IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, v. GREGORY ALLEN BOWEN, Defendant-Appellant.	Curry County Circuit Court Case No. 02CR0019 Supreme Court No. S061149

APPELLANT'S REPLY BRIEF

Appeal on automatic and direct review
of the Judgment of conviction and sentence of death
imposed by the Circuit Court for Curry County
Honorable Jesse C. Margolis, Judge

PETER GARTLAN #870467
Chief Defender
ROBIN A. JONES #892756
Senior Deputy Public Defender
Office of Public Defense Services
1175 Court Street NE
Salem, OR 97301
Robin.Jones@opds.state.or.us
Phone: (503) 378-3349
Attorneys for Defendant-Appellant

ELLEN F. ROSENBLUM #753239
Attorney General
ANNA JOYCE #013112
Solicitor General
TIMOTHY SYLWESTER #813914
Assistant Attorney General
400 Justice Building
1162 Court Street NE
Salem, OR 97301
timothy.sylwester@doj.state.or.us
Phone: (503) 378-4402
Attorneys for Plaintiff-Respondent

TABLE OF CONTENTS

Nature of the Proceeding 1

Argument 1

I. ORS 138.222(5)(a) applies only to sentencing errors. 3

II. ORS 138.222(5)(b) requires remand for resentencing of the entire case whenever the appellate court reverses *a conviction* and affirms any other felony conviction. 8

III. The only lawful effect of this court's orders in *Bowen I* was reversal of the convictions for aggravated murder and murder and remand for entry of a single conviction on the merged verdicts and for resentencing. 10

IV. The only lawful effect of this court's order in *Bowen II* was reversal of the conviction for aggravated murder and remand for entry of a single conviction complete with the requisite designations of the underlying verdicts and for resentencing. 12

V. Both the state and defendant are statutorily authorized to raise new legal and factual issues concerning resentencing on remand. 13

CONCLUSION 17

APPENDIX

ORS 138.083 .....APP-A

TABLE OF AUTHORITIES

Cases

Gideon v. Wainwright,
372 US 335, 83 S Ct 792, 796, 9 L Ed 2d 799 (1963) 16

State v. Barrett,
331 Or 27, 10 P3d 901 (2000) 6

State v. Bowen,
340 Or 487, 135 P3d 272 (2006), *cert den*, 127 S Ct 1258 (2007) 2, 10, 11, 12

State v. Bowen,
352 Or 109, 282 P3d 807 (2012) 2, 12, 13

State v. Cortes,
235 Or App 181, 230 P3d 102 (2010) 16

State v. Cunningham,
161 Or App 345, 985 P2d 827 (1999) 9

State v. Davis,
216 Or App 456, 174 P3d 1022 (2007), *rev den*, 344 Or 401 (2008) 16

State v. Edson,
329 Or 127, 985 P2d 1253 (1999) 3, 4, 5, 8

State v. Green,
145 Or App 175, 929 P2d 1057 (1996) 6

State v. Hollingquest,
241 Or App 1, 250 P3d 366 (2011) 16

State v. Link,
346 Or 187, 208 P3d 936 (2009) 13

State v. Muyingo,
225 Or App 156, 200 P3d 601 (2009).....8, 9

State v. Partain,
349 Or 10, 239 P3d 232 (2010)..... 14, 15

State v. Pratt,
316 Or 561, 853 P2d 827 (1993)..... 13, 14

State v. Reiland,
153 Or App 601, 958 P2d 900 (1998).....6

State v. Renner,
250 Or App 471, 280 P3d 1043 (2012).....16

State v. Rodvelt,
187 Or App 128, 66 P3d 577, *rev den*, 336 Or 17 (2003)..... 5, 6, 7, 8, 9

State v. Sauceda,
236 Or App 358, 239 P3d 996 (2010).....16

State v. Scott,
135 Or App 319, 899 P2d 697, *rev den*, 321 Or 560 (1995).....6

State v. Smitherman,
200 Or App 383, 114 P3d 540 (2005).....16

State v. Stockman,
43 Or App 235, 603 P2d 363 (1979).....14

State v. Turner,
247 Or 301, 429 P2d 565 (1967).....14

State v. White,
346 Or 275, 211 P3d 248 (2009)..... 9, 12

State v. Wilkins,
175 Or App 569, 29 P3d 1144, *rev den*, 333 Or 74 (2001)..... 6, 16

State v. Wright,
150 Or App 159, 945 P2d 1083 (1997), *rev den*, 326 Or 390 (1998).....6

Wardius v. Oregon,
412 US 470, 93 S Ct 2208, 37 L Ed 2d 82 (1973) 15

Washington v. Texas,
388 US 14, 22, 87 S Ct 1920, 1924, 18 L Ed 2d 1019 (1967) 15

Statutes

ORS 138.012(2) 12
ORS 138.083 ..... 2, 12
former ORS 138.222 5
ORS 138.222 ..... 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16
ORS 138.230 ..... 1, 11, 12
ORS 138.240 ..... 1, 10, 11, 12, 13
ORS 174.010 8

Other Authorities

Or Laws 1993, ch 692, § 2 4

Or Laws 2005, ch 563, § 1 ..... 3, 8, 15

Tape recording, House Appropriations—A Committee, SB 1043,
July 26, 1993, Tape 164B 4

APPELLANT'S REPLY BRIEF

Nature of the Proceeding

This case is on automatic review of proceedings after this court remanded with instructions to the trial court to enter a corrected judgment merging verdicts on charges of aggravated murder and murder into a single conviction and imposing a single sentence of death. Defendant contests the trial court's denial of his motion for resentencing on the remaining felony convictions. He also appeals the denial of his motion to be physically present for resentencing.

In response to the Appellant's Brief, the state argued that ORS 138.222(5)(a) applies rather than ORS 138.222(5)(b), that ORS 138.222(5)(a) does not require resentencing, and that defendant's argument is barred by the "law of the case" doctrine. Defendant replies to address those arguments.

Argument

ORS 138.230 provides that an appellate court "shall give judgment, *without regard* to the decision of questions which were in the discretion of the court below or *to technical errors, defects or exceptions which do not affect the substantial rights of the parties*." ORS 138.240 provides that the appellate court "may *reverse, affirm* ***or*** *modify* the judgment or order appealed from and shall, if necessary or proper, order a new trial." Those provisions demonstrate that this court can itself modify a judgment, if the modification does not address

"technical errors, defects or exceptions which do not affect the substantial rights of the parties," but nothing in ORS 138.083[1] or any other statute of which defense counsel is aware authorizes the appellate court to remand a case for entry of a "corrected judgment" *in lieu of* reversing, affirming, or modifying the judgment on appeal pursuant to ORS 138.240.

Those statutory provisions demonstrate that, by remanding in the previous appeals[2] in this case while affirming the sentence of death, either this court reversed one or more convictions and remanded the case for resentencing consistently with ORS 138.222(5)(b) or its orders were erroneous. Because the orders in the previous appeals *can be* interpreted to be consistent with its statutory authority to reverse the convictions on Counts 1, 2, and 3 and remand for the lower court to properly merge the verdicts and for resentencing under ORS 138.222(5)(b), that is how they should be understood. On that basis, the trial court was required to resentence defendant on the entire case on remand.

---

[1] The text of ORS 138.083 in its entirety is appended to this brief in Appendix "A."

[2] The decisions appear at *State v. Bowen*, 340 Or 487, 135 P3d 272 (2006), *cert den*, 127 S Ct 1258 (2007) (*Bowen I*), and *State v. Bowen*, 352 Or 109, 282 P3d 807 (2012) (*Bowen II*).

I. ORS 138.222(5)(a) applies only to sentencing errors.

ORS 138.222(5) governs whether an appellate court must remand for resentencing after reversing a trial court's ruling in a criminal case. Before 2005, the entire subsection addressed only the consequences of an appellate court determination that the trial court erred in imposing a sentence. It provided:

> "The appellate court may reverse or affirm the sentence. If the appellate court concludes that the trial court's factual findings are not supported by evidence in the record or do not establish substantial and compelling reasons *for a departure*, it shall remand the case to the trial court for resentencing. If the appellate court determines that the sentencing court, *in imposing a sentence* in the case, committed an error that requires resentencing, the appellate court shall remand *the entire case* for resentencing. The sentencing court may impose a new sentence *for any conviction* in the remanded *case*."

See, e.g., State v. Edson, 329 Or 127, 136 n 6, 985 P2d 1253 (1999) (quoting the statute) (emphasis added). That statute, *since renumbered* ORS 138.222(5)(a), Or Laws 2005, ch 563, § 1, by its terms, applies *only* when the appellate court reverses for error in imposing a sentence.

Specifically, the legislature required the appellate court to remand the case for resentencing, if the trial court imposed an erroneous departure sentence. Second, it required resentencing, if the trial court committed a *sentencing* error "that requires resentencing." By its plain terms, the subsection cannot apply unless the appellate court concludes that the lower court committed a *sentencing* error.

Even if the error in *Bowen II* could be construed as a "sentencing error," under this court's interpretation of the statute, the entire case must be remanded for resentencing, if the circuit court lawfully can impose any different sentence on any other conviction in the case.

In *Edson*, the court reversed the trial court's imposition of restitution. It rejected the state's argument that the appropriate remedy was a new sentencing proceeding, stating that, "[b]ecause the trial court found that defendant had no ability to pay any restitution, it cannot sentence her to pay any restitution." 139 Or App at 416. In those circumstances, the court concluded, "a remand for resentencing is *not required*," and so it vacated the restitution provision in the judgment and otherwise affirmed. 139 Or App at 425 (emphasis added).

On review, this court affirmed the Court of Appeals decision that the trial court erred by imposing restitution, and then it turned to whether resentencing was "not required." *Edson*, 329 Or at 129. This court began by observing that the options available to the appellate court "are dictated by applicable statutes and generally are dependent on the type of trial court decision under consideration." *Id*. at 136. It explained:

> "The third (and fourth) sentences of ORS 138.222(5) were added to the statute by Oregon Laws 1993, chapter 692, section 2. The history of that enactment establishes that the new statutory wording was independent of, and applied to a broader range of circumstances than, the second sentence of the statute. See Tape recording, House Appropriations—A Committee, SB 1043, July 26, 1993, Tape 164B at 384 (testimony of Representative Mannix

> that amendment was intended to require appellate court that finds error on one of many convictions to remand entire case, so that trial court has the ability to reconsider whole sentencing 'package')."

Edson, 329 Or at 138–39. The court then concluded:

> "[*B*]*ecause there remain options that the trial court permissibly could adopt on resentencing*, this is a case that 'requires resentencing.' In that event, the Court of Appeals lacked authority simply to vacate the sentence. *It had no other option* under ORS 138.222(5) than to reverse the sentence of the trial court and remand *the entire case* to that court for resentencing."

329 Or at 139 (emphasis added).

The decision in *Edson* makes clear that the statutory resentencing requirement is not a matter that arises as a consequence of a defendant's argument on appeal, but is instead the result required by the statute, if the trial court lawfully could impose any different sentence on remand.

In *State v. Rodvelt*, 187 Or App 128, 66 P3d 577, *rev den*, 336 Or 17 (2003), the court expressly addressed the remedy under *former* ORS 138.222(5), *since renumbered* ORS 138.222(5)(a), when the trial court's error was failure to merge "convictions." The court held that the trial court should have merged two "convictions" for assault in the fourth degree into two "convictions" for criminal mistreatment in the first degree. The state conceded that issue, but argued that resentencing on the remaining counts was required as a matter of law. The defendant opposed that contention, arguing that the appellate court had not reversed any sentence on the affirmed convictions.

The Court of Appeals noted that the practice of the appellate courts had been to remand for resentencing after merger of convictions, citing *State v. Barrett*, 331 Or 27, 10 P3d 901 (2000); *State v. Wilkins*, 175 Or App 569, 29 P3d 1144, *rev den*, 333 Or 74 (2001); *State v. Reiland*, 153 Or App 601, 958 P2d 900 (1998); *State v. Wright*, 150 Or App 159, 945 P2d 1083 (1997), *rev den*, 326 Or 390 (1998); *State v. Green*, 145 Or App 175, 929 P2d 1057 (1996); *State v. Scott*, 135 Or App 319, 899 P2d 697, *rev den*, 321 Or 560 (1995). *Rodvelt*, 187 Or App at 131 n 1. The majority and the minority of the court implicitly agreed that merger is accomplished by reversing one "conviction," while leaving in place another "conviction" into which the reversed conviction is merged.

The dissent opined that remand for resentencing was not authorized under any of the three sentences in ORS 138.222(5), because failure to merge "convictions" is *not a sentencing error*. It said:

> "Although we have relied on the statute in the past, we have never examined it to determine whether it authorizes a remand in the circumstances of this case. When the statute is read in context, it becomes apparent that the statutory language and purpose authorize us to remand an entire case for resentencing only when there was an error in the original sentence. *There is no such error in this case once the judgments for the lesser-included offenses are vacated; the remaining sentences for the primary convictions remain and are error free.* It follows that we therefore have no authority to remand under the plain language of the statute."

187 Or App at 137 (Edmonds, J., concurring in part and dissenting in part) (footnote omitted).

The majority did not characterize the trial court's failure to merge "convictions" as a "sentencing error," but nevertheless concluded that resentencing was required, because it could not discern what effect the mergers would have on sentences on the remaining convictions. It held:

> "In sum, we simply lack the information necessary to discern whether, or how, the court's failure to merge defendant's assault convictions affected the actual sentences that the court imposed on defendant's remaining convictions. We can say, however, that the error necessarily affected how the remaining convictions were classified for purposes of sentencing. Given that conclusion, the error in imposing sentences on the misdemeanor assault convictions was error that 'requires resentencing.' ORS 138.222(5). The trial court's error in imposing sentences for the assaults means that, under ORS 138.222(5), we must remand 'the entire case' for resentencing. *Id.*"

187 Or App at 135. The court's "tag line" provided:

> "Reversed and remanded for entry of judgment merging two convictions for fourth-degree assault into two convictions for first-degree criminal mistreatment *and for resentencing*; otherwise affirmed."

Id. at 136 (emphasis added).

The dissent in *Rodvelt* contended that the proper disposition was simply to vacate the convictions for fourth-degree assault and affirm the remaining convictions – with no remand. The legislature thereafter resolved the dispute in its amendment of ORS 138.222.

II. ORS 138.222(5)(b) requires remand for resentencing of the entire case whenever the appellate court reverses *a conviction* and affirms any other felony conviction.

The text interpreted in *Edson* and *Rodvelt* now appears in ORS 138.222(5)(a). Paragraph (b) of subsection (5) was added by 2005 Oregon Laws, chapter 563, section 1:

> "(b) If the appellate court, in a case involving multiple counts of which at least one is a felony, reverses the judgment of conviction on any count and affirms other counts, the appellate court shall remand the case to the trial court for resentencing on the affirmed count or counts."

Paragraph (b) requires a remand for resentencing of the entire case if the appellate court reverses any conviction and any count in the case is a felony.[3] The text does not exclude appeals in capital cases. It cannot reasonably be read to intend such an exemption without violating ORS 174.010[4] by inserting that which the legislature omitted.

---

[3] The Court of Appeals stated in *State v. Muyingo*, 225 Or App 156, 200 P3d 601 (2009), that paragraph (b) "effectively codified" the holding in *Rodvelt*. *Muyingo*, 225 Or App at 162. It would be more accurate to say that the legislature *responded to* the conundrum in *Rodvelt* by requiring resentencing in all cases, so the parties and trial courts can sort out the effects of the appellate decision.

[4] ORS 174.010 provides:

Footnote continues next page.

Accordingly, whether a proper merger is effectuated by reversing all of the convictions on the counts to be merged and merging the underlying verdicts into one conviction that remains, as the concurrence in *State v. White*, 346 Or 275, 279 n 4, 211 P3d 248 (2009), seems to suggest, or the convictions on the merging counts are reversed, leaving the greater conviction standing alone, as the dissent characterized the process in *Rodvelt*, this court in *Bowen I* was required to remand for resentencing of the *entire case*.

That requirement is a matter of the appellate court's dispositional authority and is not contingent upon an appellant's argument. In *State v. Muyingo*, 225 Or App 156, 200 P3d 601 (2009), the Court of Appeals explained:

> "As expressed in our discussion in [*State v. Cunningham*, 161 Or App 345, 985 P2d 827 (1999),] the term 'case' as used in Oregon criminal statutes is a functional one. Moreover, it has a well-established meaning within the workings of the judicial system: A 'case' is a legal proceeding that may have multiple components (*i.e.*, a criminal case may involve multiple charges, a civil case may have both claims and counterclaims) but those components are grouped together and proceed under the same case number."

> "In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."

225 Or App at 164. Applying that reasoning here, resentencing of the "entire case" was required on remand, and the trial court had authority to impose any lawful sentence for all of the convictions in Curry County Case No. 02CR0019.

III. The only lawful effect of this court's orders in *Bowen I* was reversal of the convictions for aggravated murder and murder and remand for entry of a single conviction on the merged verdicts and for resentencing.

In *Bowen I*, this court held that the trial court erred by not merging the "convictions" for aggravated murder. In the text of the opinion, consistently with ORS 138.240 and ORS 138.222(5)(b), the court ordered: "[W]e *reverse the judgments of conviction* for aggravated murder on counts one and two, vacate the sentences of death imposed on those convictions, and remand to the trial court for entry of corrected judgments *and resentencing*." 340 Or at 527 (emphasis added). It also held that the trial court erred by not merging the "conviction" for intentional murder into the "convictions" for aggravated murder. Again, consistently with ORS 138.240 and ORS 138.222(5)(b), the court stated in the text of its opinion, "*[W]e reverse the judgment of conviction* for intentional murder on count three, *vacate the sentence* imposed for that conviction and remand to the trial court for entry of a corrected judgment *and resentencing*." 340 Or at 529 (emphasis added).

Those results were the remedies that defendant requested in his opening brief.[5] Those remedies were dictated by ORS 138.230, ORS 138.240, and ORS 138.222(5)(b), even though the court used the terminology "corrected judgment" and said that the case was "remanded for further proceedings" without expressly mentioning resentencing.

To the extent that the "tag line" in *Bowen I* failed to order resentencing, it was either inartfully stated or it was error by virtue of the plain text of ORS 138.230, which provides that the appellate court has no authority to remand to the circuit court for correction of a technical defect that the appellate court itself is authorized to make by modifying the judgment pursuant to ORS 138.240.

Moreover, the orders – understood that way – properly left undisturbed the *verdicts* on the three counts to be merged and also left in place the verdicts on the penalty phase questions required to support a sentence of death on

---

[5] Defendant's conclusion in the opening brief in *Bowen I* stated:

> "For each and all of the several reasons explained above concerning the trial on the charges related to the death of and theft from , this court should reverse and remand for a new trial, and it should remand for resentencing on the counts concerning the incident. In the alternative, the court should vacate the sentence of death *and remand for resentencing on each and all counts for which defendant was convicted*."

Bowen I, App Br at 242 (emphasis added).

resentencing on the new conviction. That also is consistent with the analysis of the merger process explained in this court's concurring opinion in *White*.

IV. The only lawful effect of this court's order in *Bowen II* was reversal of the conviction for aggravated murder and remand for entry of a single conviction complete with the requisite designations of the underlying verdicts and for resentencing.

On remand from *Bowen I,* defendant argued in the circuit court that resentencing included the requirement for the court to hold a new penalty phase proceeding pursuant to ORS 138.012(2). He neither argued nor conceded that resentencing on the entire case was not otherwise required. This court has held that the trial court's ruling on that matter was correct. However, the trial court held *no* resentencing proceeding. Rather, it merely entered a "corrected judgment," as if it were proceeding under ORS 138.083, even though no one had filed a motion under that statute. Either that procedure did not comply with this court's order, or this court's order was erroneous in contravention of ORS 138.230, ORS 138.240, and ORS 138.222(5)(b).

As defendant explained in his brief in *Bowen II*, merger necessarily occurs before sentence is imposed, because "a trial court applies the merger statute *to guilty verdicts* on particular counts, rather than to 'convictions.'" *Bowen II*, App Br at 27 (quoting *White*, 346 Or at 279 n 4). Therefore, after the trial court on remand has merged the designated verdicts, it must impose a sentence for the resulting conviction. Otherwise, as defendant also explained in

his brief in *Bowen II*, the procedure effectively would be a merger of the sentences, rather than a merger of verdicts. *Bowen II*, App Br at 29 (citing *State v. Link*, 346 Or 187, 202, 208 P3d 936 (2009)). No statute authorizes that procedure.

In summary, under ORS 138.222(5)(b), the merger of the convictions on Counts 1, 2, and 3 made resentencing mandatory on remand, even if this court did not expressly say so, and without regard to whether either party expressly requested it. Accordingly, the trial court erred by not resentencing defendant on the entire case.

Because ORS138.230 and ORS 138.240 preclude remand for "correction" of technical defects in the judgment, and ORS 138.222(5)(b) directs the appellate court to remand for resentencing as a consequence of reversal of the conviction without regard to whether either party requests it or opposes it, it is not a matter that is subject to any preservation requirement. It therefore also is not a matter about which "law of the case" applies.

V. Both the state and defendant are statutorily authorized to raise new legal and factual issues concerning resentencing on remand.

The state posits that "law of the case" barred defendant from raising new sentencing issues on remand. Its reliance on *State v. Pratt*, 316 Or 561, 853 P2d 827 (1993) ("*Pratt II*"), is misplaced for at least three reasons. First, defendant expressly asserted in each of the previous appeals and before the trial

court that resentencing was required. Second, *Pratt* did not concern sentencing issues. And third, this court held in *State v. Partain*, 349 Or 10, 239 P3d 232 (2010), that both subsections of ORS 138.222(5) authorize the court to consider new legal and factual issues concerning resentencing on remand after reversal of any error, even if the error was unrelated to the sentence.

In *Partain*, the state relied on the ORS 138.222(5)(a) when it argued that the statute justified overturning the rule of *State v. Turner*, 247 Or 301, 313, 429 P2d 565 (1967). Reliance on subsection (5)(a) seems inapt with respect to the question in *Turner*, because the appellate court had remanded for a new trial. Nonetheless, the court accepted the state's argument that the statute reflects the legislature's intention that the trial court may impose different sentences on remand after an appeal, even if they are based on facts and law not previously raised in the case:

> "The amendment [to ORS 138.222(5)(a)] unambiguously provides that, when a case is remanded *because of a particular sentencing error*, the sentencing court may impose different sentences on any and all counts – *even those not affected by the identified error*."

349 Or at 19 (emphasis added). The court overruled *Turner* and abrogated *State v. Stockman*, 43 Or App 235, 603 P2d 363 (1979), which had limited the court's authority to impose a harsher sentence after remand for sentencing errors. *Partain*, 349 Or at 23.

Although the court in *Partain* began its discussion with the state's argument about the effect of ORS 138.222(5)(a), this court explained that ORS 138.222(5)(b) also allows the sentencing court on remand to consider new legal and factual arguments concerning *any* conviction in the case:

> "ORS 138.222(5)(b), adopted in 2005 (Or Laws 2005, ch 563, § 1), extends the general approach of ORS 138.222(5)(a), allowing trial courts to resentence a defendant *on any judgments of convictions that are affirmed on appeal*, if any other judgment of conviction in the same case is reversed on appeal."

340 Or at 20-21 (emphasis added). It held that the court may impose harsher sentences for any non-vindictive reasons, "including the fact that the trial court in the second sentencing proceeding has information about the defendant and his or her actions that was not available at the first or the fact that the trial court simply erred in applying sentencing statutes or guidelines." 340 Or at 23-24.

In *Partain*, the state prevailed in its contention that it could present new issues on remand to justify harsher penalties, even if they were not the subject of the appeal. The rule cannot be applied to allow the state to present arguments and evidence to support imposition of harsher penalties, but not to allow defendant to present arguments and evidence to support more lenient penalties. *Cf. Wardius v. Oregon*, 412 US 470, 474, 93 S Ct 2208, 37 L Ed 2d 82 (1973) (state rules that provide nonreciprocal benefits to the state offend due process; citing *Washington v. Texas*, 388 US 14, 22, 87 S Ct 1920, 1924, 18 L Ed 2d 1019 (1967); *Gideon v. Wainwright*, 372 US 335, 344, 83 S Ct 792,

796, 9 L Ed 2d 799 (1963)). Indeed, the Court of Appeals has repeatedly applied ORS 138.222(5) to allow parties to raise new sentencing issues on remand and has even relied on that authority as its basis to decline to address issues expressly raised in the appeal. *See, e.g., State v. Hollingquest*, 241 Or App 1, 5, 250 P3d 366 (2011) ("[W]e have held on numerous occasions that we need not address each and every assignment of error pertaining to sentencing on appeal if we conclude that one of the errors is an error that requires plenary resentencing under ORS 138.222(5)."); *State v. Smitherman*, 200 Or App 383, 114 P3d 540 (2005) (restitution issue can be raised at resentencing); *State v. Wilkins*, 175 Or App 569, 587, 29 P3d 1144, *rev den*, 333 Or 74 (2001) (compensatory fine issue can be raised at resentencing); *see also State v. Renner*, 250 Or App 471, 473 n 1, 280 P3d 1043 (2012) (unpreserved issue can be raised at resentencing); *State v. Sauceda*, 236 Or App 358, 362, 239 P3d 996 (2010) (same); *State v. Cortes*, 235 Or App 181, 230 P3d 102 (2010) (same); *State v. Davis*, 216 Or App 456, 474, 174 P3d 1022 (2007), *rev den*, 344 Or 401 (2008) (same).

CONCLUSION

For the foregoing reasons, this court should reverse and remand for resentencing. In addition, as argued in the opening brief, this court should order the trial court to allow defendant to appear personally in the resentencing proceeding.

Respectfully submitted,

PETER GARTLAN
CHIEF DEFENDER
OFFICE OF PUBLIC DEFENSE SERVICES

ESigned

ROBIN A. JONES OSB #892756
SENIOR DEPUTY PUBLIC DEFENDER
Robin.Jones@opds.state.or.us

Attorneys for Defendant-Appellant
Gregory Allen Bowen

INDEX TO APPENDIX

ORS 138.083 .....App-A

APPENDIX “A”

138.083 Corrected and supplemental judgments. (1)(a) The sentencing court retains authority irrespective of any notice of appeal after entry of judgment of conviction to modify its judgment and sentence to correct any arithmetic or clerical errors or to delete or modify any erroneous term in the judgment. The court may correct the judgment either on the motion of one of the parties or on the court’s own motion after written notice to all the parties.

(b) If a sentencing court enters a corrected judgment under this subsection while an appeal of the judgment is pending, the sentencing court shall immediately forward a copy of the corrected judgment to the appellate court. The appellate court shall notify the parties to the appeal when the appellate court receives the corrected judgment. Except as provided in subsection (3) of this section, any modification of the appeal necessitated by the corrected judgment shall be made in the manner specified by rules adopted by the appellate court.

(2)(a) A judgment that orders payment of restitution but does not specify the amount of restitution imposed is final for the purpose of appealing the judgment.

(b) Notwithstanding the filing of a notice of appeal, the sentencing court retains authority to determine the amount of restitution and to enter a supplemental judgment to specify the amount and terms of restitution.

(c) If a sentencing court enters a supplemental judgment under this subsection while an appeal of the judgment of conviction is pending, the sentencing court shall immediately forward a copy of the supplemental judgment to the appellate court. The appellate court shall notify the parties to the appeal when the appellate court receives the supplemental judgment. Except as provided in subsection (3) of this section, any modification of the appeal necessitated by the supplemental judgment may be made in the manner specified by rules adopted by the appellate court.

(3)(a) If the appellant intends to assign error to any part of the corrected or supplemental judgment, the appellant must file an amended notice of appeal from the corrected or supplemental judgment.

(b) If the appellant does not intend to assign error to any part of the corrected or supplemental judgment, the appellant need only file a notice of intent to proceed with the appeal. Such notice is not jurisdictional.

(4) As used in this section, “appellant” means the attorney of record in the appellate court for the appellant or, if the appellant is not represented by an attorney, the appellant personally. [1989 c.790 §20; 1995 c.109 §1; 1997 c.389 §2; 2003 c.576 §165; 2007 c.547 §3; 2013 c.153 §1]

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

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(b)) is 3,997 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 Appellant's Reply Brief to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on March 20, 2014.

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

Respectfully submitted,

PETER GARTLAN
CHIEF DEFENDER
OFFICE OF PUBLIC DEFENSE SERVICES

ESigned

_____

ROBIN A. JONES OSB #892756
SENIOR DEPUTY PUBLIC DEFENDER
Robin.Jones@opds.state.or.us

Attorneys for Defendant-Appellant
Gregory Allen Bowen