IN THE SUPREME COURT OF THE STATE OF OREGON

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

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Josephine County
Honorable PAT WOLKE, Judge

Opinion Filed: December 2, 2015
Author of Opinion: Ortega, P.J
Before: Ortega, Presiding Judge, and DeVore, Judge, and Garrett, Judge

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Continued…

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BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, STATE OF OREGON

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

Questions Presented

1. For a person convicted of a felony sex crime after receiving two or more "prior sentences" for such crimes, ORS 137.719(1) prescribes a presumptive "true-life" sentence. ORS 137.719(3)(b) defines a "prior sentence" to include "sentences imposed by any other state * * * for comparable offenses." What did the legislature intend when it adopted the phrase "comparable offenses" in ORS 137.719?

2. For the purpose of imposing a true-life sentence under ORS 137.719(1), is the offense described by section 288 of the California Penal Code (CPC § 288) "comparable" to any offense defined as a "sex crime" by ORS 163A.005 ?

Proposed Rules of Law

1. When it adopted the phrase "comparable offenses" in ORS 137.719, the legislature intended to include out-of-state offenses that are appropriate for or worthy of comparison with any Oregon sex crime defined by ORS 163A.005. Offenses are "comparable" even if they are not identical, so long as the offenses share enough core characteristics, such as statutory purpose or common elements, that comparison between them is appropriate.

2. The offense defined by CPC § 288 is comparable to at least two offenses defined as "sex crimes" by ORS 163A.005: first-degree sexual abuse, as defined by ORS 163.427, and attempted first-degree sexual abuse, as defined by ORS 163.427 and ORS 161.405. CPC § 288 has in common with those Oregon offenses both the statutory purpose of protecting children from sexual exploitation, and a statutory proscription on the touching of children with a sexual purpose.

SUMMARY OF ARGUMENT

In adopting ORS 137.719(3)(b)(B), the legislature intended the term "comparable offenses" to mean offenses that, because they share core similarities, are appropriate for or worthy of comparison with any of the offenses defined as "sex crimes" in ORS 163A.005. An out-of-state offense can be a "comparable offense" even if its elements are not identical to the elements of an Oregon sex crime. That is consistent with the plain meaning of the word "comparable," as well as the most common and well-established usages of that word. The statutory context of ORS 137.719 further shows that the legislature did not intend to require precise "element matching" when it adopted the phrase "comparable offenses," because it chose to adopt the word "comparable" instead of other, more precise, qualifying terms that it previously had used in similar sentencing statutes. Instead, the legislature intended that offenses would be "comparable" if they are appropriate for or worthy of

comparison, based on their core characteristics such as statutory purpose or common elements.

Here, the trial court correctly sentenced defendant to the presumptive term of life-imprisonment without parole under ORS 137.719(1) based, in part, on defendant's prior convictions under CPC § 288. The offense defined by CPC § 288 is comparable to the Oregon offenses of first-degree sexual abuse and attempted first-degree sexual abuse because it shares with those offenses the statutory purpose of protecting children from sexual exploitation, as well as a statutory proscription on the touching of children with a sexual purpose.

ARGUMENT

Defendant was convicted of first-degree sexual abuse as defined by ORS 163.427(1)(a)(A). The sentencing court, relying in part on defendant's two prior convictions under CPC § 288, and deeming those offenses "comparable" to Oregon sex crimes, imposed the presumptive sentence of life-imprisonment without parole under ORS 137.719(1). (Tr 1052). Defendant argues that the sentencing court erred by concluding that CPC § 288 and ORS 163.427(1)(a)(A) define "comparable offenses." (Pet Br 11). This court should affirm.

A. As used in ORS 137.719(3)(b)(B), the phrase "comparable offenses" means offenses sharing enough like characteristics to make comparison between them appropriate.

Whether the offense defined by CPC § 288 is "comparable" to any of the offenses defined as "sex crimes" by ORS 163A.005 requires this court first to construe the word "comparable" in ORS 137.719(3)(b)(B). That is a question of statutory construction, which this court resolves using the familiar paradigm set out in *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). This court looks first to the text of the statute, in context, then to its legislative history (if any), and finally, if the statute is ambiguous, this court will resolve any remaining ambiguity by applying well-established canons of statutory construction. *Id*. at 171-72. Applying that framework to ORS 137.719(3)(b)(B), this court should conclude that the phrase "comparable offenses" means offenses sharing enough like characteristics to make them appropriate for or worthy of comparison.

1. By using the phrase "comparable offenses," the legislature adopted text describing a flexible standard, distinct from text that requires precise element matching.

ORS 137.719 provides that a defendant's prior sentences in other states, or in federal court, for offenses that are "comparable" to any Oregon sex crime, count toward the defendant's eligibility for a presumptive "true-life" sentence. ORS 137.719 provides, in pertinent part:

> (1) The presumptive sentence for a sex crime that is a felony is life imprisonment without the possibility of release or parole if the

> defendant has been sentenced for sex crimes that are felonies at least two times prior to the current sentence.
>
> * * * * *
>
> (3) For purposes of this section:
>
> * * * * *
>
> (b) A prior sentence includes:
>
> * * * * *
>
> (B) Sentences imposed by any other state or federal court *for comparable offenses.*
>
> (4) As used in this section, "sex crime" has the meaning given that term in ORS 163A.005.

(Emphasis added).

"Comparable" is not statutorily defined. In such cases, this court assumes, in the absence of evidence to the contrary, that the legislature intended "comparable" to be given its ordinary meaning. *See Baker v. Croslin*, 359 Or 147, 156, 376 P3d 267 (2016) (stating principle). Dictionaries are a common source of possible ordinary meanings. *Id.* (citing *State v. Gonzalez-Valenzuela*, 358 Or 451, 461, 365 P3d 116 (2015)). This court often will examine multiple dictionaries in order to determine the plain meaning of a word. *See Baker*, 359 Or at 157 (looking both to *Webster's Third New International Dictionary* and the *American Heritage Dictionary of the English Language*); *State v. Nix*, 355 Or 777, 782-83 n 2, 334 P3d 437 (2014) (looking to *Webster's*, *American*

Heritage and the *Oxford English Dictionary*). Here, looking to a variety of dictionaries reveals that "comparable" is most often defined as "appropriate for worthy of comparison," and those definitions do not requires that the subjects compared be identical.

a. The plain meaning of "comparable," as reflected by multiple dictionaries, is "appropriate for or worthy of comparison."

Multiple dictionaries reflect that "comparable" is an adjective used to indicate that two subjects are appropriate for or worthy of comparison with one another—it does not connote that the subjects are identical. For example, this court's most frequently cited dictionary defines "comparable" as

> **1 :** capable of being compared: **a :** having enough like characteristics or qualities to make comparison appropriate * * * **b :** permitting or inviting comparison often in one or two salient points only * * * **2 :** suitable for matching, coordinating or contrasting **:** EQUIVALENT, SIMILAR[.] * * * **syn** see LIKE

Webster's Third New International Dictionary, 461 (Unabridged ed 1993).[1] "Comparable" also is defined in a similar manner by the *American Heritage Dictionary*:

> **1.** Admitting of comparison with others: *"The satellite revolution is comparable to Gutenberg's invention of movable type"* (Irvin

[1] Conversely, the word "incomparable" is defined, as most pertinent here, as "**2 :** not suitable for comparison : lacking such common bases or points of reference as make comparison useful, informative, or valid[.]" *Webster's Third New International Dictionary*, 1144 (Unabridged ed 1993).

> Molotsky). **2.** Similar or equivalent: *pianists of comparable ability*.

The American Heritage Dictionary of the English Language, 375 (5th ed 2016). Similarly, another dictionary defines "comparable" as:

> **1.** Able to be compared, capable of comparison (*with*). **2.** Worthy of comparison; proper, or fit to be compared; to be compared (*to*).

III *The Oxford English Dictionary*, 590 (2nd ed 1989); *see also* 1 *Funk & Wagnalls Standard Dictionary Comprehensive International Edition*, 266 (1973) (defining "comparable" as "**1** capable of comparison. **2** worthy of comparison."). Finally, "comparable" also has been defined as:

> **1.** Capable of being compared; having features in common with something else to permit or suggest comparison: *He considered the Roman and British Empires to be comparable*. **2.** Worthy of comparison: *shops comparable to those on Fifth Avenue*. **3.** Usable for comparison; similar: *We have no comparable data on Russian farming*.

Webster's Encyclopedic Unabridged Dictionary of the English Language, 416 (1996).

What is common throughout the dictionary definitions of "comparable," and, thus, what is likely the "plain, natural and ordinary meaning" of the word that the legislature intended, is that subjects referred to as "comparable" are subjects that are appropriate for or worthy of comparison with one another. Nothing in those definitions requires that subjects be identical in order to be appropriate for or worthy of comparison. That is certainly true in ordinary

conversation. *See e.g.* Bryan A. Garner *Modern American Usage* 171 (2009) ("*Comparable* = capable of being compared; worthy of comparison <comparable salaries>"). For instance, to say that Westlaw is comparable to Lexis is to say that they are appropriate for or worthy of being compared to one another; it is not to say that Lexis and Westlaw are the same in all, or even most, respects.

b. Defendant's construction of "comparable" conflicts with the plain meaning of that word.

Defendant contends that the word "comparable" means "the things compared are the same or nearly the same." (Pet Br 18). He draws that definition from the second coordinate sub-sense of "comparable" set out in *Webster's Third New International Dictionary*; that is, "**2 :** suitable for matching, coordinating or contrasting." *Webster's* at 461. (Pet Br 14-16). Defendant reads that definition in light of *Webster's* definitions of "like," "similar" and "equivalent" all of which are synonyms either of "comparable" generally or of the phrase "suitable for matching, coordinating, or contrasting." *See* (Pet Br 14-16). Because "like" is defined as "the same or nearly the same," defendant concludes that the legislature intended a "comparable" foreign offense to be an offense "with elements that are the same as or nearly the same as (equivalent to) a specified Oregon offense." (Pet Br 18). Thus, defendant's argument essentially is that "comparable means like, and like means the same,"

and, thus, the phrase "comparable offenses" in ORS 137.719(3)(b)(B) means "the same offenses." This court should reject defendant's proffered textual interpretation for at least two reasons.

First, defendant's interpretation runs contrary to this court's assumption that the legislature employs words of common usage intending that those words will be given their plain, natural and ordinary meaning. *See State v. Murray*, 340 Or 599, 604, 136 P3d 10 (2006) ("Absent a special definition, we ordinarily would resort to dictionary definitions, assuming the legislature meant to use a word of common usage in its ordinary sense."). Defendant's interpretation is at odds with the plain-meaning of "comparable" as reflected by the diverse array of dictionaries cited above, none of which define "comparable" as meaning "the same." And although it is possible to cobble together defendant's definition from the various components of the definition of "comparable" in *Webster's Third*, it is notable that no other dictionary combines all of those elements in the manner that defendant does—indeed, neither does *Webster's Third*.

Second, defendant's dictionary-based argument founders in light of the statutory context of ORS 137.719. As this court has explained, "dictionaries * * * do not tell us what words mean, only what words *can* mean, depending on their context and the particular manner in which they are used." *State v. Cloutier*, 351 Or 68, 96, 261 P3d 1234 (2011). (Emphasis in original). And the context and the particular manner in which the legislature used the word

"comparable" in ORS 137.719(3)(b)(B) indicates that it intended that word to carry its ordinary meaning; that is, that subjects are comparable if they share core characteristics making them appropriate for or worthy of comparison.

2. The context of ORS 137.719(3)(b)(B) reflects the legislature's intent that "comparable offenses" are offenses appropriate for or worthy of comparison with any Oregon sex crime, whether or not those offenses have matching elements.

Statutory context includes other related statutes, particularly statutes that concern how a defendant's prior foreign convictions or sentences should be considered for purposes of sentencing following an Oregon conviction. *See State v. Klein*, 352 Or 302, 309, 283 P3d 350 (2012) (statutory context includes other related statutes); *See also State v. Ofordrinwa*, 353 Or 507, 512, 300 P3d 154 (2013) ("The context for interpreting a statute's text includes the preexisting * * * statutory framework within which the law was enacted.") (citation omitted). Statutes addressed to the same subject as ORS 137.719(3)(b)(B) indicate that where the legislature intends a close fit between offenses being compared for the purpose of determining whether they count in a recidivist sentencing scheme, it adopts words other than "comparable."

When the legislature enacted ORS 137.719 in 2001 it did so against the backdrop of the Oregon Sentencing Guidelines, which expressly require an "element matching" approach when using a defendant's out-of-state convictions

for a slightly different purpose—to determine the defendant's criminal-history score. In 1989, the Criminal Justice Commission promulgated OAR 253-04-0011, which provided that an out-of-state conviction could be considered in calculating a defendant's criminal history if "the *elements* of the offense would have *constituted* a felony or a Class-A misdemeanor" under Oregon law. (Emphasis added). *See* Oregon Sentencing Guidelines Implementation Manual 56 (1989). The legislature expressly approved the guidelines in 1989. Or Laws 1989 c 790 § 87; *see also State v. Davis*, 315 Or 484, 487, 847 P2d 834 (1993) (so stating). That text has remained in the rule ever since. *See* OAR-213-004-0011. Thus, when the legislature chose to use to the word "comparable" in ORS 137.719(3)(b)(B), it would have understood that to be a departure from the manner by which foreign convictions are considered for purposes of sentencing under the guidelines.

The 2001 legislature also would have been aware that the Court of Appeals had construed "elements [that] * * * constituted a felony or Class A misdemeanor" as requiring the state to prove that the "elements" of the out-of-state conviction "match[ed]" the elements of an Oregon offense. *See State v. Provencio*, 153 Or App 90, 94-95, 955 P2d 774 (1998) (holding that the defendant's California conviction could not be considered in calculating the defendant's criminal history score because the California statute was "broader and more inclusive than the Oregon statute."). Thus, the 2001 legislature that

enacted ORS 137.719 would have understood the phrase "elements [that] * * * constituted a felony or Class A misdemeanor" to require that a defendant's foreign offense have elements that match the elements of an Oregon offense. That the legislature chose to adopt a different phrase—"comparable offenses"—strongly indicates that it did not intend ORS 137.719(3)(b)(B) to require element matching.

Prior to enacting ORS 137.719, the legislature had adopted two statutes closely related in focus to ORS 137.719(3)(b)(B): ORS 137.712(6)(a)(B) and ORS 163A.020(6). In ORS 163A.020(6)(a),[2] the legislature provided that the reporting requirements of sections one through five of that statute apply to "a person convicted in another United States court of a crime * * * [t]hat would *constitute* a sex crime if committed in this state." (Emphasis added).[3] Likewise, ORS 137.712(6)(a)(B)[4] provides that a "conviction" under that section includes, but is not limited to, "a conviction in another jurisdiction for a

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[2] ORS 163A.020 was renumbered from ORS 181.808 in 2015. The pertinent text has remained the same since originally enacted by the Legislature as ORS 181.597 in 1995. *See* Or Laws 1995 c 429 §2, 4.

[3] An earlier version of ORS 163A.020(6)(a), ORS 181.597(6)(a) (2011) had required persons moving to Oregon to report if the person had been convicted of a crime in another jurisdiction "if the *elements* of the crime would constitute a sex crime." (Emphasis added).

[4] ORS 137.712 was enacted by the legislature in 1999. *See* Or Laws 1999 c 614 § 3.

crime that if committed in this state would *constitute* a crime listed in subsection (4) of this statute." (Emphasis added). In light of the use of the word "constitutes" in the Sentencing Guidelines, the legislature likely intended to require a close fit between a defendant's foreign conviction and their Oregon conviction when it enacted ORS 163A.020(6)(a) and ORS 137.712(6)(a)(B).

The 2001 legislature, in adopting ORS 137.719, also avoided using the phrase "statutory counterpart" which the 1999 legislature had used in ORS 813.010. In ORS 813.010(5)(a)(A)(ii), the legislature provided that driving under the influence of intoxicants is a Class C felony if a defendant has been convicted at least three times in the past ten years of DUII in violation of ORS 813.010 or "the *statutory counterpart* of this section in another jurisdiction."[5] The Court of Appeals construed that phrase in *State v. Ortiz*, 202 Or App 695, 124 P3d 611 (2005). It held that the defendant's conviction under an Idaho statute that applied only to drivers under the age of 21 and prohibited driving with a BAC of less than 0.08 was not a conviction under the "statutory counterpart" to Oregon's DUII statute, because ORS 813.010 applied to drivers generally and prohibited driving with a BAC of 0.08 or higher. *Id.* at 700. The court emphasized that, although there are several statutes that criminalize driving while intoxicated, the phrase "statutory counterpart" refers to "this

[5] The "statutory counterpart" text of ORS 813.010 was enacted by the Legislature in 1999. *See* Or Laws 1999 c 1049 § 1.

statute;" that is, ORS 813.010, and, thus, the foreign statute under which the defendant had been convicted had to be compared to ORS 813.010 and not the other Oregon DUII statutes. *Id.*

Thus, when the legislature intends that a foreign conviction must have elements that "match" an Oregon statute, it knows how to say so. And when the legislature intends that a foreign conviction reflect conduct that also would "constitute" a sex crime in Oregon, or violate a statute that is the "statutory counterpart" to an Oregon offense, it knows how to say that too. The legislature did not use the words "elements," or "constitute" or "statutory counterpart" in ORS 137.719(3)(b)(B). Instead, it used the word "comparable," thus adopting a less exacting standard compared to the standards that it had adopted in other statutes. This court should give effect to that deliberate choice and reject defendant's proffered construction of "comparable" as requiring element matching.

3. The legislative history of ORS 137.719 does not reflect a legislative intent to depart from the ordinary meaning of "comparable."

The legislative history of ORS 137.719 reveals no recorded discussion of the term "comparable." Defendant asserts that the legislature's silence cuts in his favor because "there is no evidence that 'comparable' was used purposively and in favor of a different descriptor." (Pet Br 21). Yet as this court recently explained in *Wyers v. American Medical Response Northwest, Inc.*, 360 Or 211,

227, __ P3d __ (2016), "drawing conclusions from silence in legislative history misapprehends the nature of legislative history itself, which often is designed not to explain to future courts the intended meaning of a statute, but rather to persuade legislative colleagues to vote in a particular way." The silence in the legislative history of ORS 137.719 is just that: silence.

The few references to ORS 137.719 in the legislative history of SB 370 are best read as reflecting the legislature's general intent that recidivist sex offenders receive the second-most serious penalty that Oregon law provides: a sentence of life without the possibility of parole. *See, e.g.,* Tape Recording, Senate Committee on Judiciary, SB 370, May 10, 2001, Tape 132, Side B (statement of committee counsel Craig Prins) (stating that the amendment "establishes [the] presumptive sentence of life imprison for a third conviction for a felony sex crime."). That general intent would be frustrated by adopting an interpretation of "comparable" that would result in an offender's prior sentences for out-of-state sex offenses not counting for purposes of ORS 137.719 merely because those offenses—although sexual in nature, and although deemed a felony in the other state—encompass a slightly broader range of conduct than a comparable Oregon sex crime or otherwise do not precisely match each element of an Oregon sex crime.

4. Maxims of statutory construction further support the conclusion that "comparable offenses" means offenses that are appropriate for or worthy of comparison.

If this court concludes that the intended meaning of a statute is unclear after consideration of the text, context and legislative history of that statute, this court "may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty." *Gaines*, 346 Or at 172. Here, general maxims of statutory construction weigh in favor of affording "comparable" its plain meaning; that is, "appropriate for or worthy of comparison," because that plain meaning is consistent with the legislature's overall purpose in enacting ORS 137.719. Defendant's appeal to the "constitutional avoidance" maxim of statutory interpretation fails because the constitutional conflict that he posits does not follow from the plain meaning of "comparable offenses" in ORS 137.719(3)(b)(B).

a. Had the legislature considered the precise issue before this court, it would have resolved the issue by affording "comparable" its plain meaning: "appropriate for or worthy of comparison."

If the phrase "comparable offenses" is ambiguous, this court should resolve any ambiguity by determining "how the legislature would have resolved the issue if it had considered it." *See State v. Tannehill*, 341 Or 205, 211, 141 P3d 584 (2006) (stating maxim for resolving statutory ambiguity). In doing so, this court should be guided by the legislature's overall purpose in adopting

ORS 137.719. *See Windsor Ins. Co. v. Judd*, 321 Or 379, 387-88, 898 P2d 761 (1995) (looking to "purpose" of ambiguous statute to resolve ambiguity at third-level of analysis). As the text, context and legislature history demonstrate, the legislature's purpose in enacting ORS 137.719 was to protect the public from the risk posed by recidivist sex offenders by authorizing a sentencing court to impose a sentence of life-imprisonment without parole when an offender is being sentenced for his or her third felony sex crime. The plain meaning of "comparable" furthers that purpose, because it permits a sentencing court to count a defendant's foreign convictions for felony sex offenses when considering whether to impose the life sentence under ORS 137.719(1), even if those offenses are not exact element-for-element matches to an Oregon offense. By contrast, defendant's interpretation would frustrate that purpose by enabling those who have committed felony sex crimes in other states to avoid having those crimes taken into account when assessing their eligibility for the true-life sentence that the legislature intended for repeat sex-offenders.

b. Defendant's reliance on the "constitutional avoidance" maxim is misplaced.

Defendant urges this court to adopt his interpretation of "comparable" in part by relying on the "constitutional avoidance" maxim of statutory interpretation this court set out in *State v. Stoneman*, 323 Or 536, 540 n 5, 920 P2d 535 (1996). (Pet Br 23). Defendant argues that unless the determination of

whether a foreign offense is a "comparable offense" under ORS 137.719(3)(b)(B) is limited to "element matching," the inquiry will include "judicial factfinding that is inconsistent with the Sixth and Fourteenth Amendments." (Pet Br 27). Defendant asserts that to avoid a potentially unconstitutional result, this court should adopt the element-matching approach that he derives from his definition of "comparable." (Pet Br 28).

Defendant's argument misapprehends the nature of a sentencing court's determination of whether a defendant's prior sentence was for a "comparable offense." That is a question of law, not a question of fact. *See, e.g., State v. Escalera*, 223 Or App 26, 31, 194 P3d 883 (2008), *rev den*, 345 Or 690 (2009) (determination of whether offenses are "comparable offenses" under *former* ORS 137.717(4)(b) is resolved by examination of the statutes, not the charging instrument underlying the out-of-state conviction). Thus, a sentencing court's resolution of that question of law does not implicate the constitutional concerns that the United States Supreme Court articulated in *Apprendi v. New Jersey*, 530 US 466, 120 S Ct 2348, 147 L Ed 2d 435 (2000), and *Blakely v. Washington*, 542 US 296, 124 S Ct 2531, 159 L Ed 2d 403 (2004).

The United States Supreme Court has held as much. In *James v. United States*, 550 US 192, 213-14, 127 S Ct 1586, 167 L Ed 2d 532 (2007) *overruled on other grounds by Johnson v. United States*, __ US __, 135 S Ct 2551, 192 L Ed 2d 569 (2015), the defendant had argued that the determination of whether

his prior conviction qualified as a "violent felony" under the Armed Career Criminal Act "raise[d] Sixth Amendment issues under *Apprendi* * * * because it is based on 'judicial fact finding about the risk presented by "the acts that underlie 'most' convictions for attempted burglary.'"" (citation omitted). The Court rejected that argument as "without merit." *Id.* at 214. The Court explained that, "[i]n determining whether attempted burglary under Florida law qualifies as a violent felony under [the ACCA], the Court is engaging in statutory interpretation, not judicial factfinding" because that determination was based on the elements of the offenses and "avoided any inquiry into the underlying facts of [defendant's] particular offense." *Id.* at 214.[6]

So too here. A sentencing court's determination under ORS 137.719(3)(b)(B) whether a defendant's prior foreign sentences are prior sentences for "comparable offenses" does not involve inquiring into the facts underlying the defendant's prior sentences. Instead, the sentencing court examines the text, context and any judicial constructions of the foreign statutes

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[6] The Court's reference to the "elements" of the offense reflected its "categorical" approach to determining whether offenses fell within the Armed Career Criminal Act. *James v. United States*, 550 US 192, 202, 127 S Ct 1586, 167 L Ed 2d 532 (2007). Under that approach, the court looked "only to the fact of conviction and the statutory definition of the prior offense," and did not consider the "particular facts disclosed by the record of conviction." *Id. see also Taylor v. United States*, 495 US 575, 602, 110 S Ct 2143, 109 L Ed 2d 607 (1990) (articulating approach)..

setting out the offenses. That is statutory interpretation, not judicial factfinding, and, thus, does not implicate any Sixth or Fourteenth Amendment concerns.

c. Affording "comparable" its plain meaning also would not conflict with the Oregon Constitution.

This court need not adopt defendant's definition of "comparable" in order to avoid a construction of the statute that would potentially authorize the imposition of constitutionally disproportionate sentences. That is so for two reasons. First, a sentencing court retains the authority under ORS 137.719(2) to impose a departure sentence upon a finding of substantial and compelling reasons. Thus, if a sentencing court were confronted with the circumstance of a defendant whose foreign offense was comparable to an Oregon sex crime, but the defendant had admitted to facts underlying that foreign offense that were substantially less serious than the conduct criminalized by the comparable Oregon sex crime, a sentencing court properly could consider that disparity in deciding whether substantial and compelling reasons exist to impose a downward departure. *See State v. Althouse*, 359 Or 668, 690, 375 P3d 475 (2016)("[a] trial court may impose a downward departure sentence under ORS 137.719(2) for less egregious combinations of offenses."). Accordingly, the word "comparable" need not bear the weight that defendant places upon it.

Second, under Article I, section 16, of the Oregon Constitution, defendants who are sentenced under ORS 137.719 may raise the issue of the

seriousness of their prior criminal conduct when asserting that the presumptive sentence for their current offense is constitutionally disproportionate. *See Althouse*, 359 Or 668, 678-79, 375 P3d 475 (2016) (consideration of seriousness of prior criminal conduct part of proportionality analysis where a defendant is sentenced under ORS 137.719(1)); *see also State v. Sokell*, 360 Or 392, 398, __ P3d __ (2016) (same); *State v. Davidson*, 360 Or 370, 386-88, __ P3d __ (2016) (same). In short, adopting the state's proposed interpretation of "comparable" will not somehow require trial courts to impose true-life sentences under circumstances that will violate Article I, section 16. Instead, sentencing courts will retain sufficient flexibility under both ORS 137.719(2) and Article I, section 16, to avoid such a result.

5. "Comparable offenses" are offenses that share core characteristics with any Oregon sex crime making the offenses appropriate for or worthy of comparison.

To recapitulate: as set out above, to say that subjects are "comparable" is to say that they share characteristics making them appropriate for or worthy of comparison. In ORS 137.719(3)(b)(B), the subject modified by the adjective "comparable" is "offenses." The characteristics of an offense include the purpose of the statute establishing the offense, the placement of that statute within the overall criminal law, the elements of the offense, and any case law construing the statute along with any statutory or common-law predecessors. Thus, when determining whether an offense is a "comparable offense," a

sentencing court should set the pertinent statutes side by side, consider those characteristics, and determine whether the statutes share enough characteristics to make them appropriate for or worthy of comparison. To be sure, this formula is not exact. But that is because the legislature did not intend it to be.

B. The crime defined by CPC § 288 is comparable to at least two Oregon felony "sex crimes" defined in ORS 163A.005.

An offense is a "comparable offense" under ORS 137.719(3)(b)(B) if that offense is appropriate for or worthy of comparison with a sex crime defined by ORS 163A.005. Here, the felony described by CPC § 288 is comparable to least two sex crimes defined by ORS 163A.005(5): first-degree sexual abuse under ORS 163.427(1)(a)(A) and attempted first-degree sexual abuse under ORS 163.427(1)(a)(A) and ORS 161.405. *See* ORS 163A.005(5)(x) (defining as a "sex crime" "any attempt to commit any of the offenses listed in paragraphs (a) to (w) of this subsection[.]"). The offense defined by CPC § 288 is comparable to those offenses because it shares the same statutory purpose of protecting children from sexual exploitation, as well as the common element of proscribing the touching of a child for a sexual purpose.

1. CPC § 288 proscribes conduct, and an accompanying mental state, that are comparable to the culpable conduct proscribed by ORS 163.427(1)(a)(A).

A conviction under CPC § 288 is comparable to the sex crime of first-degree sexual abuse under ORS 163.427(1)(a)(A) because it shares the statutory

purpose of protecting children from sexual exploitation by proscribing the touching of a child for a sexual purpose. *See* ORS 163A.005(5)(d) (defining as a "sex crime" "sexual abuse in any degree"). A person commits first-degree sexual abuse under ORS 163.427(1)(a)(A) by subjecting a victim "less than 14 years of age" to "sexual contact." ORS 163.305(6) defines "sexual contact" as "any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the actor *for the purpose of arousing or gratifying the sexual desire of either party*." (Emphasis added.) Accordingly, first-degree sexual abuse necessarily involves touching a person under 14 "for the purpose of arousing or gratifying the sexual desire of either party."

Comparably, CPC § 288 also prohibits touching a child under 14 with a sexual purpose. That statute provides that

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

CPC § 288. (Emphasis added). In *People v. Martinez*, 11 Cal 4th 434, 442-44, 903 P2d 1037 (1995), the California Supreme Court held that "section 288 is violated by 'any touching' of an underage child *committed with the intent to*

sexually arouse either the defendant or the child." The court also described the purpose of the statute—the "gist" of it—as "the defendant's intent to sexually exploit a child." *Id.* (Emphasis added).

Thus, CPC § 288 shares two core characteristics with ORS 163.427: the statutory purpose of protecting children from sexual exploitation, and the statutory proscription of the touching of a child under the age of 14 with the intent of "arousing" the "sexual desires" of either party.

To be sure, a person can violate CPC § 288 without engaging in the "sexual contact" that is necessary for a conviction for first-degree sex abuse under Oregon law. Yet that difference does not render CPC § 288 "incomparable" to ORS 163.427(1)(a)(A). The two statutes share the same statutory purpose of protecting children from sexual exploitation, and they share a common element that a touching be accompanied by a sexual purpose. That one characteristic of CPC § 288 may differ from the parallel characteristic in ORS 163.427 does not mean that the two offenses—as a whole—are not appropriate for or worthy of comparison with one another. Indeed, the legislature's choice of the word "comparable" likely contemplated that parallel characteristics of offenses under comparison might differ from one another. Had the legislature wished to foreclose that possibility, it could have required element matching, and defined "prior sentence" as a sentence for an offense which, if committed in Oregon, would "constitute" a crime; or as a sentence for

an offense set out in a "statutory counterpart" to the defendant's Oregon conviction. The legislature chose not to do so and this court should give effect to that choice.

2. The offense described by CPC § 288 is comparable to attempted first-degree sexual abuse under Oregon law.

A violation of CPC § 288 also is comparable to the sex crime of attempted first-degree sexual abuse, defined by ORS 163.427(1)(a)(A) and ORS 161.405(1), because both offenses criminalize a person's touching of a child under the age of 14 with the intent of gratifying the person's, or the child's, sexual desires. A person can commit attempted first-degree sexual abuse if the person, acting with the requisite mental state, touches a child under the age of 14, while intending that touching to be a substantial step toward sexual contact with the child. *See* ORS 161.405(1) ("[a] person is guilty of an attempt to commit a crime when the person intentionally engages in conduct which constitutes a substantial step toward the commission of the crime").

That attempted first-degree sexual abuse requires that the touching be a "substantial step" toward "sexual contact" with the child does not make that offense "incomparable" to CPC § 288, for the same reasons CPC § 288 is comparable to the completed crime of first-degree sexual abuse. That is, the offense of attempted sexual abuse, like CPC § 288, is intended to protect

children from sexual exploitation by criminalizing the touching of children for a sexual purpose.

Relying on *Outdoor Media Dimensions, Inc. v. State*, 331 Or 634, 20 P3d 180 (2001), defendant argues that the state is barred from asserting that CPC § 288 is comparable to attempted first-degree sexual abuse because that assertion is akin to an "alternative basis for affirmance" and, had the state made that assertion before the trial court, the record might have developed differently. (Pet Br 34-35). Defendant contends that the record may have developed differently had the state asserted that CPC § 288 is comparable to attempted first-degree sexual abuse, because he may have made different *legal* arguments; in particular, he asserts that he might have argued for a downward departure under ORS 137.719(2) or raised a proportionality challenge to the presumptive sentence under Article I, section 16, of the Oregon Constitution. (App Br 35-36).

Defendant's reliance on *Outdoor Media* is misplaced. The "right for the wrong reason" doctrine "permits a reviewing court—as a matter of discretion—to affirm the ruling of a lower court on an alternative basis when certain conditions are met." *Outdoor Media*, 331 Or at 659. One of those conditions is that the record would not have developed differently in the trial court, in a way that would have affected the trial court's resolution of the legal issue, had the party relying on the alternative basis for affirmance raised that basis below. *Id.*

at 660. But the condition that the record would not have developed differently does not refer to the development of additional legal arguments. Instead, this court repeatedly discussed that condition in terms of differences that would have resulted in the "*evidentiary* record" and the "*factual* record" had the alternative basis for affirmance been asserted below. *Id*. at 659-60, 661. (Emphasis added).

Here, defendant cannot demonstrate how the factual record before the trial court would have developed differently, in a way that would have affected the trial court's determination whether CPC § 288 is comparable to an Oregon sex crime. That is because the court's determination was not dependent on the factual record at all. The determination of whether an offense is "comparable" to an Oregon sex crime is purely a question of law. That defendant might have made different legal arguments does not mean that the factual record at trial would have developed differently in a way that would have affected the trial court's determination.[7]

[7] In any event, defendant had every reason to request that the trial court impose a downward departure under ORS 137.719(2), as well as the opportunity to make a constitutional challenge to his sentence. Thus, whether or not the state (or the trial court) may have invoked an *additional* basis for relying on the California convictions as a basis for the true-life sentence, defendant would have possessed the same exact incentive for making any and all legal arguments he could to avoid that sentence.

To sum up: the crime defined by CPC § 288 is comparable to at least two Oregon sex crimes. Thus, the sentencing court correctly determined that defendant's prior sentences under that statute were "prior sentences" under ORS 137.719(3). And because defendant had been sentenced "for sex crimes that are felonies at least two times prior to the current sentence," the sentencing court correctly determined that he met the requirements for the presumptive true-life sentence provided for by ORS 137.719(1).

CONCLUSION

This court should affirm the judgments of the trial court and the Court of Appeals.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on October 6, 2016, I directed the original Brief on the Merits of Respondent on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Ingrid MacFarlane, attorneys for petitioner on review, by using the court's electronic filing system.

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

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 6,426 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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