IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. EMILIO JUNIOR MEDINA, Defendant-Appellant, Petitioner on Review.	Yamhill County Circuit Court Case No. CR100685 CA A147883 SC S062436

PETITIONER'S BRIEF ON THE MERITS

Review of the decision of the Court of Appeals
On appeal from the judgment of the Circuit Court for Yamhill County
Honorable Ronald W. Stone, Judge

Opinion Filed: April 2, 2014
Author of Opinion: Tookey, J.,
Before: Duncan, Presiding Judge, and Tookey, Judge, and Rasmussen, Judge pro tempore

PETER GARTLAN #870467
Chief Defender
ZACHARY LOVETT MAZER #066670
Deputy Public Defender
Office of Public Defense Services
1175 Court Street NE
Salem, OR 97301
zack.mazer@opds.state.or.us
Phone: (503) 378-3349
Attorneys for Petitioner on Review

ELLEN F. ROSENBLUM #753239
Attorney General
ANNA JOYCE #013112
Solicitor General
JEREMY RICE #055416
Assistant Attorney General
400 Justice Building
1162 Court Street NE
Salem, OR 97301
jeremy.c.rice@doj.state.or.us
Phone: (503) 378-4402
Attorneys for Respondent on Review

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional and Statutory Provisions

Other Authorities

PETITIONER'S BRIEF ON THE MERITS

STATEMENT OF THE CASE

This criminal appeal concerns the meaning and application of the identity theft statute, ORS 165.800. An officer arrested defendant following a traffic stop during which defendant gave a false name and birthdate to the officer. Later, someone at the jail prepared a fingerprint card using the false information that defendant provided. Defendant signed that card with the false name, and an officer faxed it to a fingerprint database, which reported defendant's true identity.

The first issue for this court concerns the intended meaning and application of the terms "deceive" and "defraud" in ORS 165.800. The second issue concerns whether the legislature intended the identity theft statute to apply to a person who misrepresents his identity to a police officer. If this court concludes that the statute does apply to such conduct, and that defendant intended to "deceive" or "defraud" within the meaning of the statute, the final issue is whether defendant "uttered" or "converted to his own use" the "personal identification of another person" by signing the false name on the fingerprint card.

The state charged defendant with identity theft (Count 1), ORS 165.800; giving false information to a police officer for a citation (Count 2), ORS 162.385; giving false information to a police officer (Count 3), ORS 807.620; and failure to carry or present a license (Count 4), ORS 807.570. After the parties stipulated to the evidence described below, defendant moved for a judgment of acquittal on Count 1. The state argued that defendant "created and converted [personal identification] to his own use to deceive the police to gain the benefit of not being arrested on what he thought was an outstanding warrant. And he did that by uttering the fingerprint card * * *." Tr 23. Defendant replied that creating was not at issue, because the state had only alleged "utter or convert." Tr 27.

The trial court denied defendant's motion. It ruled that defendant may have uttered or converted personal identification, "but he clearly * * * created a personal identification document, written document."[1] Tr 28. It also found that

[1] As noted, the trial court considered the state's argument that defendant had "created" personal identification by signing the fingerprint card. However, because the state did not allege in the charging instrument that defendant "created" personal identification, that theory of liability (and, consequently, the meaning of that term) is not directly at issue. *See State v. Schoen*, 348 Or 207, 213 n 2, 288 P3d 1207 (2010) (where state alleged only that defendant "tampered" with property under criminal mischief statute, meaning of alternative theory of "interfering" with property not at issue).

defendant intended to deceive the police and that the legislature's intent was "to stop deception that might benefit somebody." Tr 35.

In the Court of Appeals, defendant argued that he did not utter or convert personal identification of another person within the meaning of the statute, or, alternatively, that the legislature did not intend for ORS 165.800 to apply to his conduct. The Court of Appeals rejected both arguments. *State v. Medina*, 262 Or App 140, 324 P3d 526, *rev allowed*, 355 Or 879 (2014).

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First Question Presented: Does ORS 165.800 require that a defendant intends to gain a substantive benefit to which he is not otherwise entitled?

Proposed Rule of Law: Yes. By requiring that a defendant use the personal identification of another person with the intent to "deceive" or "defraud," the legislature meant to capture conduct directed at obtaining something of value or some other substantive benefit to which the defendant was not otherwise entitled.

The state did not argue before the Court of Appeals that defendant "created" personal identification. The Court of Appeals did not address the trial court's reliance on the "create" element, because it held that a reasonable factfinder could find that defendant's conduct violated the "utter" or "convert" elements. *Medina*, 262 Or App at 143 n 5. Defendant does not address the "create" theory further in this brief.

Second Question Presented: Did the legislature intend for the crime of identity theft to apply to a person who misrepresents his identity to a police officer?

Proposed Rule of Law: No. After discussion, the original drafters of ORS 165.800 removed a provision in the identity theft bill that would have applied to misrepresenting identity to a police officer, because they were concerned about the cost of enforcement and because other statutes already criminalized that conduct. The statute was amended in the next legislative session, but that amendment did not alter the original drafters' policy choice.

Third Question Presented: If the identity theft statute applies to a person who misrepresents his identity to a police officer, did defendant "utter" or "convert to [his] own use" the "personal identification of another person" when he gave a false name to a police officer during a traffic stop and signed the false name to a document that law enforcement officials prepared for their own purposes?

Proposed Rule of Law: No. The document was "personal identification of another person," but defendant did not put that document into circulation or misappropriate an existing piece of personal identification for his own purposes.

STATEMENT OF FACTS

The Court of Appeals correctly set forth the following facts:

> "After a police officer stopped defendant for traffic violations, defendant claimed that he had no driver's license; defendant misidentified himself as 'Sergio Molina' and gave the officer a birth date purportedly belonging to that person. The officer ran the provided information through dispatch, but dispatch was unable to locate 'Sergio Molina.' The officer arrested defendant for failure to carry and present a license and transported defendant to the police department.
>
> "During the booking process, someone prepared a property record and a fingerprint card for 'Sergio Molina.'[3] The documents bear that name as well as a birth date. The fingerprint card also bears defendant's fingerprints and a social security number. Defendant signed the name 'Sergio Molina' on the two written documents.
>
> "Defendant was cited and released, and defendant's fingerprints were faxed to the Automated Fingerprint Identification System (AFIS)—a system that obtains, stores, and analyzes fingerprint data. An AFIS employee called the officer and reported defendant's true identity. When the officer later spoke to defendant in jail, where defendant was lodged on a different matter, defendant told the officer that he did not know anyone named 'Sergio Molina.' Defendant also told the officer that he had lied about his identity because there was a warrant out for his arrest.
>
> _____
>
> "[3] The record does not indicate who prepared the documents."

262 Or App at 142.

SUMMARY OF THE ARGUMENT

ORS 165.800 provides that a person commits the crime of identity theft if he "utters" or "converts to [his] own use" the "personal identification of another person" with the intent "to deceive or to defraud." "Defraud" refers to obtaining a property or financial benefit. "Deceive" is broader, meaning "to cause to believe the false," but the statute's text, context, and legislative history, as well as general maxims of statutory construction, indicate that it does not apply to mere deception for the sake of deception. Rather, those sources indicate that "deceive" also refers to obtaining a perceived benefit, but one that does not necessarily have a property or financial component.

Furthermore, the drafters who initially crafted ORS 165.800 considered and rejected a proposal that would have expressly applied to a person who utters or converts the personal identification of another person with the intent of misrepresenting his identity to a police officer. The drafters removed that provision from the bill, because the cost of enforcement was too high and because other statutes already prohibited that conduct. The statute has been amended since that time, but the amendments did not alter the original drafters' policy choice.

Even if ORS 165.800 does apply to a person who misrepresents his identity to a police officer, and even if defendant's conduct is within the meaning of "deceive" or "defraud," defendant did not "utter" or "convert to his

own use" the "personal identification of another person" by signing the fingerprint card with a false name. To "utter" is to circulate as if genuine. To "convert" is to misappropriate an existing identification item to the actor's own use. "Personal identification" refers to a means of identification or evidence of identity. The state's theory of identity theft was that defendant uttered the fingerprint card or converted it to his own use. The fingerprint card was "personal identification." But, defendant did not circulate the fingerprint card as if it were genuine, because signing a document does not constitute circulating that document, and he did not "convert" the fingerprint card, because signing it did not constitute misappropriating it for his own use.

Under either view, defendant is entitled to a judgment of acquittal on Count 1. This court should reverse the judgment of the Court of Appeals and the trial court and remand for further proceedings.

ARGUMENT

ORS 165.800 defines the crime of identity theft. It provides:

> "(1) A person commits the crime of identity theft if the person, with the intent to deceive or to defraud, obtains, possesses, transfers, creates, utters or converts to the person's own use the personal identification of another person.
>
> "(2) Identity theft is a Class C felony.

"(3) It is an affirmative defense to violating subsection (1) of this section that the person charged with the offense:

"(a) Was under 21 years of age at the time of committing the offense and the person used the personal identification of another person solely for the purpose of purchasing alcohol;

"(b) Was under 18 years of age at the time of committing the offense and the person used the personal identification of another person solely for the purpose of purchasing tobacco products; or

"(c) Used the personal identification of another person solely for the purpose of misrepresenting the person's age to gain access to a:

"(A) Place the access to which is restricted based on age; or

"(B) Benefit based on age.

"(4) As used in this section:

"(a) 'Another person' means an individual, whether living or deceased, an imaginary person or a firm, association, organization, partnership, business trust, company, corporation, limited liability company, professional corporation or other private or public entity.

"(b) 'Personal identification' includes, but is not limited to, any written document or electronic data that does, or purports to, provide information concerning:

"(A) A person's name, address or telephone number;

"(B) A person's driving privileges;

"(C) A person's Social Security number or tax identification number;

"(D) A person's citizenship status or alien identification number;

"(E) A person's employment status, employer or place of employment;

"(F) The identification number assigned to a person by a person's employer;

"(G) The maiden name of a person or a person's mother;

"(H) The identifying number of a person's depository account at a 'financial institution' or 'trust company,' as those terms are defined in ORS 706.008, or a credit card account;

"(I) A person's signature or a copy of a person's signature;

"(J) A person's electronic mail name, electronic mail signature, electronic mail address or electronic mail account;

"(K) A person's photograph;

"(L) A person's date of birth; and

"(M) A person's personal identification number."

This case requires the court to construe ORS 165.800. This court "begin[s] with the text and context of the statute, which are the best indicators

of the legislature's intent," and "[i]f appropriate, * * * also consider[s] the statute's legislative history." *State v. Walker*, 356 Or 4, 13, 333 P3d 316 (2014). "[I]f the statute's meaning remains unclear, [this court] may resort to general maxims of statutory construction." *Id.*

I. ORS 165.800 applies when a person obtains, possesses, transfers, creates, utters or converts to the person's own use the personal identification of another person with the intent to gain a cognizable benefit to which the person is not otherwise entitled.

ORS 165.800(1) describes the offense of identity theft:

> "(1) A person commits the crime of identity theft if the person, with the intent to deceive or to defraud, obtains, possesses, transfers, creates, utters or converts to the person's own use the personal identification of another person."

The key words in that subsection are "deceive" and "defraud."

"Defraud" means "to take or withhold from (one) some *possession, right, or interest* by calculated misstatement or perversion of truth, trickery, or other deception." *Webster's Third New Int'l Dictionary*, 593 (unabridged ed 2002) (emphasis added). Thus, to violate ORS 165.800 under an "intent to defraud" theory, the actor must obtain, possess, transfer, create, utter, or convert to his own use the personal identification of another person with the intent of obtaining (taking) or interfering with (withholding) another person's

possessions, rights, or interests.[2] "Defraud" essentially expresses a "property" concept.

"Deceive" is broader than "defraud." "Deceive" means "to cause to believe the false: DELUDE[.]" *Webster's* at 584. Arguably, "deceive" could apply to any use of the personal identification of another person with the intent to cause someone to believe the false identification. However, the context of ORS 165.800 indicates that "deceive," as used in the statute, functions in a similar fashion as "defraud." That is, as used in ORS 165.800, the intended deception must be an effort to gain a cognizable, albeit non-property (or non-financial), benefit.

ORS 165.800 is generally directed at the use, possession, or creation of another person's personal identification with the intent to gain some benefit to which the actor is not entitled. The affirmative defenses set out in subsection (3) support that understanding of the statute. Those defenses apply to a minor's use of "personal identification" to purchase alcohol or tobacco and to the use of

---

[2] The legislature has used the phrase "intent to defraud" with similar meaning in other statutes. ORS 165.100 (issuing a false financial statement), for example, also requires "intent to defraud." The Commentary to the 1971 Criminal Code Revision indicates that "defraud" as used in ORS 165.100 "is used in its ordinary dictionary sense, 'to deprive a person of property or any interest, estate, or right by fraud, deceit, or artifice [*sic*].'" Criminal Law Revision Commission Proposed Oregon Criminal Code, Final Draft and Report, §167 (July 1970) (quoting *Black's Law Dictionary* (4th ed 1951)).

personal identification by anyone to misrepresent their age to "gain access to" a "[p]lace the access to which is restricted based on age" or to a "[b]enefit based on age." ORS 165.800(3). All of those defenses apply to actors who use, possess, or create the personal identification of another person for the purpose of obtaining something to which they would not otherwise be legally entitled (alcohol, tobacco, and access to an age-restricted place or other age-restricted benefit).

Furthermore, "defraud," which describes the alternative intended result, refers to taking or withholding property from another, and contextually supports a similar construction of "deceive" that applies to obtaining other types of benefits beyond those that would traditionally be within the meaning of "defraud." "Deceive" should therefore be understood as deception for the purpose of gaining a benefit, rather than deception for the sake of deception itself.

II. The drafters of ORS 165.800 and its amendments intended the offense of identity theft to apply to the use of another person's personal identification to acquire benefits to which the actor was not entitled. Furthermore, the original drafters of ORS 165.800 intended to exclude misrepresenting identity to a police officer from the statute, and subsequent amendments have not altered that choice.

As explained below, the legislature intended for ORS 165.800 to apply to a person who misrepresents his identity for the purpose of gaining property or other non-monetary benefits to which the person was not entitled. The original

drafters in 1999 understood their proposal to apply to financial fraud committed through the use of another person's personal identification and described the bill that way before the House of Representatives. The legislature subsequently amended the statute in 2001 by adding "to deceive" in order to clarify that the intended gain need not be financial to violate the statute.

Furthermore, the drafters of the initial 1999 statute made a decision to remove a provision that would have expressly applied to a person who used the personal identification of another to misrepresent his identity to a police officer. The drafters removed that provision because of the cost of enforcing it and because the "giving false information" statutes already penalized that conduct. The 2001 amendment that added "to deceive" did not alter the original drafters' policy choice that ORS 165.800 would not apply to a person who misrepresented his identity to a police officer.[3] As a result, the original drafters' specific choice to exclude misrepresentation to a police officer from the statute continues to define the scope and application of ORS 165.800.

A. The drafters of the original 1999 legislation understood their proposal to apply to a person who used the personal identification of another person to commit financial fraud and

---

[3] The legislature also amended the statute in 2007, adding "living or deceased" to the definition of "another person" in subsection (4)(a) and adding "trust company" to subsection (4)(b)(H). Or Laws 2007, c 583, §1. Those amendments are not relevant to the issues in this case.

removed a provision that would have applied to a person who misrepresented his identity to a police officer.

The identity theft law began as House Bill (HB) 2623 (1999) (attached at ATT 1-2). Audio Recording, House Judiciary Criminal Law Committee, HB 3057, April 27, 1999 (statement of John Horton, Committee Counsel). HB 2623 provided in relevant part:

> "(1) A person commits the crime of identity theft if the person intentionally:
>
> "(a) Represents that the person is another person or is acting with the authorization or consent of another person; and
>
> "(b) Uses or attempts to use any personal identifying information or personal identification document of the other person to obtain anything of value without the authorization or consent of the other person.
>
> "* * * * *
>
> "(3) As used in this section:
>
> "(a) 'Personal identification' document means a birth certificate, passport, credit card * * *, debit card, driver's license, or identification card * * *.
>
> "(b) 'Personal identifying information' includes, but is not limited to:
>
> "(A) The person's name, address or telephone number;
>
> "(B) The distinguishing number assigned to the person on the person's driver's license or identification card;
>
> "(C) The person's Social Security number;
>
> "(D) The person's employer or place of employment;

> "(E) The identification number assigned to the person by the person's employer;
>
> "(F) The maiden name of the person's mother;
>
> "(G) The identifying number of the person's depository account at a financial institution * * *;
>
> "(H) The person's signature or a copy of the person's signature;
>
> "(I) The person's photograph."

HB 2623 (1999).

Representative Roger Beyer sponsored HB 2623. At the initial hearing on HB 2623, the House Judiciary Criminal Law Committee heard testimony from several witnesses, including (1) a woman who submitted loan payments to a company in Indiana, after which an employee of the loan company used the woman's name and identifying information to open and use credit card accounts; (2) a woman whose check book, driver's license, credit cards, and social security number were stolen from her car, following which someone put a new photograph on her license and used it to write and cash the woman's checks; and (3) a woman who had financial information stolen from her medical paperwork and used for financial fraud. Audio Recording, House Judiciary Criminal Law Committee, HB 2623, March 25, 1999.

With one exception, the use of personal identifying information to commit financial fraud was the entire focus of the committee. The exception

was Jim Rice, who testified on behalf of the Oregon Criminal Defense Lawyers Association. Rice described representing a client who had been inadvertently charged with drug crimes when the actual perpetrator identified himself to the police with Rice's client's information. *Id.*

HB 3057 replaced HB 2623. Audio Recording, House Judiciary Criminal Law Committee, HB 3057, April 27, 1999 (statement of John Horton, Committee Counsel). The initial version expressly applied to a person who used the "personal identification of another person" with the intent of "representing to a peace officer * * * that the person is another person":

> "(1) A person commits the crime of identity theft if the person, with the intent:
>
> "(a) To defraud, obtains, possesses, transfers, creates, utters or converts to the person's own use the personal identification of another person; or
>
> "(b) Of representing to a peace officer lawfully performing the officer's duties or to a judge that the person is another person, obtains, possesses, transfers, creates, utters or converts to the person's own use the personal identification of another person."

HB 3057-4 (1999) (attached at ATT 3-6).

At the first discussion of the "-4" amendments, Representative Floyd Prozanski, who joined as a cosponsor, stated that one goal for the bill was to address people who provided false information to police officers:

> "We want to make certain that an individual who is in the process of getting cited for a citation [*sic*] does not get away from [*sic*] false information to a police officer."

Audio Recording, House Judiciary Criminal Law Committee, HB 3057, April 27, 1999.

Prozanski's proposal was short lived. At a public hearing in the Ways and Means Committee Subcommittee on Public Safety and Regulation, the subcommittee considered the "-A9" amendments, which removed subsection (1)(b) from the bill. Audio Recording, Ways and Means Committee, Subcommittee on Public Safety and Regulation, HB 3057, June 17, 1999. Beyer explained that the core intent of the proposed legislation was to fill a gap in the current law—barring the actual commission of fraud or the actual theft of an item from the victim, a person who used another person's identifying information could not be prosecuted:

> "* * * [I]n many cases all they do is they use a person's name and identifying numbers and they become that person on paper, but they've never actually stolen anything from anyone."

Id.

However, the subcommittee was concerned about the fiscal impact of subsection (1)(b), which criminalized providing false information to a police officer. *Id*. Beyer explained that

> "[a]pparently that part of the bill * * * creates quite a fiscal impact because apparently a lot of people must lie to police officers and courts * * *."

Id. Beyer stated that he would have liked subsection (1)(b) to remain in the bill, but that he was willing to remove it to get at the "bigger problem." *Id.* Prozanski added that deleting subsection (1)(b) was acceptable, because there were other statutes that already prohibited giving false information to police officers:

> "There are some laws in place right now that * * * will deal with people who lie to police officers. Giving False Information to a Police Officer."

Id.

The subcommittee next considered the "-A14" amendments, which incorporated the "-A9" amendments. Audio Recording, Ways and Means Committee, Subcommittee on Public Safety and Regulation, HB 3057, July 1, 1999. Larry Niswender, a fiscal analyst, introduced the "-A14" amendments to the subcommittee as "eliminat[ing] the charge of identity theft * * * when a person lies to an officer about their identity." *Id*. The subcommittee adopted the "-A14" amendments. *Id*.

The full Ways and Means committee considered the amended bill on July 9, 1999. Representative Patridge informed the committee that the bill's sponsors had amended it to reduce the fiscal impact. Audio Recording, Ways and Means Committee, HB 3057, July 9, 1999. The committee moved it out to the House floor. *Id*.; HB 3057-B (attached at ATT 7-10).

On the House floor, Beyer described HB 3057-B exclusively in terms of financial fraud. Audio Recording, House Floor Debate, HB 3057-B, July 12, 1999 (statements of Representative Beyer). Beyer stated that the legislation was needed, because in identity theft scenarios, it was often the case that no property was the subject of "theft" in the traditional sense, making prosecutions difficult:

> "The interesting thing about identity theft currently is that there is no real way to prosecute because * * * the victim has had nothing physical stolen from them."

Id. Further, Beyer noted that victims of identity theft were saddled with the debt that resulted from such activity. *Id*. Beyer cited to Oregon statistics on financial fraud compiled by Transunion, a credit-reporting company. *Id*. The relevant portions of HB 3057 remained unchanged from that point forward as the bill progressed through the Senate. HB 3057-Enrolled (1999) (attached at ATT 10-14). On the Senate floor, Senator Gordly noted that amendments had significantly reduced the fiscal impact of the bill. Audio Recording, Senate Floor Debate, HB 3057-B, July 20, 1999.

There are two significant points in the 1999 legislative history. First, and most significantly, the 1999 history shows that the drafters of HB 3057 considered and rejected a proposal for identity theft that would have expressly applied to a person who used "personal identification of another person" with

the intent of representing to a police officer that "the person was another person." That provision was not in the original bill, but after the initial hearing on HB 2623, Prozanski inserted that provision, possibly in response to Jim Rice's testimony about his wrongfully-charged client. However, the House Ways and Means subcommittee balked at the fiscal cost of that subsection, because, as Beyer stated, "apparently a lot of people must lie to police officers and courts[.]" Prozanski acknowledged that the committee could remove subsection (1)(b), because other statutes already applied to the conduct that motivated his proposal. In the Senate, Gordly referred to the amendment that reduced the fiscal impact of the bill—the very amendment that removed the provision concerning misrepresenting identity to a police officer.

Thus, the conduct that comes within the giving-false-information-to-a police-officer statutes is the core conduct that the drafters intended to exclude from the scope of ORS 165.800. ORS 162.385 provides:

> "(1) A person commits the crime of giving false information to a peace officer for issuance or service of a citation or for an arrest on a warrant if the person knowingly uses or gives a false or fictitious name, address or date of birth to any peace officer for the purpose of:
>
> "(a) The officer's issuing or serving the person with a citation * * *; or
>
> "(b) The officer's arresting the person on a warrant."

ORS 807.620 similarly provides that

> "(1) A person commits the offense of giving false information to a police officer if the person knowingly uses or gives a false or fictitious name, address or date of birth to any police officer who is enforcing motor vehicle laws."

The 1999 history demonstrates that the original drafters of ORS 165.800 did not intend for it to duplicate those statutes, and indeed, affirmatively removed a provision that effectively *would* have duplicated them.

The second critical point that emerges from the 1999 history is that the drafters viewed their proposal as addressing financial fraud committed through the use of another person's identifying information. That view was reflected in the use of the word "defraud" to describe the intent element of the offense—as noted above, the word "defraud" embodies the concept of tricking another out of property (with, in this case, the "trick" being the false identification). With the exception of Rice's testimony at the initial hearing on HB 2623, every example before the initial committee and every discussion of the bill both in the substantive committee, the Ways and Means subcommittee, and the Ways and Means committee itself focused exclusively on the use of identifying information to commit financial fraud, for example by opening fake credit cards or accessing a person's financial accounts.

Ultimately, and most significantly, Beyer described the bill to the full House solely as a bill that addressed financial fraud committed through the use of personal identifying information. Beyer told the House that the bill was

necessary, because little if any actual property was "stolen" from identity theft victims in the traditional sense and referred the House to financial fraud statistics. Other than the brief appearance and disappearance of proposed subsection (1)(b), nothing said before either chamber throughout the progress of HB 2623 or HB 3057 indicates an intent to apply to anything other than financial fraud committed through misusing another person's personal identification.

B. In 2001, the legislature added the intent "to deceive" to ORS 165.800 to clarify that identity theft would apply even when the actor's conduct was not motivated by financial gain.

In 2001, the legislature added the intent "to deceive" to ORS 165.800, resulting in the first paragraph of the statute that has remained unchanged since:

> "A person commits the crime of identity theft if the person, with the intent *to deceive* or to defraud, obtains, possesses, transfers, creates, utters or converts to the person's own use the personal identification of another person."

ORS 165.800(1) (emphasis added).

The 2001 amendment to ORS 165.800 was enacted in House Bill 2918 (2001) but introduced in the senate. Or Laws 2001, c 870, §3; Audio Recording, Senate Judiciary Committee, HB 2918, May 16, 2001. Senate Judiciary Committee Counsel Craig Prins described the amendment as intended to clarify that identity theft could occur even if the perpetrator did not have a financial motive:

> "This was done * * * to make it clear * * * that there need not be * * * a purpose to get pecuniary gain for [*sic*] financial gain but any deception is enough to satisfy the intent on that law."

Audio Recording, Senate Judiciary Committee, HB 2918, May 16, 2001. Now-Senator Roger Beyer, who (as a House Representative) cosponsored the original legislation that created ORS 165.800 two years earlier, discussed an example of a person who had illicitly filed an address change under another name with the post office, resulting in the second person's mail being sent to some other address. *Id*.

The remaining relevant legislative history of HB 2918 is sparse.[4] On July 2, 2001, Paul Siebert, a fiscal analyst for the Ways and Means Committee, introduced the amendment to a Ways and Means subcommittee as "expand[ing] the crime of identity theft by adding intent to deceive." Audio Recording, Ways and Means Committee, Subcommittee on Capital Construction, Lottery, and Bonding, HB 2918, July 2, 2001. Likewise, on July 4, 2001, Senator Kate Brown stated to the full committee that the amendment "expands the crime of

---

[4] HB 2918 (2001) was a much more extensive bill that included a funding package for domestic violence programs and a "fix" for this court's decision in *State v. Harberts*, 331 Or 72, 11 P3d 641 (2000), among numerous other criminal law provisions. The *Harberts* "fix" and the domestic violence program funding package provisions dominated the legislative discussions.

identity theft," although she did not describe how. Audio Recording, Ways and Means Committee, HB 2918, July 4, 2001.

The Senate considered HB 2918 on July 5, 2001. Senator Brown again stated that the bill "expands the crime of identity theft," but again did not explain how. Audio Recording, Senate Floor Debate, HB 2918, July 5, 2001. The Senate passed the bill, and, without any relevant discussion, the House concurred in the Senate amendments and re-passed it later that same day. *Id.*; Audio Recording, House Floor Debate, HB 2918, July 5, 2001.

To the extent there is any indication in the 2001 history of what the legislature intended by adding the intent "to deceive," the history suggests that the term was intended to capture the use of another person's personal identification to obtain non-financial or non-property benefits. Although this court typically puts little weight on a single statement from a non-legislator witness, *State v. Guzek*, 322 Or 245, 260, 906 P2d 272 (1995), Prins's introduction of the amendment before the Senate Judiciary Committee is the sole substantive statement on the intent of the 2001 amendment. His statement identified the intent of the amendment as clarifying that "there need not be * * * a purpose to get pecuniary gain" or "financial gain" to violate ORS 165.800. Although Prins also stated that "any deception" would suffice, the example that Beyer provided was not merely deception for the sake of deception. Rather,

Beyer discussed the use of another person's personal identification to obtain that person's mail. Beyer's example indicates that he still viewed ORS 165.800 as requiring the use of another person's identification with the intent to obtain some benefit to which the actor was not entitled.

Seibert's and Brown's remarks shed little light on the intent of the 2001 amendment. Both stated that the amendment "expanded" the crime of identity theft. Those statements are true enough—adding mental state elements to a crime will always "expand" it—but neither statement suggests any particular view about the nature of that expansion or what it was intended to capture.

Thus, the history indicates that "deceive" was intended to function similarly to "defraud," but applied when the actor's intent was to gain non-financial or non-property benefits. For example, using a fake name to register to vote a second time would not constitute "defrauding" the elections bureau, but would clearly constitute "deceiving" to obtain a benefit. The history indicates that the legislature viewed "deceive" as functioning in that fashion.

Finally, the addition of the intent "to deceive" did not alter the original drafters' decision that ORS 165.800 would not apply to a person who misrepresents his identity to a police officer. A later-enacted amendment to a statute can alter the original meaning of a statute in two circumstances: (1) if it is expressly intended to alter the original intent, or (2) if it is necessarily

inconsistent with the original intent. *Fifth Avenue Corp. v. Washington Co.*, 282 Or 591, 597-98, 581 P2d 50 (1978) ("It is also said that a presumption exists that amendatory acts do not change the meaning of preexisting language further than is expressly declared or necessarily implied."). The addition of "to deceive" is not *necessarily* inconsistent with the original drafters' intent—deception can occur in any number of ways other than misrepresenting identity to a police officer. The 2001 legislature also did not expressly discuss an intent to alter the original drafters' intended scope of ORS 165.800. That is particularly significant because Beyer, who spoke about the 2001 amendment, would certainly have been aware of the initial decision to exclude that conduct from identity theft—he spoke expressly about that decision during the 1999 session when he cosponsored the original bill as a House Representative. Thus, this court should adhere to the presumption that the 2001 amendment did not change the original drafters' intent that identity theft would not apply to a person who misrepresents his identity to a police officer.

III. This court should adopt a narrow construction of ORS 165.800 to avoid constitutional problems and other unreasonable results.

As noted above, "if the statute's meaning remains unclear" after considering the plain text and legislative history, "[this court] may resort to general maxims of statutory construction." *Walker*, 356 Or at 13. Two such maxims are pertinent here. First, this court "will give a statute such an

interpretation as will avoid constitutional invalidity." *State v. Stoneman*, 323 Or 536, 540 n 5, 920 P2d 535 (1996). Second, when an analysis of the plain text and history suggests more than one plausible construction, this court assumes that the legislature did not intend an absurd or unreasonable result that is inconsistent with the general policy of the statute as a whole. *State v. Vasquez-Rubio*, 323 Or 275, 282-83, 917 P2d 494 (1996).

A. A broad interpretation of "deceive" leads to constitutional concerns.

Article I, section 8, of the Oregon Constitution provides:

> "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever * * *."

A law that is directed to the

> "*substance* of any opinion or any subject of communication violate[s] Article I, section 8
>
> > 'unless the scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach.'"

State v. Moyer, 348 Or 220, 229, 230 P3d 7, *cert den*, __ US __, 131 S Ct 326, 178 L Ed 2d 146 (2010) (quoting *State v. Plowman*, 314 Or 157, 164, 838 P2d 558 (1992), *cert den*, 508 US 974, 113 S Ct 2967, 125 L Ed 2d 666 (1993)) (emphasis in *Moyer*). However, a law that is not directed at speech *per se*, but rather at "the pursuit or accomplishment of forbidden *results*[,]" *id*. (emphasis

in *Moyer*), "must be scrutinized to determine whether it appears to reach privileged communication or whether it can be interpreted to avoid such 'overbreadth.'" *State v. Robertson*, 293 Or 402, 418, 649 P2d 569 (1982).

Whether ORS 165.800 fits into the former or latter category is unclear. *See Moyer*, 348 Or at 229 (noting that determining whether a statute falls into the first or second category "has proved somewhat elusive"). One could view ORS 165.800 as prohibiting a forbidden result—deception or defrauding—but significantly, neither result is *required* to violate the statute (the actor must only possess the requisite intent). To the extent it prohibits a result, ORS 165.800 clearly prohibits expression used to achieve that result. Uttering, creating, and transferring are clearly expressive conduct, and even possessing, obtaining, and converting to one's own use are potentially expressive.

On the other hand, *because* the prohibited result need not even come to pass, ORS 165.800 more directly relates to the expressive elements itself, rather than the prohibited result. *See Moyer*, 348 Or at 232 n 4 (noting that "the targeted harm need not occur to violate the statute" and thus "the statute cannot be classified under the *Robertson* methodology as a category-two law"). And, as this court has noted, "statutes that impose criminal sanctions for deception that can be accomplished only through expression violate Article I, section 8, unless they fall within some well-established historical exception to free speech

guarantees." *Moyer*, 348 Or at 231-32. *See also United States v. Alvarez*, __ US __, 132 S Ct 2537, 2543-48, 183 L Ed 2d 574 (2012) (rejecting the government's argument that false statements have no First Amendment protection; holding that content-based speech restrictions are permissible under First Amendment "only when confined to the few" historic exceptions such as fraud, among others). However, whether ORS 165.800 is a category one or two law, both paths lead to the same result.

A category one law must fit wholly within a historical exception to the free speech guarantee, such as speech related to "perjury, solicitation, or verbal assistance in crime, some forms of theft, forgery and fraud and their contemporary variants." *Robertson*, 293 Or at 412. *See also Alvarez*, __ US at __, 132 L Ed 2d at 2543-48 (same). As discussed above, the legislative history supports an interpretation of "deceive" that brings it within the historical exceptions (or their contemporary variants) for forgery and fraud. To fit wholly within the historical exceptions, "deceive" must be understood to require the intent to obtain some substantive benefit to which the actor is not entitled, but which is not related to property or money and therefore is not "defrauding" in the strictest sense. For example, registering to vote with a fake name, and signing a fake signature to a ballot, would likely fall within a historical exception for deception that results in a "public inconvenience" or "social

injury." *See Moyer*, 348 Or at 234 (discussing Blackstone treatise indicating that lying was beyond the reach of criminal law "unless it carries with it some public inconvenience" or "social injury"). Such conduct would also likely be within historical exceptions for forgery and fraud. *See id.* at 238 (noting that statute prohibiting making a campaign contribution in someone else's name may be "contemporary variant of the exception for common-law fraud").

If ORS 165.800 falls into the second category—laws that prohibit results, but penalize speech used to obtain those results—overbreadth analysis leads to the same answer. That is, this court can construe the statute to avoid protected speech by cabining "deceive" within the historical free speech exceptions for fraud, forgery, and other prohibited deception. *Robertson*, 293 Or at 418 (overbroad statute may be saved by narrowing construction). However, deception for the sake of deception would, as Blackstone noted, be beyond the reach of criminal law. For example, broadly construed, ORS 165.800 could apply to a woman at a bar who writes a fake phone number and name on a matchbook and gives it to a man who is inappropriately hassling her for a date. The statue would also apply to an author who uses a "pen name." In the 1800s, for instance, several female authors used male pen names for fear that their writing would not be accepted if the public knew they were female—Mary Ann Evans (George Eliot) and Charlotte, Emily, and Anne Brontë (Currer, Ellis, and

Acton Bell), among others. Both the woman in the bar and the female authors' conduct would be a felony under a broad construction of ORS 165.800. This court can and should adopt a narrow construction of the statute that avoids the potential constitutional problems in criminalizing such conduct.[5]

B. A broad construction of ORS 165.800 leads to unreasonable and absurd results.

As demonstrated by the hypotheticals discussed above, broadly construing ORS 165.800 to apply to *any* deception achieved through the use of another person's personal identification would lead to unreasonable and absurd results that the legislature would not have intended. That is particularly true, because the definition of "another person" includes an imaginary person. ORS 165.800(4)(a). Nothing in the history or text of ORS 165.800 indicates that the legislature intended to make felons out of the woman at the bar who tries to deceive (and thereby avoid) a man by providing a false name and number, or to

---

[5] Of course, "[i]n construing a statute, this court is responsible for identifying the correct interpretation, whether or not asserted by the parties." *Stoll v. Hoke*, 326 Or 72, 77, 948 P2d 722 (1997). If this court cannot identify a narrowing construction that brings the statute within either historical constitutional limits (if a category one law) or that excludes protected speech (if a category two law), it may be that ORS 165.800 is simply constitutionally invalid. *Robertson*, 239 Or at 435-36 (finding coercion statute constitutionally invalid because court could not identify narrowing construction). *See also State v. Ciancanelli*, 339 Or 282, 321-22, 121 P3d 613 (2005) (finding category one law "unconstitutional on its face" because it regulated content of speech and did not fall within historical exception to Article I, section 8).

authors who use pen names to hide their true identities for whatever reason. The hypothetical applications are endless. An unconstrained construction of ORS 165.800 would arguably criminalize David Bowie's Ziggy Stardust personality, a person who sets up a "dummy" email account to use for signing up for various online commercial offers (to avoid receiving junk email ("spam") in his or her primary email account), or a person who checks into a hotel under a false name.

Defendant's proposed narrow construction of ORS 165.800 avoids those unanticipated, unreasonable, and absurd results. That construction is consistent with the text and context of ORS 165.800 and the history underlying its adoption. This court should construe "deceive" as limited to conduct intended to gain a benefit to which the actor is not entitled.

IV. Defendant is entitled to a judgment of acquittal on Count 1 because the drafters of ORS 165.800 did not intend for the statute to apply to the conduct at issue here and because he did not intend to obtain a benefit to which he was not entitled.

Defendant lied about his name to a police officer during a traffic stop. After he was arrested and taken to the police station, an unidentified person filled out a fingerprint card using the false information that defendant provided. Defendant signed that card with the same false name. An officer entered that card into the AFIS system. The state's theory of the case is that defendant

violated ORS 165.800 by "uttering" or "converting to his own use" that fingerprint card.

Defendant's conduct was not the type of deception that the legislature intended to capture in ORS 165.800. As discussed above, the text and history of the statute indicate that the legislature was concerned with obtaining affirmative benefits—financial, property, or otherwise—to which the defendant was not otherwise entitled. Here, defendant was not attempting to *obtain* anything. It is true that he intended to avoid a consequence, and that avoiding a consequence can always, in a sense, be viewed as obtaining a benefit, but avoiding arrest on a warrant was not the type of "benefit" that the legislature considered in enacting ORS 165.800.

Indeed, the legislative history unmistakably demonstrates that the original drafters of ORS 165.800 did not intend for it to apply in these circumstances. The drafters of what became ORS 165.800 expressly considered and rejected a version of the statute that would have applied to a person who intends to "represent[] to a peace officer that * * * that the person is another person." When the statute was before the House of Representatives as a whole, its cosponsor described its operation solely in terms of financial fraud. At each step throughout the 1999 session, after the bill was amended to its final form, those who remarked on it referred to the amendments that reduced its

fiscal impact—the very amendment that removed the provision concerning misrepresenting identity to a police officer or court. Thus, defendant's conduct is exactly what the drafters' considered and removed from the legislation that became ORS 165.800. As discussed above, the subsequent amendment did not alter the original drafters' fundamental policy decision.

Defendant acknowledged below and continues to acknowledge that his conduct violated ORS 162.385 and ORS 807.620. He "used" and "gave" the officer a false name both while the officer was enforcing traffic laws and in hopes of avoiding arrest on a warrant that he believed was outstanding against him. Signing the fingerprint card at the police station with the name "Sergio Molina" was a continuation of that same conduct—using and giving the false name. Conduct that falls under ORS 162.385 and ORS 807.620 is precisely what the drafters intended to exclude from the ambit of the original identity theft bill. This court must give effect to the drafters' intent that ORS 165.800 not apply to that conduct. Consequently, defendant is entitled to a judgment of acquittal on Count 1.

V. Alternatively, defendant did not "utter" or "convert to [his] own use" the "personal identification of another person."

A. The plain text of ORS 165.800 indicates that to "utter" or "convert" the "personal identification of another person," a defendant must put into circulation or misappropriate another person's personal identification.

The state alleged that defendant "uttered" or "converted to his own use" the "personal identification of" another person." *Indictment*, ER-1-3. The plain meanings of those terms show that a defendant must circulate or misappropriate another person's means of identification or evidence of identity.

To "utter" is "to put * * * into circulation ; *specif.* : to circulate (as a forged or counterfeit note) as if legal or genuine[.]"[6] *Webster's Third New Int'l Dictionary*, 2526 (unabridged ed 2002). "Convert", in turn, means "to change from one state into another : alter in form, substance, or quality : TRANSFORM, TRANSMUTE * * * to change or turn from one use, purpose, or function to another * * * to appropriate dishonestly or illegally <[convert]ing to its own … use 80,000 bushels of corn stored for the Commodity Credit Corp. * * *>." *Webster's*, 499. Two distinct concepts emerge from that definition. First, to "convert" something can mean to alter or change an item's form or function. Second, to "convert" something can mean to misappropriate an existing item to one's own uses.

B. Under the plain text of ORS 165.800, defendant did not "utter" or "convert to [his] own use" the "personal identification of another person."

---

[6] The legislature similarly defined "utter" for purposes of the related forgery statutes as "to issue, deliver, publish, circulate, disseminate, transfer or tender a written instrument or other object to another." ORS 165.002. That definition does not expressly apply to ORS 165.800. *See* ORS 165.002(1) (listing statutes to which definition applies).

Defendant acknowledges that the fingerprint card was "personal identification" in that it was a means of identifying a person, albeit a presumably imaginary one—Sergio Molina.[7] However, *defendant* did not "utter" the fingerprint card—that is, *he* did not circulate it as if it was genuine. Defendant simply signed the card, which a law enforcement official prepared for law enforcement purposes, with a false name. An officer subsequently circulated the fingerprint card by entering it in the AFIS system, at which point that system revealed defendant's true identity.

Signing the card also did not constitute "uttering" it. For example, a person who signs a fraudulent check with a fake name and puts it in his wallet has not "uttered" or circulated the check or the fake signature. Rather, "uttering" or circulating would occur when and if the person passes the fraudulent check to a bank teller. Similarly, a person who signs a ballot measure petition on the sidewalk in downtown Portland does not "utter" that petition by signing it. Rather, "uttering" would occur when someone submits that petition to the Secretary of State's office. Here, however, the only

---

[7] "Personal" means "of or relating to a particular person." *Webster's* at 1686. "Identification" is "a means of identifying" or "evidence of identity[.]" *Webster's* at 1123.

evidence is that defendant signed the fingerprint card. Officer Simmons *then* uttered or circulated it by faxing the fingerprint card to the AFIS system.

Defendant also did not "convert" the fingerprint card "to [his] own use." As discussed above, to "convert" a piece of personal identification to one's own uses requires misappropriating an existing piece of personal identification or altering the use, purpose, or function of the personal identification. Here, the personal identification item—the fingerprint card—did not exist independently of or prior to defendant's misrepresentation of his identity to the police. Thus, defendant did not misappropriate an existing personal identification item when he signed the fingerprint card. Furthermore, defendant did not use the fingerprint card for his own purposes. Instead, the officers continued to possess and use the fingerprint card for their own purposes.

Defendant's conduct also did not run afoul of the "alter" definition of "convert." The "alter" definition of "convert" requires changing the "use, purpose, or function" of the identification item. The use, purpose, or function of the fingerprint card was to determine and document defendant's identity, and that use, purpose, or function did not change when defendant signed the card with the false name. Indeed, the fingerprint card—despite the false information—still served its purpose of identifying defendant. Once Simmons faxed it to the AFIS system, that system identified defendant and relayed

defendant's identity to Simmons. Thus, the fingerprint card served the exact use, purpose, and function for which it was intended.

Because defendant did not "utter" or "convert to [his] own use the personal identification of another person, as those terms are used in ORS 165.800, he is alternatively entitled to a judgment of acquittal on Count 1 on that basis.

CONCLUSION

Defendant respectfully asks this court to reverse the judgment of the Court of Appeals and the trial court and remand for further proceedings.

Respectfully submitted,

PETER GARTLAN
CHIEF DEFENDER
OFFICE OF PUBLIC DEFENSE SERVICES

ESigned

ZACHARY LOVETT MAZER OSB #066670
DEPUTY PUBLIC DEFENDER
zack.mazer@opds.state.or.us

Attorneys for Defendant-Appellant
Emilio Junior Medina

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

Petition length

I certify that (1) this petition complies with the word-count limitation in ORAP 9.05(3)(a) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 8,609 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on October 6, 2014.

I further certify that I directed the Petitioner's Brief on the Merits to be served upon Anna Joyce attorney for Respondent on Review, on October 6, 2014, by having the document personally delivered to:

Anna Joyce #013112
Solicitor General
400 Justice Building
1162 Court Street NE
Salem, OR 97301
Phone: (503) 378-4402
Attorney for Petitioner on Review

Respectfully submitted,

PETER GARTLAN
CHIEF DEFENDER
OFFICE OF PUBLIC DEFENSE SERVICES

ESigned

_____

ZACHARY LOVETT MAZER OSB #066670
DEPUTY PUBLIC DEFENDER
zack.mazer@opds.state.or.us

Attorneys for Petitioner on Review
Emilio Junior Medina