

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. SCOTT B. GERHARDT, Defendant-Appellant, Respondent on Review.	Polk County Circuit Court Case No. 12P3329  CA A152760  <b>SC N005569</b>
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BRIEF OF *AMICI CURIAE*

M. GERHARDT (CRIME VICTIM), National Crime Victim  
Law Institute and Oregon Crime Victims Law Center

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Review of the decision of the Court of Appeals  
on appeal from a judgment of the Circuit Court for Polk County  
Honorable Monte S. Campbell, Judge

*En Banc* Opinion Filed: September 16, 2015

Author of Opinion: Armstrong, J. (joined by Haselton, C.J., and Sercombe,  
Duncan, Hadlock, DeVore, Tookey and Garrett, JJ).

Dissenting Judges: Egan, J.; Flynn, J. (Joined by Ortega, Nakamoto, and Egan,  
JJ).

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**STATEMENT OF *AMICI CURIAE*'S INTEREST**

M. Gerhardt is the victim of the strangulation at issue in the underlying criminal case against Defendant, and she is the person to whom restitution has been ordered.

The National Crime Victim Law Institute (NCVLI) is a nonprofit educational and advocacy organization located at Lewis and Clark Law School in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training; promoting the National Alliance of Victims' Rights Attorneys and Advocates (NAVRA); researching and analyzing developments in crime victim law; and litigating issues of national importance regarding crime victims' rights in cases in state, federal, tribal and military courts.

The Oregon Crime Victims Law Center ("the Center") is a nonprofit organization that provides crime victims across Oregon with no-cost legal representation in asserting and enforcing their rights in criminal proceedings in Oregon's state, federal and tribal courts, including issues surrounding the right to restitution. The Center also provides victims with non-legal assistance.

This case directly impacts Ms. Gerhardt and involves issues that are fundamental to the rights and interests of victims across Oregon, including the

rights to protection, justice, fairness and prompt restitution. Allowing the Court of Appeal’s decision to stand would result in serious injustice.

## INTRODUCTION

Intimate partner violence (IPV) is a pervasive public health problem in the United States, with estimates of one in three women being raped, physically assaulted, and/or stalked by an intimate partner in her lifetime. See Kristie A.

Manisha and Susan B. “Do you Know What it Feels

*Like to Drown?”: Strangulation as Coercive Control in Intimate Relationships,*

38 Psych of Women Quarterly 124 (2014) (collecting and analyzing studies).<sup>1</sup>

Strangulation is one of the most lethal tools of IPV, and is often used by abusers

“to let [partners] know they *can* kill them—any time they wish.” Casey

Gael and Melissa *Law Reform Targets the Crime of*

*Strangulation*, 19 Domestic Violence Report 81 (Aug/Sep 2014) (emphasis in

original).<sup>2</sup> Studies reveal that women who survive strangulation by an intimate

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<sup>1</sup> See also *Domestic Violence Fact Sheet*, Nat’l Network to End Domestic Violence 1, available at [http://nnedv.org/downloads/Policy/AD14/AD14\\_DVSA\\_Factsheet.pdf](http://nnedv.org/downloads/Policy/AD14/AD14_DVSA_Factsheet.pdf) (last visited Dec. 11, 2015) (“*Domestic Violence Fact Sheet*”), citing M.C. Black, K.C. Basile, M.J. Breiding, S.G. Smith, M.L. Walters, M.T. Merrick, J. Chen, and M.R. Stevens, *The National Intimate Partner and Sexual Violence Survey (NISVS): 2010 Summary Report*, Nat’l Center for Injury Prevention and Control, Ctr for Disease Control and Prevention (2011).

<sup>2</sup>See also Gael B. Casey Dean William Bill *Why Didn’t Someone Tell Me? Health Consequences of Strangulation Assaults for Survivors*, 19 Domestic Violence Report 81, 87(Aug/Sep 2014) (noting that “it is unequivocally understood that strangulation is one of the most lethal forms of domestic violence”); see also Gael B. George E. and Dean *A Review of 300 Attempted Strangulation Cases, Part I: Criminal Legal Issues*, 21 J. of Emergency Med. 303, 303-09 (2001) (finding that 10 percent of violent deaths in the United States were attributable to strangulation).



partner are at increased risk of being killed by that partner. *See* Psych of Women Quarterly at 124.

These now well-recognized realities of IPV have compelled numerous policy changes. *See, e.g.*, ORS 163.187(4) (amended in 2011 to elevate strangulation to a felony crime under certain circumstances); *see also* Int'l Ass'n of Chiefs of Police, *Nat'l Law Enforcement Policy Ctr., Domestic Violence-Concepts and Issues Paper* (2006), reprinted in Nancy K. D. Lemon, *Domestic Violence Law* 672, 674-76 (3d ed 2009) (recommending adoption of a risk assessment checklist that includes questions on strangulation and choking).

Coincident with this increasing awareness of IPV, Oregon has made steady progress reshaping the criminal justice system to meaningfully integrate crime victims. This integration includes securing for victims their rights to protection; to justice; to receive prompt restitution; and to be treated with due dignity, respect and fairness. *See, e.g.*, Or Const, Art I, §§ 42(1), 42(1)(d), 43(1)(a); *see also* ORS 137.106(1)(a)(providing crime victims the right to restitution). A central component of the progress has been the Oregon legislature's repeated amendment of the criminal restitution statutes to accommodate the rights and interests of victims, increase offender accountability, and ensure that victims receive the financial compensation that

they need to begin to address the impact that defendants' criminal conduct.<sup>3</sup>

Time and again, the Oregon Court of Appeals has resolved disputes over the construction of the restitution scheme in a manner consistent with the policy that offenders should shoulder the burden of the financial consequences of the full impact of their unlawful activities.<sup>4</sup>

Notably, these Oregon's victims' rights laws, adopted in a time of increased understanding of IPV, specifically contemplate that exercise of the rights may be best achieved through retention of an attorney. *See, e.g.*, Or Const Art I, §§ 42(3)(a)-(b) (providing that "[a] victim may assert a right established in this section in a pending case, by a mandamus proceeding if no case is pending or as otherwise provided by law"); ORS 147.502(1) (providing "[a] victim may assert a claim [for rights violation] personally, through an attorney or through an authorized prosecuting attorney").

Faced with a case that implicated the entire landscape articulated above, the Court of Appeals reversed direction on well-established law and policy in

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<sup>3</sup> *See, e.g.*, Or Laws 2003, ch 670, § 1 (amending ORS 137.106 to provide, *inter alia*, that (1) the trial court "shall enter" a restitution judgment if there is evidence that the victim suffered "pecuniary damages" and (2) the restitution award must "equal[] the full amount of the victim's pecuniary damages"); Or Laws 2005, ch 564, § 1 (amending ORS 137.106 to replace "pecuniary" damages with "economic" damages and amending ORS 137.103(2) to replace the former definition for "pecuniary damages" with a definition for "economic damages" that removed the "civil action" clause).

<sup>4</sup> *See e.g., State v. Wagoner*, 257 Or App 607, 610, 307 P3d 528 (2013) (interpreting ORS 137.106's 90-day limit concluding that the trial court had authority to impose restitution in the first instance after that time period to remedy a violation of the victim's right); *see also State v. Thompson*, 257 Or App 336, 342, 306 P3d 731 (2013), *rev den*, 354 Or 390 (2013) (interpreting ORS 137.106 and concluding that the trial court had the authority to order supplemental restitution outside the 90-day period).

*State v. Gerhardt*, 273 Or App 592, \_\_\_ P3d \_\_\_ (2015) (*en banc*) . Despite the trial court’s finding of a causal relationship between defendant’s strangulation of the victim and her retention of an attorney to assist with her protection rights, the appellate court concluded that “the attorney fees that the [trial] court awarded as restitution do not represent an expense that the victim necessarily incurred to redress harm that she suffered as a result of defendant’s strangulation of her.” *Id.* at 597. As articulated in the dissent, this denial of restitution is not only contrary to established law but represents “an unwise change in policy.” *State v. Gerhardt*, 273 Or App 592, 600, \_\_\_ P3d \_\_\_ (2015) (Egan, J., dissenting).

### **STATEMENT OF THE CASE**

Amici adopt the factual and procedural background set forth in the State’s Petition for Review; we supplement that recital here to elucidate information important to the Court’s determination of the propriety of review.

Despite the requirements of ORS 147.433(1)(b), the victim case was not informed that Defendant had appealed the restitution order until after the Court of Appeals released its opinion reversing the trial court’s restitution order. As Judge Flynn’s dissenting opinion noted, the itemized attorney bill totaling \$1,880 that formed the basis of the restitution order reveals that the victim first contacted her attorney on the day following the strangulation and the same day that defendant posted bond for release. *Gerhardt*, 273 Or App at 601 (Flynn, J.,

dissenting). The bill also reveals that the billed work related to a myriad of victims' rights, including: communications "with jail re release and no contact order;" communications with the district attorney "re restitution and plea agreement;" assistance with the "restitution request and sentencing;" and work to secure a "restraining order" against Defendant.<sup>5</sup>

On October 2, 2015, with no notice to or consultation with the victim regarding her restitution rights, and despite the requirements of ORS 147.545,<sup>6</sup> the State of Oregon moved for an indefinite extension of time in which to file a petition for review of the Court of Appeals' decision, arguing that review should await the outcome of this Court's decisions in *State v. Ramos*, 267 Or App 164 (2014), *rev allowed*, 357 Or 143 (2015) and *State v. Kirschner*, 268 Or App 716, *rev allowed*, 357 Or 299 (2015). Upon denial of its motion for extension of time, the State, again with no notice to or consultation with the victim, petitioned for review on October 20, 2015, asking that review be held in abeyance pending the outcomes of *Ramos* and *Kirschner*.

During the pendency of the State's *MOET*, the victim filed a *Motion – Intervene, MOET – File Petition for Review* on October 12, 2015. On

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<sup>5</sup> Pursuant to the Family Abuse Prevention Act (FAPA), a petitioner may seek a civil order that provides protection from harm by a family or household member. ORS 107.700, *et seq.*

<sup>6</sup> ORS 147.545(1)(a) states: "Prior to the Attorney General's first appearance in an appellate court proceeding in which the State of Oregon is a party and to which Article I, section 42 or 43, of the Oregon Constitution, applies, the Attorney General shall determine whether the Department of Justice has taken all reasonably practicable steps to fulfill the rights granted by Article I, sections 42 and 43, of the Oregon Constitution, to the victim of the crime in the appellate courts."

November 30, 2015, the Court denied the victim's motion, without prejudice to her participation as *amicus curiae* in this matter pursuant to ORAP 8.15(5)(a).

### **REASONS FOR GRANTING REVIEW**

This Court considers a number of grounds for allowing a petition for review. *See* ORAP 9.07. In addition to the grounds set forth in the State's Petition for Review, this case merits consideration under ORAP 9.07(1) (the case "presents a significant issue of law"), ORAP 9.07(2) ("the issue or a similar issue arises often"), and ORAP 9.07(3) ("many people are affected by the decision" and "the consequence of the decision is important to the public"). Counter to the State's position, such review should not be held in abeyance.

#### **I. This Case Presents Significant Questions of Constitutional and Statutory Law that Merit Review.**

This case presents significant and unique questions of law under ORAP 9.07(1) regarding the proper interpretation of statutory and constitutional provisions. The Oregon Constitution guarantees crime victims the rights to be treated with due dignity and respect; to fair and impartial treatment in the criminal justice system; to receive prompt restitution; and to be reasonably protected. *See* Or Const, Art I, § 42(1) (providing victims with the right to be accorded "due dignity and respect" and to be assured that "a fair balance is struck between the rights of crime victims and the rights of criminal defendants in the course and conduct of criminal \*\*\* proceedings"); Or Const, Art I,

§ 42(1)(d) (providing victims “[t]he right to receive prompt restitution from the convicted criminal who caused the victim’s loss or injury”); Or Const, Art I, § 43(1)(a) (guaranteeing a crime victim “[t]he right to be reasonably protected”). Intersecting with these constitutional rights are victims’ statutory rights to restitution, and the proper causation analysis of restitution claims. *See, e.g.,* ORS 31.710(2)(a); *see also State v. Gerhardt*, 273 Or App 592, 601, \_\_\_\_ P3d \_\_\_\_ (2015) (Flynn, J., dissenting) (discussing complexities of statutory restitution scheme at issue in this case).

As noted above, these rights operate within a legal scheme that specifically contemplates their exercise may be best achieved through retention of an attorney. *See, e.g.,* Or Const Art I, §§ 42(3)(a)-(b); ORS 147.502(1).

This case presents the unique intersection of all of the above constitutional and statutory rights in the context of a victim securing legal representation to effectuate those rights. As Judge Flynn noted in dissent, “[a]ssuming that we have correctly taken the path of including some private attorney fees within the scope of permitted restitution, I am unwilling to hold that the path stops short of allowing victims of domestic violence to recover attorney fees necessary to secure protection from contact by the abuser.” *Gerhardt*, 273 Or App at 605 (Flynn, J., dissenting). This Court’s guidance on these important issues of law is necessary.

## **II. This Case Presents Issues Important to Public Health and Safety and Will Affect Victims Across Oregon that Merit Review.**

This case satisfies ORAP 9.07(2) and (3). As noted above, IPV generally, and strangulation specifically, are pervasive problems. Indeed, in 2014 alone there were more than 131,050 calls for help made to the Oregon Sexual and Domestic Violence Programs. Dep't of Human Servs Child Safety Unit, *Striving to Meet the Need: Summary of Services Provided by Sexual and Domestic Violence Programs in Oregon* 1 (2015). Importantly, IPV does not impact only individuals; it affects the whole community. *See, e.g., Domestic Violence Fact Sheet* at 1 (noting the full financial costs of IPV); *see also* U.S. Dep't of Justice, *The Kentucky Civil Protective Order Study: A Rural and Urban Multiple Perspective Study of Protective Order Violation Consequences, Responses, & Costs* 1, 19 (2009) (noting that when victims' quality of life was considered, substantial savings accrue to society from safety interventions).

If the Court of Appeals' decision stands, victims of strangulation, a potentially lethal crime, will be presented the Hobson's Choice: either fully effectuate rights but at a cost, or refrain from exercising rights in the most meaningful way. As noted in Judge Egan's dissenting opinion,

A victim of domestic violence may take considerable personal risk in reporting an abuser's actions to police. That report is risky because the abuser abused the victim, not simply because he violated a no-contact order. A Family Abuse Prevention Act (FAPA) order helps protect victims from that risk. The law, as it stood, encouraged

victims of domestic violence, like the victim here, to seek the protection of a FAPA order. We should not weaken that policy.

*Gerhardt*, 273 Or App at 600 (Egan, J., dissenting); *see also* ORS 107.700, *et seq.*

To date, few appellate cases address the current version of Oregon's restitution statutes generally, and fewer still approach the issue of recovery of attorney fees incurred when exercising one's rights. Restitution aims to make Oregon crime victims financially whole, which is crucial to their recovery and sometimes to their survival. The Court of Appeals' misconstruction of current law is significant to crime victims statewide and merits further review.

### **III. This Court Should not Delay Review of this Case.**

Contrary to the State's position, this Court should not delay review in this case. The trial court awarded restitution to reimburse the victim for attorney fees incurred for her exercise of rights, finding that the fees were directly caused by defendant's conduct. The propriety of this ruling will not be resolved by *State v. Ramos*.<sup>7</sup>

In *Ramos*, the victim incurred attorney fees during investigation and in aid of recovery during prosecution of an arson and fraudulent insurance claim. The Court of Appeals determined that the victim's attorney fees were properly

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<sup>7</sup> In its *Petition*, the State equated the issues in this case with those in *State v. Ramos* and *State v. Kirschner*; notably, the Court of Appeals did not make reference to *Kirschner* in its decision and only *Ramos* involves seemingly similar issues. Thus, amici focus on *Ramos*.



included in restitution because defendant's criminal conduct was the "but for" cause of the victim's expenses, and no further showing was necessary to establish the requisite causation. *Ramos*, 267 Or App at 178. On appeal, defendant did not dispute that her criminal conduct was a "but for" cause of the attorney fees. Rather, at the core of defendant's appeal was that the trial court should have applied something more than a "but for" causation standard for restitution, *i.e.*, whether a showing of reasonable foreseeability is also a necessary element of causation under Oregon restitution law. (*See, e.g., Ramos* Petitioner's Brief at 2).

In contrast, the Court of Appeals' ruling in this case is premised upon a finding that there is *no* causal connection between the underlying crime of strangulation and the victim's attorney fees. *See Gerhardt*, 592 Or App at 598 (observing that the expenses in this case were caused by unlawful conduct that occurred after defendant's arrest and "are not comparable to the [attorney fee] expenses for which the [victim] received restitution in *Ramos*"). The court in this case premised its ruling on a determination that defendant's post-arrest violations of the no-contact order constituted new crimes for restitution purposes rather than being part and parcel of the conduct leading to the restitution as ordered.

The legal and factual issues of *Ramos* and this case are distinct. The issues presented in this case warrant the Court's timely consideration, in

accordance with the victim's constitutional right to receive prompt restitution, as well as her statutory right to the prompt resolution of this appeal. Or Const, Art I, § 42(1)(d); ORS 147.430(1)(b).

### CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the State's Petition for Review, *amici curiae* request that the Court grant review of the case and do so without delay.

Date: December 14, 2015

Respectfully submitted,

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AND TYPE SIZE REQUIREMENTS**

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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 3,980 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 hereby certify that on November 14, 2015, I directed the foregoing BRIEF OF *AMICI CURIAE* to be electronically filed with the Appellate Court Administrator, Appellate Records Section.

I further certify that I electronically served the document, using the court's eFiling system pursuant to Rule 16.45, upon the following persons:

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