

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff-Respondent,
Respondent on Review,

v.

MICHAEL PAUL LYKINS,

Defendant-Appellant,
Petitioner on Review.

Washington County Circuit
Court No. C100530CR, D101103M

CA A146498 (Control)
A146499

SC S061997

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 Washington County
Honorable STEVEN L. PRICE, Judge

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Before: Ortega, P.J., Haselton, C.J., and Sercombe, J.

Continued . . .

PETER GARTLAN #870467
Chief Defender
Office of Public Defense Services
NEIL F. BYL #071005
Deputy Public Defender
1175 Court St. NE
Salem, Oregon 97301
Telephone: (503) 378-3349
Email: neil.f.byl@opds.state.or.us

Attorneys for Petitioner on Review

ELLEN F. ROSENBLUM #753239
Attorney General
ANNA M. JOYCE #013112
Solicitor General
JENNIFER S. LLOYD #943724
Attorney-in-Charge Criminal Appeals
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email: jennifer.lloyd@doj.state.or.us

Attorneys for Respondent on Review

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

INTRODUCTION AND QUESTIONS PRESENTED

Defendant was convicted of tampering with a witness based on his attempt to get his former girlfriend to recant her earlier report to police about his unlawful entry into her apartment. In doing so, defendant knowingly attempted to exploit her psychiatric condition by repeatedly suggesting to her that she had not been taking her prescribed antipsychotic medication and that she had been delusional when she made the report. The issue in this case is whether the sentencing court properly characterized the witness as a “victim” for purposes of the vulnerable-victim aggravating factor under the sentencing guidelines.¹

The term “victim” is an elastic term that depends on the context in which it is used. As used in the criminal code, the term is very broad and refers to all persons, including family members of homicide victims and guardians of minor children, who have suffered any of a broad range of harms as a result of the crime. ORS 131.007. In contrast, for purposes of the anti-merger statute, the term “victim” is coextensive with what the legislature intended in defining the

¹ The vulnerable-victim factor is contained in OAR 213-008-0002(1)(b)(B), which provides: “The offender knew or had reason to know of the victim’s particular vulnerability, such as the extreme youth, age, disability or ill health of the victim, which increased the harm or threat of harm caused by the criminal conduct.”

substantive offense. *State v. Glaspey*, 337 Or 558, 100 P3d 730 (2004). Here, the term “victim” is used in the guidelines rule that authorizes departure sentences, and that rule is designed to give judges broad discretion to tailor sentences to the crime. That context supports a broad interpretation of the term “victim” that includes any person who is directly harmed by the criminal conduct.

In this case, the Court of Appeals held that, for purposes of the sentencing-guidelines departure provisions, the term “victim” includes anyone who is directly harmed by the conduct that constitutes the offense. *State v. Lykins*, 259 Or App 475, 314 P3d 704 (2013). The court rejected as “too narrow” defendant’s argument, based on *Glaspey*, that “victim” includes only the person who is the victim under the substantive criminal statute.

This case presents the following question, to which the state proposes the following answer:

Question presented: For purposes of the vulnerable-victim aggravating factor described in OAR 213-008-0002(1)(b)(B), what does the term “victim” mean?

Proposed answer: “Victim” means any person who was directly harmed by the conduct constituting the offense.

Historical and Procedural Facts

Defendant committed the crime of tampering with a witness by attempting to influence the anticipated testimony of his former girlfriend,

about his earlier unlawful entry into her apartment.² Defendant previously had served a prison sentence for assaulting her. *Lykins*, 259 Or App at 477. After his arrest for the incident at the apartment, he called from jail, attempting to convince her to recant her version of events. In doing so, he tried to convince her that she had stopped taking her antipsychotic medication and had been suffering delusions as a result. (Tr 223-28).

At sentencing on the tampering conviction, the state argued that the sentencing court should find substantial and compelling reasons for a departure sentence based on the vulnerable-victim aggravating factor because defendant exploited [redacted] psychiatric condition in committing the crime. (Tr 424). Defendant argued that, as a matter of law, [redacted] could not be a “vulnerable victim” because tampering with a witness is “a crime against the State.” (Tr 430).³ The sentencing court found that the state had proved the “vulnerable victim”

² A person tampers with a witness if the person “knowingly induces or attempts to induce a witness or a person the person believes may be called as a witness in any official proceeding to offer false testimony or unlawfully withhold any testimony.” ORS 162.385(1)(a).

³ Defendant also argued that the state had not proved, as a factual matter, that defendant had used his knowledge of her mental and physical vulnerabilities to commit the crime. (Tr 433). He does not reassert that argument on appeal.

enhancement factor, reasoning that had suffered psychological and social harm:

Ms. is * * * a victim because she suffered psychological and social harm as a result of [defendant's] attempts to pressure her. In both the jail telephone calls and her trial testimony, Ms. was obviously distraught over [defendant's] efforts to pressure and manipulate her. Based on years of manipulating and taking advantage of Ms. [defendant] knew of her particular vulnerability. This vulnerability increased the threat of harm to which Ms. was subject, both in the short term (being successfully manipulated into testifying falsely) and in the long term (continuing in the abusive relationship with [defendant]).

(TCF 17,⁴ letter opinion).⁵

On appeal, the Court of Appeals affirmed, relying on its prior decision in *State v. Teixeira*, 259 Or App 184, 313 P3d 351 (2013), in which it had concluded, based on the text, context, and history of the rule, that, for purposes of the sentencing guidelines, “a ‘victim’ is a person who is directly, immediately, and exclusively injured by the commission of the crime[.]” *Lykins*, 259 Or App at 480,

⁴ The letter opinion is labeled with the wrong circuit court case number and thus appears in the trial court file for the original trespass and criminal mischief case, circuit court no. D101103M; the cases were consolidated for appeal.

⁵ The sentencing court also identified an alternate theory – that the State of Oregon was a vulnerable victim because was a key witness, which meant that the case would be unusually difficult to prosecute without her truthful testimony. The Court of Appeals did not address that issue because it affirmed on the ground that the departure based on vulnerability was permissible. *Lykins*, 259 Or App 476, n 2. The state does not concede that the State of Oregon can *never* be a vulnerable victim under the rule. However, the state does not argue before this court that the State of Oregon was a particularly vulnerable victim in this case.

quoting *Teixeira*, 259 Or App at 199. It held that, because defendant knew of and exploited [redacted] psychiatric issues and caused her distress by his conduct, the record supported the court's vulnerable-victim finding, which was a substantial and compelling reason for the departure sentence. *Id.* at 480-81. Because the Court of Appeals decided the case based on a broad reading of "victim," it did not address whether, if defendant's argument based on *Glaspey* were correct, the "witness" described in the crime of tampering with a witness would be a victim within the meaning of the substantive statute. *Lykins*, 259 Or App at 480.

Summary of Argument

The issue is whether the sentencing guidelines' use of the term "victim" in describing aggravating and mitigating factors is narrowly limited only to the person who is the victim within the meaning of the underlying substantive crime, or whether it applies more broadly to include anyone who was directly harmed by the crime. Defendant does not dispute, as a factual matter, that [redacted] was particularly vulnerable, or that the risk of harm from his conduct was increased by his knowing exploitation of her vulnerability. And the state does not pursue before this court the alternative theory that the State of Oregon was a particularly vulnerable victim. Nor does the state assert that, under the substantive statute defining tampering with a witness, the "witness" would be a victim under the *Glaspey* analysis. The sole question, therefore, is the legal issue whether

could be a “victim” within the meaning of the vulnerable-victim departure factor.

The answer is that she was. For purposes of the vulnerable-victim factor, a “victim” is any person who was directly harmed by the criminal conduct being sentenced. OAR 213-008-0002(1) provides a non-exclusive list of aggravating and mitigating factors that can support departures from the presumptive sentence. That departure provision has a wider focus, designed to broadly allow judges to consider circumstances that are not limited to offender history and the circumstances that established the elements of the crime. Defendant’s narrow reading of the rule would be inconsistent with the purpose of the departure rule, because sentencing courts would be able to consider harms inflicted only on those persons already contemplated to be the victim by the fact of the conviction itself. That construction would conflict with the goal of the guidelines to ensure that judges have discretion to impose longer or shorter sentences based on a broad range of factors that might make a crime more or less serious than typical.

ARGUMENT

A. Background: The guidelines establish presumptive sentences based on two narrow criteria, but give broad discretion to depart for “substantial and compelling reasons.”

The state begins with an overview of the sentencing guidelines’ system of presumptive and departure sentences because that background shows that, although the legislature intended presumptive sentences to be based on narrow

considerations of crime seriousness and offender history, it also intended that sentencing judges should have the flexibility to consider a host of other facts in order to tailor the individual sentence to the individual case. That background informs the state's later discussion of the text and context of the vulnerable-victim rule. Although the text is useful, the context of that rule most persuasively shows that the term "victim" is a broad term that includes any person who was directly harmed by the crime. The legislative history confirms that conclusion.

Oregon's felony sentencing guidelines, adopted by the legislature in 1989, "serve as the primary means through which courts determine an offender's sentence for felony offenses." *State v. Ferman-Velasco*, 333 Or 422, 425, 41 P3d 404 (2002). The guidelines establish "presumptive" sentences for crimes based on the general seriousness of the offense and the offender's criminal history. *See* OAR 213-003-0001(16) (the "presumptive sentence" is determined "by the combined effect of the crime seriousness ranking of the current crime of conviction and the offender's criminal history").

A sentencing court must impose a presumptive sentence unless the court finds substantial and compelling reasons for an upward or a downward departure. OAR 213-008-0001; ORS 137.671(1). That flexibility is a key component of the sentencing guidelines, which allow sentencing courts, within certain parameters, to tailor the individual sentence to the individual case. *See* OAR 213-002-0001(1) (a primary objective of sentencing is to "punish each offender appropriately"); *State*

v. Miller, 317 Or 297, 306, 855 P2d 1093 (1993) (“Major purposes behind the guidelines promote statewide uniformity in sentencing while according the maximum latitude possible within the overall guidelines system to the individual judge’s sentencing discretion.”)

The guidelines do not limit the types of facts that can support a departure sentence. OAR 213-008-0002(1) identifies a list of mitigating and aggravating factors that the sentencing court may consider to determine whether “substantial and compelling reasons” exist for a departure sentence. But that list expressly is a “nonexclusive” list of examples, and a sentencing court has discretion to impose a departure sentence based on nonenumerated grounds. *See* Commentary, Oregon Criminal Justice Council, OREGON SENTENCING GUIDELINES IMPLEMENTATION MANUAL 127 (1989) (“Sentencing judges may cite a factor not listed in [the] rule as grounds for a departure if that fact makes the case exceptional for sentencing purposes”).

The guidelines, therefore, establish a comprehensive set of “presumptive” sentences that are determined by a very narrow set of considerations: the elements of the crime and the offender’s criminal history. In contrast, the rules governing departure sentences allow judges broad discretion to consider facts that are not captured by the presumptive sentence. Against that backdrop, the terms used in the list of departure factors should not be interpreted narrowly, and the term “victim” should not be limited only to the person who is the victim for purposes of the

substantive offense. Rather, the term “victim,” as used in the enumerated departure factors, should be interpreted to allow sentencing courts to consider any increased risk of harm to any person whose vulnerability the defendant knowingly exploits in committing the crime.

B. The term “victim” in OAR 213-008-0002(1)(b)(B) means any person who is directly harmed by the crime.

To determine the meaning of the vulnerable-victim factor, this court employs the analysis set forth in *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). To determine the legislature’s intent in adopting the rule, this court first considers the text and context of the rule, giving terms their plain and ordinary meanings. *Gaines*, 346 Or at 171-72. The court may then consider pertinent legislative history. *Id.* at 172. Application of that methodology supports a broad definition of “victim” that includes anyone who is directly harmed by the commission of a crime.

1. The plain text supports a broad definition.

The starting point for evaluating the legislature’s intent is the text of the provision at issue. *Gaines*, 346 Or at 171. As the Court of Appeals recognized in this case and in *Teixeira*, the term “victim” is an elastic term that can be read narrowly or broadly, depending on its context. Therefore, although the state begins by explaining that the text provides support for a broad construction of the term “victim,” as used in the vulnerable-victim aggravating factor, the context, as

discussed in the section that follows, supplies the strongest support for that conclusion.

As the Court of Appeals correctly recognized, the meaning of the term “victim” depends on the context in which it is used. For example, as this court reasoned in *Glaspey*, the anti-merger statute, which requires trial courts to begin their analysis by examining the “statutory provisions” creating the offenses, expressly “refers to, and depends upon, some statute other than itself”; for that reason, the identity of the “victim” under the anti-merger statutes is determined by the legislature’s intent in defining the substantive offense. *Glaspey*, 337 Or at 563. But in effectuating victims’ participatory rights in the criminal process under ORS 131.007, the legislature provided a broad definition that is not tied to the intent underlying the substantive statute.⁶ Those differences exist because the provisions have different purposes. *Lykins*, 259 Or App at 479; *Teixeira*, 259 Or App at 192. Likewise, the meaning of “victim,” as used in the sentencing guidelines, will depend on the context of how it is used in those provisions.

⁶ ORS 131.007 defines “victim” as any person “who have suffered financial, social, psychological or physical harm as a result of a crime and includes, in the case of a homicide or abuse of corpse * * *, a member of the immediate family of the decedent, and, in the case of a minor victim, the legal guardian of the minor.”

Because neither the guidelines in general nor OAR 213-008-0002(1)(b)(B) in particular provides a specific definition for the term “victim,” this court considers the ordinary meaning of that term. The ordinary meaning of the term “victim” is “**2**: someone put to death, tortured, or mulcted by another: a person subjected to oppression, deprivation or suffering * * * **4**: someone tricked, duped, or subjected to hardship : someone badly used or taken advantage of.” *Webster’s Third New Int’l Dictionary* 2550 (unabridged ed 2002).

The other terms in the vulnerable-victim rule show that the term “victim” is intended to be broad in scope. The vulnerable-victim rule refers to an offender’s exploitation of a victim’s vulnerability if the exploitation increases the “harm” or “threat of harm” caused by the offense. The dictionary definition of “harm” is “**1 a** : physical or mental damage : INJURY * * * **2** : an act or instance of injury * * * ; a material and tangible detriment or loss to a person, whether or not the law grants a remedy – distinguished from *injury* **syn** see INJURY[.]” *Webster’s* at 1034. In turn, “injury” is defined as “**1 a**: an act that damages, harms, or hurts : WRONG * * * **b** : a violation of another’s rights for which the law allows an action to recover damages or specific property or both : an actionable wrong – distinguished from *harm*[.]” *Webster’s* at 1164.

Together, those dictionary definitions support an interpretation of OAR 213-008-0002(1)(b)(B) that allows an upward departure if the offender’s knowledge of a particular weakness of a person subjected to hardship created an increased harm

or loss to that person as a result of the criminal offense.⁷ And the harm or loss need not be one that is directly redressable in the legal action itself, which supports an interpretation of “victim” that is not restricted to the person whom the legislature contemplated to be the victim of the substantive offense.

Defendant focuses on the rule’s use of the singular term “victim,” and asserts that that phrasing suggests that the drafters intended that each crime would have only a single victim—the person who is the victim under the substantive statute defining the crime. Defendant places more weight on that point than it can fairly bear. It is equally consistent with a belief by the legislature that a basis for a departure would exist if the defendant knowingly exploited the particular vulnerability of *any* victim, and, by doing so, increased the risk of harm from the offense.

In sum, the text of the vulnerable-victim factor supports an inclusive reading of the term “victim” that includes any person who was directly harmed by the conduct constituting the crime.

⁷ Other terms in the vulnerable-victim rule ensure that departures are imposed only if the crime is meaningfully distinguishable from the “usual” case. The rule requires that the victim be “particularly” vulnerable. “Particularly” means: “**1:** in a particular manner: * * * **d:** in a special or unusual degree : to an extent greater than in other cases or towards others.” *Webster’s* at 1647. Moreover, the exploitation of that particular vulnerability must result in an increased harm or risk of harm from the conduct.

2. The context shows that departure factors are designed to capture facts beyond the offense alone, and should not be constrained to the elements of the crime.

The meaning of the text of the vulnerable-victim rule is most clearly informed by its context: the entirety of the rule describing possible departure factors, along with other rules that were enacted as part of the sentencing guidelines. *See Gaines*, 346 Or at 171. That context confirms that the legislature intended the list of departure factors to be interpreted broadly, and, indeed, that the availability of departures exists to capture facts other than those included in the elements of the substantive crime.

In explaining the purposes of the sentencing guidelines, the legislature made clear its intent that, although presumptive sentences will be based on narrow considerations of crime seriousness and offender history, departure factors can include a broad range of facts so as to allow judges to tailor the individual sentence to the individual case. It stated that the “primary objectives of sentencing are to punish each offender appropriately, and to insure the security of the people in person and property, within the limits of correctional resources provided by the Legislative Assembly, local governments, and the people.” OAR 213-002-0001(1). In each of the provisions describing the goal of consistency furthered by the gridblock system, the drafters made clear that the presumptive sentence always will be subject to the discretion of the sentencing judge to deviate based on aggravating and mitigating circumstances. OAR 213-002-0001(2), (3)(d), (3)(e).

That is, to treat similar offenses and offenders consistently, the guidelines both establish what the presumed proper sentence should be and allow judges to impose departures based on facts that warrant a greater or lesser sentence.

Therefore, the general guidelines rules show that, although presumptive sentences are to be based on narrow determinations of general crime seriousness and criminal history, the departure factors are intended to allow broad consideration of facts not encompassed by those used to determine the presumptive sentence. Moreover, as explained below, the departure rule, read in its entirety, supports a broad reading of “victim” that includes any person harmed by the crime.

OAR 213-008-0002 identifies a non-exclusive list of mitigating and aggravating factors that the sentencing court may consider to determine whether “substantial and compelling reasons” exist for a departure sentence:

(1) Subject to the provision of sections (2) and (3) of this rule, the following nonexclusive list of mitigating and aggravating factors may be considered in determining whether substantial and compelling reasons for a departure exist:

(a) Mitigating factors:

(A) The victim was an aggressor or participant in the criminal conduct associated with the crime of conviction.

(B) The defendant acted under duress or compulsion (not sufficient as a complete defense).

(C) The defendant’s mental capacity was diminished (excluding diminished capacity due to voluntary drug or alcohol abuse).

(D) The offense was principally accomplished by another and

the defendant exhibited extreme caution or concern for the victim.

(E) The offender played a minor or passive role in the crime.

(F) The offender cooperated with the state with respect to the current crime of conviction or any other criminal conduct by the offender or other person. The offender's refusal to cooperate with the state shall not be considered an aggravating factor.

(G) The degree of harm or loss attributed to the current crime of conviction was significantly less than typical for such an offense.

(H) The offender's criminal history indicates that the offender lived conviction-free within the community for a significant period of time preceding his or her current crime of conviction.

(I) The offender is amenable to treatment and an appropriate treatment program is available to which the offender can be admitted within a reasonable period of time; the treatment program is likely to be more effective than the presumptive prison term in reducing the risk of offender recidivism; and the probation sentence will serve community safety interests by promoting offender reformation.

(b) Aggravating factors:

(A) Deliberate cruelty to victim.

(B) The offender knew or had reason to know of the victim's particular vulnerability, such as the extreme youth, age, disability, or ill health of victim, which increased the harm or threat of harm caused by the criminal conduct.

(C) Threat of or actual violence toward a witness or victim.

(D) Persistent involvement in similar offenses or repetitive assaults. This factor may be cited when consecutive sentences are imposed only if the persistent involvement in similar offenses or repetitive assaults is unrelated to the current offense.

(E) Use of a weapon in the commission of the offense.

(F) The offense involved a violation of public trust or professional responsibility.

(G) The offense involved multiple victims or incidents. This factor may not be cited when it is captured in a consecutive sentence.

(H) The crime was part of an organized criminal operation.

(I) The offense resulted in a permanent injury to the victim.

(J) The degree of harm or loss attributed to the current crime of conviction was significantly greater than typical for such an offense.

(K) The offense was motivated entirely or in part by the race, color, religion, ethnicity, national origin or sexual orientation of the victim.

(L) Disproportionate impact [for certain theft offenses].

(2) If a factual aspect of a crime is a statutory element of the crime or is used to subclassify the crime on the Crime Seriousness Scale, that aspect of the current crime of conviction may be used as an aggravating or mitigating factor only if the criminal conduct constituting that aspect of the current crime of conviction is significantly different from the usual criminal conduct captured by the aspect of the crime.

(3) Any aspect of the current crime of conviction which serves as a necessary element of a statutory mandatory sentence may not be used as an aggravating factor if that aspect is also used to impose the mandatory sentence.

Two primary points about that context bear emphasis. First, the legislature expressly provided that the list of departure factors is nonexclusive. Second, the legislature intended that departures would recognize facts other than those encompassed in the crime itself. As further explained below, those points demonstrate that the list should not be interpreted narrowly, and that the term

“victim” is not limited to the person whom the legislature contemplated as the victim when it defined the underlying substantive crime.

First, the use of a non-exclusive list confirms that the legislature intended to allow judges to consider a broad range of possible factors that could warrant a higher or lower sentence than the presumptive sentence, as long as they are “substantial and compelling reasons” for the departure. That provides strong support for a conclusion the descriptions themselves were not intended to be interpreted narrowly. Rather, the fact that the list is non-exclusive demonstrates an intent to capture a very broad range of possible reasons that a sentencing court may consider to be substantial and compelling reasons for a departure.

Second, other subsections of OAR 213-008-0002 support the conclusion that the terms used in the list of departure factors are not meant to be merely coextensive with those used in the statute creating the substantive crime. To the contrary, those subsections show the legislature’s recognition that, generally, departure factors are intended to address facts that are *not* encompassed in the elements of the crime. Those provisions expressly state that facts that are captured by the statutory elements of the crime, of subcategory factors that elevate the crime-seriousness level for the offense, or of a statutory mandatory sentence, *should not* be bases for departures, unless those factual aspects of the crime are “significantly different from the usual criminal conduct captured by” the elements of the crime. OAR 213-008-0002(2)-(3). Given that the express purpose of a

departure sentence is to capture facts that are not taken into account by the crime-seriousness level of the statutory offense, the legislature would not have intended that the meaning of the language used to describe possible departure factors necessarily must reflect the intent behind the substantive statute.

Defendant’s argument that the sentencing guidelines contemplate only a single victim per crime is belied by the fact that the legislature adopted the “multiple victims” factor. The text of that rule allows a departure if the “offense involved multiple victims.” OAR 213-008-0002(1)(b)(G). That is, as the Court of Appeals concluded in *Teixeira*, a single offense can have multiple victims. *Teixeira*, 259 Or App at 193.⁸

Defendant argues that the *Teixeira* court was wrong in that respect. He acknowledges that the text of the rule supports the Court of Appeals’ conclusion, but asserts that this court nevertheless should interpret “offense” to mean “offenses.” (Pet Merits Br 30-31). This court should not do so. *See* ORS 174.010 (in construing a statute, the court is not to insert what has been omitted, or to omit what has been inserted).

⁸ The *Teixeira* court found that the facts of the burglary in that case did not support the multiple-victims factor because the harm to the multiple people—whose items were stolen but who were not present at the time of the unlawful entry—did not have a sufficiently “direct” connection to the burglary. *Teixeira*, 259 Or App at 193. Nevertheless, its interpretation of the multiple-victims rule would allow a sentencing court to find multiple victims for a single crime, even if the legislature contemplated that only the owner of the real property is the “victim” for purposes of the substantive crime of burglary.

Even if defendant's argument did not conflict with the text of the multiple-victims rule, however, his reasoning fails. His argument is based primarily on the fact that the legislature placed a limitation on the use of the multiple-victims factor. Specifically, after the language in OAR 213-008-0002(1)(b)(G) describing the multiple-victims factor, the legislature provided that the factor *cannot* be used as a basis for a departure if the court is also imposing consecutive sentences for multiple crimes with multiple victims. Defendant argues that, in adopting that limitation on "double counting" the same factor, the legislature also intended to say that the factor *can only* support a departure when the court has authority to, but does not, impose consecutive sentences on multiple crimes based on the involvement of multiple victims.

That logic is flawed. Although the drafters of the guidelines clearly were aware of the potential overlap between the multiple-victim and different-victim provisions in OAR 213-008-0002(1)(b)(G) and ORS 137.123, that does not mean that they intended that a departure based on multiple victims is permissible *only* in situations in which ORS 137.123 authorizes consecutive sentences based on the existence of multiple victims but in which the court does not rely on that factor to support consecutive sentences.

In sum, the context as a whole, including the legislature adoption of the "multiple victims" departure factor supports the Court of Appeals' conclusion in *Teixeira* that, for purposes of the guidelines, an offense can have "victims" other

than the person or persons whom the drafters of the substantive criminal statute had in mind in defining the offense.

3. Legislative history shows that construing “victim” to include anyone directly harmed by the crime comports with the legislature’s intent.

Defendant relies heavily on certain statements that appear in the legislative history in support of his argument that this court should interpret the term “victim” narrowly. But those statements do not support the conclusion he asks this court to reach. Rather, the legislative history, when viewed as a whole, strongly supports the conclusion that the legislature contemplated that sentencing courts would have broad discretion to consider facts that warrant a shorter or longer sentence. For that reason, the term “victim” should be construed to allow sentencing courts to consider harm to persons other than those considered by the legislature to be the victim when it defined the substantive offense.

The Oregon Sentencing Guidelines Board’s commentary to the guidelines rules provides strong support for a broad reading of “victim” that would include any person who was directly harmed by the crime. The legislative history does not support a conclusion that the term “victim” should be interpreted to refer only to the person who is the victim for purposes of the substantive criminal statute.

The commentary to the rule that is now OAR 213-008-0001, the “statement of purposes and principles” underlying the guidelines, begins by emphasizing the general principle that presumptive sentences should be applied in most cases, and

describes the departure rule as “recogniz[ing] the important role of the sentencing court in addressing unusual facts in individual cases.” Commentary, OREGON SENTENCING GUIDELINES IMPLEMENTATION MANUAL 124-25. It advises sentencing judges, in stating reasons for a departure sentence, to “remember the primary basis for proportional punishment under this guidelines system is based on two primary sentencing objectives: just deserts for the crime of conviction and public safety.” *Id.* at 125.

The commentary to OAR 213-008-0002 makes clear that the list was intended to be only a starting point, describing the term “substantial and compelling reasons” as an “initial definition.” Commentary, OREGON SENTENCING GUIDELINES IMPLEMENTATION MANUAL 127. It expressly acknowledges that “further refinements of the departure standard can be expected through future amendments to these rules, statutory definitions and decisions of Oregon’s appellate courts.” *Ibid.* The commentary describes the list of aggravating and mitigating factors as an attempt by the board to “identify” specific facts that “may” constitute substantial and compelling reasons for departure, but makes clear that sentencing judges “may cite a factor not listed in this rule” as a basis for departure “if that fact makes the case exceptional for sentencing purposes.” *Ibid.*

The commentary contains factual examples of how certain departure factors might apply. Those examples demonstrate the clear intent that judges must be able to depart based on facts that are *not* elements of the crime. For example, in

describing the potential mitigating factor that an offender “played a minor or passive role in the crime,” the commentary describes a drug delivery by a person who is paid money to deliver a package that he believes contains marijuana, but which in fact contains a pound of heroin. *Id.* at 128. The commentary states that the sentencing judge “may conclude that the offender’s role in the drug distribution scheme was minor,” and impose a downward departure sentence for the drug crime. *Ibid.* But, of course, if the terms “minor or passive role in the crime” are taken literally, the described offender has *not* taken a particularly minor or passive role in the drug delivery—in fact, he is a primary actor. But the inclusion of this example demonstrates that “minor role” is intended to allow broad consideration of the offender’s overall culpability, which includes his mistaken belief about the identity of the particular controlled substance he delivered.

Likewise, the commentary to the rule allowing a downward departure where the “degree of harm or loss” is “significantly less than typical for the offense,” OAR 213-008-0002(1)(a)(G), shows the drafters’ intent that judges should consider facts beyond the bare elements of the crime. The example used for that factor is of an unarmed offender who is convicted of first-degree burglary for stealing a bicycle tire from an unlocked garage that is attached to an occupied residence. *Id.* at 129. Although the crime-seriousness level for that burglary would be a level 8 because the house was occupied at the time, the commentary anticipates that a sentencing judge might consider the conduct to be “significantly

less serious than” the usual offense, in which an offender might break into “the victim’s actual living quarters to steal much more valuable property or to commit a physical assault.” *Ibid.* But, if interpreted in lock-step with the elements of the substantive crime of burglary, the degree of actual loss or harm from those offenses might be the same: that is, a burglary is complete at the time of the entry, and does not require that the occupants be subjected to any actual harm or loss. The commentary’s use of this example demonstrates that the mitigating factor is designed to characterize the offender’s overall culpability, and was not intended to be constrained by the precise elements that make the conduct a crime in the first place.

Defendant’s primary focus in discussing the legislative history is the legislature’s recognition that the length of departures should be limited by rule in order to ensure that sufficient resources remain for more serious offenders. (Pet Merits Br 19-23). Although the guidelines give judges flexibility to impose departures when appropriate, the legislature expressly recognized, both in the rules and in its commentary, the reality that correctional resources are not infinite. Therefore, defendant relies on the legislature’s statements about use of correctional resources to support his argument that the departure factors should be limited. But to the extent that defendant asserts that narrow construction of the terms used in the aggravating factors is consistent with conservation of fiscal resources, his premise is wrong. Given that the rules allow both upward and *downward*

departures – and the term “victim” is used among the mitigating factors as well as the aggravating factors – a narrow reading of the term “victim” would not further the purpose of conserving correctional resources. Rather, if “victim” in the guidelines is constrained by the meaning of the substantive statute, it will narrow the list of mitigating factors, and thereby will reduce sentencing courts’ ability to make downward departures as well. For those reasons, the legislature’s description of the inevitable fact of limited corrections resources does not weigh in favor of a narrow interpretation of the terms used to describe possible departure factors.⁹

Defendant points to the fact that the legislature, in adopting the enumerated factors, rejected a factor from Minnesota caselaw that would have authorized a departure based on the “impact on persons associated with the victim (i.e., business clients, family of child victim (minor)).” (Pet Merits Br 22, App-22). The legislature chose not to list that particular factor because “most person crimes affect the family and friends of the victim.” (*Ibid.*). Defendant asserts that that comment shows an intent not to allow departures based on effects on people other

⁹ The legislative history shows that other rules were specifically designed to meet the goal of saving financial resources. The guidelines limit the extent of durational departures, which cannot exceed double the presumptive sentence for the offense. OAR 213-008-0004. The purpose of that limit is to ensure that the length of a durational departure is “generally proportional to the significance of the aggravating factor, and to avoid departures of a length that is excessive, which would limit the correctional resources available to punish more serious offenders.” Commentary, OREGON SENTENCING GUIDELINES IMPLEMENTATION MANUAL 135.

than the person whom the legislature contemplated to be the victim of the substantive crime. But the mere fact that the legislature chose not to list that particularly broad factor does not show that it intended the vulnerable-victim factor to be so narrow as to exclude others from the characterization of “victim.” Rather, the vulnerable-victim factor, read as a whole, describes several facts beyond the mere “impact” of the crime on the victim: it describes the defendant’s knowledge of the victim’s particular vulnerability, and it requires that the exploitation of that vulnerability result in an increased harm or risk of harm from the crime. It is not a mere “impact on others” factor like the Minnesota factor that the legislature feared would fail to distinguish the aggravated cases from the more typical case.

Defendant’s other argument about the legislative history is that it shows that the legislature expected departures to be available for “unusual” facts, and that departures would be “rare.” (Pet Merits Br 20-21). But as used in those discussions, the terms “unusual” and “rare” are relative terms, which the drafters used to distinguish departure sentences from presumptive sentences. Although a departure is designed to address “unusual” facts not covered by the criminal statute or the offender’s criminal history alone—and therefore not captured by the gridblock determination—the discussions do not suggest that the drafters intended

that upward or downward departures be remarkable in any general sense.¹⁰ A broad construction of the term “victim,” as used in the list of aggravating and mitigating factors, to include all persons directly harmed by the offense, would not be inconsistent with the drafters’ intent that departures be imposed based on “unusual” facts. Each of the enumerated departure factors that uses the term “victim” does so along with other characterizations that ensure that the sentencing court is considering facts that make the crime different from the “usual” case. The fact that makes the case unusual is not that there was a “victim,” but the fact that the defendant knowingly exploited that vulnerability, and that that exploitation increased the harm or risk of harm from the crime. In the context of the entire phrase, a construction of the term “victim” to include any person who suffers harm as a result of the offense is not inconsistent with a conclusion that the crime is an

¹⁰ Defendant also relies on discussions of the anticipated effect of the guidelines on prison populations, which refer to a “model” that assumed that 10% of all offenders would receive a departure sentence of double the presumptive prison term, and that 7.5% of overall crimes would be subject to upward or downward departure. (Pet Merits Br 20). However, those discussions appear to have occurred in the course of fiscal-impact discussions, rather than the discussions of the substantive terms of the guidelines rules. (See Pet Merits Br 5-6). As a result, those figures are of questionable value in determining how to construe the terms of the guidelines. In any event, nothing suggests that a broad construction of the term “victim,” as used in the departure rule, would cause the overall number of departures to exceed the projected percentage for all cases.

unusual one that warrants a sentence other than the presumptive gridblock sentence.

CONCLUSION

In sum, the text, context, and legislative history show that, in adopting the guidelines, the legislature intended that sentencing courts have broad discretion to impose departures based on substantial and compelling reasons that distinguish the offenses being sentenced from the usual case. Defendant's interpretation of the "vulnerable victim" factor to refer only to the person contemplated to be the victim under the substantive statute would be inconsistent with that intent. Rather, the Court of Appeals' interpretation is consistent with the legislative purpose of consistency in sentencing.

For those reasons, this court should affirm the Court of Appeals' decision and the judgment of conviction and sentence.

Respectfully submitted,

ELLEN F. ROSENBLUM

Attorney General

ANNA M. JOYCE

Solicitor General

/s/ Jennifer S. Lloyd

JENNIFER S. LLOYD #943724

Attorney-in-Charge Criminal Appeals

jennifer.lloyd@doj.state.or.us

Attorneys for Respondent on Review

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on July 7, 2014, I directed the original Brief on the Merits of Respondent on review to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Peter Gartlan and Neil F. Byl, attorneys for defendant, 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 6725 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).

/s/ Jennifer S. Lloyd

JENNIFER S. LLOYD #943724
Attorney-in-Charge Criminal Appeals
jennifer.lloyd@doj.state.or.us

Attorney for Respondent on Review