IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. SHELBY EDWARD CROFT, Defendant-Appellant Petitioner on Review.	Josephine County Circuit Court Case Nos. 11CR0665, 11CR0869, 11CR0874, 12CR0029, 12CR0381 CA A152423 (Control), A152424, A152425, A152426, A152427 S062513

REPLY BRIEF ON THE MERITS OF PETITIONER ON REVIEW

Review of the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court
for Josephine County
Honorable Pat Wolke, Judge

Affirmed Without Opinion: June 18, 2014
Before: Armstrong, Presiding Judge, and Nakamoto Judge, and Egan, Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional and Statutory Provisions

Others

PETITIONER'S REPLY BRIEF

STATEMENT OF THE CASE

Questions Presented

(1) When offenses arise from a continuous and uninterrupted course of conduct, does ORS 137.123 require a trial court to make findings of fact on the record in order to impose consecutive sentences?

(2) Is the State of Oregon the "victim" of a racketeering offense under ORS 166.720(3)?

(3) Is defendant's argument unpreserved?

Summary of Argument

(1) When multiple offenses arise from a continuous and uninterrupted course of conduct, a trial court must find on the record a basis for imposing consecutive sentences on those offenses.

(2) To determine the victim of an offense, this court looks to the statute defining that offense. The text of the racketeering statutes suggests that the victims of the predicate offenses that constitute the "pattern of racketeering activity" are the victims of the racketeering offense, and the legislative history supports that reading.

(3) The state argues that defendant's argument is unpreserved under *State v. Bucholz*, 317 Or 309, 855 P2d 1100 (1993). However, *Bucholz* is inapplicable. In *Bucholz*, the question was whether the defendant had properly moved the trial court to place its factual findings to support consecutive sentences on the record. Here, the trial court accepted the state's argument that no findings of fact were required to impose a consecutive sentence on the racketeering conviction. Consequently, there was no reason (and in fact, it would have been futile) for defendant to ask the trial court to put its factual findings on the record, because the trial court accepted the state's reasoning that no fact-findings were necessary as a matter of law.

Argument

This case concerns the application of the consecutive sentencing statute, ORS 137.123, to racketeering and the underlying, freestanding convictions for the predicate offenses that comprise the "pattern of racketeering activity." The state does not contest that defendant's racketeering conviction and the underlying convictions for the predicate offenses that formed the "pattern of racketeering activity" arose from a "continuous and uninterrupted course of conduct." The state also agrees that the trial court did not make findings of fact on the record in order to justify imposing consecutive sentences on those offenses.

Instead, the state contends that even if those offenses arose from a continuous and uninterrupted course of conduct, (1) ORS 137.123 does not require a trial court to make findings of fact on the record; (2) that the victim of racketeering is the State of Oregon, and, as a matter of law, a separate victim from the victims of the predicate offenses; and (3) that defendant's argument is unpreserved under *Bucholz*. Defendant addresses each point in turn.

I. ORS 137.123 requires a trial court to make findings of fact on the record.

The full text of ORS 137.123 is set forth in Petitioner's Brief on the Merits. Pet BOM, 13-14. In construing a statute, this court gives the words their "plain, natural, and ordinary meaning." *State v. Ziska*, 355 Or 799, 804, 334 P3d 964 (2014). When construing a statute enacted by ballot measure, the operative question is the intent of the voters. *State v. Guzek*, 322 Or 245, 265, 906 P2d 272 (1995).

The plain text of ORS 137.123 requires a trial court to find the basis for consecutive sentencing on the record. ORS 137.123(1) provides that a trial court "may provide for consecutive sentences *only in accordance with the provisions of this section*" (emphasis added). Concurrent sentences are the presumption; a judgment must "expressly provide[] for consecutive sentences." When offenses arise from a continuous and uninterrupted course of conduct, a trial court only has authority to impose consecutive sentences if it "complies

with the procedures set forth in subsection (5) of this section." ORS 137.123(4). Subsection (5) provides that a trial court has discretion to impose consecutive sentences on offenses arising from a continuous and uninterrupted course of conduct "*only* if the court *finds*" the facts described in (5)(a) and (b) (emphasis added).

Because ORS 137.123 was adopted in a ballot measure, it is important to understand it as the voters would have understood it. It is true that the statute does not expressly require on-the-record findings. But a lay voter would understand a statute that directs a trial court to "compl[y]" with its procedural provisions and that requires a trial court to make particular "findings" in order to depart from the presumptive norm to mean that a trial court must make a record of the findings that trigger its authority to act under that statute. Particularly because a judgment must "expressly" provide for consecutive sentences, a voter would understand ORS 137.123 as setting forth a procedure to be followed in court and memorialized in a written judgment. ORS 137.123 does not only provide authority for imposing consecutive sentences on offenses arising from a continuous and uninterrupted course of conduct—it is a directive to trial courts as to the procedure it must employ to exercise that authority.

Comparing ORS 137.123 to the terms of its "predecessor" statute, *former* ORS 137.122 (1985), is of limited relevance in these circumstances. That statute did contain an express requirement for on-the-record findings that is

lacking in ORS 137.123. *State v. Racicot*, 106 Or App 557, 562, 809 P2d 726 (1991) (Deits, J., dissenting) (observing that the requirement of on-the-record findings was present in ORS 137.122 but lacking in ORS 137.123). Further, defendant agrees that, "[g]enerally, when the legislature includes and express provision in one statute and omits the provision in another related statute, we assume that the omission was deliberate." *State v. Bailey*, 346 Or 551, 562, 346 P3d 1240 (2009). But the logical premise of that general rule—that the *legislature* did one thing in one instance and another thing in another instance—does not hold when different bodies enacted the different statutes at issue. Thus, this court should not view the omission of an express requirement for on-the-record findings in ORS 137.123 as evidence of the voters' intent to depart from that requirement.

Finally, construing ORS 137.123 to require a record of the trial court's findings does not place it at odds with Article I, section 44(1)(b) of the Oregon Constitution. That section provides that "No law shall limit a court's authority to sentence a criminal defendant consecutively for crimes against different victims." Or Const Art I, § 44(1)(b). Far from conflicting with Article I, section 44(1)(b), ORS 137.123 *authorizes* a trial court to impose consecutive sentences on offenses arising from a continuous and uninterrupted course of conduct if it finds that the offenses have "different victims." To the extent that ORS 137.123 requires findings on the record to support that determination, it is

a reasonable procedure that actually effectuates the constitutional principle in Article I, section 44(1)(b). *See, e.g., State v. Birchfield*, 342 Or 624, 631, 157 P3d 216 (2007) (noting, with regard to Article I, section 11, confrontation right, that the legislature could "require the defendant to assert the right or * * * design a procedure to determine whether the defendant agrees that a written report will suffice").

II. The "victims" of a racketeering offense under ORS 166.720(3) are the "victims" of the underlying offenses that constitute the "pattern of racketeering activity."

Defendant agrees with the state that the identity of the "victim" or "victims" for the purposes of ORS 137.123(5) is a function of the substantive statute defining the offense. *State v. Glaspey*, 337 Or 558, 563, 100 P3d 730 (2004) (construing the term "victim" in ORS 161.067, also adopted in Ballot Measure 10). ORS 166.720 defines the offense of racketeering at issue here, and is set forth in full in Petitioner's Brief on the Merits. Pet BOM, 27-29. The relevant subsection provides that

> "(3) It is unlawful for any person employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt."

That section requires (1) membership in an enterprise and (2) participation in the enterprise through a "pattern of racketeering activity." The later term is defined as "engaging in at least two incidents of racketeering activity that have

the same or similar intents, results, accomplices, *victims* or methods of commission or otherwise are interrelated by distinguishing characteristics * * *" (emphasis added). "Racketeering activity," in turn, means to commit (or attempt, conspire, or solicit to commit) a number of specifically enumerated criminal offenses. Thus, the second element of racketeering under ORS 166.720(3) can be reduced to: participating in a pattern of criminal conduct that, among other possible distinguishing characteristics, targets the same or similar victims.

That text indicates that the victims of a racketeering offense under ORS 166.720(3) are the victims of the predicate offenses that comprise the "pattern of racketeering activity." "Racketeering" simply adds the additional element that those offenses be tied together through an "enterprise."

The legislative history supports that construction. In discussing the financial components of the racketeering statutes, Professor Robert Blakey stated that the statute "would key the fine to the damage done or the profit gain" and "would also authorize damage suits by private parties who were injured." Minutes, Joint Subcommittee on Organized Crime, April 23, 1981, at 10. Blakey viewed the statute as "an important remedy that the government ought to have and the *private people injured by crime* ought to have." *Id*. at 13 (emphasis added). In written testimony, then-Attorney General Dave Frohnmayer expressed his concern about the "human misery and the

exploitative activities which organized crime brings in its wake * * *." Testimony, Senate Committee on Justice, SB 531, April 23, 1981, Ex A (statement of Attorney General Dave Frohnmayer). Blakey viewed the extent of victimization as the basis for setting the fine, and both his statements and Frohnmayer's statements emphasized the human injury caused by racketeering activity and the private rights of action those victims would have (in addition to prosecutorial remedies).

Similarly, a letter from then-Arizona Attorney General Bob Corbin described using the civil and financial provisions in that state's racketeering statute—also modeled on Blakey's proposals—against a fraudulent lending company. Corbin described the people who had given money to the lender as the "victims" of the racketeering activity. He stated that they sought a receivership "to protect whatever money is left for the people who had given their money" and that had it not been for "the RICO statute," a lengthy criminal instigation would have been required and "[p]robably by that time all the money would have been gone, leaving nothing for *the victims* and there probably would have been *more victims*." Testimony, House Judiciary Committee, SB 531, July 8, 1981, Ex A (letter from Bob Corbin, included in packet of material from Attorney General Frohnmayer) (emphasis added). Corbin concluded that they "have saved some of the investors' money and we

also get [the racketeering enterprise] out of business before there are additional victims." *Id*.

Finally, on the Senate Floor, Senator Wyers introduced the racketeering bill with a story about a woman killed in Gaston, Oregon, who had testified against the Hell's Angles motorcycle gang. Audio Recording, Senate Floor Debate, SB 531, May 28, 1981 (statement of Sen. Wyers). Wyers also described the civil remedies in the bill as a "victim's relief bill." *Id*. And, he also distinguished between the victim and the state, stating that the "victim has prior right to any wealth that the criminal activity has generated" over the state. *Id.*

That history establishes that the legislators who enacted the racketeering statutes viewed the victims of "racketeering activity" as the "victims" of the pattern of predicate offenses that comprised the "racketeering activity." It is certainly true that, in some cases, the victim of the predicate offenses may be the State of Oregon. But here, as the state agrees, the victims of the predicate offenses that were sentenced consecutively with the racketeering offense are all private individuals. Those individuals were the victims of their respective predicate offenses as well as of the racketeering offense.

The state asserts that the victim of the racketeering offense must be the State of Oregon, because racketeering is a continuing crime. Although defendant agrees that racketeering is continuing offense—indeed, that is a key

component of defendant's own argument—that is an entirely separate point from identifying the victim of the offense. As the plain text and history indicate, the victims of a racketeering offense are the victims of the predicate offenses that comprise the "pattern of racketeering activity."

III. Defendant's argument is preserved.

Finally, the state argues that defendant's argument is unpreserved under this court's opinion in *Bucholz*. There, this court held that a challenge to the lack of findings under ORS 137.123 was unpreserved where the defendant "expressly was aware that a consecutive sentence was being imposed" and did not object "to [the] lack of findings or request * * * findings * * *." 317 Or at 320.

This case is not in the same posture as *Bucholz*. Here, in arguing for a consecutive sentence on the racketeering charge, the state's sentencing memorandum relied on a Court of Appeals case, *State v. Blossom*, 88 Or App 75, 744 P2d 281 (1987), *rev den*, 305 Or 22 (1988), in which that court held (without analyzing ORS 137.123) that racketeering may be sentenced consecutively to its predicate offenses as a matter of law. During the state's oral presentation at sentencing, the state asserted that "case law suggests" that a racketeering sentence should be consecutive. Tr 87. Trial court expressly asked why it needed to make findings of fact, and the state told the trial court that it did not need to make findings. Tr 89. In fashioning the sentence, the

trial court noted that, with the exception of the total length of the sentence, it intended to follow the state's recommendations, and "if there's a misunderstanding you can refer back to the State's sentencing memorandum." Tr 117. That memorandum, as noted, relied on *Blossom* as the authority for imposing a consecutive sentence on the racketeering conviction as a matter of law.

Consequently, the trial court appeared to accept the state's assertion that it did not need to make findings of fact in order to sentence the racketeering offense consecutively to the sentences on the underlying predicate offenses. Therefore, defendant would have no reason to object to the lack of findings under ORS 137.123—because the trial court did not believe any findings were required, and any objection to the lack of findings in this case would have been futile. Defendant's argument is therefore preserved. *State v. George*, 337 Or 329, 339, 97 P3d 656 (2004) ("Our requirements respecting preservation do not demand that parties make what the record demonstrates would be futile gestures.").

In any event, this case is also distinguishable from *Bucholz*. Based on the briefing in *Bucholz*, it appears that the defendant there never objected to the consecutive sentences *at all* in the trial court. Appellant's Opening Brief, *State*

v. Bucholz, A65640, A65641.[1] Here, however, defendant *did* argue for concurrent sentences on the racketeering conviction and its predicate offenses in the trial court, both orally and in his sentencing memorandum. *See* Pet Br 8-9 (describing record). It is true that defendant used the phrase "criminal episode," but as this court has acknowledged, "the realities of trial practice may be such that fairly abbreviated short-hand references suffice to put all on notice about the nature of a party's arguments." *State v. Walker*, 350 Or 540, 550, 258 P3d 1128 (2011). It was clear below that defendant was arguing for concurrent sentences and that, in his view, the racketeering offense and the underlying predicate offenses arose from a "continuous and uninterrupted course of conduct." Raising that argument was sufficient "to enable opposing parties to meet [the] objection and the trial court to avoid error." *Id*. That is all that is required. Thus, *Bucholz* does not preclude review.

[1] Defendant refers to the Court of Appeals briefing. It appears that, beyond the petitions for review, neither party in *Bucholz* filed a brief on the merits.

CONCLUSION

For the foregoing reasons, as well as those advanced in defendant's opening brief on the merits, this court should reverse the judgment of conviction and remand for resentencing.

Respectfully submitted,

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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 2,696 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 Reply Brief on the Merits of Petitioner on Review to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on February 20, 2015.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Reply Brief on the Merits of Petitioner on Review will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Anna Joyce, #013112, Solicitor General, attorney for Plaintiff-Respondent.

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