

No. _____

**In The
Supreme Court of the United States**

_____ Δ _____

AARON JOSEPH EMINETH

Petitioner,

v.

STATE OF OREGON

Respondent,

_____ Δ _____

**On Petition For Writ Of Certiorari
To The Supreme Court of the State of Oregon**

_____ Δ _____

PETITION FOR WRIT OF CERTIORARI

_____ Δ _____

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QUESTION PRESENTED:

1. Did the state trial court violate Petitioner's constitutional right to Due Process under the Fourteenth Amendment of the United States Constitution by not requiring the state to prove every element of the offense at trial?

List of Parties

STATE OF OREGON, Plaintiff-Respondent;

AARON JOSEPH EMINETH, Defendant-Petitioner.

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TABLE OF AUTHORITIES

Cases:

State v. King, 111 P.3d 1146, Or.App. 278
(Or. App., 2005), pet. denied 25 P.3d 750,
339 Or. 544 (Or. 2005) 8,9

*Medtronic, Inc. v. Mirowski Family
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187 L.Ed.2d 703, 82 USLW 4067 (2014) 9

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Aaron Joseph Emineth, by and through counsel, respectfully petitions this court for a Writ of Certiorari to review the final judgment by the Oregon Court of Appeals of July 7, 2018, and the review of which was denied by the Supreme Court of Oregon on June 7, 2018. App.1 Document A.

OPINIONS BELOW

There are no written opinions in this matter. The judgment of the trial court was affirmed without opinion by the Oregon Court of Appeals and review of that decision was denied by the Oregon Supreme Court.

JURISDICTION

The Oregon Court of Appeals affirmed the judgment of the trial court on March 7, 2018. App. 4. Petitioner timely filed a petition for review with the Supreme Court of Oregon, which denied review by written order on June 7, 2018. App. 3. The Oregon Court of Appeals subsequently issued final judgment on July 7, 2018. App. 1. Petitioner timely filed this Petition for Writ of Certiorari. Jurisdiction with this Court is proper under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they

reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

ORS 810.438:

Photo radar authorized; evaluation.

(1) The following jurisdictions may, at their own cost, operate photo radar:

- (a) Albany.
- (b) Beaverton.
- (c) Bend.
- (d) Eugene.
- (e) Gladstone.
- (f) Medford.
- (g) Milwaukie.
- (h) Oregon City.
- (i) Portland.
- (j) Tigard.

(2) A photo radar system operated under this section:

- (a) May be used on streets in residential areas or school zones.
- (b) May be used in other areas if the governing body of the city makes a finding that speeding has had a negative impact on traffic safety in those areas.
- (c) May not be used for more than four hours per day in any one location.
- (d) May not be used on controlled access highways.
- (e) May not be used unless a sign is posted announcing "Traffic Laws Photo Enforced." The sign posted under this paragraph must:
 - (A) Be on the street on which the photo radar unit is being used;

- (B) Be between 100 and 400 yards before the location of the photo radar unit;
- (C) Be at least two feet above ground level; and
- (D) If posted in a school zone not otherwise marked by a flashing light used as a traffic control device, indicate that school is in session.
- (3) A city that operates a photo radar system under this section shall, once each biennium, conduct a process and outcome evaluation for the purposes of subsection (4) of this section that includes:
 - (a) The effect of the use of the photo radar system on traffic safety;
 - (b) The degree of public acceptance of the use of the photo radar system; and
 - (c) The process of administration of the use of the photo radar system.
- (4) By March 1 of each odd-numbered year, each city that operates a photo radar system under this section shall present to the Legislative Assembly the process and outcome evaluation conducted by the city under subsection (3) of this section.

ORS 810.439:

Citations based on photo radar; response to citation.

- (1) Notwithstanding any other provision of law, in the jurisdictions using photo radar:
 - (a) A citation for speeding may be issued on the basis of photo radar if the following conditions are met:
 - (A) The photo radar equipment is operated by a uniformed police officer.
 - (B) The photo radar equipment is operated out of a marked police vehicle.
 - (C) An indication of the actual speed of the vehicle is displayed within 150 feet of the location of the photo radar unit.

(D) Signs indicating that speeds are enforced by photo radar are posted, so far as is practicable, on all major routes entering the jurisdiction.

(E) The citation is mailed to the registered owner of the vehicle within six business days of the alleged violation.

(F) The registered owner is given 30 days from the date the citation is mailed to respond to the citation.

(G) The jurisdiction operating photo radar complies with the requirements described in ORS 810.438.

(b) A rebuttable presumption exists that the registered owner of the vehicle was the driver of the vehicle when the citation is issued and delivered as provided in this section.

(c) A person issued a citation under this subsection may respond to the citation by submitting a certificate of innocence or a certificate of nonliability under subsection (3) of this section or may make any other response allowed by law.

(2) A citation issued on the basis of photo radar may be delivered by mail or otherwise to the registered owner of the vehicle or to the driver. The citation may be prepared on a digital medium, and the signature may be electronic in accordance with the provisions of ORS 84.001 to 84.061.

(3)

(a) A registered owner of a vehicle may respond by mail to a citation issued under subsection (1) of this section by submitting a certificate of innocence within 30 days from the mailing of the citation swearing or affirming that the owner was not the driver of the vehicle and by providing a photocopy of the owner's driver license. A jurisdiction that receives a certificate of innocence under this paragraph shall dismiss the citation without requiring a court appearance by the registered owner or any other information from the registered owner other than the

swearing or affirmation and the photocopy. The citation may be reissued only once, only to the registered owner and only if the jurisdiction verifies that the registered owner appears to have been the driver at the time of the violation. A registered owner may not submit a certificate of innocence in response to a reissued citation.

(b) If a business or public agency responds to a citation issued under subsection (1) of this section by submitting a certificate of nonliability within 30 days from the mailing of the citation stating that at the time of the alleged speeding violation the vehicle was in the custody and control of an employee or was in the custody and control of a renter or lessee under the terms of a rental agreement or lease, and if the business or public agency provides the driver license number, name and address of the employee, renter or lessee, the citation shall be dismissed with respect to the business or public agency. The citation may then be issued and delivered by mail or otherwise to the employee, renter or lessee identified in the certificate of nonliability.

(4) If the person named as the registered owner of a vehicle in the current records of the Department of Transportation fails to respond to a citation issued under subsection (1) of this section, a default judgment under ORS 153.102 may be entered for failure to appear after notice has been given that the judgment will be entered.

(5) The penalties for and all consequences of a speeding violation initiated by the use of photo radar are the same as for a speeding violation initiated by any other means.

(6) A registered owner, employee, renter or lessee against whom a judgment for failure to appear is entered may move the court to relieve the owner, employee, renter or lessee from the judgment as

provided in ORS 153.105 if the failure to appear was due to mistake, inadvertence, surprise or excusable neglect.

STATEMENT OF THE CASE

The heart of this dispute is whether the state bears the burden to prove each element of an offense at trial, or whether courts may arbitrarily determine that certain elements of a statute are procedural in nature, rather than substantive, thus alleviating the state of its trial burden and depriving a defendant of his Fourteenth Amendment right to due process.

Oregon state law permits the enforcement of certain traffic laws by photo radar, but only if certain statutory prerequisites are met. When the legislature did not specify whether it intended to establish these statutory prerequisites as additional elements of the offense, the Oregon Court of Appeals ruled that the legislature intended only to create procedural safeguards and that consequently the state did not bear the burden of proving at trial that it had met these prerequisites. In so doing, the court apparently relied on the fact that certain elements appeared procedural and ignored that other elements were inherently substantive – such as the burden of proof.

Petitioner entered a plea of not guilty to the charge of speeding and, after hearing evidence, asked the trial court to dismiss the charge because the state had failed to elicit evidence as to certain of those statutory prerequisites. The trial court denied the motion, Petitioner was found in violation of the charge of speeding, and this appeal followed.

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REASONS TO GRANT THE WRIT

I. **The Real-World Impact of Stripping a Fundamental Right from Millions of Citizens**

The implementation of photo radar has enormous impact on the residents of Oregon because of (1) the sheer numbers – over 31,000 citations were issued in Portland in 2016 alone¹ with a typical fine of \$160;² and (2) the effect these citations can have on an individual's privilege to drive and the far-reaching collateral consequences of the loss of that privilege. Recognizing this impact in drafting ORS 810.438 and 810.439, the Oregon legislature provided strict prerequisites for the lawful operation of photo radar.

These prerequisites act primarily to force municipalities to give proper notice to drivers and also to prohibit municipalities from anonymizing the issuance of traffic citations. They also act to hold municipalities accountable to the state and ensure that the photo radar programs are administrated responsibly.

When the Court of Appeals labeled these prerequisites as procedural rights rather than substantive, it stripped a vital layer of protection granted to the people of Oregon by its legislature by

¹City of Portland Photo Enforcement Biennial Report, p. 9, available at https://www.oregonlegislature.gov/citizen_engagement/Reports/PortlandPhotoEnforcementBiennialReport.pdf, last retrieved August 30, 2018.

²Legislative Report Outcome Evaluation: Fixed Photo Radar System City of Portland 2015 – 2017, p. 19, <https://www.portlandoregon.gov/transportation/article/656361>, last retrieved August 30, 2018.

denying people accused of these violations the right to have these facts proven at trial in open court.

II. The Holding in *King* Should Be Reversed and Substantive Due Process Rights Preserved

Any Oregon jurisdiction utilizing photo radar as a basis for issuing speeding citations must meet the prerequisites of ORS 810.438 and ORS 810.439. The trial judge in this case, consistent with *State v. King*, ruled that any challenges to the sufficiency of the state's compliance must be raised pre-trial, and this ruling was upheld upon appeal. *State v. King*, 111 P.3d 1146, Or.App. 278 (Or. App., 2005), pet. denied 25 P.3d 750, 339 Or. 544 (Or. 2005).

With respect to what's relevant here, *King* was decided primarily on two bases: (1) inferring from statutory construction that the legislature did not intend to use ORS 810.439 to add elements to the offense of speeding; and (2) an inference that the phrase “[n]otwithstanding any other provision of law” was evidence that “the legislature had other existing *procedural* statutes in mind when it added the requirements of ORS 810.439 to the law.” *King*, 111 P.3d at 1150.

Essentially, although the legislature made no explicit provision for how the government's compliance with radar prerequisites might be challenged, the court in *King* inferred that the legislature had intended a procedural modification, rather than a substantive change. *Id.*

There is, however, no explicit finding or evidence of legislative intent. It is just as true that “[n]otwithstanding any other provision of law” is evidence that the legislature had other existing *substantive* statutes in mind when it added the

requirements of ORS 810.439 to the law. The legislature did not state what other provisions of law it might have had in mind or limit those other provisions of law to those that are procedural.

In fact, other parts of the same statute make substantive changes to the law of speeding enforcement. ORS 810.439(1)(b), for example, creates a “rebuttable presumption” that the registered owner was the driver of the vehicle. Burden-shifting is a substantive change to the law, not procedural. *See, e.g., Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 134 S.Ct. 843, 187 L.Ed.2d 703, 82 USLW 4067 (2014) (“the burden of proof is a substantive aspect of a claim”); *Office of Workers' Compensation, v. Greenwich Collieries*, 512 U.S. 267, 114 S.Ct. 2251, 129 L.Ed.2d 221 (1994) (“the assignment of the burden of proof is a rule of substantive law”).

There is no direct evidence of legislative intent. At least one change made by the law is clearly established as a substantive change. Consequently, to determine that the rest of the statute is purely procedural is an arbitrary decision contrary to the available evidence. This decision arbitrarily denies tens of thousands of citizens their substantive right to Due Process under the Fourteenth Amendment of the United States Constitution. Defendant-petitioner respectfully requests that the rule in *King* be reexamined and reversed.

CONCLUSION

Based on the foregoing, Petitioner humbly requests that this Petition for Writ of Certiorari be granted.

Respectfully Submitted,

By: s/ Date: August 31, 2018
 Eliot D. Thompson
 Counsel of Record
 Law Office of Eliot Thompson
 4506 SE Belmont St. Ste 230B
 Portland, OR 97215
 (503) 564-8281

APPENDIX INDEX

APPENDIX A

June 7, 2018 Order Denying Review
from the Supreme Court of the State
of Oregon Case No. S065863.....App. 1

APPENDIX B

July 12, 2018 APPELLATE JUDGMENT
and SUPPLEMENTAL JUDGMENT
Order Affirming Without Opinion from
the Court of Appeals for the State of
Oregon Case No. A165039.....App. 2

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March 7, 2018 Order Affirming Without
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May 3, 2017 Trial Court Judgment
from the Multnomah County Circuit
Court Case No: 15VI122333.....App. 5

App. 1

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF
OREGON

STATE OF OREGON
Plaintiff-Respondent
Respondent on review

v.

AARON JOSEPH EMINETH
Defendant-Appellant,
Petitioner on Review.

Court of Appeals
A165039

S065863

ORDER DENYING REVIEW

Upon consideration by the court.

The court has considered the petition for review and
orders that it be denied.

s/
THOMAS A. BALMER
CHIEF JUSTICE SUPREME COURT
6/7/2018 1:08 PM

C: Eliot Deringer Thompson
Sheria Mayfield

tnb

App. 2

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF
OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.

AARON JOSEPH EMINETH,
Defendant-Appellant.

Multnomah County Circuit Court
15VI122333

A165039

**APPELLATE JUDGMENT and SUPPLEMENTAL
JUDGMENT**

Michael C. Zusman, Judge pro tempore.

Submitted on February 15, 2018.

Before Hadlock, Presiding Judge; DeHoog, Judge;
and Aoyagi, Judge.

Attorney for Appellant: Eliot Thompson

Attorney for Respondent: Sharia Mayfield

AFFIRMED WITHOUT OPINION

**DESIGNATION OF PREVAILING PARTY AND
AWARD OF COSTS**

Prevailing party: Respondent [X] Costs allowed,
payable by Appellant.

MONEY AWARD

Creditor: State of Oregon
Attorney: Jamie Contreras, 1162 Court St NE, Salem
OR 97301
Debtor: Aaron Joseph Emineth
Attorney: Eliot Thompson
Costs: \$473.00
Total Amount: \$473.00
Interest: Simple, 9% per annum, from the date of this
appellate judgment.

Appellate Judgment COURT OF APPEALS

**APPELLATE JUDGMENT and SUPPLEMENTAL
JUDGMENT**

REPLIES SHOULD BE DIRECTED TO: State Court
Administrator, Records Section, Supreme Court
Building, 1163 State St, Salem OR 97301-2563
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Effective Date: July 12, 2018 (seal)

**APPELLATE JUDGMENT and SUPPLEMENTAL
JUDGMENT**

REPLIES SHOULD BE DIRECTED TO: State Court
Administrator, Records Section, Supreme Court
Building, 1163 State St, Salem OR 97301-2563
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APPENDIX C

FILED: March 07, 2018

IN THE COURT OF APPEALS OF THE STATE OF
OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

AARON JOSEPH EMINETH,
Defendant-Appellant.

Multnomah County Circuit Court

15VI122333

A165039

Michael C. Zusman, Judge pro tempore.

Submitted on February 15, 2018.

Before Hadlock, Presiding Judge, and DeHoog, Judge,
and Aoyagi, Judge.

Attorney for Appellant: Eliot Thompson

Attorney for Respondent: Sharia Mayfield

AFFIRMED WITHOUT OPINION

**DESIGNATION OF PREVAILING PARTY AND
AWARD OF COSTS**

Prevailing party: Respondent

☐ No costs allowed.
☒ Costs allowed, payable by Appellant.

App. 5

APPENDIX D

IN THE CIRCUIT COURT OF THE STATE OF
OREGON
FOR THE COUNTY OF MULTNOMAH
1021 SW 4th. AVENUE, PORTLAND OR 97204

Case No: 15VI122333
State of Oregon
vs
AARON JOSEPH EMINETH
GENERAL
JUDGMENT
☒ creates lien

The court finds the defendant GUILTY of charges
designated "CONVICTED" in the section below.

ORS/OAR#	PLEA	DISPOSITION
811.11	Not Guilty	Convicted-Violation
Judge		

CHARGE	FINE
Violating a Speed Limit	\$ 160.00

CONVICTED SPEED:	DESIGNATED SPEED:
43	30

IN SCHOOL ZONE?	IN WORK ZONE?
No	No

The court has imposed a sentence of a fine of \$ 160.00
The court will delay execution of that fine pending
completion of the action indicated below. If the
action is completed by the date indicated, the court

App. 6

will suspend \$ _____ of the fine amount and will sentence will be filed and entered accordingly without further order of the court.

- ___ The court will order, without further hearing and as additional sanction imposed with the sentence in this action, the Department of Motor Vehicles to suspend the defendant's driving privileges unless the defendant provides proof of completion of the classes indicated below by the date indicated.
- ___ High Risk Driving Course
- ___ Seat Belt Class (Trauma Nurses Talk Tough)
- ___ National Traffic Safety Institute Driving Course L1 (NTSI-1)
- ___ Share the Road Safety Class
- ___ National Traffic Safety Institute Driving Course L2 (NTSI-2)
- ___ Verification of Operator's License
- ___ Youth Alcohol Awareness (National Training Systems)
- ___ Other: _____

Proof of completion of these actions must be provided by: _____

___ Dismiss counts _____ upon completion.

The court orders:

- ___ Set aside default judgment (ORS 153.105)
- ___ Motion to set aside default judgment denied.
- ___ Set for new trial
- ___ Set for new arraignment. Clerk will notify defendant of date/time by mail.
- ___ Waive court clearance fee.
- ___ Set for I.D. hearing on regular trial docket so officer can appear.
- ___ Vacate DMV Suspension

OTHER:

FINE ASSESSED: \$ 160.00.(__ includes restitution
of \$ payable to: (name, address:)

Judgment creditor: State of Oregon **Judgment**

Debtor: Defendant

Payment in full is due IMMEDIATELY. If payment is not received within 30 days of this judgment, additional costs and fees will be added and your driver's license may be suspended.

Go to

<http://courts.oregon.gov/OJD/OnlineServices/ePay>
to pay online

Filed: 5/3/2017 11:06:20 AM

s/

Circuit Court Judge Michael C. Zusman