts covered by * * * the existing 'joy-riding' statute[.]" Commentary, § 134, 142.

The essential nature of a joyrider's conduct is that he temporarily uses a vehicle without permission. It is that lack of permission or consent that renders the conduct unlawful. And unauthorized use, or use without consent, is a particular form of use. It is not, as the state contends, a bodily movement plus an "accessory fact" any more than "in a vehicle" in an accessory to "riding." Because the owner's lack of consent is a component of the conduct prohibited by the crime of UUV, it requires the "knowingly" mental state. Accordingly, a person charged with committing UUV must *know* that he uses the vehicle without the owner's consent to be convicted of that crime.

V. The trial court incorrectly instructed the jury as to the mental state for unauthorized use of a motor vehicle.

The state's proof in this case was that defendant rode as a passenger in his neighbor's 1983 Datsun pickup while his brother drove. *State v. Simonov*, 269 Or App 735, 737, 346 P3d 589, *rev allowed*, 357 Or 324, 354 P3d 696 (2015). Defendant's theory of the case was that his brother obtained permission from the neighbor to borrow the truck and that defendant did not know that they used the truck beyond the neighbor's permission. *Id.* at 738.

Defendant requested the following jury instructions:

> "Oregon law provides that a person commits the crime of unauthorized use of a vehicle when the person knowingly rides [in] another's vehicle without the consent of the owner.
>
> "In this case, to establish the crime of unauthorized use of a vehicle, the state must prove beyond a reasonable doubt the following four elements:
>
> " * * * * *
>
> "(4) [Defendant] knew the use of [the] [1983] Datsun Pickup was without the consent of the owner."

Id. (ellipses and alterations in original). He also requested the court to instruct the jury that "[w]hen used in the phrase [defendant] knew the use of [the] vehicle was without the consent of the owner, 'knowingly' or 'with knowledge' means that the person acts with an awareness that he had [actual] knowledge [of] the lack of consent of the owner." *Id.* (alterations in original).

The trial court rejected those instructions and instructed the jury as follows:

> "Oregon law * * * provides that a person commits the crime of unauthorized use of a vehicle when a person unlawfully and with criminal negligence takes, operates, exercises control over, rides in or otherwise uses another's vehicle without the consent of the owner.
>
> "In this case, to establish the crime of unauthorized use of a vehicle, the State must prove beyond a reasonable doubt * * * [that defendant] failed to be aware of a substantial and unjustifiable risk that he did not have the consent of the owner.
>
> "A person acts with criminal negligence if that person fails to be aware of a substantial and unjustifiable risk that a particular result will occur or a particular circumstance exists.
>
> " * * * * *

> "When used in the phrase, the defendant * * * did unlawfully and with criminal negligence take, operate, exercise control over, ride in and otherwise use a vehicle, a 1983 Datsun pickup[,] without the consent of the owner * * *, criminal negligence or criminally negligent means that the person fails to be aware of a substantial and unjustifiable risk that the 1983 Datsun pickup was being operated, controlled, [ridden] in or otherwise used without the consent of the owner."

Id. at 739 (ellipses and alterations in original).

The trial court's jury instructions misstated the elements of the offense. As discussed, the state must prove that a defendant *knew* that the owner did not consent to the use in order obtain a conviction for UUV. Consequently, the trial court erred by misinstructing the jury as to the elements of the offense and by refusing to give defendant's requested instructions, which provided a correct statement of the law. *See Williams v. Phillip Morris Inc.*, 344 Or 45, 56, 176 P3d 1255 (2008) ("Under Oregon law, there are two different types of error respecting jury instructions: (1) error in the failure to give a proposed jury instruction, and (2) error in the jury instructions that were actually given."). This court should affirm the decision of the Court of Appeals and reverse and remand for a new trial.

Finally, the trial court's instructions were erroneous, even if the state's proposed construction of the culpability requirements for UUV is correct. The court instructed the jury that "Oregon law * * * provides that a person commits the crime of [UUV] when a person unlawfully and *with criminal negligence*

takes, operates, exercises control over, rides in or otherwise uses another's vehicle without the consent of the owner." *Simonov*, 269 Or App at 769 (emphasis added). The court's instructions thus applied the mental state of criminal negligence to the verbs listed in the UUV statute.

Of course, defendant did not dispute that he was consciously riding in the pickup truck, and the jury was required to find that he did so voluntarily. Instead, the case turned on defendant's knowledge regarding the *nature* of his bodily act—that the riding was without consent. The fact that a trial court's erroneous instruction on the mental state for the conduct element of a crime could be harmless under the state's construction further emphasizes defendant's point: the essential nature of the conduct prohibited in an offense—the very aspect of the conduct that renders it criminal—is included within the conduct element of the offense.

CONCLUSION

The essential nature of a joyrider's conduct is that the joyrider uses a vehicle without the owner's permission. That lack of permission is included within the conduct element of the offense of UUV. Because the trial court failed to properly instruct the jury with regard to a necessary culpable mental state, this court should affirm the decision of the Court of Appeals and reverse and remand for a new trial.

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 9,455 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 Respondent's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on October 7, 2015.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Respondent's Brief on the Merits will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Paul L. Smith, #001870, Deputy Solicitor General, attorney for Plaintiff-Respondent.

Respectfully submitted,

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