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 Case No. 10CR0836 CA A150855 SC S063917

PETITIONER'S REPLY BRIEF ON THE MERITS

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, Presiding Judge,
Concurring Judges: DeVore, Judge, and Garrett, Judge.

ERNEST G. LANNET #013248
Chief Defender
Criminal Appellate Section
INGRID A. MACFARLANE #863328
Chief Deputy Defender
Office of Public Defense Services
1175 Court Street NE
Salem, OR 97301
Ingrid.MacFarlane@opds.state.or.us
Phone: (503) 378-3349
Attorneys for Petitioner on Review

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
ROBERT M. WILSEY #085116
Assistant Attorney General
400 Justice Building
1162 Court Street NE
Salem, OR 97301
robert.wilsey@doj.state.or.us
Phone: (503) 378-4402
Attorneys for Respondent on Review

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INTRODUCTION

Petitioner's opening brief asserts that "comparable offenses" within the meaning of ORS 137.719(3)(b)(B) are foreign convictions for crimes with elements that are the same as, equivalent to, or narrower than the elements of an ORS 163A.005 offense with which it is being compared. Petitioner's Brief on Merits (BOM) at 1-2. The state's responding brief asserts that the term "comparable offenses" describes offenses that are "appropriate for or worthy of comparison" based on shared "core similarities." Respondent's BOM at 2. This court should reject the state's proposed interpretation of the phrase "comparable offenses" for three reasons: 1) the interpretation fails to acknowledge that the term "comparable" has more than one meaning, 2) the interpretation is not supported by ORS 137.719(3)(b)(B)'s context or its legislative history, and 3) an interpretation that compares "core similarities" of an offense rather than elements of an offense runs afoul of the narrow criminal history exception to the proof requirements of the Sixth and Fourteenth Amendments identified in *Apprendi v. New Jersey*, 530 US 466, 120 S Ct 2348, 147 L Ed 2d 435 (2000).

ARGUMENT

I. The state's interpretation of "comparable offenses" fails to acknowledge that the term "comparable" has more than one meaning.

In concluding that the term "comparable offenses" describes offenses that are simply "appropriate for or worthy of comparison" with the offenses identified in ORS 163A.005, the state relies on multiple dictionary definitions of "comparable." Respondent's BOM at 6-7. Each definition quoted provides two meanings for the word, one describing a high degree of similarity and a second describing a lesser degree of similarity. *Id*. One definition—like the Webster's definition provided in petitioner's brief—uses the word "equivalent" as a meaning of "comparable." *Id*. at 7 (quoting *The American Heritage Dictionary of the English Language*, 375 (5th ed 2016)). Yet the state's argument fails to acknowledge "comparable's" multiple meanings and instead assumes that "comparable" has only one meaning and that that single meaning is the less restrictive one. Respondent's BOM at 7-10.

But "comparable" has two meanings, and the meaning intended by the word's use in ORS 137.719 depends on the context of its use. Petitioner's BOM at 16. *See also State v. Cloutier*, 351 Or 68, 96, 261 P3d 1234 (2011) (noting that 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. Fries*, 344 Or 541, 546, 185 P3d 453 (2008) (context

determines which of multiple definitions is the one the legislature intended). Because the word "comparable" is used in ORS 137.719 as a basis to identify qualifying prior convictions for sentence enhancement purposes, and because a conviction is determined by the elements of the offense supporting the conviction, "comparable" must take its more restrictive meaning and describe something more closely related than offenses sharing a "core similarity." See Petitioner's BOM at 11-19.

Even if the state's "core similarity" interpretation were correct, whether compared items have a core similarity also depends on context. That is, whether offenses have a "core similarity depends upon the characteristics being compared. For example, whether apples and oranges have core similarity depends on the characteristics being compared. If comparing handheld fruit that might withstand a cross-continental flight in the bottom of a backpack, apples and oranges might be comparable. But if comparing fruit that is suitable for a pie filling, they are incomparable.

Here, the basis for comparison is whether a foreign conviction is for an offense that is like one of several listed Oregon offenses. That comparison may only be made by comparing the offenses' elements, because that is what constitutes, or is at the core of, an offense. Therefore, the state's definition of "comparable," applied in context, requires a result more restrictive than the

state's broad conclusion that an offense is comparable to an ORS 162A.005 offense if it shares a similarity as mere as a common legislative concern.

In short, the state's definition does not recognize that "comparable" has more than a single meaning, and does not explain why the legislature intended the less restrictive meaning or how that less restrictive meaning, in the context of its use, could require mere legislative purpose alignment. For those reasons, the state's proposed interpretation of "comparable" as used in ORS 137.719 should be rejected.

II. The state's interpretation of "comparable offenses" is supported neither by the statute's context nor its legislative history.

In concluding that the term "comparable offenses" means offenses sharing only "core similarities," the state relies on the context of ORS 137.719(3)(b)(B) and its lack of legislative history. Respondent's BOM at 10-15. Its context argument is based on the legislature's use of different words to identify qualifying convictions in four other conviction-counting statutes and on the Court of Appeals' construction of two of those statutes. Respondent's BOM at 10-14.

First, the state points to OAR 253-04-0011, which provides that a foreign conviction may be considered in calculating an offender's criminal history score when "the elements of the foreign offense would have constituted a

felony or a Class A misdemeanor under current Oregon law."[1] Second, the state relies on ORS 137.712(6)(a)(B), providing that a conviction in another jurisdiction is a qualifying conviction if it "would constitute a crime listed in subsection (4) of [ORS 137.712],"[2] and ORS 163A.020(6),[3] providing that the reporting requirements for sex offenders apply to a person convicted of a crime in another state that "would constitute a sex crime if committed in this state."[4] Finally, the state notes that ORS 813.010(5)(A)(ii)[5] provides that driving under the influence of intoxicants is a Class C felony if the defendant has been convicted at least three times in the past 10 years of DUII in violation of ORS

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[1] OAR 253-04-0011 was promulgated in 1989 by the Criminal Justice Commission.

[2] The "constitute" language in ORS 137.712(6)(a)(B) is a part of the statute as originally enacted in 1997. Oregon Laws 1997, ch 852, §1.

[3] The "constitute" language in ORS 163A.020(6) is a part of the statute as originally enacted in 1995 (though since renumbered). Oregon Laws 1995, ch 429, §2.

[4] See also, ORS 163.465(2)(b), providing for an enhanced penalty for public indecency and describing a sentence-enhancing conviction as a conviction for "a crime in another jurisdiction that, if committed in this state, would constitute public indecency or a crime described in ORS 163.355 to 163.445." The "constitute" language to include and describe a foreign qualifying conviction was added in 2005. Oregon Laws 2005, ch 434, §1.

[5] The "statutory counterpart" language in ORS 813.010(5)(A)(ii) was added to the DUII statute in 1999. Oregon Laws 1999, ch 1049, §1.

813.010 or "the statutory counterpart of this section in another jurisdiction."[6] Respondent's BOM at 10-14. The state appears to agree that the conviction-counting schemes in each of the cited statutes require element matching. See Respondent's BOM at 14 ("Thus, when the legislature intends that a foreign conviction must have elements that 'match' an Oregon statute, it knows how to say so.").

The state concludes from the legislature's use of different words to describe conviction-counting schemes that require close element matching that the legislature must not have intended close element matching when it used "comparable offenses" in ORS 137.719. Respondent's BOM at 14. The state's argument fails, though, because the support for its argument instead establishes that when the legislature intends a conviction-counting scheme that requires close element matching, it uses a variety of words. And the words that it uses are synonymous with words that are synonyms for "comparable." See Petitioner's BOM at 15-16 (noting that "corresponding" is a synonym of "like" and that "like" is synonymous with "comparable").

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[6] See also, ORS 163.185(1)(d)(A) and (B)(i), defining the crime of assault in the first degree and providing that a person commits first-degree assault if the person, among other prerequisites, has previous convictions under ORS 813.010, "or its statutory counterpart in any jurisdiction * * *." The "statutory counterpart" language to include and describe a foreign qualifying conviction was added in 2007. Oregon Laws 2007, ch 867, §3.

In addition to the words identified in the statutes noted above, the legislature has used yet another word to describe qualifying foreign convictions in conviction-counting schemes. And that other word—equivalent—is yet another synonym of "comparable." See Petitioner's BOM at 15-16. For example, ORS 167.320, 167.325, and 167.330, all relating to animal abuse and neglect, provide for an enhanced penalty if the person has a previous conviction for an offense under ORS 167.320, 167.322, 167.325, or 167.330, "or the equivalent laws of another jurisdiction."[7] ORS 163.187, proscribing strangulation, provides for an enhanced penalty if the person has been previously convicted of violating ORS 163.187, 163.160, 163.165, 163.175, 163.185, or 163.190, "or of committing an equivalent crime in another jurisdiction * * *."[8] And ORS 163.160 provides for an enhanced penalty for assault in the fourth degree based on certain facts, including a previous conviction for "an equivalent crime in another jurisdiction."[9]

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[7] The "equivalent laws" language in ORS 167.320, 167.325, and 167.330 first appears in ORS 167.320 in 2003. Oregon Laws 2003, ch 577, §8.

[8] The "equivalent crime" language in ORS 163.187 was added in 2003. Oregon Laws 2003, ch 577, §2.

[9] The "equivalent crime in another jurisdiction" language in ORS 163.160 was added in 2015, Oregon Laws 2015, ch 639, §2, and was an amendment from language added in 2009 providing for a penalty enhancement for prior convictions "under equivalent laws of another jurisdiction." Oregon Laws 2009, ch 785, §3.

Significantly, the assault statutes use "equivalent crime in another jurisdiction" and "statutory counterpart in any jurisdiction" interchangeably. That is, ORS 163.160(2)(b) and (c) provide for an enhanced penalty for assault in the fourth degree based in part on a foreign conviction for an "equivalent crime," while ORS 163.185(1)(d)(A) and (B)(i) define assault in the first degree based in part on foreign convictions for a "statutory counterpart" to ORS 813.010 or for a "statutory counterpart" to listed Oregon offenses. *See also State v. Tapp*, 110 Or App 1, 3, 821 P2d 1098 (l991) (describing element-matching under the guidelines as an inquiry into whether the elements of a foreign conviction "correspond" to the elements of an Oregon felony or Class A misdemeanor).

And the words "comparable offenses" to designate qualifying foreign convictions for sentence enhancement purposes are used not only in ORS 137.719, but also in ORS 137.717, providing for enhanced sentences for repeat property offenders; [10] ORS 165.803, providing for enhanced sentences for

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[10] See ORS 137.717(9)(b)(B) (providing that as used in ORS 137.717, "previous conviction" includes "[c]onvictions entered in any other state or federal court for comparable offenses."). That language was a part of the statute as originally enacted in 1996. Oregon Laws 1996, ch 3, §1. It was a staff amendment to House Bill 3488, see HB 3488, A-Engrossed (Feb 1, 1996) (Exhibit E), but there is no evidence in the bill's history that "comparable" describes something different than "statutory counterpart" or "equivalent."

repeat aggravated identity theft offenders;[11] and ORS 475.935, providing for enhanced sentences for repeat unlawful delivery of methamphetamine offenders.[12]

In summary, because the legislature uses words that are identified in dictionaries as synonymous with "comparable" to describe conviction-counting sentencing schemes that require close element matching, the legislature likely intended "comparable" to also describe a conviction-counting sentencing scheme that requires close element matching. The state's interpretation of "comparable offenses" is not supported by ORS 137.719's context and should be rejected.

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[11] See ORS 165.803(3)(b) (providing that as used in ORS 165.803, "previous conviction" includes "[c]onvictions entered in any other state or federal court for comparable offenses."). That language is part of the statute as enacted in 2007. Oregon Laws 2007, ch 584, §1. ORS 165.803 provides alternative means for establishing aggravated identity theft, one of which includes a previous conviction for aggravated identity theft. ORS 165.803(4) requires that when a previous conviction theory is in play, "[t]he state shall plead in the accusatory instrument and prove beyond a reasonable doubt, as an element of the offense, the previous conviction for aggravated identity theft."

[12] See ORS 475.935(3)(b) (providing that as used in ORS 475.935(3)(b), "previous conviction" means "[c]onvictions entered in any other state or federal court for comparable offenses."). That language is part of the statute as originally enacted in 2005. Oregon Laws 2005, ch 708, §8.

III. In requiring alignment of only "core similarities," the state's interpretation of "comparable offenses" runs afoul of *Apprendi*.

The state asserts that its interpretation of "comparable offenses" does not conflict with *Apprendi* because a trial court comparing offenses will review not the facts constituting the foreign offense but instead the "text, context and any judicial constructions of the foreign statutes" at issue. Respondent's BOM at 19-20. Such review would allow the court to apply a "flexible standard" for identifying offenses that share a sufficient number of (unspecified) "like characteristics to make comparison between them appropriate." Respondent's BOM at 4. In the state's view, offenses would be comparable when the offenses share "core characteristics such as statutory purpose or common elements." Respondent's BOM at 2-3.

In *State v. Bray*, 342 Or 711, 723-24, 160 P3d 983 (2007), though, this court examined the aggravating sentencing factor of persistent involvement in similar offenses in light of *Apprendi* and *Shepard v. United States*, 544 US 13, 125 S Ct 1254, 161 L Ed 2d 205 (2005). It held that determining the "persistent involvement" factor presents a factual issue for the jury that goes beyond the scope of the prior conviction exception. The court noted that in determining whether a record establishes persistent involvement in similar offenses,

> "a sentencing court must do more than find that a defendant has two or more prior convictions for similar offenses. The trier of

> fact must infer from the number and frequency of those prior convictions whether the defendant's involvement in similar offenses is sufficiently continuous or recurring to say that it is 'persistent.' If, as the plurality explained in *Shepard*, the prior conviction exception includes only those facts that the conviction itself or the judicial record conclusively establishes, then it does not include inferences, such as persistent involvement in similar offenses."

Bray, 342 Or at 724.

Because the state's test for determining offense comparability is "flexible" and requires the match of an unspecified number of elements and may be satisfied if statutes share as little as a statutory purpose, the test is much like the test for determining "persistent involvement" that this court found outside of the prior conviction exception in *Bray*. That is because in determining offense comparability under the state's test, the trier of fact must determine whether offenses are sufficiently alike in either legislative purpose or general scope to qualify as appropriate for comparison. In other words, the state's interpretation of "comparable offenses" requires that the trier of fact make a very rough (and very subjective) judgment call about whether offenses qualify as comparable. That undertaking is a far cry from a determination based on the conclusive significance of a prior judicial record that was recognized *Shepard*, and more like findings subject to *Apprendi*. Thus, the state's interpretation of "comparable offenses" runs afoul of *Apprendi* and should be rejected.

CONCLUSION

For the foregoing reasons and the reasons advanced in the petitioner's brief on the merits, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

ERNEST G. LANNET
CHIEF DEFENDER
CRIMINAL APPELLATE SECTION
OFFICE OF PUBLIC DEFENSE SERVICES

ESigned

_____

INGRID A. MACFARLANE OSB #863328
CHIEF DEPUTY DEFENDER
Ingrid.MacFarlane@opds.state.or.us
Attorneys for Petitioner on Review
Donovan Robert Carlton

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

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 2,547 words.

Type size

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

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner on Review Reply Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on October 20, 2016.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this original Petitioner on Review Reply Brief on the Merits will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Benjamin Gutman #160599, Solicitor General, and Robert M. Wilsey #085116, Assistant Attorney General, attorneys for Respondent on Review.

Respectfully submitted,

ERNEST G. LANNET
CHIEF DEFENDER
CRIMINIAL APPELLATE SECTION
OFFICE OF PUBLIC DEFENSE SERVICES

ESigned

_____

INGRID A. MACFARLANE OSB #863328
CHIEF DEPUTY DEFENDER
Ingrid.MacFarlane@opds.state.or.us

Attorneys for Petitioner on Review
Donovan Robert Carlton