VOLUME I

TABLE OF CONTENTS APPENDIX

A- Appellate Judgment- denying "upon consideration by the Court"-counsel and mandamus

B- Order denying motion to reconsider the order

C- Motion to reconsider

D- Order dismissing motion to hold in abeyance as moot

E- Motion to hold in Abeyance

F- Order denying petition for reconsideration

G- Petitioning for reconsideration-mandamus proceeding #S068178

H- Denying motion to appoint counsel and denying writ of mandamus

I- Motion to appoint counsel

J- Order granting motion to file memorandum: 2-24-2021

K-Notice of service

L- Mandamus ORAP 11.05(3) Memorandum

M- Order dismissing motion for extension of time as moot

N- Motion for extension of time

O- Petition for peremptory writ of mandamus

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Adverse Party,

v.

AUSTIN CALLAHAN BRAND, aka Austin Brand, aka Austin C. Brand,
Defendant-Relator.

Multnomah County Circuit Court
14CR28021

S068178

APPELLATE JUDGMENT

Upon consideration by the court.

The motion to appoint counsel is denied. The petition for writ of mandamus is denied.

March 18, 2021
DATE

/s/ Martha L. Walters
Chief Justice, Supreme Court

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Adverse Party [X] No costs allowed.

Appellate Judgment
Effective Date: June 3, 2021

SUPREME COURT
(seal)

els

[redacted]
App. A

APPELLATE JUDGMENT

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Adverse Party,

v.

AUSTIN CALLAHAN BRAND, aka Austin Brand, aka Austin C. Brand,
Defendant-Relator.

Multnomah County Circuit Court
14CR28021

S068178

ORDER DENYING MOTION

Relator has filed a motion in response to the order dismissing his motion to hold proceedings in the Multnomah County Circuit Court in abeyance. The court treats the motion as one to reconsider the order.

The motion is denied.

LYNN R. NAKAMOTO
PRESIDING JUSTICE, SUPREME COURT
6/3/2021 8:35 AM

c: Carson L Whitehead
Benjamin Gutman
Austin Callahan Brand

els

[redacted] - App. B

IN THE SUPREME COURT OF THE STATE OF OREGON

AUSTIN CALLAHAN BRAND,
Defendant-Relator, Petitioner pro se.

v.

STATE OF OREGON, Plaintiff-Adverse party.

Multnomah County Circuit Court
#14CR28021

S068178

MOTION IN RESPONSE TO ORDER ABEYANCE-MANDAMUS PROCEEDING

NOW COMES, AUSTIN CALLAHAN BRAND, pro se moving this court in Response to the Order denying petitioners pro se motion to hold the Multnomah County Circuit Court case 14CR28021 in abeyance pending the outcome of the mandamus petition and as moot. Material to the motion to hold in abeyance is the operative assignment of executor in the command sought after in the mandamus petition, as, the "*difference*" in contention of a constructive trust id. Judge Eric J. Bergstrom (on magistrate position) on passing judgment of probable cause and the feeling gift bond relationship constructive of third party rights, in the progression and development of petitioners claim to appointment in the litigation contended, patent exclusive to the canon held as Jonah and working

App. C

together tracing the relationship feeling gift bond with petitioner and the Court, the motion for abeyance is in fulfillment of this caveat. Put in simple perspective the Court respectfully, "puts the cart before the horse" on the order to hold in abeyance because the petition for writ of mandamus is peremptory id. at.#S068178. The operative scope of bias identified in the *connective* (tracing #A162224 constructive fraud reliance interest antitrust-monopoly, commodity mode) relationship gift feeling exchange patents, seek to assign Eric J. Bergstrom together/company with the appointment of petitioner as the *difference* remedied by the constructive trust superconstructive of and to flesh out working together to produce an order on the schism Jonah for which petitioner possesses patents exclusive to litigation and likewise exchangeable to the public market with assurances for the public's interest in counsel. Pointing out and making clear in contrast and fruit natural to, the cognitive dissonance bias properly presented in the mandamus writ of two appointments again petitioner (as Jonah) and of course the other appointment counsel to the public (as Nineveh) and the impending destruction of both appointments by point boundary fraud contention., id. at. Fraud thereof motion #A162224 pro se brief excerpt of record.

Not to miss the value of storytelling in the schism of the canon of Jonah and for ease of following the path of litigation (see, Bias and Judging, August 30, 2018 Harvard law review, and Cleveland State Law Review, Judicial Bias 1994) the book of Jonah challenges God's people not to exalt themselves over others. The lord, the great King, is free to bless, to be gracious, and to be patient with all the nations of the Earth. More then that. He may show compassion even on the wicked. Indeed, [h]is mercy extends even to animals., Jonah (4:11). We of course are not dealing with such a prospect on a grand scale no matter the held divine blessings, but nonetheless of coming to terms with the appointment of petitioner where from the discussion took course to the 1st Amendment to the U.S. constitution and petitioners free exercise of Religion came into play. This above mentioned proposition along with #A162224 litigation preserved from treble damages held in complexity from the theory presented as constructive fraud inter playing the a fore reliance interest and expectation interest

damages on such, violating separation of church and State. And to cite Separation of Church and State "Law or Prepossessions?" By John Courtney Murray., as an illustrative essay and value to the current position of petitioner. Not to boggle the Court with excessive comparisons of the present proposition and the citation above. Petitioner's appointment interest in the various patents, separation of Church and State (constructive fraud) and free exercise of Religion id. at. Canon Jonah (victim) is not only in the private interest of petitioner, but of public interest in assurances to counsel against fraudulent Government transactions. The Government gives all the power and aid to the appointment of counsel in our legal system, monetary aid and Juridical equality. Turn away from wicked ways and repent, for if not the preaching herein petitioners appointment, trust in the relation of confidence and the judicial system will be destroyed.

Jonah 4:1-4 "But it displeased Jonah exceedingly, and he became angry. So he prayed to the Lord, and said, 'ah, lord, was not this what I said when I was still in my country? Therefore I fled previously to Tarshish; for I know that You are a gracious and merciful God, slow to anger and abundant in lovingkindness, One who relents from doing harm., Therefore now, O Lord, please take my life from me, for it is better for me to die than to live!" The Hallelujah in petitioner's position is directed to the Court herein and throughout litigation, because none of petitioner's legal fiction, development, and interaction in relationship bond could/would be possible if it were not for that bond and the oral ruling as gatekeeper, and by oath before Eric Bergstrom on issuance of a search warrant on bad faithx2 veracity of the Gresham City Police Department Charles Skeahan Affiant., id. at. #A162224 ER-81 affidavit, ER-36-41 search warrant. The *harm* id. at. #a162224 pro se reply brief pg.5 and at. Memorandum- MANDAMUS PROCEEDING pg.4., citing (As our prior decisions teach, it is the general nature of the harm at risk, not the precise nature of the harm suffered by a particular victim, that controls the analysis. Piazza v. Kellim, 360 Ore. 58, 87; 377 p.3d 492, 509; (2016))., "The proper inquiry focuses upon the actor's torturous conduct, not the plaintiff's damages." Limone v. U.S.A., 579 F.3d 79, 93; (2009)., Here the inquiry has likewise came to fruition this risk or damage is particularly

harmful in the existent religious practice appointment of petitioner and the economics to the fair market exchange in an adversarial system the storytelling of petitioners brand Jonah canon. The destruction of this relationship gift feeling bond with the Court (Eric Bergstrom, difference of the constructive trust) and the relationship of confidence with counsel, Privileges and Immunity's, and of course the gift to the public on assurances to counsel against executive police misconduct as fruit., [T]he 1st amendment and the harm., a right is legally damaged when, in a case where it appears as central and clamors for recognition, it meets judicial blindness and deafness, petitioner has transcended this disillusion by his appointment in the connection valued by way of motion to hold Multnomah County Circuit Court case #14CR28021 in abeyance to connect with Judge Eric Bergstrom by feeling bond gift exchange as the difference in this constructive trust Jonah canon producing an order for this beloved Oregon Supreme Court. This would save Judicial time, and is in relief point specific in the writ sworn out to by petitioner for the command sought in the peremptory mandamus petition. This Court's Order respectfully, puts the cart before the horse, when deciding to dismiss the petition before first dealing with the procedural constructive trust device on unjust enrichment id. at. Ex parte by the "difference" (entailed in abeyance motion) gift feeling bond Eric J. Bergstrom and petitioner's appointment Jonah canon big fish story patent.

Dated this 23rd day of May 2021.

AUSTIN CALLAHAN BRAND, pro se
8809 SE 190th DR.
Damascus, OR 97089
(503) 432-7645 callahanbrand89@gmail.com

Certificate of Serves

NOW COMES, Austin Callahan Brand pro se, certifying that on the day of May 23th , 2021, that service on all the below parties of true copies of the following: Motion in Response to abeyance order. Mail postage paid and delivered to the USPS mail box.

Oregon Supreme Court/records section, 1163 state street, Oregon, Salem 97301

A.G. & S.G. 400 Justice Building 1162 Court street NE, Oregon, Salem 97301

Multnomah County Judge Eric J. Bergstrom 1021 SW Fourth Ave., Oregon, Portland 97204

D.A. Amber Kinney 1021 SW forth ave., Oregon, Portland 97204

Counsel Jason Steen 741 SW Lincoln Oregon, Portland 97201

Dated this 23th day of May 2021.

AUSTIN CALLAHAN BRAND, Pro se
8809 SE 190th DR.
Damascus, OR 97089
callahanbrand89@gmail.com

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Adverse Party,

v.

AUSTIN CALLAHAN BRAND, aka Austin Brand, aka Austin C. Brand,
Defendant-Relator.

Multnomah County Circuit Court
14CR28021

S068178

ORDER DISMISSING MOTION TO HOLD IN ABEYANCE AS MOOT

The petition for reconsideration was denied on May 6, 2021. Therefore, the motion to hold Multnomah County Circuit Court case 14CR28021 in abeyance pending the outcome of the mandamus petition is dismissed as moot.

LYNN R. NAKAMOTO
PRESIDING JUSTICE, SUPREME COURT
5/17/2021 9:14 AM

c: Carson L Whitehead
Benjamin Gutman
Austin Callahan Brand

od

[redacted] - APP. D

IN THE SUPREME COURT OF THE STATE OF OREGON

AUSTIN CALLAHAN BRAND,
Defendant-Relator, Petitioner pro se.

v.

STATE OF OREGON, Plaintiff-Adverse party.

Multnomah County Circuit Court
#14CR28021

MOTION TO HOLD IN ABEYANCE-MANDAMUS PROCEEDING
#S068178

NOW COMES, AUSTIN CALLAHAN BRAND, pro se moving this Court to hold the above Multnomah County Circuit case number in abeyance while a proper order can be produced incorporating patents to capitalize the public interest, and private interest., see, Baldwin and Baldwin, 215 Or. App. 2003; 168 p.3d 1233, (2007). The Court acting as a reactive body in the relationship and "seeing", id. at. Petition for reconsideration, pg. 6-7. Petitioner giving repentance herein as well as the proposition on counsels part for that prospect. This also in the story of Jonah their was animosity

App. E

from Jonah toward the city of Nineveh. Nineveh in some light represents an attorney (and administrative executive power GCPD) and the public as the "boundary" point contended for counsels representation against fraud point on "destruction" versus constructive to rights therewith the canon of Jonah patents.

The express terms are naturally adversarial and the object of an indictment against petitioner, wound up in various due process concerns. The dismissal of that indictment would moot exclusive as well as public interest gift patents., id. at. Petition for reconsideration., by some other Judge (quantifying gift patent on fiduciary relationship with the court and petitioner). Id. at. Fraud thereof motion (probable cause). And a position of eminence herein to work with the court and to come together for an order on such, assurances and fruit. No known position by opposing counsel.

Dated this 6th day of May 2021.

AUSTIN CALLAHAN BRAND, pro se
8809 SE 190th DR.
Damascus, OR 97089
(503) 432-7645

CERTIFICATE OF SERVICE

NOW COME, Austin Callahan Brand pro se, certifying that on the day of service on all the below stated parties of true copies of the the following: Motion to hold in abeyance - Mandamus Proceeding
Mail postage paid and delivered to the USPS mail box.

Oregon Supreme court/records section, 1163 state street, Oregon, Salem 97301

A.G. & S.G. 400 Justice Building 1162 court street NE , Oregon, Salem 97301

Multnomah county Judge ~~Greenlick~~ Eric Bergstrom 1021 SW Fourth ave. Oregon, Portland 97204

D.A. Amber Kinney 1021 SW forth ave. Oregon, Portland 97204

Counsel Jason Steen 741 SW Lincoln Oregon, Portland 97201

Dated this 6th day of May, 2021.

Austin Brand
8809 SE 190th Dr.
Damascus, OR 97089

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Adverse Party,

v.

AUSTIN CALLAHAN BRAND, aka Austin Brand, aka Austin C. Brand,
Defendant-Relator.

Multnomah County Circuit Court
14CR28021

S068178

ORDER DENYING PETITION FOR RECONSIDERATION

Upon consideration by the court.

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

MARTHA L. WALTERS
CHIEF JUSTICE, SUPREME COURT
5/6/2021 9:44 AM

c: Carson L Whitehead
Benjamin Gutman
Austin Callahan Brand

tnb

App. F

IN THE SUPREME COURT OF THE STATE OF OREGON

AUSTIN CALLAHAN BRAND,
Defendant-Relator, Petitioner pro se.

v.

STATE OF OREGON, Plaintiff-Adverse party.

Multnomah County Circuit Court
#14CR28021

PETITIONING FOR RECONSIDERATION-MANDAMUS PROCEEDING
#S068178

James W. Ness, id. at. A162224 opinion ER 116., together with the decision of Chief Justice Martha L. Walters, no opinion.

AUSTIN C. BRAND
8809 SE 190th DR.
Damascus, OR 97089
(503)432-7645
callahanbrand89@gmail.com

Ellen F. Rosenblum
Attorney General
Benjamin Gutman
Solicitor General
400 Justice Building
1162 Court street NE
Salem, OR 97301

[redacted]
App. G

APPENDIX

Appendix-A, Chief Justice Martha L. Walters; Order denying motion to appoint counsel And denying petition for writ of mandamus

Appendix-B, Appellate Commissioner James W. Nass #A162224 Order denying motion to supplement the record

NOW COMES, AUSTIN CALLAHAN BRAND, pro se petitioning this Court ORAP 9.25 to reconsider an order of the appellate commissioner together with the decision of the Chief Justice appendix A, B. Capitalizing on gift aspect brand specific to the canon Jonah, vine fruit natural to the identified bias, id. at. Cognitive dissonance.

To set the stage for context better in part from petitioner to reconsider by the court the order on petition for writ of mandamus to subragate executor Eric Bergstrom (id. at. Serves of petition) on a constructive trust via. Search warrant. And A162224 pro se brief ER 116 simply acting as appropriations under the guise of Huffman v. Alexander, 197 Ore. 283; 253 p.2d 289; (1953), ORAP 71, ORCP 8.25 traced in the Oregon Court of Appeals forum, incorporating patents yet to be wound up., id. at. By and through counsel, Franks. Preserved in case # 14CR28021 fraud thereof motion and order #A162224 ER 43-89-103, Petition for review-Jonah angry about plant and worm (valuable consideration)., again introspective of gift form citing Jonathan Lethem The Ecstasy of Influence-A Plagiarism at. You can't steal a gift., Petitioners brand Jonah canon superconstructive of the appointment of petitioner. To be clear in the schism Jonah analogous to petitioners position herein reconsideration would be point contented three days and three nights in the belly of the great fish tracing fraud thereof motion and order as one,

#A162224 ER 116 as two, and herein reconsideration as 3., id. at. Franks motion and assign Judge pg. 3 and Gourd. Fruit natural to the mandamus proceeding assigning Eric Bergstrom interested executor of the constructive trust as subrogated quantifying the gift aspect.

Back to the road of scholarship in how the court deals with the public as cognitive dissonance subject to the scope of bias inherent in a disinterested judge-executor. Petitioner identifying two objective proponents of appointment by which operative the normal execution of a constructive trust or rather form the relationship of confidence id. at. Petitioners, counsel, contending property, 4th, 5th , 14th, ext. Again contrast to the flow of constitutional rights through counsel. The problem with that is the "extraordinary circumstance" breach of good faith x2 sets no boundary to the wisdom of the canon Jonah's inverted-U and put another way the operative patents Franks by which petitioner requests to be heard and the double negative in the decision sought to be reconsidered at any point inherent to a counsel client confidential relationship is a boundary preservative to. Gift patents traced through the ex parte gift to the adversary State, Gresham City Police Department's breach of the implied covenant of good faith x2 none severable both set no path to vindicate rights (absent post conviction which is readily available to all the public). That is there is no boundary (sanctions) to the destruction of two appointments and constitutional rights benefited. This is the message articulated as destruction of Nineveh, that, AUSTIN CALLAHAN BRAND, prophesying the canon of Jonah, (subjective) seeking oral argument to preach this message herein.

The story goes that Jonah was in the belly of the beast for three days and three nights and Sheol (the place of death) vomited Jonah up. Jonah's journey figures an inverted-U. At this particular point in the story there/their is Jonah's inverted-U upon getting vomited up from the great fish, God relents from Jonah's destruction. It sets two variant contexts of destruction one

associated with the people of Nineveh, analogous to the public interest and for Jonah an actual figure inverted-U upon tracing his journey along the story., id. at. Franks hearing and assign Judge pg. 4-5 (inverted-U figure). Could that be why Jonah is the only prophet Jesus identified as a symbol of himself? Jesus said, "An evil and adulterous generation seeks after a sign and no sign will be given to it except the sign of the prophet Jonah" (Matt. 12:39). And then we see how much Jonah's story is a type of Jesus' life, death, resurrection. "For as Jonah was three days and three nights in the belly of the great fish, so will the Son of Man be three days and three nights in the heart of the Earth... and indeed a greater than Jonah is here"(Matt.).

Present in petitioners position is the patent concern based on [h]is confidential relation with counsel this is aspect exclusive to the configuration of petitioner AUSTIN CALLAHAN BRAND's Jonah brand inverted-U. So, too is the public concern extending to all (people of Nineveh) in counsel relationship based on post-conviction avenues and to stop here to draw the analogy to the story of Jonah and thee vine id. at. Franks memorandum and Judge (expectation and disappointment) citing The Divine Vine- John 15:5 posted on May 21, 2015 by Chuck Gianotti. And the old testament is simply viewing Jesus form the old testament. Jesus son representing counsel., to the father God Court if you will.

The point aspect gift patent ex parte is likewise presently enshrined in another relationship with the Court upon the double negative., fraud upon the court, breach of good faith. Again Jonah's gift patent extending to petitioner where the fraud upon the court patent traced throughout litigation. And the relationship based transaction relation representing, Jonah and God (petitioner and the court), the story goes that based on Jonah's and God's relationship he explicitly relied on this relationship to be vomited up, here too is petitioners religious concern id. at. Mandamus memorandum, pg.3. Vomited, infers a hard time dealing with and coming to terms

with the appointment of Jonah. Analogous here to is the court coming to terms of how to deal with petitioner and his legal appointment. Identification of both parties subject to the courts disillusion and bias the court has considered two parties objective to the courts natural fruit from the mandamus petition. Petitioner posits that it has to take a subjective standard too along with is objective standard when it considers discourse introspective of cognitive dissonance bias. Stopping for a second on the word discourse specifically to the court order can best be described as a lack of communication in its double negative. As a prophetic book Jonah is unique in that the message of the book centers on the negative interaction between the lord and his Prophet. Here to all petitioner is working off of is negative interaction discourse denial orders and ER 116 Appellate Commissioner Jame W. Ness opinion, respectfully.

Subject to story mode various story's Game of Thrones, The Hobbit and the war of five armies. If you have a subject proper to a hero's Journey id. at. Franks Memorandum and assign judge, with one or more apex points graphed along the timeline of the story and forming alliance, company party lines against a foe adversary. [Y]ou or rather popular cultural understanding is that you would never hand over that hero, subject character to the other party because there is a feeling gift aspect possessed by the viewer who has interest in the completion of a proper hero's journey. Here to petitioner's appointment is subject to the popular cultural public interest demand more so than ever at this particular moment in time given the police misconduct involved in the bad faith, defense counsels defense appointment and the superstitious covit-19 destruction (weird) to fulfill the will of the inverted-U. The public interest is eminence.

Here to it would be improper to give the command gift aspect by which the Judge issuing the search warrant entails, to a different Judge to cut., id. at. Mandamus command legal fiction therefore the assignment of Judge Eric Bergstrom. Not only petitioner having deep suffering, but

the public will suffer deeply for the loss of this gift aspect it portrays to the public. Citing Jonathan Lethem, supra:

The phrase Je est un autre, with its deliberately awkward syntax, belongs to Arthur Rimbaud. It has been translated both as "i is another" and "I is someone else," as in this excerpt from Rimbaud's letters: For I is someone else. If brass wakes up a trumpet, it is not its fault. To me this is obvious: I witness the unfolding of my own thought: I watch it, I listen to it: I make a stroke of the bow: the symphony begins to stir in the depths, or springs on the stage. If the old fools had not discovered only the false significance of the ego, we should not now be having to sweep away those millions of skeletons which, since time immemorial, have been piling up the fruits of their one eyed intellects, and claiming to be, themselves, the authors!

This brings up an important issue of jurisdiction. Jonah known as the sleeper is woke up by "brass" counsel to petitioner in the analogy drawn and traced in the story Jonah for the appointment of petitioner on context of destruction by pretext of fraud, by the subjective identity held by petitioner and his religion. "I is another" is not only a cultural term of identity philosophy used here when constitutional rights flow through confidential counsel relation in an American Court.

This Angers petitioner that there is no limit to the destruction of representation drawn at any point, the story goes Jonah asks is it better for him to die. Is it better for petitioner's appointment position to be denied and the cognitive dissonance to infect the disillusion of the court. Jonah 4:3 "The lord asked is it right for you to be angry." When you have a partner in relationship confidential/fiduciary or of any kind its nice to have the ability to see the other side. To understand differences. It may be to most the important sense during long term relationships., via. litigation herein, id. at. Double negative orders. But their our one problem in it is, sometimes

you could forget what you feel and what you wish, during the time this will make you unhappy for all others, above public loss. So don't change petitioners noble quality. Just learn to say no. Understand your [partner], whenever he or she does good or wrong. But put the boundary to the inverted-U constructive trust, as demonstrated by Malcolm Gladwell's book David and Goliath part 3. After that boundary you have to take care about yourself (stability and fruitfulness).

Jonah also wishes, asks, prays for his death 4: 9., this brings up an insightful term; never call for whom the bell tolls it tolls for thee. Donne says "that because we are all part of mankind any persons death diminishes me, because I am involved in mankind; and therefore never send to Know for whom the bell tolls; it tolls for thee"

This naturally is fruit species to the appointment of AUSTIN CALLAHAN BRAND a subjective measure on the identity of the two appointments. And therefore is a seeking of to know who, keynoting a question of Jonah and his "bell toll" on mark of identity and therefor the death of petitioners position in petition's denial on mandamus commanding a gift is a loss to the public is a loss to petitioner. Les embarras de I 'identite: "the embarassments (or the troubles) of identity." True lexical riddle that identity has become in the different meanings in which it is used today. Identity in the proper sense answers to the question who is it? Put in the third person, which will be answered with a name that will allow to identify someone. Second sense will allow to answer a question concerning the first person "who am I" "who are we." Now, to put such a question about identity in the first person implies that we thus give it a subjective meaning that the word did not have in the beginning. It is no longer a matter of identifying oneself. So the question obviously no longer concerns a persons name. But, petitioner's appointment Jonah a big fish story gift, if this is to end in fire then we all burn together.

Dated this 30th day of March 2021.

AUSTIN CALLAHAN BRAND, pro se
8809 SE 190th DR.
Damascus, OR 97089

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Adverse Party,

v.

AUSTIN CALLAHAN BRAND, aka Austin Brand, aka Austin C. Brand,
Defendant-Relator.

Multnomah County Circuit Court
14CR28021

S068178

ORDER DENYING MOTION TO APPOINT COUNSEL AND DENYING PETITION FOR WRIT OF MANDAMUS

Upon consideration by the court.

The motion to appoint counsel is denied. The petition for writ of mandamus is denied.

MARTHA L. WALTERS
CHIEF JUSTICE, SUPREME COURT
3/18/2021 11:56 AM

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Adverse Party [X] No costs allowed

c: Carson L Whitehead
Benjamin Gutman
Austin Callahan Brand
Hon. Michael A. Greenlick

od

APP. H/A

ER 116

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

AUSTIN CALLAHAN BRAND, aka Austin Brand,
Defendant-Appellant.

Multnomah County Circuit Court No. 14CR28021

Court of Appeals No. A162224

ORDER DENYING MOTION TO SUPPLEMENT THE RECORD

Appellant's attorney has moved the court to supplement the record to include appellant's *pro se* motion to set aside the judgment from which he appeals for fraud, which motion defendant filed after entry of the judgment on appeal. For the reasons that follow, the motion is denied.

The record on appeal is limited to the record made in the trial court on the basis of which the trial court rendered the decision memorialized in the judgment being appealed. The trial court did not have before it the documents filed after entry of the judgment from which this appeal was taken. Therefore, the documents are not properly part of the record of this appeal. Also, it appears that appellant was represented by counsel in the trial court and, as such, any document filed with the trial court must be filed through counsel. Appellant himself filed the motion to aside the judgment; therefore, the motion was not properly before the trial court.

Appellant's brief is due 14 days from the date of this order.

James W. Nass 05/02/2017 3:52 PM

JAMES W. NASS
APPELLATE COMMISSIONER

c: Andrew D Robinson
Benjamin Gutman

ej

Appendix-B

Document of Preparation & Certificate of Serves

This petition complies with word limitations of ORAP 5.05(1)(c) and contains 2,126 words. The petition was prepared in Pro Se format and to the current ability of, Austin Callahan Brand, pro se.

NOW COMES, Austin Callahan Brand pro se, certifying that on the day of March 30 th , 2021, that service on all the below parties of true copies of the following: Petition for Reconsideration-MANDAMUS PROCEEDING. Mail postage paid and delivered to the USPS mail box.

Oregon Supreme Court/records section, 1163 state street, Oregon, Salem 97301

A.G. & S.G. 400 Justice Building 1162 Court street NE, Oregon, Salem 97301

Multnomah County Judge Eric J. Bergstrom 1021 SW Fourth Ave., Oregon, Portland 97204

D.A. Amber Kinney 1021 SW forth ave., Oregon, Portland 97204

Counsel Jason Steen 741 SW Lincoln Oregon, Portland 97201

Dated this 30th day of March 2021.

AUSTIN CALLAHAN BRAND, Pro se
8809 SE 190th DR.
Damascus, OR 97089

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Adverse Party,

v.

AUSTIN CALLAHAN BRAND, aka Austin Brand, aka Austin C. Brand,
Defendant-Relator.

Multnomah County Circuit Court
14CR28021

S068178

ORDER DENYING MOTION TO APPOINT COUNSEL AND DENYING PETITION FOR WRIT OF MANDAMUS

Upon consideration by the court.

The motion to appoint counsel is denied. The petition for writ of mandamus is denied.

MARTHA L. WALTERS
CHIEF JUSTICE, SUPREME COURT
3/18/2021 11:56 AM

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Adverse Party [X] No costs allowed

c: Carson L Whitehead
Benjamin Gutman
Austin Callahan Brand
Hon. Michael A. Greenlick

od

[redacted]
APP. H/A

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON
Plaintiff - Adverse Party,

V.

AUSTIN CALLAHAN Brand,
Defendant - Relator.

Multnomah County Circuit Court
14 CR 28021
5068178

Now Comes, Austin Callahan Brand pro se Moving This Court to appoint Counsel. This Mandamus proceeding is contended to be the role of executor in remedy of a constructive trust steming From a Fraudulent transaction in terms of Probable cause. And Sanctions thrOugh the wisdom of the inverted-V and relator's good Faith in Jonah.

The pursuit of a Forum to litagate is proper to this high court in Value of a higher interest in contrast to the States prosecution of relator. Though it may be said that relator has counsel currently in the Multnomah County circuit court

Jason Steen to contest by & through Constitutional rights and herein. City of Klamath Falls V. Bell, 490 P.2d 515,520; or. App. 330,340 (1972) (we hold that an attempt by a grantor to transfer his possibility of reverter does not destroy it.)

For that and logistical help in this matter the Court should appoint ad litem Counsel, and relator For Such.

Dated this 9th day of February 2021.

Austin C. Brand
8809 SE 190th Dr.
Damascus, OR 97089
Phone #: (503)432-7645
brandcallahan89@gmail.com

CERTIFICATE OF SERVICE

NOW COME, Austin Callahan Brand pro se, certifying that on the day of service on all the below stated parties of true copies of the the following: Motion to appoint counsel and item.
Mail postage paid and delivered to the USPS mail box.

Oregon Supreme court/records section, 1163 state street, Oregon, Salem 97301

A.G. & S.G. 400 Justice Building 1162 court street NE , Oregon, Salem 97301

Eric S. Bergstrom
Multnomah county Judge ~~Greenlick~~ 1021 SW Fourth ave. Oregon, Portland 97204

~~D.A. Amber Kinney 1021 SW forth ave. Oregon, Portland 97204~~

Counsel Jason Steen 741 SW Lincoln Oregon, Portland 97201

Dated this 9th day of 2021.

Austin Brand
8809 SE 190th Dr.
Damascus, OR 97089
(503) 432-7645
brandcallahan89@gmail.com

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Adverse Party,

v.

AUSTIN CALLAHAN BRAND, aka Austin Brand, aka Austin C. Brand,
Defendant-Relator.

Multnomah County Circuit Court
14CR28021

S068178

ORDER GRANTING MOTION TO FILE MEMORANDUM

Relator has filed a motion for extension of time to file a memorandum. The court construes the filing as a motion to file the memorandum.

The memorandum is deemed filed the date of this order.

LYNN R. NAKAMOTO
PRESIDING JUSTICE, SUPREME COURT
2/24/2021 3:57 PM

c: Carson L Whitehead
Benjamin Gutman
Austin Callahan Brand

gk

[redacted]
APP. 5

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff - Adverse party.

V.

AUSTIN CALLAHAN BRAND
Defendant - Relator.

Multnomah County Circuit Court
14ER28021
5068178

Notice is hereby given of a clerical error the command in the above mandamus proceeding should be directed to the Honorable Eric J. Bergstrom. An amended certificate of service has been served on the Multnomah County Court Judge Eric J. Bergstrom, Search Warrant November 16, 2014, id. at. A162224 pro se brief ER 36-41.

Dated this 9th Day, 2021

Austin C. Brand
8809 SE 190th Dr.
Damascus, OR 97089
(503) 432-7645
brandcallahan89@gmail.com

[redacted]
App-K

CERTIFICATE OF SERVICE

NOW COME, Austin Callahan Brand pro se, certifying that on the day of Notice & Amended certificate service on all the below stated parties of true copies of the the following: of service Eric J. Bergstrom
Mail postage paid and delivered to the USPS mail box.

Oregon Supreme court/records section, 1163 state street, Oregon, Salem 97301

A.G. & S.G. 400 Justice Building 1162 court street NE , Oregon, Salem 97301

Multnomah county Judge ~~Greenlick~~ Eric J. Bergstrom 1021 SW Fourth ave. Oregon, Portland 97204

~~D.A. Amber Kinney 1021 SW forth ave. Oregon, Portland 97204~~

Counsel Jason Steen 741 SW Lincoln Oregon, Portland 97201

Dated this 9 day of February, 2021.

Austin Brand
8809 SE 190th Dr.
Damascus, OR 97089
(503)-432-7645
brandcallahan89@gmail.com

1 OF 4

IN THE SUPREME COURT OF THE STATE OF OREGON

AUSTIN CALLAHAN BRAND, Defendant-Relator.

v.

STATE OF OREGON, Plaintiff-Adverse party.

Multnomah County Circuit Court
#14CR28021

Memorandum MANDAMUS PROCEEDING
#S068178

AUSTIN C. BRAND
8809 SE 190th DR.
Damascus, OR 97089
(503)432-7645
Brandcallahan89@gmail.com

Ellen F. Rosenblum
Attorney General
Benjamin Gutman
Solicitor General
400 Justice Building
1162 Court street NE
Salem, OR 97301

APP. L

The command to Judge Bergstrom to execute on a constructive trust, relator naturally asks a question is their bias in subrogation of a particular executor? Judge Bergstrom of Multnomah disinterested pre-issuance of search warrant and post an active party in the exchange ex parte (patent)., id. at. Fraud thereof motion-A162224 pro se brief ER. This "patent" ex parte and the gift advantage aspect over the adversary fundamental to the proceedings is herein primary to contention of this petition for writ of mandamus. Hat trick to this gift aspect is the particular line of jurisdiction or tracing the litigation through different forums in contrast to jurisdiction. Better understood using the schism of the canon Jonah along with other points of contentions along the line of proceedings. The particular contention here to bias is called cognitive dissonance via. one belief built into the superstructure of the "constructive trust" operative in a proper transaction of a search warrant and relator's constructive trust remedied built by the superstructure of the canon Jonah as a big fish story. It is point contention in "gift" aspect that bears fruit natural to this mandamus proceeding, on take away introspective to issuance of the writ.

Also, subject to bias is the endowment effect. Other party judges would be bias in both these aspects of executor not to note familiarity on party lines too. The argument is for a constructive trust in transaction of a search warrant under the Oregon as well as the United States Constitution. *Frank v. Delaware,* 438 U.S. 154, (1978) Relator also urges a federal disposition of claimed rights see, Bowles v. Barder Steel Co. 177 ore. 421 (1945). This provides a fruitful path for scholarship in looking at the judiciary and bias that it may carry interacting with the public avoiding destruction of rights.

Unique to jurisdiction is a brand Jonah reflects in the story; Jonah running from God's will, here present in relator's various proceedings in different forums: circuit court, new trial motion, ORCP 71 fraud thereof motion, appeal A162224, and on review #S067354 and finally to the present forum as the analogous running from review be the Court (God). This unique aspect is subject material in the difficulty of the role that tracing plays along the line of contention that is the canon Jonah that displays the constructive trust brand that is contended to be of cognitive dissonance in display of relator's rights. Working from these forums tracing concepts enable to define "substantial performance" for parties interactive to the constructive trust to determine how important their role of (intentional) deviation may be in disabling the party from claiming the protection of doctrinate workings.

For example, the State of Oregon-adverse party performance is likewise deviated in course as a material breach of bad faith x2 by the Gresham City Police Departments conduct, but in the adverse parties responds to the bad faith id. at. A162224 pro se brief ER 91-94, pg.2, 17-20. The adverse party disavowed any misconduct or fraud and that it simply did not happen, Bunker Hill Distributing Inc. v. District Attorney 375 mass. 142, 379 N.E. 2d 1095 (1978) established a holding that district attorneys have a responsibility to inform the court of any misconduct or fraud that they have participate in. The adverse party here did not per se participate in the bad faith, but none the less, Kyles v. Whitley, 514 U.S. 419 (1995) Aguilar v. Woodford, 725 F.3d 970, 982-83 (9th Cir. 2013) "Brady violation where prosecutor did not disclose drug sniffing dog's unreliability because police knew even if prosecutor did not." Put both the GCPD and the prosecutor in the same boat. In re Complaint as to the Conduct of Lisa D. Klemp, 363 Ore. 62; 418 p.3d 733; (2018)(attorney did not try to correct an unrepresented

person's mistaken belief that she represented the person)., thus the only deviation at fault was the District Attorney not speaking up for its representation of the GCPD bad faith in party formation lines. It was a misrepresentation, but none the less was enough to sway the bias of the Judge in its cognitive dissonance in the disillusioned constructive trust, see Wadsworth v. Talmage, 365 Or 558, 572; 450 p.3d 486, 494 (2019) "Thus, in [t]he terminology of the Restatement a constructive trust exists in the discussed circumstances all the while but may (or may not) be enforced by the court." If not in policy concerns relator incorporating the patents coram nobis procedures along the forum tracing, id. at. fraud thereof motion., United States v. Denedo, 556 U.S. 904, 913,; 129 S Ct 2213, 173 L Ed 2d 1235, (2009);

Because coram nobis is but an extraordinary tool to correct a legal or factual error, an application for the writ is properly viewed as a belated extension of the original proceeding during which the error allegedly transpired. See Morgan, supra, at 505, n 4, 74 S. Ct. 247, 98 L. Ed. 248 (coram nobis is ``a step in the criminal case and not, like habeas corpus where relief is sought in a separate case and record, the beginning of a separate civil proceeding"(cites omitted in part)).

Holding on to this forum argument is ORCP 71, ORAP 8.25 by which relator received an order from the court id. at. A162224 pro se brief ER 103. At this point a valid appeal was in effect in that forum and ORAP 8.25 id. at. supra ER 90, postured a mandatory forum clause on the proceedings. Whether this tracing process and the completion of relators legal fiction (Wadsworth v. Talmage, supra at. obtains the legacy of the constructive trust ends in the conclusion of an unreasonable search and seizure of the 4th amendment abstract to the fulfillment of a legal fiction grounded in the forum jointment argument, see Roberts v. Triquint Semiconductor, Inc., 358 Or 413; 364 p.3d 328(2015), Trinity v. Apex Directional Drilling LLC, 363 Or 257; 434 p.3d 20 (2018)., As unreasonable.

Relators valuable consideration is in contention of violation of church and State as equitable relief and in treble damages articulated from his unjust enrichment of privileges and immunities, Miranda v. Arizona, 384 U.S. 436, 448-50, 467 (1966) and in patents Franks v. Delaware supra., in consumption of expectation interest and reliance damages patents (constructive fraud theory). Further, the "cognitive dissonance" would violate relators practice of religion in the belief of the canon Jonah and the wisdom of and would work an immunity in application of his [choice] of a constructive trust., id. at. Corrected petition for Review #S067354 (valuable consideration) and argument "victim", pg. 1-2.

(As our prior decisions teach, it is the general nature of the harm at risk, not the precise nature of the harm suffered by a particular victim, that controls the analysis. Piazza v. Kellim,360 Ore. 58,87,377 p.3d 492, 509; (2016)) "The proper inquiry focuses upon the actor's tortious conduct, not the plaintiff's damages." Limone v. U.S.A., 579 F.3d 79, 93; (2009) citations omitted. (State v. Foot, 100 Mont. 33, 48 P.2d 1113 (1935), State v. Cooke, 59 Wn. 2d 804, 371 p.2d 39 (1962); "It is well settled that the victim of fraud need not have relied solely upon the false representation in parting with his money, but only that he relied materially upon it.")

See, V.I. v. Fahie, 419 F.3d 249, 253 n.5 (3d Cir. 2005) "government's bad faith was 'probative of materiality' and had additional relevance in determining remedy"., U.S. v. Jackson, 780 F.2d 1305, 1311 n.4 (7th Cir. 1986) "government's bad faith attempt to suppress evidence considered 'common sense' indication of materiality when materiality had not yet been conclusively determined"., U.S v. Williams, 547 F.3d 1187, 1202 (9th Cir. 2008) "no Brady violation because tape was ambiguous and no bad faith on part of government in failing to

disclose tape"., Talamante v. Romero, 620 F.2d 784, 788 (10th Cir. 1980) "good faith or bad faith of prosecutor may play role in materiality determination for Brady purposes".

This valuable consideration and conceptualization of the inverted-U (religion) work a higher interest to creditors id. Adverse party State of Oregon in prosecution of relator "in the high point to the negative incorporation of patents Franks, supra of the inverted-U as a breakdown of the adversarial process.

Wilson v. Amerada Hess Corp., 773 A.2d 1121, 1130 (2001) "[A] party exercising its right to use discretion in setting price under a contract breaches the duty of good faith and fair dealing if that party exercises its discretionary authority arbitrarily, unreasonably; or capriciously, with the objective of preventing the other party from receiving its reasonably expected fruits under the contract."; Dayan v. McDonald's Corp., 466 N.E. 2d 958, 972 (Ill.App. Ct. 1984) "[T]he courts of this State have held that a party vested with contractual discretion must exercise that discretion reasonably and with proper motive, and may not do so arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties." Rideout v. Knox, 19 N.E. 390 ((mass. 1889) (Homes. J.)) "If the party's actions and accompanying motives are tortious or violate some other contract doctrine, that, of course, the party should face liability."

Dated this 15th day of February 2021.

Austin C. Brand
8809 SE 190th DR.
Damascus, OR 97089
(503) 432-7645
brandcallahan89@gmail.com

CERTIFICATE OF SERVICE

NOW COME, Austin Callahan Brand pro se, certifying that on the day of service on all the below stated parties of true copies of the the following:

Mail postage paid and delivered to the USPS mail box.

Extention of Time & ORAP 11.05 (3) Memorandum

Oregon Supreme court/records section, 1163 state street, Oregon, Salem 97301

A.G. & S.G. 400 Justice Building 1162 court street NE , Oregon, Salem 97301

Multnomah county Judge ~~Greenlick~~ Bergstrom 1021 SW Fourth ave. Oregon, Portland 97204

~~D.A. Amber Kinney 1021 SW forth ave. Oregon, Portland 97204~~

Counsel Jason Steen 741 SW Lincoln Oregon, Portland 97201

Dated this 15th day of February, 2021.

Austin Brand
8809 SE 190th Dr.
Damascus, OR 97089

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Adverse Party,

v.

AUSTIN CALLAHAN BRAND, aka Austin Brand, aka Austin C. Brand,
Defendant-Relator.

Multnomah County Circuit Court
14CR28021

S068178

ORDER DISMISSING MOTION FOR EXTENSION OF TIME AS MOOT

Relator's motion for extension of time to file a brief under ORAP 11.10 is dismissed as moot, because ORAP 11.10 governs the time for adverse party to file a memorandum in opposition.

LYNN R. NAKAMOTO
PRESIDING JUSTICE, SUPREME COURT
1/12/2021 5:11 PM

c: Carson L Whitehead
Benjamin Gutman
Austin Callahan Brand

gk

APP. M

IN THE SUPREME COURT OF THE STATE OF OREGON

Austin Callahan Brand,
Defendant-Relator

v.

STATE OF OREGON
[illegible]

Case No:
Multnomah Co. No 16CR[illegible]

EXTENSION OF TIME.

Mandamus Proceedings [illegible]

(1) 14 day Brief Schedule - Extend [illegible] 30 days.

Dated this 19 day of December 202[illegible]

[signature]
Austin Brand
[illegible] SE [illegible]
[illegible]

APP. N

IN THE SUPREME COURT OF THE STATE OF OREGON

AUSTIN CALLAHAN Brand, Defendant-Relator.

V.

STATE OF OREGON, Plaintiff-Adverse party.

Multnomah County Circuit court
14CR28021

Petition for peremptory writ of Mandamus

Case# S068178

Inverness Jail
Austin C. Brand #77714
11540 NE Inverness Dr.
Portland, OR 97220

Ellen F. Rosenblum
Attorney General
Benjamin Gutman
Solicitor General
Carson Whitehead
400 Justice Building
1162 Court Street NE
Salem, OR 97301
benjamin.gutman@doj.state.or.us
Phone: (503) 378-4402

[redacted] - Aff. O

Statement

Petition for mandamus relief was not made to the circuit Court as it Content a form of agnostisism by the Oregon Supreme Court's order in Case # S067354, State v. Brand, 301 Or App 54, A162224 (Dec. 4, 2019), review denied, 366 or. 259, (Mar. 26, 2020). A matter of first impression for the court given a Criminal matter pertaining to a confidential relationship and fiduciary duty and the Context of a Constructive trust remedy. Given the legal "fiction" associated with the remedy, the Complexity of the on-going litigation, it would be best Initially that a circuit court would buy into the presentation of a writ for such

Further, defendant does not have a plain, Speedy and adequate remedy to compete for the relief of a Constructive trust in the Circuit Court by the attachment of defendants OPS

133.693 Franks hearing motion and their is nor known authority to consign a specific judge as to what the underlining merits of the command seeks herein, such as ORS 14.260. Jansen v. Atiyen 96 ore. App. 54; 771 P.2d 298; (1989), says that an ORCP 71 Motion can proceed after a reversal on appeal, but given that defendant's criminal conviction was reversed and remanded for a new trial, State v. Brand, supra., this would assume a new record vanishing the process of "tracing" that a constructive trust proceeds by, but contending a reversal was "right for the wrong reasons" on a harmless error premiss, an affirmative defense (never made) would present an un-plain, or not clear inadequate remedy. The jurprudence of a Coram nobis what defendant's ORCP 71 (Fraud thereof motion) was partly brought under also states an extra side judicible issue

or claim defendant referanced a double jeopardy claim that would be harmonized with a constructive trust remedy "defeating other creditors" (the state) theoretically.

Lastly, this petition is timely as relator wrote Judge Greenlick on October 30th, 2020 under SLR 4.012.(1) requesting a hearing, brief be set for the attached motion, waited with no response, there has been, yet, no assignment to another judge ORS 14.260. Also, relator is prose in County jail with limited resources, having to steal paper, copy difficultys and no mailing funds.

Jurisdiction

Article VII (Amended), § 2 of the Oregon State Constitution Provides in part: "[T]he Supreme Court may, in its own discretion, take original jurisdiction in Mandamus" "proceedings"

ORS 34.110 & Judical notice of Case #5067350, Oregon Court of Appeal, case #A162224.

Facts

On November 12th, 2014 the Gresham City Police Department offered probable cause to the Multnomah County Court then acting magistrate, Judge Greenlick by whos hand executing a search warrant occuring the relation herein petitioned appearing on such premise for case, State v. Brand # 14CR28021., id. at. A162224 - pro se brief exerpt of record.

Defendant proceeded to trial got convicted and moved the court for a new trim (new evidence). The oral ruling on the new trial was the subject of a pro se brief A162224, after ORCP 71 (4th & 5th power amendment) motion to set aside the judgement for fraud upon the court (Fraud thereof motion)

in the Circuit Court, id. at. A162224 pro se Mot Exerpt of record. The pro se brief allocating risk to the State of Oregon under the guise of providing Counsel to defendant and the harm therefrom violating due process (Judges oral ruling, "defendant's risk of testifying not at trial") patents. Defendant also moved the Orego Court of Appeals to vacate the Juges order denying the ORCP 71 "Fraud here-of motion", that Court not entertaining said motion c findings from defendant entered an order as such, id. at. pro se brief (contended to be one proxy incorporating the patent expressed in the underlining ex parte proceeding). Defendant's criminal judgment was reversed and remanded for a new trial on appeal, State v Braun supra. Defendant moved the Orego Court of Appeals to reConsider on face of breach of fiduciary duty, disco nacledness by

Virtue of the Commodity mode (patents) and under the theory of Constructive fraud tacking on additional assets denied by the State of Oregon and under their duty to provide 5th amendment US. Consta. by ₰ through 14th, OR Consta. Art. I § 12, protective procedure (patents) Miranda v. Arizona, 384 U.S. 436, 467 (1966) and by ₰ through Counsel (patents)., id, at. "Fraud thereof motion" and petition For review (Jonah-worm), again identifying and tracing the underlining patent expressed in the ex parte proceeding as the difference by the constructive trust remedy and held by defendants good faith., (Francs v. Delaware, 438 U.S. 154 (1978)) patent. The additional element in defendant's theory of constructive Fraud (reliance and expectation interest) Miranda v. Arizona, Supra., patent acts as an agent to the States expectation interest in defendants Counsel's preformance

and Finnis, supra, for the proposition of "disappointment" of defendants counsel therefrom to a fair hearing together vindicating the enigma of a post attack, Thus the facts of the situation here to deal with a Confidential relationship defendant, his counsel (constitutional rights flowing therefrom) and a fiduciary duty from the court to defendant,

Defendant filed a petition for review to the Oregon Supreme Court standing the above mentioned theme and relying on his contention of "valuable consideration" per se SOC7354 - petition for review, The OR Supreme court denied review, supra, and "upon consideration by the court", endowed in the Courts order, after such defendant petitioned for reconsideration contending "inadequacy of consideration" copying the theme/thesis of economics and trusting the position Cancer Jonah Holy Bible.

Defendant was never afforded a full and fair litigation of such and the court denied reconsideration and thus any kind of briefing and essentially adopted a form of agnosticism impressed in the court's Order, id. at. SC67354, March 26, 2020 and June 4th, 2020 order on Petition for review and reconsideration.

Presently, Defendant back in the jurisdiction of the Multnomah County for the State of Oregon, moved the Court for a Franks hearing, additional counsel and Consignment of Judge Greenlick executor of the search warrant as subrogated in the sought after remedial device a "constructive trust" and Filed a memorandum of law - Attachment - 1, and under the authority of Jansen v. Atigeh, supra.

Pertinent to the herein petition for a writ of Mandamus is the metaphor "by whom passes judgment

Shall Swing the Sword" presenting a legal fiction by Context of a Constructive trust., id. at attachment-i, This Stands for the simple proposition that the Judge who's hand executed the Search Warrant and from where probable cause passed by which the unfair advantage (bad faith) was taken in the underlining Constructive trust (Judicial officer to decern probable cause and appointment of defendants Counsel) Shall also 'Swing the Sword' as mated by the Injunction as Surrogated by the Constructive trust for the fraud patent entailed in the Ex parte proceeding, again Carter Ford to tracing throughout litigation., id at. Judicial officer intercening between the executive branch (C.C.P.D) Fraud theZot motion Vacate motion, Disco neutedness, Constructive trust theory and denied on review. The unjust enrichment claim an assumption or a passing of value can also be traced throughout litigation

id. at. Fraud thereof motion - Stay the Judgment of Confinment: Circuit Court, Oregon court of appeals, (additional authoritys) and OR Supreme Court.

AS to the bona fide purchaser's proposition of a Constructive trust tracing starting with the veracity of the affidavit in Support of the search warrant (on terms of probable cause)., id. at Fraud thereof motion - then OCE violations 612 & 106 - new trial Motion and the Judges oral ruling (Brady v. Maryland 373 U.S. 83), Kyles v. Whitney, patent). id. at. Fraud thereof motion - pro se brief and providing a procedure Franks hearing patent to give a Fair hearing throughout litigation, id. at. Fraud thereof motion - appeal - petition for review "valuable consideration" and Finally to the current proposition on reconsideration of "inadequacy of consideration" and/or mistake by the OR Supreme Court. There's obviously an exhaustive matter of tracing different propositions of case law (patents)

that change form throughout the advancement of litigation.

Following this theme of tracing at all times is the extra element of the contended 5th amendment by & through 14th Art. 1 § 12 OK Consta., the (supplanted) mother of the victims Tulee walker credible witness statements to police of a text message admission of self incrimination by defendant omitted from the affidavit and the disappointment of defence counsel., i.e. ato. Fraud thereof motion, in trial intrinsic, and through valuable consideration by the State not providing a procedural mirandal patent-work

This coming to an end in the ruling that is the process of tracing by the remedy of a constructive trust is the contention of Sac-336, the order on the petition for review and preservation of inadequacy of consideration the court taking a form of agnosticism. The merits

of defendants Good Faith in the Canon book of Jonah-Bible and particularly demonstrated by Malcom Gladwell's book David and Goliath - part three, From the legacy of Jonah the inverted-U., id. at. attachment-.. [T]hat assets of authority id. at. ex parte, Franks, maranda patents, ect., used to exert power, governmental control over the conviction, prosecution and destructive of Constitutional rights (6th by through 14th counsel) become to numerous where upon exceeding the bounds of the inverted-U of legitimacy of prosecuting defendant by way of fundamental brake down of the constructive trust of our judiciary system.

Heretofore from whom judgment passes (probable cause Judge) shall swing the sword, subrogated as remedied by a constructive trust.

Judge Greenlick is the only Judge whom has an

unbiased interest in the success of the deal all others are disinterested judicary. and all conditions precedent are present and the Court should not be disillusioned, The incorporation of these different patents and Governmental power does not equal worth and legitimacy (as demonstrated by Marcom Gladwell's book David and Goliath, part three) in a Judical system. Wisdom, the sort that is displayed by the canon Jonah's inverted-u, is a far greater virtue because it preserves our Good Faith in our Judical System

Nagative Facts, the State of Oregon disavowed involvement in the breach of Good Faith, id. at. State's Respon. Pro Se brief E; Also, the State of Oregon contented that the egregiousness in trial did not reach the height of Boyd v. United States, 116 U.S 616, 29 LED 746 (1886) (defendant suspect is what was meant), id. at. State of Oregons Answering brief,

A162224.

34.210 Recovery of damages***

Defendant seeks $60,000,000.00 USDA in the sale of patents and the legacy herein., Cy Pres.

Relator-Defendant, AUSTIN CALLAHAN BRAND pro se, herein petitioning for a Peremptory Writ of Mandamus issue directed to this "Advers party" the Honorable Michael A. Greenlick Judge of said court Commanding him immediately upon receipt of said writ to "swing the sword upon which he passed judgment" in the duty as subrogated by remedy of constructive trust.

Dated this 7 day of December 2020.

Austin C. Brand
Inverness Jail
11540 NE Inverness Dr.
Portland, OR 97220

CERTIFICATE OF SERVICES

Now Comes, Austin Callahan Brand pro se in custody of Inverness Jail, Multnomah County For the State of Oregon. Certifying that on December 9, 2020 a true copy of: Petition for peremptory writ of Mandamus, was served on all the below mention partys through ~~first class~~ Serves Inverness Jail ~~Express~~. 30 ¢ envelope to be posted by the Jail here.

OR Supreme Court
Appellate Court Administrator
Appellate Court Records Section
165 State Street
Salem, OR 97301-2563

A.G. & S.G. of Oregon
400 Justice Building
1162 Court Street NE
Salem OR 97301-4096

Multnomah County Courthouse
Judge Carrellick
1021 SW Fourth ave,
Portland, OR 97204

Ms. Amber Lang
1021 SW Fourth ave
Portland, OR 97204

Counsel Jason Stern
741 SW Lincoln
Portland, OR 97201

Dated this 7 day of December 2020

Austin Brand
Austin J. Brand
Inverness Jail
1401 NE Inverness Dr.
Portland OR 97220

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON,
plaintiff.

v.

Austin Callahan Brand,
Defendant.

Case # 19CR28021

ADDITIONAL COUNSEL REQUEST
FRANKS HEARING REQUEST
SPECIAL JUDGE REQUEST
(Special Fact Finding)

NOW COMES, Austin C. Brand pro se, Pleading proceeding procedent, defense "Inadequacy of Consideration" Defense merited on a constructive Fraud (Claim of Fact) theory litigated and preserved in Oregon Court of Appeals #162224, SC67354; State v. Brand, 301 Or App. 59 (2019), review denied, 306 or. 259 (2020).

And Moves this COURT to take Judicial notice of preserved litigation (Peeples V. Lampert, 346 or 331; 211 P3d 262 (2009)) special Findings. Further, moving to have an ORS 133.693 or Frank V. Delaware, 438 U.S. 154 (1978) hearing and/or to Continue Brand's Independant action, see, Jansen V. Atiyeh 96 ore. App. 54; 771 P.2d 298; (1989). Requesting Judge Greenlick of search warrent, under Maxim "by whom Judgement's hand Passes, Shall swing the sword." Requesting Additional Counsel. OR Court of Appeals reverse & remand was "right For the wrong reason" Doctrine. Brand having paid Valuble consideration.

Dated this 14th Day of August 2020.

Austin Brand #27774
Inverness Jail
11540 NE Inverness Dr.
Portland, OR 97220

Verified Correct Copy of Original 8/19/2020

Certificate of Service

Now comes, Austin Callahan Brand certifying that a true copy was delivered on August 14th, 2020 to be docketed of a: Franks hearing request and special Judge Consignment (Special Findings of Fact) At the below addressed partys, by Inverness mail.

Clerk of the Court
Circuit Court of Oregon
For the County of Multnomah
1021 SW Fourth Ave.
Portland, OR 97204

District Attorney# 2208830-IV
Multnomal County Courthouse
1021 SW Fourth ave.
Portland, OR 97204

Dated this 14th day of August 2020.

Austin C. Brand #77714
Inverness Jail
11540 NE Inverness Drive
Portland, OR 97220

Callaway case, Supreme Court Docket No. [illegible]

[illegible] 20 [illegible] Complaint, Stating all incident

has been fulfilled; Oregon Court of Appeals # A162124, Oregon

Supreme Court # S067334., Various Briefs Excerpt, and filings.

Jensen v. Kitzhaber, 235 Or. App 581, 735 P.2d 298; (1987). And by

and through the remedies Never Completely Tried,

Waldschmidt v. Talmage, 365 Or. 558, 450 P.3d 486 (2019).

Narrative

Stipulating [illegible] the Holy Bible - Book of Jonah is a

fundamental human quality [illegible] other entities or species from

the competitive and gave us Absolute Dominion, without

a Story & Moral to Relate [illegible] themselves Etc. [illegible] Stories and Legends Myths, Shrines

The thesis of Malcom's book was the proposition of the inverted-U [illegible] on which grafted sources of power exercised by authority are benefic[illegible] to the apex of the inverted-U, then after [illegible] point) become [illegible] and a negative [illegible] given situation, David and Goliath [illegible] [illegible], Authored [illegible] was a [illegible] "heros journey" [illegible] of a given heros journey [illegible] apex in the story time line, [illegible] the character reaches [illegible] of [his] accomplishment gloriously [illegible]. In contrast the book of Jonah is an unusual story of continued misfortune and suffering of Jonah [illegible] point of [illegible] even [illegible] death, [illegible] nothing [illegible] suffer [illegible] is [illegible] the reach to [illegible] [illegible] [illegible]

[illegible]

[illegible] from the [illegible] of the [illegible]

[illegible] laws of the State of [illegible] [illegible]

[illegible], [illegible], [illegible] at pg. 27

Constructive Trust

[illegible] v Talmage 365 [illegible], 55[illegible], 5[illegible] [illegible]

[illegible] (2.1)

"Severe Scrutiny" [illegible]

[illegible] p 20 Tab [illegible]

Constructive [illegible] the [illegible] [illegible]

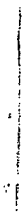
[illegible] in the lesser [illegible] the

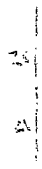
[illegible], [illegible] the [illegible]

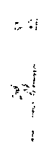
Secret [illegible] the Sleep, [illegible]

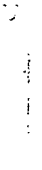
[illegible] [illegible] [illegible]

[illegible] [illegible] [illegible]









power of the court as the proverbial lord and [illegible]

to J. Ige Greelish [illegible] the differance. Called

fair valuable consideration, [illegible] the thing at risk [illegible]

competitive, id. at. Petition for review, the [illegible] can be

linked to Jonah's prayer to the holy be [illegible] can playmates, and

the bluff and stone are not [illegible] inside, [illegible]

[illegible] and warm wherein. The [illegible] however

the [illegible] [illegible]. They're [illegible] to [illegible]. But

I can think of at least two [illegible] easy to [illegible]

That's because the [illegible] [illegible]. Entwined

from the cut v, these twin vines become [illegible]

inseparable. One is called [illegible] [illegible]

[illegible] them, [illegible]

[illegible] Jonah [illegible] its explicit [illegible]

of less-than-ideal circumstances short-circuited.

And worst of all the delightful spontaneity of a friendship strained. The chain of obligation built into links of expectation holds us in the manacles of disappointment.

With a due respect to the beloved bygone friend song, half of lives I'd suggest we change the title to Best be the tie that frees.

[illegible], Dec. 23rd, 255 (1994), being shortest [illegible] of the [illegible], [illegible] the three hour stretch.

[illegible] stretching space [illegible] to respond as recent in a variety of ways ever [illegible] strife creating [illegible] variety of possibilities.

[illegible] [illegible] of [illegible]

[illegible]

Cyprus

issue made claim herein throughout litigation,

3) Plaintiff is entitled to the Court to claims pursuant hereto under United States v. Rasuto, 499 F 2d 781, 781 (9th Cir. 1974) to cut the levee and drain the reservoir; to the Creek to cut the levee and drain the Pond; plaintiff equitable interest and interest in water rights therein and herein by virtue of fee

4) The proceedings presently in here to remain private complete the deal of the

Dated this 23 rd September 2016

Respectfully submitted

A Bill Blackwell

Witness To

1540 NE Business Dr
Portland OR 97232

23rd

by Austin Forand

[signature]

Notary Public for Oregon

My Commission Expires 04/30/2024

OFFICIAL STAMP
ERIKA LOUISE WHITE
NOTARY PUBLIC - OREGON
COMMISSION NO. 999137
MY COMMISSION EXPIRES APRIL 30, 2024

Amended

CERTIFICATE OF SERVICE

NOW COME, Austin Callahan Brand pro se, certifying that on the day of service on all the below stated parties of true copies of the the following: petition for Writ of Mandamus & Franks & Judge motion - proceedings.
Mail postage paid and delivered to the USPS mail box.

~~Oregon~~ Supreme court/records section, 1163 state street, Oregon, Salem 97301

~~A.G. & S.G. 400 Justice Building 1162 court street NE, Oregon, Salem 97301~~

Erick J. Bergstrom
Multnomah county Judge ~~Greenlick~~ 1021 SW Fourth ave. Oregon, Portland 97204

~~D.A. Amber Kinney 1021 SW forth ave. Oregon, Portland 97204~~

~~Counsel Jason Steen 741 SW Lincoln Oregon, Portland 97201.~~

Dated this 9 day of February, 2021.

Austin Brand
8809 SE 190th Dr.
Damascus, OR 97089
(503) 432-7645
brandcallahan89@gmail.com

Amended

CERTIFICATE OF SERVICE

NOW COME, Austin Callahan Brand pro se, certifying that on the day of service on all the below stated parties of true copies of the the following: petition For Writ of Mandamus & Franks & Judge Motion - proceedings.
Mail postage paid and delivered to the USPS mail box.

~~Oregon Supreme court/records section, 1163 state street, Oregon, Salem 97301~~

~~A.G. & S.G. 400 Justice Building 1162 court street NE, Oregon, Salem 97301~~

Multnomah county Judge ~~Greenlick~~ Erick J. Bergstrom 1021 SW Fourth ave. Oregon, Portland 97204

~~D.A. Amber Kinney 1021 SW forth ave. Oregon, Portland 97204~~

~~Counsel Jason Steen 741 SW Lincoln Oregon, Portland 97201.~~

Dated this 9 day of February, 2021.

Austin Brand
8809 SE 190th Dr.
Damascus, OR 97089
(503) 452-7645
brandcallahan89@gmail.com

VOLUME II

TABLE OF CONTENTS APPENDIX

A- Order denying petition for reconsideration

B- Petition for reconsideration

C- Order denying review and motion to stay

D- Motion to stay the judgment and release

E- Corrected pro se petition for review

F- Compliance Notice

G- Order allowing memorandum of additional authorities

H- Pro se additional authorities

I- Order allowing memorandum of additional authorities

J- State of OR additional authorities

K- Respondent's supplemental answering brief

L- Pro se petition for review

M- ORAP 6.25 motion to reconsider

N- Reply to excommunication

O- Appellant's pro se reply brief

P- Order granting time to file pro se reply brief

Q- Appellant's motion-EOT

R- Notice

S- Order granting pro se reply brief

T- Order striking pro se motion

U- Leave to file pro se reply brief

V- Respondent's answering brief

W- Pro se brief supplemental

X- Appellant's opening brief & excerpt of record

Y- Order striking pro se motion

Z- Motion & such

Briefs/Petitions

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
Respondent on Review,

v.

AUSTIN CALLAHAN BRAND, aka Austin Brand,
Defendant-Appellant,
Petitioner on Review.

Court of Appeals
A162224

S067354

ORDER DENYING PETITION FOR RECONSIDERATION

Upon consideration by the court.

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

MARTHA L. WALTERS
CHIEF JUSTICE, SUPREME COURT
6/4/2020 9:08 AM

c: Andrew D Robinson
Jordan R Silk

tnb

APP. A

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent,

v.

AUSTIN CALLAHAN BRAND, aka Austin Brand
Defendant-Petitioner, pro se

S067354

Court of Appeals Case No.A162224

PETITION FOR RECONSIDERATION ORAP 9.25

NOW COMES, Austin Callahan Brand, pro se asking the Court for leave to file herein petition for reconsideration untimely as petitioner received the Courts order April 20, 2020 and any ORAP 5.05 and ORAP 5.95 form defect.

Petitioning for Reconsideration of the attached order herein as Inadequacy of consideration. The art of a benefactor is to take us to the brink. A benefactor can only point the way and trick. In the Courts order "upon consideration by the court" is inadequate in the present context of the bargain ie. Brand's privilege to counsel and the Courts duty to discern probable cause and a full and fair opportunity to contest property/punctuary rights id. at. Petition for review. This should also be shown to be in the pragmatic interest of Brand after serving going on 6 years behind bars and remedial rights pertaining to damages in monitary form loss of job, time, family and punitive. But not to miss the point and the value to affirm the Courts freedom, sovereignty and power. Power extending over all creation and tyrannic executive power

App. B

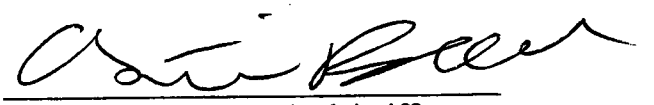
(Gresham City Police) exalted over Brand and the public. The legislator made ORCP 71 procedure.

The Court should discipline the bargain for the quality of economic fairness evaluating industry structure and competition questions considering the public policy mandates. Which in Brand's view hits on *Boyd v. United States 116 US 616, 29 LED 746, (1886),* where if the court fails to take in the breath of this case would silence the public, sanction a tyrannic gestapo to interact with the public in order to self incriminate them and force confessions. The State of Oregon has no right to proceed in convicting and detaining subject under these types of situations.

The court should examine the adequacy of consideration as the doctrine constructive fraud involves a deliberate exception to the general rule that courts do not measure the adequacy of consideration. And the economics of the transaction for fairness. As Churchill once noted, most democracies can be counted on to do the right thing only after they have exhausted all the other options. And Release Brand.

Bible, book of Jonah.

Dated this 21st day of April 2020.



Austin Callahan Brand, plaintiff, pro se
OSP-sid #16137792
2605 state st. Salem, OR 97310

****

CERTIFICATE OF SERVICE

CASE NAME: State v. Brand
CASE NUMBER: OR of appeals A162224/ S067354

COMES NOW, AUSTIN CALLAHAN BRAND, pro se, and certifies the following:

That I am incarcerated by the Oregon Department of Corrections at Oregon State Penitentiary.

That on the 21st day of april, 2020, I personally placed in the Correctional Institution's mailing service A TRUE COPY of the following:

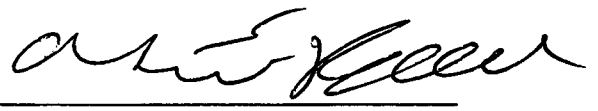
petition for reconsideration

I placed the above in a securely enclosed, postage prepaid envelope, to the person(s) named at the places addressed below:

Oregon Supreme Court
records division
1163 state st.
Salem, OR 97301

OPDS
Andrew Robinson
1175 Court Street NE
Salem, Or 97301-4030

ELLEN F. ROSENBLUM#753239
Attorney General
Benjamin Gutman#160599
Solicitor General 400 Justice Building
1162 Court Street NE
Salem, Or 97301



Austin Callahan Brand, plaintiff, pro se
sid #16137792 OSP
2605 state st. Salem, OR 97310

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
Respondent on Review,

v.

AUSTIN CALLAHAN BRAND, aka Austin Brand,
Defendant-Appellant,
Petitioner on Review.

Court of Appeals
A162224

S067354

ORDER DENYING REVIEW AND MOTION TO STAY

Upon consideration by the court.

The court has considered the petition for review and orders that it be denied. The motion to stay the judgment and release petitioner is denied.

MARTHA L. WALTERS
CHIEF JUSTICE, SUPREME COURT
3/26/2020 11:30 AM

c: Andrew D Robinson
Jordan R Silk

asb

[redacted]
App. C

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent,

v.

AUSTIN CALLAHAN BRAND, aka Austin Brand
Defendant-Petitioner, pro se

S067354

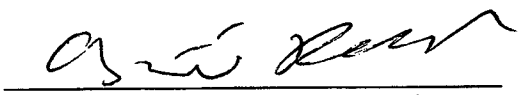
Court of Appeals Case No.A162224

MOTION TO STAY THE JUDGMENT AND RELEASE

NOW COMES, Austin Callahan Brand, pro se pursuant to ORAP 9.30 and ORS 135.285 moving this Court to abide by the spirit of the Art. 1 § 9 and the 4th amendment and release Brand. Freedom unifies the soul.

Petition for review filed 02/04/2020. This motion for release was raised in the Circuit Court.

Dated this 5th day of February 2019.



Austin Callahan Brand, plaintiff, pro se
OSP-sid #16137792
2605 state st. Salem, OR 97310

[redacted]
- APP. D

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent,

v.

AUSTIN CALLAHAN BRAND, aka Austin Brand
Defendant-Petitioner, pro se

S067354
Court of Appeals Case No.A162224

Multnomah County Circuit Court
14CR28021
Judge John A. Wittmayer, Multnomah County Circuit Court

Corrected Pro Se
Petition for review of Court of Appeal
Decision Argued and Submitted April 24, 2018;
Decided December 4, 2019, in a written opinion. Reversed and Remanded.
(Cited as 301 Or App 59 (2019)
Opinion By The Honorable Roger J. DeHoog, Presiding Judge,
and Devore, Judge (Devore, P.J., vice Hadlock, J. pro tempore.);
and Aoyagi, Judge.

Austin Brand, pro se
SID#16137792
OSP
2605 state st.
Salem, Oregon 97310

ELLEN F. ROSENBLUM #3753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
400 Justice Building
1162 Court Street NE
Salem, OR 97301
benjamin.gutman@doj.state.or.us
Phone: (503) 378-4402

- App. E

ADDENDUM FACTS

The means of disposition of the case by the Court of Appeals was favorable to Brand., *State v. Brand*, 301 Or App. 59 (2019) reversed and remanded. But is contented to be in violation of double jeopardy's doctrine res judicature in the Courts repose. *As petitioned herein the disconnectedness is in fact a virtue of the commodity mode*., see, Jonathan Lethem The ecstasy of influence A plagiarism, from Harper's magazine (2008 the best American essays, Robert Atwan series editor). Wherein the Court and State are monopolizing the practice of law (art)., id. at. Motion to reconsider and pro se brief-ER 115-122 (excommunication). Confusing and frustrating the purpose of Brand's appellant counsel who was never a party to the proceeding. This is why jurisdiction is particularly wise to this Court as a producer of art (law) and the practice of law and Brand being a consumer of various different patents and standards in the practice of art (law). Art (law) takes in a dual prospect in the market, criminal law and Brand's case, in the concept of a fundamentally fair adversarial system. Art (law) can be commodifed, but is also a gift to the audience it's meant for in our adversarial system and/or market. Beg to pardon that it gets complicated in the prospect of a criminal case, with canons and a pro se inmate. When this dual concept of art and the practice of law is isolated to one propertization of a commodity mode there is then something other then art, but an advertisement, leading to petitioner's theory of constructive fraud, antitrust, noncompetitive disconnectedness from Brand , the Court in there "pater-nalistic" position and trial by fire competition from the State. Making a state of impossibility for Brand. The concept of victimization of Brand, id. Pro se brief under this the government has no right to coerce an American citizen to do something that goes against his

ideology's id. Herein. Especially, the argument goes, when America was founded on that ideology-and blessed because of it. In closing Bible-Hebrews 4:12.

NOTICE: Brand intends to file a brief on the merits and a motion to reconsider was filed in the Oregon Court Appeals. Brand is under no notice of a final order from the Court of Appeals.

ARGUMENT

The Court's hold up of undisclosed incorporation of standards in patent to the formation of the search warrant .id ex parte and the resulting ex communication corporation of such patents and standards continued gives unfair advantage to other parties ie. Court and State leading to valuable consideration of antitrust and noncompetitive behavior. Conceptualizing a gross increase in the cost of performance of this patent leads to an adjoining of church (court) and State in a forum of ecclesiastical law on which Brand contests the Orders of the Oregon Court of Appeals denying fillings by appellant Brand pro se excommunicating him and frustrating the purpose of counsel. For this the Oregon Court of Appeals should consent to a supersedes Order dis-affirming this adjoining. A pattern of Frustration of purpose of Brand's counsel material to performance of counsel in contesting probable cause, the allocation of risk to the State of Oregon and the resulting obligation by the Court having a good Faith duty to petitioner as constructive to an ex parte proceeding (affidavit/search warrant issued) labeled, reliance interest damages payment on damages of Brand's breach of the implied covenant of good faith x2 this would be analogous to a wrongful death tort. See, *Juarez v. Windsor Rock Prods., Inc., 341 ore. 160, 173; 144 p.3d 211; (2006),* "that the relation of parent and child exists in fact,-- and furnishes the

reasonable expectation of pecuniary advantage from its continuance upon his life and of its extinction upon his death." This consent herein would pay for the pecuniary advantage on Brand's frustration of counsel bringing in his theory of bad faith based on relief of a quasi contract on a factual relationship with Brand through the issuance of the search warrant on terms of probable cause. The Son analogized on the prefix of prosecution of Brand claims of bad faith by counsel to the court (and as such the father).

The market value of Brand's claims to a supplanted self incrimination by bad faith is simply a procedure to contend Miranda v. Arizona, 384 U.S. 436, 448-50, 467 (1966), and by and through counsel the State of Oregon has not provided such by repudiation and disablement of this. This is a willful violation of the adversarial process and should be an excuse for non competitiveness and antitrust the Court should quash the orders not allowing Brand to communicate and consent to valuable consideration. The market value here would give an unfair advantage to other parties and should be excused as it leads to antitrust and noncompetitive competition and the States expectation interest in Brand's counsel should be considered waived for this. Brand has not gotten a full and fair shot at any point in the proceedings examined and prosecutes a property/ pecuniary advantage 4th and patent Miranda v. Arizona, supra., for this Brand should receive review. See, Nance v. Busby, 18 S.W. 874 (1892)., and Buckeye Check Cashing, Inc. v. Cardengna 546 U.S. 440; 126 S. Ct. 1204; (2006).

PRAYER FOR REVIEW

Wherefore appellant Brand prays that the Oregon State Supreme Court reviews claims of Bad Faith in a forum Ecclesiastical under this courts equitable jurisdiction to save double

jeopardy for Brand and grant a good faith relationship with Brand through his Art.1 §9 and 4th amendment rights to the Oregon and U.S. Constitution by review of the Oregon Court of Appeals Order's id. at. Pro se Brief-excerpt 116-17 of excommunicating Brand as antitrust and noncompetitive contention, to reconsider Opinion attachment- State v. Brand 301 Or app. 59 (2019) on a theory of constructive fraud (no scienter required). And for value of public and private interest and a full and fair review.

QUESTIONS

Does appellant's theory of constructive fraud by the Oregon Court of Appeals trigger review by jurisdiction of it's order id. Pro se brief ex-116-117 effectively ex communicating Brand from the court and frustrating the purpose of counsel in offer of valuable consideration provide a means of review for claims of Bad faith in the presentment of an affidavit in support of a search warrant?

[W]hat is the examination of separation of power in the hood that is ORCP 71?

REASONS FOR REVERSAL

A full and fair departure from review of Brand's claims and his property/pecuniary rights in dealing with the Court.

STATEMENT OF FACTS

Issuance of search warrant id. Pro se brief-excerpt 35-41 and excommunication 115-122.

REASONS FOR REVIEW

To see if Brand has property/punctuary rights in membership with the church and should he be ex communicate. And to own up to the Courts deal with Brand., See, Allied Tube &Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988), and Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982).

Dated this 4th day of February 2019.

Austin Callahan Brand, plaintiff, pro se
OSP-sid #16137792
2605 state st. Salem, OR 97310

CERTIFICATE OF SERVICE

CASE NAME: State v. Brand

CASE NUMBER: (if known) 5067354 - A162224

COMES NOW, Austin C Brand, and certifies the following:

That I am incarcerated by the Oregon Department of Corrections at Oregon State penitentiary.

That on the 4 day of February, 2020, I personally placed in the Correctional Institution's mailing service A TRUE COPY of the following:

Petion For Review - motion to recall Judgments order,

I placed the above in a securely enclosed, postage prepaid envelope, to the person(s) named at the places addressed below:

Oregon Supreme Court
Records Divison
1163 State St.
Salem, OR 97301

Ellen F. Rosemblum A.G.
Benjamin Gutman S.G.
400 Justice Building
1162 Court Street NE
Salem, OR 97301

O.P.D.S.
Andrew Robinson
1175 Court Street NE
Salem, OR 97301-4030

Austin Brand
(Signature)

Print Name Austin C. Brand
S.I.D. No.: 16337792
OSP
2605 State St
Salem, OR 97310

IN THE SUPREME COURT OF THE STATE OF OREGON

Date: January 23, 2020

To: Andrew D Robinson
o/b/o Austin Callahan Brand
Office of Public Defense Services
1175 Court St NE
Salem OR 97301

From: Appellate Court Records Section Clerk Olivia (503) 986-5897

Re: State of Oregon v. Austin Callahan Brand
S067354
Court of Appeals
A162224

The Petition for Review of Court of Appeals Decision was filed on January 07, 2020.

COMPLIANCE WITH THE FOLLOWING IS REQUIRED:

The Petition for Review of Court of Appeals Decision does not conform to the Oregon Revised Statutes (ORS) and/or the Oregon Rules of Appellate Procedure (ORAP) in that:

- The petition must identify the date of the decision of the Court of Appeals, the means of disposition of the case by the Court of Appeals, and the members of the court who decided the case. ORAP 9.05.

If the above-listed deficiency(ies) are not corrected within 14 days from the date of this notice, the defective document will not be considered by the court.

All documents filed with the court must include service on the opposing party(ies). ORAP 1.35(2)(a).

ORAP 1.35 (1)(B)(v)
"CORRECTED"

9.05 (3)(a)(B)(v) Notice whether intends to file a Brief on merits rely on Brief of Court of Appeals

[redacted]
- App. F

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

AUSTIN CALLAHAN BRAND, aka Austin Brand,
Defendant-Appellant.

Multnomah County Circuit Court
14CR28021

A162224

ORDER ALLOWING MEMORANDUM OF ADDITIONAL AUTHORITIES

Appellant, Austin Callahan Brand, has moved for leave to file a memorandum of additional authorities pursuant to ORAP 5.85.

The motion is granted.

Erika L Hadlock

ERIKA L. HADLOCK
PRESIDING JUDGE, COURT OF APPEALS
5/22/2019 9:00 AM

c: Andrew D Robinson
Jordan R Silk

vb

[redacted]
Appl. Ca

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, v. AUSTIN CALLAHAN BRAND, Aka Austin Brand, Defendant-Appellant.	) Multnomah County Circuit Court) Case No. 14CR28021)) CA Case No.A162224))) APPELLANT'S PRO SE MOTION FOR) LEAVE TO FILE MEMORANDUM OF) ADDITIONAL AUTHORITIES AND) MEMORANDUM OF ADDITIONAL) AUTHORITIES

A. Motion for Leave to File Memorandum of Additional Authorities

This case was argued before the Court of Appeals on April 24, 20018. Under ORAP 5.85(1), the appellant, pro se moves this court for leave to file a memorandum of additional authorities, to notify this court of a recent Oregon Supreme Court decision bearing on the issue raised by appellant's pro se brief, which argues that the Gresham City Police Department breached the implied covenant of good faith x2 and in nature to a writ of coram nobis through ORCP 71(C) and ORAP 8.25 procedure. As error raised for the omitting of statements from the affidavit in support of the search/arrest warrant, in fraud upon the court and extrinsic fraud and from the prior proceeding of an new trial motion's oral ruling allocating risk to appellant testifying in trial.

B. Additional Authorities

The case is In re Complaint as to the Conduct of363 Ore. 62, 74; 418 P.3d 733,741; (2018), Identifying appropriate case's for Quantum meruit and implied promises in fact retain a

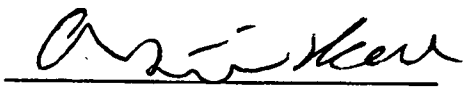
[redacted]
APP. H

contractual character and relief on the "going rate" as necessary to prevent unjust enrichment . And Larisa Home Care,LLC, v. Nichols-Shields, 362 Ore. 115; 404 P.3d 912 (2017) applying "unjust enrichment" to restitution in appellant's Quantum Meruit theory of bad faith x2, id. at. Fraud thereof-motion. Specifically to adjudication of probable cause that the appellant never received from a judicial officer. This adjudication would assume a passing on release on terms of probable cause, appellant was denied this assumption by the Gresham City P.D.'s bad faith x2 in the omission complained of., Larisa Home Care, LLC, 362 at. 126, "it may also sometimes require a defendant to give to the plaintiff something the plaintiff never had". Under appellant's Quantum meruit theory and unjust enrichment additional authorities appellant Brand should receive this assumpsit as the "going rate" and be released in this case as it's something he never had because of the bad faith issues raised. Larisa Home Care, LLC, 362 at. 138, "opinion going into liability of the principle, for the agents omissions of duty". Appellant's case the principle would be the probable cause judge in-trusted with the determining of probable cause and the Gresham City P.D., agents in omission of duty and the concept of liability pertaining to a Judicial determination Quantum meruit by this Oregon Court of Appeals.

CONCLUSION

The Court should review this issue with urgency as a willful misconduct circumventing America's adversarial process material to appellant's counsel and sua sponte ORS 135.285 release appellant pending appeal. This issue should also take priority by the Court as if this case is reversed on other assignments of error it will still be judicable by the appellant's double jeparty concerns and confinement.

Dated this 8th day of May 2019.



Austin Brand sid# 16137792
OSP
2605 State st.
Salem, OR 97310

****

CERTIFICATE OF SERVICE

CASE NAME: State of Oregon, plaintiff-Respondent v. AUSTIN CALLAHAN BRAND, defendant-Appellant,

CASE NUMBER: 14-CR-28021
CA A162224

COMES NOW, AUSTIN CALLAHAN BRAND, pro se, and certifies the following:

That I am incarcerated by the Oregon Department of Corrections at Oregon State Penitentiary.

That on the 8 day of May, 2019, I personally placed in the Correctional Institution's mailing service A TRUE COPY of the following:
Appellant's, pro se, motion for leave to file additional memorandum of authoritys and memorandum.

I placed the above in a securely enclosed, postage prepaid envelope, to the person(s) named at the places addressed below:

Office of Public Defense Services
Appellate Division
ATTN: Andrew Robinson
1175 Court Street NE
Salem, OR 97301

Oregon Court of Appeals
1163 State Street
Salem, Oregon 97301

Ellen F. Rosenblum #753239
Attorney General
Benjamin Gutman #160599
Solicitor General
400 Justice Building
1162 Court Street NE
Salem, Oregon 97301

Austin Brand sid# 16137792
OSP
2605 State st.
Salem, OR 97310

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

AUSTIN CALLAHAN BRAND, aka Austin Brand,
Defendant-Appellant.

Multnomah County Circuit Court
14CR28021

A162224

ORDER ALLOWING MEMORANDUM OF ADDITIONAL AUTHORITIES

Respondent has moved for leave to file a memorandum of additional authorities pursuant to ORAP 5.85.

The motion is granted.

Erika L Hadlock

ERIKA L. HADLOCK
PRESIDING JUDGE, COURT OF APPEALS
4/17/2019 10:17 AM

c: Andrew D Robinson
Jordan R Silk

vb

App. I

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, v. AUSTIN CALLAHAN BRAND, aka Austin Brand, Defendant-Appellant.	Multnomah County Circuit Court No. 14CR28021 Appellate Court No. A162224 RESPONDENT'S MOTION FOR LEAVE TO FILE MEMORANDUM OF ADDITIONAL AUTHORITIES AND MEMORANDUM OF ADDITIONAL AUTHORITIES

A. Motion for Leave to File Memorandum of Additional Authorities

This case was argued before the Court of Appeals on April 24, 2018. Under ORAP 5.85(1), the state moves this court for leave to file a memorandum of additional authorities, to notify this court of a recent Oregon Supreme Court decision bearing on the issue raised by defendant's first assignment of error, which argues that a police officer's testimony applying general delayed reporting principles to the specific facts of this case constituted impermissible vouching. Defendant does not object to this motion.

B. Additional Authorities

The case is *State v. Black*, 364 Or 579, __ P3d __ (2019). It reverses this court's prior decision in *State v. Black*, 289 Or App 256, 407 P3d 992 (2017), which the state discussed in its answering brief.

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 378-4402

App. 5

The issue in *Black* was whether the trial court correctly limited a defense forensic interviewing expert's testimony such that the expert was allowed to testify to general principles of appropriate forensic interviewing techniques, but was prohibited from applying those principles to the specific facts of the case—*i.e.*, identifying for the jury parts of interviews that, in the expert's view, breached interviewing protocols, diminishing the credibility of the interviewee response. 364 Or at 581. This court affirmed, reasoning that "the trial court was correct in not permitting defendant's expert to 'connect the dots' for the jury by providing the answer to the 'penultimate question,'" *i.e.*, by applying the general forensic interviewing principles to the specific interviews at issue. 289 Or App at 263-64.

The Supreme Court allowed review and recently reversed this court's decision. The Supreme Court clarified that the prohibition against "vouching" testimony applies only when a witness offers "an opinion on truthfulness," not when the witness "provides a tool that the factfinder could use in assessing credibility." *Black*, 364 Or at 593. In light of that principle, the Supreme Court held that the vouching rule did not bar the *Black* expert's application of general forensic interviewing principles to the specific interviews at issue. *Id.* at 593-94. Rather, the expert's application of those general principles to the specific

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 378-4402

facts of the case remained a permissible part of the expert's whole testimony providing the jury a tool for assessing witness credibility. *Id.* at 593-94.

In reaching that conclusion, the Supreme Court impliedly rejected a distinction present in this court's case law, including *Black* and *State v. McCarthy*, 251 Or App 231, 283 P3d 391 (2012), on which defendant relies here, and which the state contends is wrongly decided if it applies to this case: Namely, the distinction that experts must restrict their testimony to general principles, and that experts violate the rule against vouching if their testimony involves a discussion of whether and how the specific facts of a case might be consistent with those general principles.

Respectfully submitted,

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General

/s/ Jordan R. Silk
JORDAN R. SILK #105031
Assistant Attorney General
jordan.r.silk@doj.state.or.us

Attorneys for Plaintiff-Respondent
State of Oregon

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 378-4402

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on April 15, 2019, I directed the original Respondent's Motion for Leave to File Memorandum of Additional Authorities and Memorandum of Additional Authorities to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Andrew D. Robinson, attorneys for appellant, by using the court's electronic filing system.

/s/ Jordan R. Silk
JORDAN R. SILK #105031
Assistant Attorney General
jordan.r.silk@doj.state.or.us

Attorney for Plaintiff-Respondent
State of Oregon

Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
(503) 378-4402

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, v. AUSTIN CALLAHAN BRAND, aka Austin Brand, Defendant-Appellant.	Multnomah County Circuit Court No. 14CR28021 CA A162224

RESPONDENT'S SUPPLEMENTAL ANSWERING BRIEF

Appeal from the Judgment of the Circuit Court
for Multnomah County
Honorable JOHN A. WITTMAYER, Judge

ERNEST LANNET #013248
Chief Defender
Office of Public Defense Services
ANDREW D. ROBINSON #064861
Deputy Public Defender
1175 Court St. NE
Salem, Oregon 97301
Telephone: (503) 378-3349
Email:
andrew.robinson@opds.state.or.us

Attorneys for Defendant-Appellant

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
JORDAN R. SILK #105031
Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email: jordan.r.silk@doj.state.or.us

Attorneys for Plaintiff-Respondent

6/19

App. K

TABLE OF CONTENTS

ARGUMENT 1

TABLE OF AUTHORITIES

Cases

Apodaca v. Oregon,
406 US 404, 92 S Ct 1628, 32 L Ed 2d 184 (1972) 1, 2

Ramos v. Louisiana,
2019 WL 1231752 (March 18, 2019) 2

State v. Bowen,
215 Or App 199, 168 P3d 1208 (2007),
adh'd to as modified on recons,
220 Or App 380,
rev den, 345 Or 415 (2008),
cert den, 558 US 815 (2009) 1

State v. Cave,
223 Or App 60, 195 P3d 446 (2008),
rev den, 345 Or 690 (2009) 2

State v. Gann,
254 Or 549, 463 P2d 570 (1969) 1

State v. Weltch,
297 Or App 409, 439 P3d 1047 (May 1, 2019) 1

Statutes & Constitutional Provisions

US Const, Amend VI 1, 2

US Const, Amend XIV 1

RESPONDENT'S SUPPLEMENTAL ANSWERING BRIEF

ARGUMENT

In his first through sixth supplemental assignments of error, defendant argues that the trial court plainly erred when it instructed the jury that it could return a nonunanimous verdict, published a verdict form that allowed the jury to reach a nonunanimous verdict, and accepted nonunanimous verdicts on four of the charges against defendant. Defendant contends that the Sixth Amendment, made applicable to the states via the Fourteenth Amendment, requires a unanimous jury verdict to convict someone of a crime.

Defendant's claim is foreclosed by current caselaw from the United States Supreme Court, the Oregon Supreme Court, and this court. *See, e.g.*, *Apodaca v. Oregon,* 406 US 404, 92 S Ct 1628, 32 L Ed 2d 184 (1972); *State v. Gann*, 254 Or 549, 551-56, 463 P2d 570 (1969) (rejecting the argument that the Sixth Amendment requires state criminal jury verdicts to be unanimous); *State v. Bowen*, 215 Or App 199, 202, 168 P3d 1208 (2007), *adh'd to as modified on recons*, 220 Or App 380, *rev den*, 345 Or 415 (2008), *cert den*, 558 US 815 (2009) (rejecting the defendant's argument that the Sixth Amendment required a criminal court to instruct the jury that its verdict must be unanimous); *State v. Weltch*, 297 Or App 409, 410, 439 P3d 1047 (May 1, 2019) (*per curiam*) (rejecting defendant's challenges to jury instruction and acceptance of

nonunanimous verdicts as "foreclosed by our case law"); *State v. Cave*, 223 Or App 60, 68-69, 195 P3d 446 (2008), *rev den*, 345 Or 690 (2009) (same).

As defendant notes, the United States Supreme Court recently allowed *certiorari* in *Ramos v. Louisiana*, 18-5924, 2019 WL 1231752, at *1 (March 18, 2019), and it is possible that that Court will revisit its decision in *Apodaca*. While the state recognizes that possibility, its response to defendant's argument at this time relies solely on current caselaw. Should the United States Supreme Court decide *Ramos* in a way that calls current law into question, the state will seek leave to file additional briefing addressing the import of that decision to this case—including raising any preservation, plain error, or harmless error arguments and specifically responding to defendant's assertion that the alleged error in this case is "structural error." Until then, though, this court should rely on current law and reject defendant's Sixth Amendment claims.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General
BENJAMIN GUTMAN
Solicitor General

/s/ Jordan R. Silk
JORDAN R. SILK #105031
Assistant Attorney General
jordan.r.silk@doj.state.or.us

Attorneys for Plaintiff-Respondent
State of Oregon

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on June 21, 2019, I directed the original Respondent's Supplemental Answering Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Andrew D. Robinson, attorneys for appellant, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(1)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b) and (2) the word-count of this brief (as described in ORAP 5.05(1)(a)) is 385 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(3)(b).

/s/ Jordan R. Silk
JORDAN R. SILK #105031
Assistant Attorney General
jordan.r.silk@doj.state.or.us

Attorney for Plaintiff-Respondent
State of Oregon

JRS:mkf/9685346

IN THE SUPREME COURT OF THE STATE OF OREGON

State of Oregon, plaintiff-respondent

v.

AUSTIN CALLAHAN BRAND, aka Austin Brand
Defendant, pro se

#_____

Multnomah County Circuit Court
14CR28021

Court of Appeals Case No.A162224

Office of Public Defense Services, file No. 65790

PRO SE Petition for review

from the Oregon Court of Appeals Order.

Austin Brand, pro se
SID#16137792
OSP
2605 state st.
Salem, Oregon 97310

ELLEN F. ROSENBLUM #3753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
400 Justice Building
1162 Court Street NE
Salem, OR 97301
benjamin.gutman@doj.state.or.us
Phone: (503) 378-4402

App. L

ARGUMENT

The Court's hold up of undisclosed incorporation of standards in patent to the formation of the search warrant .id ex parte and the resulting ex communication corporation of such patents and standards continued gives unfair advantage to other parties ie. Court and State leading to valuable consideration of antitrust and noncompetitive behavior. Conceptualizing a gross increase in the cost of performance of this patent leads to an adjoining of church (court) and State in a forum of ecclesiastical law on which Brand contests the Orders of the Oregon Court of Appeals denying fillings by appellant Brand pro se excommunicating him and frustrating the purpose of counsel. For this the Oregon Court of Appeals should consent to a supersedes Order dis-affirming this adjoining. A pattern of Frustration of purpose of Brand's counsel material to performance of counsel in contesting probable cause, the allocation of risk to the State of Oregon and the resulting obligation by the Court having a good Faith duty to petitioner as constructive to an ex parte proceeding (affidavit/search warrant issued) labeled, reliance interest damages payment on damages of Brand's breach of the implied covenant of good faith x2 this would be analogous to a wrongful death tort. See, *Juarez v. Windsor Rock Prods., Inc., 341 ore. 160, 173; 144 p.3d 211; (2006),* "that the relation of parent and child exists in fact,-- and furnishes the reasonable expectation of pecuniary advantage from its continuance upon his life and of its extinction upon his death." This consent herein would pay for the pecuniary advantage on Brand's frustration of counsel bringing in his theory of bad faith based on relief of a quasi contract on a factual relationship with Brand through the issuance of the search warrant on terms

of probable cause. The Son analogized on the prefix of prosecution of Brand claims of bad faith by counsel to the court (and as such the father).

The market value of Brand's claims to a supplanted self incrimination by bad faith is simply a procedure to contend Miranda v. Arizona, 384 U.S. 436, 448-50, 467 (1966), and by and through counsel the State of Oregon has not provided such by repudiation and disablement of this. This is a willful violation of the adversarial process and should be an excuse for non competitiveness and antitrust the Court should quash the orders not allowing Brand to communicate and consent to valuable consideration. The market value here would give an unfair advantage to other parties and should be excused as it leads to antitrust and noncompetitive competition and the States expectation interest in Brand's counsel should be considered waived for this. Brand has not gotten a full and fair shot at any point in the proceedings examined and prosecutes a property/ pecuniary advantage 4th and patent Miranda v. Arizona, supra., for this Brand should receive review. See, Nance v. Busby, 18 S.W. 874 (1892)., and Buckeye Check Cashing, Inc. v. Cardengna 546 U.S. 440; 126 S. Ct. 1204; (2006).

PRAYER FOR REVIEW

Wherefore appellant Brand prays that the Oregon State Supreme Court reviews claims of Bad Faith in a forum Ecclesiastical under this courts equitable jurisdiction to save double jeopardy for Brand and grant a good faith relationship with Brand through his Art.1 §9 and 4th amendment rights to the Oregon and U.S. Constitution by review of the Oregon Court of Appeals Order's id. at. Pro se Brief-excerpt 116-17 of excommunicating Brand as antitrust and noncompetitive contention, to reconsider Opinion attachment- State v. Brand 301 Or app. 59

(2019) on a theory of constructive fraud (no scienter required). And for value of public and private interest and a full and fair review.

QUESTIONS

Does appellant's theory of constructive fraud by the Oregon Court of Appeals trigger review by jurisdiction of it's order id. Pro se brief ex-116-117 effectively ex communicating Brand from the court and frustrating the purpose of counsel in offer of valuable consideration provide a means of review for claims of Bad faith in the presentment of an affidavit in support of a search warrant?

[W]hat is the examination of separation of power in the hood that is ORCP 71?

REASONS FOR REVERSAL

A full and fair departure from review of Brand's claims and his property/pecuniary rights in dealing with the Court.

STATEMENT OF FACTS

Issuance of search warrant id. Pro se brief-excerpt 35-41 and excommunication 115-122.

REASONS FOR REVIEW

To see if Brand has property/punctuary rights in membership with the church and should he be ex communicate. And to own up to the Courts deal with Brand., See, Allied Tube

&Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988), and Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982).

Dated this 7th day of January 2019.

Austin Callahan Brand, plaintiff, pro se
OSP-sid #16137792
2605 state st. Salem, OR 97310

CERTIFICATE OF SERVICE

CASE NAME: State of Oregon v. Brand

CASE NUMBER: (if known) Multnomah County #14CR28021; A162224

COMES NOW, Austin C. Brand, and certifies the following:

That I am incarcerated by the Oregon Department of Corrections at Oregon State Penitentiary.

That on the 7 day of January, 2020, I personally placed in the Correctional Institution's mailing service A TRUE COPY of the following:

Petition For Review, pro se

I placed the above in a securely enclosed, postage prepaid envelope, to the person(s) named at the places addressed below:

Oregon Court OF Appeals
Records Division
1163 State St.
Salem, OR 97301

Ellen F. Rosenblum A.G.
Benjamin Gutman S.G.
400 Justice Building
1162 Court Street NE
Salem, OR 97301

O.P.D.S.
Andrew Robinson
1175 Court Street NE
Salem, OR 97301-4030

(Signature)

Print Name Austin C. Brand
S.I.D. No.: 16137792
OSP
2605 State St.
Salem, OR 97310

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,	) Multnomah County Circuit Court
	) Case No. 14CR28021
Plaintiff-Respondent,	)
	) CA Case No.A162224
v.	)
	)
AUSTIN CALLAHAN BRAND,	)
Aka Austin Brand,	) **ORAP 6.25 MOTION TO**
	) **RECONSIDER (excuse)**
Defendant-Appellant.	)

NOW COMES, Appellant AUSTIN CALLAHAN BRAND, Pro se pursuant to ORAP 6.25 on petition for reconsideration presenting an issue of fact controlling to the own motion matter ORAP 8.25., ORCP 71 (C) moving the Court to reconsider Multnomah County Circuit Court # 14CR28021; A162224., State of Oregon v. Brand 301 Or app. 59 (2019) as an excuse to exercise this Oregon Court of Appeals equitable jurisdiction to issue a supersedes order herein disposition on of theory of constructive fraud as a reliance interest that is fundamentally constructive to a good faith dealing with appellant per issuance of search warrant (ex parte), respectfully.

Grounds

Citing 302 Or app. at. 61; In fact, it was only her roommate who ultimately called the police, in respondse to defendant repeatedly kicking and banging on the apartment door, demanding to see S.

[redacted] APP. M

In fact; appellant has presented an issue of fact in his presentation id. pro se brief ORAP 8.25, ORCP 71 (C) on the attack of the Gresham City Police Departments Oath as an attack on the veracity of the search warrant, as disputed by appellant., see, *State v. Wright, 266 ore. 163, 166; 511 p.2d 1223; (1973).* The failure by the Oregon Court of Appeal's to take in consideration of this fact fundamentally violates it's duty of trust as a judicial party in the issuance of the search warrant. And fails a good faith relationship with Brand (Oregon Law Review 2013 volume 92 #1, pages 203-205, Siri, can you keep a secret? A balanced approach to fourth amendment principles and location data.)

Additionally, the State of Oregon, Plaintiff respondent's voluntary disablement by repudiation of Oregon Court of appeals jurisdiction herein of Appellant's ORAP 8.25, ORCP 71 (C), ORS 419 B.923., own motion matter id. a meaningful procedure to contest an incriminating statement, see *Miranda v. Arizona, 384 U.S. 436, 467 (1966).* This incriminating statement appellant contents was fruit that was supplanted by the bane of the Gresham City P.D. Bad faith. see, *Boyd v. United States 116 US 616, 29 LED 746, (1886.* The federal Court used *United States v. Basurto, 497 F.2d 781, 786 (9th Cir. 1974)* as a structure to articulate an abstract in Defendant Brand's case, first, on the allocation of the covenant of good faith to Brand's defense counsel, in the measure of the general risk at issue allocated to the State of Oregon, id. at. Pro se brief fraud thereof motion., (cut the cancer *(United States v. Basurto, 497 F.2d 781, 786 (9th Cir. 1974)).* And second, as to Brand's defense counsels inability on an intrinsic (due process) level at trial to compete with the adversary, after ORE 612 and rule of completion (& drain reservoir *(United States v. Basurto, supra.)).* Judge's oral ruling of plaintiff's risk of testifying in trial to rebut

Jolene Walker's testimony in trial as to the text messages and plaintiff's self incrimination therein, and the admissibility of such procedures at trial are governed by due process standard., *Kirby v. Ill., 406 U.S. 682, 690-91 (1972)* "right to counsel does not attach to preindictment identification rather admissibility of such procedures at trial governed by due process standard." Here the denial of the fruit of the procedures contended for, were enough to violate due process, (which would be a low standard) as it was so suggestive (of plaintiff perpetrating the crime) as to risk very substantial likelihood of irreparable misidentification as to the truth, exculpatory, and full reality of identification of the conversation between plaintiff and Jolene Walker (though plaintiff believes it was more bane) in trial and *irreparable by counsel.*, *Simmons v. U.S., 390 U.S. 377, 384-85 (1968)* "due process not violated by identification from photo array because procedure not so suggestive as to risk "very substantial likelihood of irreparable misidentification." *See, Boyd v. United States, supra.* Power of appointment, Maranda v. Arizona, supra.

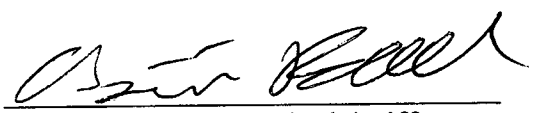
Larisa' Home Care, LLC, v. Nichols-shields, 362 Ore. 115, 125; 404 P.3d 912, 918 (2017); As a term, "unjust enrichment" also can be misleading, suggesting that liability turns on vague notions of injustice. The traditional definition is that coined by Lord Mansfield: whether a party, "upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money." (Assumpsit common law., *Fleming v. Wineberg, 253 Or. 472, 482-84, 455 p.2d 600 (1969)).* that the magistrate finds probable cause to believe the accused committed the offense, the defendant will remain bound for trial., Id. at. Pro se brief (ORS 135.185) this rubic assumes a passing on release. The plaintiff should be able to continue this assumption of a

continued protected liberty interest post harmoniously herein. The Gresham City P.D., bad faith presents a question as to damages, on the merits, whether in Brand's case "unjust enrichment" is applicable to the promise of a judicial officer conducting an independent review of probable cause and whether Brand should get back liberty in the assumption denied?

Plaintiff never received this "going rate" on release, on terms of probable cause by a judicial officer, but for the omission complained of, statement of Jolene Walker and (police narrative, Jolene Walker's statement)., id at. affidavit in support of search warrant (no statement included)., id. at. search/arrest warrant issued., as necessary to prevent unjust enrichment. In re complaint as to the conduct of Klemp, 363 Ore. 62, 75 (2018) "going rate". The right to a Judicial Officer is the corner stone to 4th amendment rights both in the Feds., and Oregon. As an excuse to make present and unconditional as an issue of fact controlling both quasi contract and in fact, id. at. ORCP 71 fraud thereof-motion (*State v. Wright, 266 ore. 163, 166; 511 p.2d 1223; (1973)).* Appellant's issue of fact has already been adjudicated in oral ruling of Judge John A. Wittmayer's oral ruling.

Lastly, if the Court does or does not reconsider defendant wants assurances of additional protective procedure and reprensentation.

Dated this 9th day of December 2019.



Austin Callahan Brand, plaintiff, pro se
OSP-sid #16137792
2605 state st. Salem, OR 97310

CERTIFICATE OF SERVICE

CASE NAME: State of Oregon v. Brand

CASE NUMBER: (if known) Multnomah County #14CR28021; A162224

COMES NOW, Austin C. Brand, and certifies the following:

That I am incarcerated by the Oregon Department of Corrections at Oregon State Penitentiary.

That on the 9 day of December, 2019, I personally placed in the Correctional Institution's mailing service A TRUE COPY of the following:

ORAP 6.25 Motion to reconsider

I placed the above in a securely enclosed, postage prepaid envelope, to the person(s) named at the places addressed below:

Oregon Court of Appeals
Records Devision
1163 State St.
Salem, OR 97301

Ellen F. Rosenblum #755
Benjamin Gutman #160592
S.G.
400 Justice Building
1162 Court Street NE
Salem, OR 97301

Andrew D. Robinson
O.P.D.S.
1175 Court Street NE
Salem, Oregon 97301-4030

(Signature)

Print Name Austin C. Brand
S.I.D. No.: 16134792
OSP
2605 State St.
Salem, OR 97310

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, v. AUSTIN CALLAHAN BRAND, Aka Austin Brand, Defendant-Appellant.	) Multnomah County Circuit Court) Case No. 14CR28021)) CA Case No.A162224)))) **REPLY TO EXCOMMUNICATION**))

NOW COMES, Austin Callahan Brand, pro se again in reply contending Art.1, § 9 OR and 4th & 5th by and through 14th amendment rights to the U.S. Consta., addressing equitable jurisdiction of this Oregon Court of Appeal's in a forum ecclesiastical moving this Court to quash it's Order's .id at. Pro se brief Excerpt of record 116-117. (contended herein excommunication orders), in which Defendant Brand moved this Court to vacate the Multnomah County Circuit Court # 14CR28021 Order denying pro se fraud thereof-motion (ORCP 71), supplementing the record and appointment of counsel and essentially excommunicating Brand in prosecution of property right's and a punctuary good faith relationship with Brand and the court through his 4th amendment.

ARGUMENT

The Court's hold up of undisclosed incorporation of standards in patent to the formation of the search warrant .id ex parte and the resulting ex communication corporation of such patents and standards continued gives unfair advantage to other parties ie. Court and State leading to valuable consideration of antitrust and noncompetitive behavior. Conceptualizing a gross increase in the cost of performance of this patent leads to an adjoining of church (court) and State in a forum of ecclesiastical law on which Brand contests the Orders of the Oregon Court of Appeals denying fillings by appellant Brand pro se excommunicating him and frustrating the purpose of counsel. For this the Oregon Court

[redacted]

APP. N —

of Appeals should consent to a supersedes Order dis-affirming this adjoining. A pattern of Frustration of purpose of Brand's counsel material to performance of counsel in contesting probable cause, the allocation of risk to the State of Oregon and the resulting obligation by the Court having a good Faith duty to petitioner as constructive to an ex parte proceeding (affidavit/search warrant issued) labeled, reliance interest damages payment on damages of Brand's breach of the implied covenant of good faith x2 this would be analogous to a wrongful death tort. See, *Juarez v. Windsor Rock Prods., Inc., 341 ore. 160, 173; 144 p.3d 211; (2006),* "that the relation of parent and child exists in fact,-- and furnishes the reasonable expectation of pecuniary advantage from its continuance upon his life and of its extinction upon his death." This consent herein would pay for the pecuniary advantage on Brand's frustration of counsel bringing in his theory of bad faith based on relief of a quasi contract on a factual relationship with Brand through the issuance of the search warrant on terms of probable cause. The Son analogized on the prefix of prosecution of Brand claims of bad faith by counsel to the court (and as such the father).

The market value of Brand's claims to a supplanted self incrimination by bad faith is simply a procedure to contend Miranda v. Arizona, 384 U.S. 436, 448-50, 467 (1966), and by and through counsel the State of Oregon has not provided such by repudiation and disablement of this. This is a willful violation of the adversarial process and should be an excuse for non competitiveness and antitrust the Court should quash the orders not allowing Brand to communicate and consent to valuable consideration. The market value here would give an unfair advantage to other parties and should be excused as it leads to antitrust and noncompetitive competition and the States expectation interest in Brand's counsel should be considered waived for this. Brand has not gotten a full and fair shot at any point in the proceedings examined and prosecutes a property/punctuary advantage 4th and patent Miranda v. Arizona, supra., for this Brand should receive review. See, Nance v. Busby, 18 S.W. 874 (1892)., and Buckeye Check Cashing, Inc. v. Cardengna 546 U.S. 440; 126 S. Ct. 1204; (2006).

The point of fact identified of the issuance of the search warrant on terms of probable cause is

material to the court's opinion attachment-State v. Brand, 301 Or app. 59 (2019) and Brand should get a full and fair review of this, and res judicata on facts he was acquitted of.

Dated this 12th day of January 2019.

Austin Callahan Brand, plaintiff, pro se
OSP-sid #16137792
2605 state st. Salem, OR 97310

CERTIFICATE OF SERVICE

CASE NAME: State v. Brand

CASE NUMBER: (if known) Multnomah County # 14CR28021; A162224

COMES NOW, Austin C. Brand, and certifies the following:

That I am incarcerated by the Oregon Department of Corrections at Oregon State Penitentiary.

That on the 12 day of January, 2020, I personally placed in the Correctional Institution's mailing service A TRUE COPY of the following:

Reply

I placed the above in a securely enclosed, postage prepaid envelope, to the person(s) named at the places addressed below:

Oregon Court of Appeals
Records Division
1163 State St.
Salem, OR 97301

Ellen F. Rosenblum AG.
Benjamin Gutman S.G.
400 Justice Building
1162 Court Street NE
Salem, OR 97301

Andrew Robison
A.D.A.
1175 Court Street NE
Salem, Oregon 97301-4030

(Signature)

Print Name Austin C. Brand
S.I.D. No.: 16157702
OSP
2605 State St.
Salem, OR 97310

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, V. AUSTIN CALLAHAN BRAND, aka Austin Brand, Defendant-Appellant.	Multnomah County Circuit Court Case No. 14CR28021 CA A162224

APPELLANT'S PRO SE REPLY BRIEF

Appeal from the Judgment of the Circuit Court
for Multnomah County
Honorable John A. Wittmayer, Judge

AUSTIN CALLAHAN BRAND
SID#16137792
SRCI
777 Stanton blvd.
Ontario, OR 97914

ELLEN F. ROSENBLUM #3753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
400 Justice Building
1162 Court Street NE
Salem, OR 97301
benjamin.gutman@doj.state.or.us
Phone: (503) 378-4402
Attorneys for Plaintiff-Respondent

APP. O -

TABLE OF CONTENTS

STATEMENT OF THE CASE.....1

Summary of Argument.....1

Jurisdiction.....1

CONCLUSION.....5

TABLE OF AUTHORITIES

Cases

Espinoza v. Evergreen Helicopters 356 Or 63, 376 p.3d 960, (2016).....1

Frank v. Delaware 438 US 154, 57 L Ed 2d 667, 98 S Ct 2674 (1978).....1

State v. Wright,JR., 266 Ore. 163; 511 p.2d 1223; (1973).....1

Johnson v. Johnson, 302 Ore. 382, 394; 730 p.2d 1221, 1228; (1986).....1

Wills v. Wills 203 Or. 479, 480; 280 p.2d 410, 411; (1955).....1

Fazzolari v. Portland School Dist. NO. 1J, 303 Or 1; 734 p.2d 1326, (1987).....

Piazza v. Kellim,360 Ore. 58,377 p.3d 492; (2016).....2,5

Simmons v. U.S., 390 U.S. 377, 88 S Ct 967, 19 L Ed 2d 1247 (1968).....2

Couey v. Atkins, 357 Ore. 460, 355 P3d 866 (2015).....NA

Shadwick v. Tampa, 407 US 345, 32 L Ed 2d 783, 42 S Ct 2119 (1972)..... 2

Kimmelman v. Morrison 477 U.S. 365, 106 S Ct 2574, 91 LEd 2d (1986)..... 2

Evitts v. Lucey, 469 US 387, 105 S Ct 830, 83 L Ed 2d 821, (1985)..... 2

Cuyler v. Sullivan 446 US 335, 100 S Ct 1708, 64 LEd 2d 333, (1980)..... 2

Murray v. Carrier 477 US 478, 106 S Ct 2639, 91 LEd 2d 397, (1486)..... 3

Boyd v. United States 116 US 616, 29 LED 746, (1886)..... 3

State v. Montigue, 288 OR 359, 605 P.2d 656 (1980)..... 4

Salitan v. Dashney, 219 or 553, 347 P.2d 974 (1959) _____ 5

Lee v. Lee, Brown, 5 or App. 74, 482 P.2d 745 (1971) 5

Torry Smith, et al plaintiffs v. City of Oakland, ET AL 538 F. Supp. 2d 1217; * 2008 U.S. Dist. LEXIS 20735 _____ 5

Constitutional and Statutory Provisions

Or Const, Art I, sec.9.....1-5

Or Const, Art I, sec.12.....1-5

ORS 19.270.....1

US Const, 4th amendment by through 14th _____ 1-5

US Const, 5th amendment by through 14th _____ 1-5

US Const, ~~Art~~ 6th amendment by through 14th _____ 1-5

Or Const, Art 1, Sec. 20 _____ 1-5

ORS 133.545 _____ 4

ORS 135.185 _____ 4

OR Const, Art. 18, Sec. 7 _____ 1

OR const, Art VII, Sec. 1 _____ Power clause-NA

DEFENDANT'S, PRO SE REPLY BRIEF

SUMMARY OF ARGUMENT

Appellant's pro se assignments of error and supporting argument identify important issues of the superstructure of law and can be analogized to contract law. Also identifying important burdens involved in the case at hand for the new trial motion (new evidence) in conjunction from the basis of appellant's "fraud thereof-motion" applying the standard of review from appellant's pro se second assignment of error of defendant's reliance on the duty of the implied covenant of "good faith" in one theory of veracity and in the right of probable cause being decided by a magistrate as a second duty of the implied covenant of "good faith" and as an objective factor external to the defense impeding counsel's performance to comply with the State's procedural rule as an issue of being unforseeable by a reasonable attorney

JURISDICTION

Espinoza v. Evergreen Helicopters 356 Or 63, 376 p.3d 960, (2016)

The above case name and number as in defendant's pro se brief carry the jurisdictional doctrine of forum non conveniens found derived from the Oregon State Constitution Art.18, sec.7. The Court of Appeals has jurisdiction (among other authority) of the "fraud thereof-motion" by, ORCP 71 (B) (2)***The moving party shall file a copy of the trial court's order in the appellate court within seven days of the date of the trial court order. Which defendant contents is an equivalent to a procedural devise conferring jurisdiction over the "fraud thereof-motion" to the Court of Appeals on completion, *see*, Wills v. Wills 203 Or. 479, 480; 280 p.2d 410, 411; (1955) and along with ORAP 8.25 (letter of transmittal), this has been completed and the "fraud thereof-motion" is an "independent action", *see,* Johnson v. Johnson, 302 Ore. 382, 394; 730 p.2d 1221, 1228; (1986), where this court should review because of the "good faith v. bad faith" fiduciary duties involved.

ARGUMENT

Appellant pro se has raised a ORCP 71 (C) "fraud thereof-motion" entailing of an independent action for a fiduciary duty that the appellant had the burden of carrying and the test, State v. Wright,JR., 266 Ore. 163,166; 511 p.2d 1223,1224; (1973) which he has carried by way of impeachment of the affidavit's veracity (Frank v. Delaware 438 US 154, 57 L Ed 2d 667, 98 S Ct 2674 (1978)) ER 60-63, and veracity the definition of such speaks of a fiduciary duty of trust for the terms of the warrant that can be found as a theory of the implied covenant of "good faith" which in this case is bad faith as such. At this point the appellant believes and should be the extent of prosecution needed by appellant for the

court to "take over" the analysis of the facts insofar as the second theory of "good faith" is in play (omitting Jolene Walker's statement's) although where as here it is not distinct from rights under the Oregon Const. Art. 1 sec. 9 and 4th amendment by through 4th for an objective of probable cause.

Here on the second theory of "bad faith" which would control the point of analysis found in appellant's pro se brief under the standard of review the following: As our prior decisions teach, it is the general nature of the harm at risk, not the precise nature of the harm suffered by a particular victim, that controls the analysis. Piazza v. Kellim,360 Ore. 58,87,377 p.3d 492, 509; (2016). And following this the argument goes appellant was reliant on the duty of good faith of the police to disclose Jolene Walker's statement's for the right of that being heard by a magistrate, *see,* Shadwick v. Tampa, 407 US 345, 32 L Ed 2d 783, 92 S Ct 2119 (1972) for a proper showing of probable cause. This would be necessary to the defendant to receive an adversarial test of probable cause in particular representation in the form counsel on a 4th amendment issue, *see,* Kimmelman v.morrison 477 U.S. 365, 106 S Ct 2574, 91 L Ed 2d, (1986), for a fair shot at this whole deal in any sense of a form of a procedure for counsel to preform and receive the "fruit" under, Simmons v. U.S., 390 U.S. 377,389-94, 88 S Ct 967, 19 L Ed 2d 1247 (1968). And to be clear defendant had no counsel with allocation to contest, suppress or controvert in any form of procedure afforded by the state.

Which brings use to the question of forseeability. Was it forseeable to a reasonable attorney based on the facts of the "fraud thereof-motion" to contest, suppress of controvert in any form of a procedure afforded by the State? No, it was unforseeable to a reasonable attorney based on the arbitrary play of the police to contest, suppress, controvert in any fashion to perform under a procedure afforded by the State. "The constitutional mandate is addressed to the action of the state", Evitts v. Lucey, 469 US 387, 105 S Ct 830, 83 L Ed 2d 821, (1985), and where a "procedural default is the result of ineffective assistance of counsel, the 6th amendment itself requires that responsibility for the default be imputed to the state", Cuyler v. sullivan 446 US 335, 344, 100 S Ct 1708, 64 L Ed 2d 333, (1980) and

"the state bears the 'risk' of constitutionally deficient assistance of counsel", Murray v. Carrier 477 US 478, 488, 106 S Ct 2639, 91 L Ed 2d 397, (1986). And to be clear appellant understands the exhaustion of remedies and to fully alert the Court this is not an ineffective claim this is an unforseeable circumstance.

To bring it back to the Honorable Judge Wittmayer's ruling on the motion for new trial it wouldn't be an issue of the "risk" of defendant not testifying in trial it would be under the State's risk of the "fraud thereof-motion" and defendant not having an advocate to represent him for this issue, leading to a powerful rule of law that has consistently been argued to be the fruit of the poisonous tree" and a right against self incrimination (OR. CONST. Art.1, sec.12 and US CONST. 5th by and through 14 amendment) the fruit, from the extrinsic fraud/fraud upon the court being the tree (OR. CONST. Art.1, sec.9 and US CONST. 4th by and through 14th amendment), where petitioner never had a trial on the merits of guilt, but was said to have admitted to the charge, *see,* Boyd v. United States 116 US 616, 29 LED 746, (1886).

Further, the State has an expectation of the defendant to contest, suppress or controvert contrary to the terms of an ex parte proceeding an issue that is unforseeable to a reasonable attorney and should be liable for not, but this is inconsistent with the purpose of the first duty of good faith and with the purpose of the terms of the affidavit and warrant. If defendant is to be bound by expectations to contest, suppress or controvert then there is no need for binding agreements entailed in the veracity of the affidavit in support of the search warrant. The point of agreeing on terms is to ensure that all have a common understanding of the rights and obligations. If liability is based on expectation, then defendant should be on notice of that fact at the time of contract formation of the warrant so that those expectations may be enunciated and clarified which is the argument for the second assignment of error presented in appellant's pro se brief. The expectation of the state is unjustified because its inconsistent with the parties bargain.

State v. Montigue,288 ore. 359, 368; 605 p.2d 656, 669; (1980) - Or Const art I, sec 9. In deference to this constitutional guarantee, ORS 133.545 provides in part:

ORS 133.545 Issuance and execution of search warrant.

(6)*** If an affidavit is based in whole or in part on hearsay, the affiant shall set forth facts bearing on any unnamed informant's reliability and shall disclose, as far as possible, the means by which the information was obtained.

135.185 Holding defendant to answer; use of hearsay evidence.

If it appears from the preliminary hearing that there is probable cause to believe that a crime has been committed and that the defendant committed it, the magistrate shall make a written order holding the defendant for further proceedings on the charge. When hearsay evidence was admitted at the preliminary hearing, the magistrate, in determining the existence of probable cause, shall consider:

(1) The extent to which the hearsay quality of the evidence affects the weight it should be given; and

(2) The likelihood of evidence other than hearsay being available at trial to provide the information furnished by hearsay at the preliminary hearing.

The above cited passage and ORS are underlining argument of petitioner's "fraud thereof-motion" being that (ORS 135.185(1)) the police were arbitrary in regards to the consideration involved in Jolene Walker's statement's the basis for the fraud (concealment of a material fact from the magistrate) when hearsay was the basis for the presentation for the affidavit in support of the search warrant. ORS 135.185 (2) resulting in capricious likelihood of the cell phone text message evidence by the police. The whole premise of having probable cause before a magistrate and not delegated to the officers.(State v. Montigue,288 ore. 359, 368-371; 605 p.2d 656, 669-71; (1980))
Central to the constitutional guarantee is that the search may be made only if a judicial officer, not a police officer or prosecutor, is convinced by trustworthy information under oath that there is probable cause for authorizing the search. Citing *State v. Montigue,288 Or.359,369;605 p.2d 656;(1980).*

FORUM NON CONVENIENCES

The Order rendered by the trial court entered on January 25, 2017 denying petitioner's "fraud

thereof-motion" is void because it was "based on the written submissions of the parties" in excess of the trial court's jurisdiction, see Salitan v. Dashney, 219 Or 553, 347 p.2d 974 (1959), see also, Lee v. Lee, brown, 5 Or App. 74, 482 p.2d 745 (1971).

CONCLUSION

The burdens are for lack of a better word messed up because of the State consistently bamboozling the Court and defendant. Defendant- appellant is pro se and has no law degree and the lack of an advocate for this issue has continued on appeal as appellate attorney Mr. Robinson can't touch this issue. The point of analysis also takes in an important point Piazza v. Kellim,supra "suffered by a particular victim" and with that I would like an attorney to "take over" for a legal representation for damages, *see,* Torry smith, et al plaintiffs v. City of Oakland, ET Al 538 F. Supp. 2d 1217; 2008 U.S. Dist. LEXIS 20735. On the first assignment of error vacate, on the second set aside Judgment for fraud. And the State can get me out of prison ASAP, very respectfully.

Dated the day of February 16th, 2018

Respectfully submitted,

AUSTIN CALLAHAN BRAND
Snake River Correctional Institution
777 Stanton blvd.
Ontario, OR 97914

CERTIFICATE OF SERVICE

CASE NAME: State v. Brand

CASE NUMBER: (if known) A168224

COMES NOW, Austin Brand, and certifies the following:

That I am incarcerated by the Oregon Department of Corrections at SRCI

That on the 16 day of February, 20 18, I personally placed in the Correctional Institution's mailing service A TRUE COPY of the following:

Appellant's Pro SE Reply Brief

I placed the above in a securely enclosed, postage prepaid envelope, to the person(s) named at the places addressed below:

OFFICE OF Public Defense Services
Andrew Robinson
1175 Court St NE
Salem, OR 97301

(Signature)

Print Name Austin Brand
S.I.D. No.: 16137792
777 Stanton Blvd.
Ontario, OR 97914

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05

Brief length

I certify that (1) I do not have the ability to provide a word count because the brief was prepared *pro se*; (2) this brief complies with the page limitation in ORAP 5.05; and (3) the number of pages in this brief is 10 pages.

Type size

I certify that the size of the type in this brief could not be determined because the brief was prepared *pro se*.

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Appellant's Pro Se Supplemental Brief to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on February 28, 2018.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Appellant's Pro Se Supplemental Brief will be eServed pursuant to ORAP 16.45 (regarding electronic sevice on registered eFilers) on Benjamin Gutman #160599, Solicitor General, attorney for Plaintiff-Respondent.

Respectfully submitted,

ERNEST G. LANNET
CHIEF DEFENDER
CRIMINAL APPELLATE SECTION

OFFICE OF PUBLIC DEFENSE SERVICES

Signed
By Andrew Robinson at 1:20 pm, Feb 28, 2018

ANDREW D. ROBINSON OSB #064861
DEPUTY PUBLIC DEFENDER
Andrew.Robinson@opds.state.or.us

Attorneys for Defendant-Appellant
Austin Callahan Brand

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

AUSTIN CALLAHAN BRAND, aka Austin Brand,
Defendant-Appellant.

Multnomah County Circuit Court
14CR28021

A162224

ORDER GRANTING TIME TO FILE PRO SE REPLY BRIEF

Appellant has moved for an extension of time to file the *pro se* Reply Brief.

The Motion is granted. The *pro se* Reply Brief was filed on February 28, 2018.

Erika L Hadlock

ERIKA L. HADLOCK
PRESIDING JUDGE, COURT OF APPEALS
2/28/2018 3:52 PM

c: Andrew D Robinson
Jordan R Silk

ne

App. P [redacted]

ORDER GRANTING TIME TO FILE REPLY BRIEF

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

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, v. AUSTIN CALLAHAN BRAND, aka Austin Brand, Defendant-Appellant.	Multnomah County Circuit Court Case No. 14CR28021 CA A162224

APPELLANT'S MOTION – EXTENSION OF TIME TO FILE PRO SE REPLY BRIEF

Defendant moves for relief from default and for an extension of time of eight days, from February 20, 2018, to and including February 28, 2018, to serve and file the *Pro Se* Reply Brief.

On January 30, 2018, this court granted defendant's motion for leave to file a *pro se* reply brief and ordered that the brief would be due on February 20, 2018. On February 16, 2018, defendant mailed the completed brief to appellate counsel. Counsel's office received the brief on February 23, 2018. Because counsel was out of the office, counsel did not become aware that the brief had been completed until February 28, 2018. Defendant respectfully requests that the court allow the necessary extension and accept the brief, which counsel submits concurrently with this motion.

Opposing counsel has no objection to this motion.

[redacted]
App. Q –

Office of Public Defense Services • Appellate Division
1175 Court St. NE • Salem, Oregon 97301-4030
Telephone: (503) 378-3349 • Fax: (503) 378-2163

I certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Motion will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Benjamin Gutman #160599, Solicitor General, attorney for respondent.

DATED February 28, 2018.

Respectfully submitted,

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

Signed
By Andrew Robinson at 10:53 am, Feb 28, 2018

ANDREW D. ROBINSON OSB #064861
DEPUTY PUBLIC DEFENDER
Andrew.Robinson@opds.state.or.us

Attorneys for Defendant-Appellant
Austin Callahan Brand

Office of Public Defense Services • Appellate Division
1175 Court St. NE • Salem, Oregon 97301-4030
Telephone: (503) 378-3349 • Fax: (503) 378-2163

IN THE COURT OF APPEALS OF THE STATE OF OREGON

Date: February 28, 2018

To: Andrew D Robinson
o/b/o Austin Callahan Brand
Ofc of Public Defense Svcs
1175 Court St NE
Salem OR 97301

From: Noelle/ Appellate Court Records Section Clerk
(503) 986-5559

Re: State of Oregon v. Austin Callahan Brand
A162224
Multnomah County Circuit Court
14CR28021

The Reply Brief was filed on February 28, 2018.

COMPLIANCE WITH THE FOLLOWING IS REQUIRED:

The Reply Brief does not conform to the Oregon Revised Statutes (ORS) and/or the Oregon Rules of Appellate Procedure (ORAP) in that:

- It does not include a certificate of compliance. ORAP 5.05(2)(d).

If the above-listed deficiency is not corrected within 14 days from the date of this notice, the defective document will not be considered by the court.

All documents filed with the court must include a certificate of service indicating that service on the opposing party was completed. ORAP 1.35(2)(a) and (d).

c: Jordan R Silk

APP. N

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

AUSTIN CALLAHAN BRAND, aka Austin Brand,
Defendant-Appellant.

Multnomah County Circuit Court
14CR28021

A162224

ORDER GRANTING *PRO SE* REPLY BRIEF

Appellant has moved for leave to file a *pro se* reply brief in this case. Opposing counsel has no objection.

The motion is granted. The *pro se* reply brief is due February 20, 2018, and must be submitted through counsel in proper form.

Erika L Hadlock

ERIKA L. HADLOCK
PRESIDING JUDGE, COURT OF APPEALS
1/30/2018 7:15 PM

c: Andrew D Robinson
Jordan R Silk

km

[redacted]
App. 5

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

AUSTIN CALLAHAN BRAND, aka Austin Brand,
Defendant-Appellant.

Multnomah County Circuit Court No. 14CR28021

Court of Appeals No. A162224

ORDER STRIKING *PRO SE* MOTIONS

Appellant himself moves the court for leave to file a *pro se* notice to the court regarding his petition for writ of habeas corpus pending in the Oregon Supreme Court; and for leave to file a motion for extension of time to file a motion for leave to file a *pro se* reply brief.

The court strikes the motions on the ground that appellant is represented by counsel and, as between appellant and the court, counsel is appellant's exclusive representative, and any motion must be filed through counsel. ORS 9.320 (where party appears by attorney, written proceedings must be through attorney); *Johnson v. Premo*, 355 Or 866, 333 P3d 288 (2014) (court does not recognize "hybrid" representation whereby party represented by counsel may file motions with the court).

Erika L Hadlock

ERIKA L. HADLOCK
PRESIDING JUDGE, COURT OF APPEALS
1/29/2018 2:40 PM

c: Andrew D Robinson
Jordan R Silk

ej

APP. T

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, v. AUSTIN CALLAHAN BRAND, aka Austin Brand, Defendant-Appellant.	Multnomah County Circuit Court Case No. 14CR28021 CA A162224

APPELLANT'S MOTION – LEAVE TO FILE PRO SE REPLY BRIEF

Defendant-appellant, through counsel, moves this court for leave to file a *pro se* reply brief. Defendant filed a *pro se* supplemental brief and the state responded to defendant's *pro se* claims in its response brief. Defendant indicates his desire to reply to the state's response to his *pro se* claims in a *pro se* reply brief.

Opposing counsel has no objection to this motion.

I certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Motion will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Benjamin Gutman #160599, Solicitor General, attorney for respondent.

DATED January 26, 2018.

Respectfully submitted,

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

Signed
By Andrew Robinson at 1:46 pm, Jan 26, 2018

ANDREW D. ROBINSON OSB #064861
DEPUTY PUBLIC DEFENDER
Andrew.Robinson@opds.state.or.us
Attorneys for Defendant-Appellant
Austin Callahan Brand

App. C

Office of Public Defense Services • Appellate Division
1175 Court St. NE • Salem, Oregon 97301-4030
Telephone: (503) 378-3349 • Fax: (503) 378-2163

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, v. AUSTIN CALLAHAN BRAND, aka Austin Brand, Defendant-Appellant.	Multnomah County Circuit Court No. 14CR28021 CA A162224

RESPONDENT'S ANSWERING BRIEF

Appeal from the Judgment of the Circuit Court
for Multnomah County
Honorable JOHN A. WITTMAYER, Judge

ERNEST LANNET #013248
Chief Defender
Office of Public Defense Services
ANDREW ROBINSON #064861
Deputy Public Defender
1175 Court St. NE
Salem, Oregon 97301
Telephone: (503) 378-3349
Email:
andrew.robinson@opds.state.or.us

Attorneys for Defendant-Appellant

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
JORDAN R. SILK #105031
Assistant Attorney General
1162 Court St. NE
Salem, Oregon 97301-4096
Telephone: (503) 378-4402
Email: jordan.r.silk@doj.state.or.us

Attorneys for Plaintiff-Respondent

12/17

[redacted]
-App. V

TABLE OF CONTENTS

STATEMENT OF THE CASE 1

Summary of Argument 1

ANSWER TO FIRST ASSIGNMENT OF ERROR 3

The trial court did not err in admitting Turnage's testimony that the victim's failure to promptly report defendant's conduct was an example of the phenomenon of delayed reporting in domestic violence cases 3

A. Preservation 3

B. Standard of Review 4

ARGUMENT 4

A. Background 4

1. The victim attempts to hide from defendant, her ex-boyfriend, but he finds her and terrorizes her over multiple days. 4

2. Detective Turnage testifies about delayed reporting. 9

B. The trial court did not err in allowing the challenged portion of Turnage's testimony. 10

1. Defendant's general objection to delayed reporting evidence cannot be reconciled with this court's case law. 11

2. Turnage's application of general delayed reporting principles to the specific facts of this case was not tantamount to stating that the victim was telling the truth. 13

3. *McCarthy* does not (and ought not) control this case. 16

C. The challenged portion of Turnage's testimony was harmless 20

ANSWER TO SECOND ASSIGNMENT OF ERROR 20

The trial court did not plainly err in failing to strike, *sua sponte*, Officer Hardy's testimony that the victim "seemed like a girl that—that didn't know what else to do, and so she's finally coming to the police but didn't want [defendant] necessarily to get into a bunch of trouble." 20

ANSWER TO THIRD ASSIGNMENT OF ERROR 20

The trial court did not plainly err in failing to strike, *sua sponte*, Officer Hardy's testimony that, when he first responded in this case, his interactions with the victim led him to think that "this was a big deal, that this was a big case, that bad things happened, and we needed to step in and save this girl[.]" 20

ANSWER TO FOURTH ASSIGNMENT OF ERROR 21

The trial court did not plainly err in failing to strike, *sua sponte*, Officer Hardy's testimony that, in his opinion, "there was a lot of minimization about what actually occurred." 21

A. Combined Preservation 21

B. Combined Standard of Review 21

COMBINED ARGUMENT 21

A. Background 22

B. The challenged portions of Hardy's testimony do not constitute "true vouching," so the trial court did not plainly err in failing to strike them *sua sponte* 25

C. To the extent that the trial court erred in failing to strike Hardy's statements *sua sponte*, this court should decline to exercise its discretion to correct the error. 26

ANSWER TO FIFTH ASSIGNMENT OF ERROR 27

Even assuming that the trial court erred in failing to deliver a concurrence instruction on Count 6 (coercion), any error was harmless. 27

A. Preservation 28

B. Standard of Review 28

ARGUMENT 28

ANSWER TO SIXTH ASSIGNMENT OF ERROR 32

The trial court did not plainly err in instructing the jury on Count 5, first-degree kidnapping. 32

A. Preservation 32

B. Standard of Review 32

ARGUMENT 33

A. Defendant has failed to establish plain error 34

B. Even if the trial court plainly erred, this court should decline to exercise its discretion to correct the error. 36

ANSWER TO *PRO SE* ASSIGNMENTS OF ERROR 36

Defendant's *pro se* assignments of error and supporting arguments identify no basis for reversal. 36

ARGUMENT 37

CONCLUSION 39

TABLE OF AUTHORITIES

Cases

Briggs v. Lamvik,
242 Or App 132, 255 P3d 518 (2011) 38

J.C. Compton Company v. Brewster,
187 Or App 709, 69 P3d 719 (2003) 38

Mellerio v. Nooth,
279 Or App 419, 379 P3d 560 (2016) 32

State v. Ashkins,
357 Or 642, 357 P3d 490 (2015) 2, 28, 29, 30, 31, 32, 40

State v. Beauvais,
357 Or 524, 354 P3d 680 (2015) 11, 13, 14, 15, 16, 19

State v. Black,
289 Or App 256, __ P3d __ (2017) 4, 11, 13, 14, 15, 16, 21

State v. Blaylock,
267 Or App 455, 341 P3d 758 (2014) 20

State v. Brown,
310 Or 347, 800 P2d 259 (1990) 21

State v. Cloutier,
351 Or 68, 261 P3d 1234 (2011) 35

State v. Collins,
256 Or App 332, 300 P3d 238 (2013) 12

State v. Corkill,
262 Or App 543, 325 P3d 796,
rev den, 355 Or 751 (2014) 25, 26

State v. Cox,
337 Or 477, 98 P3d 1103 (2004),
cert den, 546 US 830 (2005) 27

State v. Davis,
336 Or 19, 77 P3d 1111 (2003) 20

State v. Gray,
261 Or App 121, 322 P3d 1094 (2014) 34, 35

State v. Henley,
281 Or App 825, 386 P3d 126 (2016),
rev allowed, 360 Or 752 (2017) 17

State v. Hunt,
270 Or App 206, 346 P3d 1285 (2015) 21, 25

State v. Keller,
315 Or 273, 844 P2d 195 (1993) 14, 15, 16, 19

State v. Kerne,
289 Or App 345, __ P3d __ (2017) 27, 36

State v. Lupoli,
348 Or 346, 234 P3d 117 (2010) 17, 19

State v. McCarthy,
251 Or App 231, 283 P3d 391 (2012) 16, 17, 18, 19

State v. Middleton,
294 Or 427, 657 P2d 1215 (1983) 11, 13, 14, 15, 18, 19, 25

State v. Milbradt,
305 Or 621, 756 P2d 620 (1988) 14, 15, 16, 19

State v. Montez,
309 Or 564, 789 P2d 1352 (1990) 38

State v. Montgomery,
50 Or App 381, 624 P2d 151 (1981) 34

State v. Nguyen,
222 Or App 55, 191 P3d 767 (2008),
rev den, 345 Or 690 (2009) 26

State v. Parkins,
346 Or 333, 211 P3d 262 (2009) 34, 35

State v. Pipkin,
354 Or 513, 316 P3d 255 (2013) 28, 29, 34

State v. Remme,
173 Or App 546, 23 P3d 374 (2001) 13, 18

State v. Reynolds,
250 Or App 516, 280 P3d 1046,
rev den, 352 Or 666 (2012) 27

State v. Russum,
265 Or App 103, 333 P3d 1191,
rev den, 356 Or 575 (2014) 11

State v. Simonsen,
275 Or App 154, 364 P3d 702 (2015) 33, 35

State v. Southard,
347 Or 127, 218 P3d 104 (2009) 16, 17, 19

State v. Sundberg,
268 Or App 577, 342 P3d 1090,
rev den, 357 Or 325 (2015) 11, 12

State v. Swain,
13 Or App 600, 510 P2d 1341 (1973),
rev'd on other grounds,
267 Or 527 (1974) 37

State v. Swinney,
269 Or App 548, 345 P3d 509,
rev den, 357 Or 743 (2015) 12, 18

State v. Teagues,
281 Or App 182, 383 P3d 320 (2016) 28, 29

State v. Varnornum,
354 Or 614, 317 P3d 889 (2013) 33

State v. White,
252 Or App 718, 288 P3d 985 (2012) 11

State v. Zavala,
276 Or App 612, 368 P3d 831 (2016),
rev'd on other grounds,
361 Or 377 (2017) 36

Statutes & Constitutional Provisions

ORCP 59 B 34

ORS 133.545 37

ORS 133.555 37
ORS 133.555(4) 37
ORS 133.693 37
ORS 136.225(1)(b) 33
ORS 136.235 33
ORS 163.225(1)(b) 33, 34
ORS 19.270(5) 37

RESPONDENT'S ANSWERING BRIEF

STATEMENT OF THE CASE

Respondent State of Oregon accepts defendant's statement of the case, except to the extent that the facts are supplemented or clarified in the argument below.

Summary of Argument

Defendant appeals convictions for first-degree kidnapping, coercion, fourth-degree assault, and menacing (all constituting domestic violence), after he terrorized his ex-girlfriend over the course of multiple days. On appeal, he claims that two different witnesses engaged in impermissible vouching, that the trial court erred in failing to deliver a concurrence instruction on the coercion charge, and that the trial court delivered an erroneous jury instruction on the kidnapping charge. This court should affirm.

1. Defendant's first assignment of error challenges Detective Turnage's testimony that delayed reporting is a common phenomenon in domestic violence cases and that, in his view, the victim in this case delayed reporting out of fear of further assaults by defendant. Defendant contends that that testimony impermissibly vouched for the victim, but defendant is incorrect. This court has already held that testimony about the phenomenon of delayed reporting is admissible. And Turnage's testimony applying those principles to the facts of this case was not "'tantamount' to stating that [the victim was]

credible"; any implication that Turnage believed the victim was sufficiently remote from the substance of his testimony. In any event, Turnage's testimony was harmless because another witness offered the same opinion about the victim's behavior and defendant does not challenge that testimony on appeal.

2-4. Defendant's second through fourth assignments of error argue that the trial court erred in failing to strike *sua sponte* three different statements by Officer Hardy regarding his interaction with the victim after responding to a 911 call. None of Hardy's challenged testimony was "true vouching," however, so the trial court had no *sua sponte* obligation to strike it. Indeed, Hardy's statements were not vouching at all. Rather, they explained why Hardy believed further investigation of the victim's circumstances was imperative, at a time when he had limited knowledge of the situation and the victim seemed conflicted between seeking police help and avoiding getting defendant in trouble.

5. Defendant's fifth assignment of error argues that the trial court plainly erred in failing to deliver a jury concurrence instruction on the coercion charge, because the evidence in this case supported multiple, temporally distinct instances of coercion and the state did not elect a specific factual occurrence. But even assuming the trial court erred, any error was harmless under *State v. Ashkins*, 357 Or 642, 357 P3d 490 (2015), because the evidence of coercion

was undifferentiated and nonspecific, and defendant did not challenge particular occurrences of that conduct, but rather asserted that none of it happened.

6. Defendant's sixth assignment of error challenges as plain error the trial court's jury instruction on the kidnapping charge because the trial court instructed the jury that it had to find that defendant "secretly confined" the victim but did not expressly instruct that the confinement must occur "in a place where [the victim] is not likely to be found." That claim fails because "*secret* confinement" plausibly subsumes a finding that the confinement occurs in a place where the victim is not likely to be found. It is therefore not obvious that the trial court failed to adequately instruct the jury on the law. For the same reason, any error in instructing the jury was sufficiently harmless to be unworthy of correction by this court.

ANSWER TO FIRST ASSIGNMENT OF ERROR

The trial court did not err in admitting Turnage's testimony that the victim's failure to promptly report defendant's conduct was an example of the phenomenon of delayed reporting in domestic violence cases.

A. Preservation

Defendant preserved an objection that Turnage's testimony about delayed reporting impermissibly speculated on the "motives, behaviors, and justification" for the victim's conduct, and that that testimony impermissibly vouched for the victim insofar as, in offering an explanation for a delayed

report *other than fabrication*, all delayed reporting evidence necessarily assumes that the victim did not fabricate her allegations of abuse. Tr 749-50.

B. Standard of Review

The question whether testimony constitutes impermissible "vouching" is one of law. *State v. Black*, 289 Or App 256, 261, __ P3d __ (2017).

ARGUMENT

Defendant's first assignment of error challenges the trial court's admission of Detective Turnage's testimony that the victim's "failure to promptly report defendant's conduct was an example of the phenomenon of delayed reporting in domestic violence cases." That argument fails because this court has already held that testimony about the phenomenon of delayed reporting is generally admissible, and Turnage's application of that principle to the facts of this case was not tantamount to stating that the victim was telling the truth.

A. Background

1. The victim attempts to hide from defendant, her ex-boyfriend, but he finds her and terrorizes her over multiple days.

Defendant and the victim began dating about a year before the events of this case. Tr 247. As their relationship progressed, defendant became more controlling. Tr 247, 612, 629. Defendant also became physically violent; six months before the events of this case, defendant threw food at the victim and punched her in the face. Tr 247-54. The victim left defendant for about two

months afterward, but they got back together. Tr 252-53, 267. Defendant again became possessive. Tr 268-69. Two months before the events in this case, defendant and the victim got into two physical fights. Tr 270-74.

After those fights, the victim decided to leave defendant again. Tr 274. Defendant was close with the victim's family, so the victim felt that she needed to hide her whereabouts from her family. Tr 274-75. The victim moved in with a friend, Klein, whom she had met at her methadone clinic. Tr 274-76.

Two months after moving in with Klein, defendant showed up at Klein's apartment. Tr 277-78. Defendant and the victim spoke, and defendant persuaded the victim to visit her family with him. Tr 278-79. Her family was upset about her disappearance and turned her away. Tr 279-80. Defendant and the victim ended up drinking at a bar, and the victim became intoxicated. Tr 280-82. They returned to Klein's apartment, spent the night together, and had consensual sex. Tr 282.

Defendant left in the morning, but returned that evening. Tr 282-84. Defendant and the victim talked in defendant's car. *Id.* Defendant wanted to get back together, but the victim said she could not. Tr 284-85.

When the victim told defendant she did not want to be with him, he "jumped on top of [her] in the car and strangled [her]." Tr 286. The victim lost consciousness briefly. Tr 286-88. When she came to, she was still in the car

and defendant was driving out of the parking lot. Tr 288. The victim tried to escape, but defendant kept her inside. Tr 288-89.

Defendant drove around for hours in a rural area near defendant's parents' house, apparently "killing time" while "everyone was awake" because he was not allowed there. Tr 320-21. During that time, defendant drove aggressively and threatened to kill himself and the victim because she refused to be with him. Tr 325, 331-33. The victim "want[ed] to survive" so she told defendant that she would be with him. Tr 325. Eventually, defendant took the victim to his parents' house, entering the basement through a sliding glass door. Tr 334.

In the basement, defendant "initiated sex" and told the victim "that if [she] were to scream or make any noise * * * that he would punch [her] teeth out[.]" Tr 338. The victim "did not resist or fight," but she did not want to have sex with defendant. Tr 338-39. She did not feel that she had a choice, however, and defendant had intercourse with her. Tr 339.

Defendant then took the victim, still naked, and in cold weather, to a partially-finished room inside of a barn on his parents' property. Tr 341-44. The victim resisted, but defendant carried her, squeezing her tightly enough to silence her and cause pain. Tr 342-43. The floors of the room inside the barn were concrete and "there were spiders" and "little egg sacs everywhere." Tr

346. Defendant told the victim that he was going to keep her in that room for a month to "withdraw [her] from methadone[.]" Tr 341, 347.

Defendant later brought a mattress and blankets into the room, as well as a beer for himself and a soda for the victim. Tr 349-51; *see also* Exs 128, 129 (photographs of the room taken later by police). Defendant and the victim had sex again, even though the victim did not want to. Tr 356. They stayed in the room overnight. Tr 353.

The next morning, defendant learned that he had been selected for a post-prison supervision urinalysis. Tr 362. Defendant assumed that his urinalysis would be "dirty" and that he would go to jail. Tr 363. Defendant decided to take the victim with him rather than keeping her in the barn; he told her that if he was arrested, she could take the car, and she told him that she would not go to the police about what he had done. Tr 364.

On the way to the urinalysis, defendant allowed the victim to stop at Klein's apartment to get clothes. Tr 369. He threatened her to come back within 10 minutes. Tr 370-72.

In the apartment, Klein saw that she was naked except for a "really flimsy blue blanket." The victim told Klein that defendant kidnapped her, and he could see several bruises on her body. Tr 659-60. The victim chose to continue with defendant on the expectation that he would be arrested. Tr 372-73.

Defendant was not arrested, however. Tr 379. The victim worked the next two days at her bartending job; defendant showed up each evening and waited for her get off work. Tr 379-80, 383-84. The next morning, defendant took the victim to the methadone clinic. Tr 384-85. Klein was there; he smuggled the victim out of the clinic and back to his apartment. *Id.*

Defendant followed. Tr 388-89. He banged and kicked the door, demanding to see the victim. *Id.* Klein called 911. Tr 670-75 (recording of Klein's 911 call). Police arrived, but the victim was reticent to tell everything defendant had done for fear of getting him in trouble. Tr 391-92. Klein volunteered that defendant kidnapped her. *Id.*; *see also* Tr 479-80 (Officer's Hardy's testimony that the victim told Klein to "[s]top" and then told Hardy "I don't know why I'm telling you this. I don't want [defendant] to get in trouble, but I don't want to get abused anymore.'"). Police took defendant into custody. Tr 479.

As a result of defendant's actions over those four days, the state charged 12 crimes: first-degree rape, first-degree kidnapping based on taking the victim from one place to another, first-degree kidnapping based on secretly confining the victim, coercion based on the threats directed at the victim herself, coercion based on threats defendant made to harm the victim's sister, attempted first-degree burglary, two counts of fourth-degree assault, strangulation, menacing,

reckless endangerment, and reckless driving. ER-1-4.[1] The jury returned guilty verdicts on five of those charges: kidnapping based on secretly confining the victim, coercion based on threatening the victim herself, menacing, fourth-degree assault, and reckless endangerment. Tr 957-60; ER-5-6. The jury was unable to reach a verdict on the charge of first-degree rape, and it acquitted defendant of the remaining charges. Tr 952-60.[2] Defendant now appeals his convictions.

2. Detective Turnage testifies about delayed reporting.

Defendant's first assignment of error challenges a portion of the testimony offered by a detective who investigated the case, Turnage. Defendant contends that Turnage impermissibly vouched for the victim when he testified that the victim's "failure to promptly report defendant's conduct was an example of the phenomenon of delayed reporting in domestic violence cases." App Br 15.

As pertinent to that issue, Turnage testified that he had specialized training on domestic violence investigations at the police academy and "over a hundred hours of classes" on the subject. Tr 752-53. "[P]robably 70 percent"

---

[1] The state dismissed two other counts charged in the indictment before trial.

[2] The trial court declared a mistrial on the first-degree rape charge, and the state later dismissed it. Tr 956, 1045-46.

of Turnage's caseload is "domestic violence related." Tr 729. He has investigated domestic violence incidents "since the first day [he] was a police officer" and police "respond to [it] every, single day." Tr 729, 752-53.

Based on his training and experience, Turnage explained that victims of domestic violence frequently delay reporting their abuse for "lots and lots" of reasons, such as financial or emotional dependency, love, and a desire not to incriminate their partner. Tr 753-55. Turnage testified further that "When [he] spoke to [the victim] it became clear to [him that] the reason [the victim] chose not [to promptly report defendant to police] was under fear, fear of continued assaults against herself." Tr 756.

B. The trial court did not err in allowing the challenged portion of Turnage's testimony.

Defendant argues that Turnage's testimony about delayed reporting impermissibly "vouched" for the victim because it "necessarily was based on his assessment of [the victim's] credibility[.]" App Br 20. But defendant's general objection to delayed reporting evidence cannot be reconciled with this court's cases holding general delayed reporting evidence admissible, and defendant preserved no more specific objection to any particular part of Turnage's testimony. In any event, Turnage's statement that the victim delayed reporting out of fear of future assaults was not tantamount to a statement that the victim was telling the truth.

1. Defendant's general objection to delayed reporting evidence cannot be reconciled with this court's case law.

To be sure, no witness may, directly or indirectly, offer an opinion that another witness is telling the truth. *Black*, 289 Or App at 261-62; *see also Middleton*, 294 Or 427, 438, 657 P2d 1215 (1983) (stating rule). "That prohibition applies both to 'direct comments on the credibility of another witness, as well as to statements that are 'tantamount' to stating that another witness is credible.'" *Black*, 289 Or App at 261-62 (quoting *State v. Beauvais*, 357 Or 524, 543, 354 P3d 680 (2015)). But this court has repeatedly held that expert testimony "regarding the phenomenon of delayed reporting" is relevant and admissible to "explain why the complainant may have delayed reporting" and to "counter a possible inference by the jury that the delay is indicative of fabrication.'" *State v. Sundberg*, 268 Or App 577, 582-83, 342 P3d 1090, *rev den*, 357 Or 325 (2015) (quoting *State v. White*, 252 Or App 718, 723, 288 P3d 985 (2012)); *accord State v. Russum*, 265 Or App 103, 122, 333 P3d 1191, *rev den*, 356 Or 575 (2014).

In light of those authorities, defendant's argument fails to the extent it rests on the premise that—in providing an explanation for delayed reporting *other than fabrication*—*all* delayed reporting evidence necessarily assumes that the victim did not fabricate her allegations of domestic violence. The evidence is relevant precisely because it rests on that factual assumption—*i.e.*, the

possibility that the victim's delay in reporting can be explained by reasons *other than fabrication*. That does not make it impermissible vouching. *See id.*; *see also State v. Swinney*, 269 Or App 548, 559, 345 P3d 509, *rev den*, 357 Or 743 (2015) (quoting *Sundberg*, 268 Or App at 585 ("[T]here is a distinction between impermissible vouching and corroboration," and evidence does not violate the rule against vouching merely because it informs the jury's *own* assessment of the victim's conduct "and, by extension, her credibility.")).

As noted, defendant preserved only a general objection to delayed reporting evidence at trial. Tr 749-50 (arguing that all delayed reporting evidence is vouching because it assumes that the victim did not fabricate her allegations of domestic violence). Defendant preserved no more specific objection to any part of Turnage's testimony, including Turnage's statement that, in his view, the victim delayed reporting out of fear of further assaults. This court should accordingly decline to consider defendant's first assignment of error further. *See State v. Collins*, 256 Or App 332, 347, 300 P3d 238 (2013) ("When a party objects to evidence as a whole and the trial court rules that the evidence is admissible, the reviewing court will affirm the trial court's ruling when any part of the evidence is admissible.").

2. Turnage's application of general delayed reporting principles to the specific facts of this case was not tantamount to stating that the victim was telling the truth.

To the extent that defendant preserved a more specific objection to Turnage's statement that the victim delayed reporting out of fear of further assaults, that claim also fails, because that testimony was not "'tantamount' to stating that'" the victim was telling the truth. *Black*, 289 Or App at 261-62 (quoting *Beauvais*, 357 Or at 543). As amplified below, the mere fact that an expert's application of general principles to specific facts implies that the expert believes the victim does not make the testimony impermissible vouching. The testimony is permissible as along as the vouching inference is sufficiently "remote" from the substance of the testimony, and it serves a purpose other than merely "signaling" to the jury that the expert believes the victim. *Beauvais*, 357 Or at 543-44 (identifying that basis for distinguishing between permissible and impermissible testimony in this context).

As a starting point, the mere fact that Turnage applied general delayed-reporting principles to the specific facts of this case did not result in vouching. *See State v. Remme*, 173 Or App 546, 558, 23 P3d 374 (2001) (experts permissibly may provide "not only *general* testimony about" typical behavior of abuse victims "but also testimony as to whether the *particular* complainant's conduct was consistent with that behavior"). For example, in *Middleton*, the Supreme Court held permissible an expert witness's testimony *both* explaining

generally that child sexual abuse victims sometimes recant, and also opining that the victim's recantation was "very typical for a teenage sex abuse victim." 294 Or at 433, 433 n 6. That testimony was not impermissible vouching merely because, by offering a reason *other than fabrication* for why the victim in that case recanted, the expert's testimony implied that victim's allegations of sexual abuse were truthful. *Beauvais*, 357 Or at 544 (discussing *Middleton*).

Instead, expert testimony applying general principles to specific facts becomes impermissible only if it goes beyond implying that the victim is telling the truth and more directly asserts a conclusion about credibility. *See id.* (implicit suggestion that a victim is telling the truth is not impermissible if the improper vouching inference is sufficiently "remote" from the substance of the testimony). For example, in *State v. Keller*, 315 Or 273, 285, 844 P2d 195 (1993), the Supreme Court disapproved testimony that a child victim exhibited "no evidence of leading or coaching or fantasizing[.]" And in *State v. Milbradt*, 305 Or 621, 629-30, 756 P2d 620 (1988), the Supreme Court similarly disapproved testimony "that a witness was 'not deceptive,' was incapable lying without getting 'tripped up,' and would not betray a friend[.]" *Black*, 289 Or App at 262 (quoting *Milbradt*). In both cases, the expert's assertions related specifically to witness credibility—*i.e.*, whether a witness had been "coached" or exhibited signs of "decep[tion]"—and thus merely "signaled" the expert's own views on credibility. *See Beauvais*, 357 Or at 543-44 (comparing *Milbradt*

and *Keller* with *Middleton* and concluding that the application of the general to the specific in *Middleton* was permissible because the expert's implicit suggestion that the victim "was telling the truth was more remote than the inferences in *Milbradt* and *Keller*").

Most recently, in *Black*, this court considered those principles in the context of expert testimony about interviewing protocols designed to support truthful responses from abuse victims. *See id.* at 267. This court disapproved testimony opining that such protocols were violated in a specific case because, consistently with *Keller* and *Milbradt*, the assertion that an interviewer failed to follow an interview protocol *specifically designed to support truthful responses* merely signals to the jury the expert's view that the jury should disbelieve the interviewee's responses. *See id.*

The foregoing principles demonstrate that Turnage's testimony that the victim delayed reporting out of fear of physical violence was not tantamount to stating that the victim was telling the truth. Instead, like *Middleton*, that testimony merely applied general delayed reporting principles to the victim's circumstances. "[T]he primary effect of [that] statement was to show that," out of the universe of possible reasons *other than fabrication* a victim of domestic violence might delay reporting, the victim's own circumstances suggested the most likely reason to be her fear of further assaults by defendant. *See Beauvais*, 357 Or at 544 (describing *Middleton*). Turnage's statement did not relate more

directly to any issue of credibility, as the improper testimony in *Keller*, *Milbradt*, and *Black* had, nor was it merely a means of "signaling [Turnage's] belief" to the jury that the victim was telling the truth. *Black*, 289 Or App at 264 (quoting *Beauvais*, 357 Or at 543).

In sum, any implicit suggestion in Turnage's testimony that the victim was telling the truth was sufficiently "remote" from the substance of his testimony, and no improper vouching occurred. *Beauvais*, 357 Or at 544 (identifying that basis for distinguishing between permissible and impermissible testimony); *cf. Black*, 289 Or App at 264 (expert's opinion as to whether interview protocols designed to support truthfulness were violated merely signaled the expert's views as to whether interviewee's responses were truthful). The trial court did not err in allowing Turnage's testimony.

3. *McCarthy* does not (and ought not) control this case.

In urging a contrary conclusion, defendant relies on this court's decision in *State v. McCarthy*, 251 Or App 231, 233, 235-36, 283 P3d 391 (2012). But defendant's reliance on *McCarthy* is misplaced for at least two reasons. First, *McCarthy* is distinguishable. In *McCarthy*, this court disapproved a CARES nurse practitioner's testimony that the child sexual abuse victim "delayed her disclosure because of fear" and was "groomed" not to report. *Id.* at 233, 235-36. This court analyzed the propriety of that testimony through the lens of *State v. Southard*, 347 Or 127, 218 P3d 104 (2009), and *State v. Lupoli*, 348 Or 346,

234 P3d 117 (2010), which hold that a scientific diagnosis of sexual abuse is inadmissible in the absence of corroborating physical evidence because it rests solely on the expert's assessment of the child victim's credibility.

This case is not amenable to such an analysis, however, for two reasons. First, this case did not involve any scientific diagnosis; instead, Turnage testified solely based on his training and experience investigating domestic violence cases. *Compare Southard*, 347 Or at 138-39 (a diagnosis of child sexual abuse is "scientific" evidence), *with State v. Henley*, 281 Or App 825, 833-34, 386 P3d 126 (2016), *rev allowed*, 360 Or 752 (2017) (evidence is not "scientific" if it derives solely from a witness's training and experience). Second, the jury in this case had before it physical evidence of defendant's assaultive conduct of the victim. *See* Exs 8-41 (photographs of the victim's injuries). Thus, to the extent that Turnage's testimony can be viewed through the lens of *Southard/Lupoli*, the jury would not have understood the victim's potential credibility to be the only evidence supporting Turnage's opinion.

This court also should decline to follow *McCarthy* for a second reason. Specifically, to the extent it is not distinguishable, it is clearly erroneous. In explaining why the testimony in *McCarthy* was improper, this court stated that the testimony improperly failed to restrict itself to "general terms" and instead discussed delayed reporting and grooming "as [they] related to the complainant's circumstances in this case." *Id.* at 236. This court explained

further that that application of the general to the specific "necessarily was based on [the witness's] assessment of [the victim's] credibility and, thus, amounted to impermissible vouching." *Id.*

To the extent that *McCarthy* holds that an expert's application of general principles to the specific facts of a case is categorically improper, it cannot be reconciled with the decisions discussed above, decided both before and after *McCarthy*. As explained, this court and the Supreme Court have repeatedly held that expert testimony permissibly may apply general principles like delayed reporting to the specific facts of the case. *Middleton*, 294 Or at 433, 433 n 6 (permitting testimony that the victim's behavior was "typical" of a child sexual abuse victim); *Swinney*, 269 Or App at 559 (permitting testimony that defendant's conduct was "classic" grooming); *see also Remme*, 173 Or App at 558 (recognizing that "*Middleton* approved not only *general* testimony about" typical behavior of abuse victims "but also testimony as to whether the *particular* complainant's conduct was consistent with that" behavior).[3]

---

[3] To the extent that this court's decisions suggest that the specific words an expert uses to apply general principles to specific facts makes the difference, this court should decline to draw a legal line based on such semantic parsing of witness testimony. As explained above, all delayed reporting evidence puts before the jury the factual assumption that the victim did not fabricate her allegations and, in that context, the jury is unlikely to perceive a significant difference between opinion testimony that "the victim delayed reporting out of fear of further assaults" and opinion testimony that "the victim's delay in reporting was consistent with that of a domestic violence victim who delays

Footnote continued...

As also noted above, the Supreme Court recently reaffirmed those principles in *Beauvais*. There, the Supreme Court recognized that experts permissibly may apply general principles to specific facts, just not if the application merely "signal[s]" to the jury that the expert believes the victim. *See Beauvais*, 357 Or at 543-44 (expert's application of the specific to the general was permissible in *Middleton*, but impermissible in *Keller* and *Milbradt*, and the difference was the proximity of the improper vouching inference to the substance of the expert's assertion). Furthermore, in the context of a *Southard/Lupoli* challenge, the Supreme Court in *Beauvais* held that an expert permissibly could both describe evaluative criteria for assessing child sexual abuse disclosures and describe the specific behavior exhibited by the victim relevant to those criteria. *Beauvais*, 357 Or at 546-47. In both of those ways, it is difficult to reconcile *McCarthy*'s reasoning with the Supreme Court's later-decided opinion in *Beauvais*. For all of those reasons, *McCarthy* supplies no basis for reversal in this case.

(...continued)
reporting out of fear of further assaults." To the extent that a witness fails to follow the latter formulation on direct examination, a defendant remains free to clarify on cross-examination that the expert's knowledge extends to correlations only.

C. The challenged portion of Turnage's testimony was harmless.

Even assuming that the trial court erred in allowing the challenged portion of Turnage's testimony, any error was harmless. *See State v. Davis*, 336 Or 19, 31-32, 77 P3d 1111 (2003) (evidentiary error does not require reversal if it had little likelihood of affecting the verdict). A different witness—Officer Hardy—offered the same opinion as Turnage that the victim's failure to promptly report defendant's conduct was typical for a victim of domestic violence, and defendant does not challenge that testimony on appeal. Tr 485-86; *see State v. Blaylock*, 267 Or App 455, 472, 341 P3d 758 (2014) (erroneously admitted evidence is harmless if it is "not 'qualitatively different'" than other unchallenged evidence) (quoting *Davis*, 336 Or at 34).

ANSWER TO SECOND ASSIGNMENT OF ERROR

The trial court did not plainly err in failing to strike, *sua sponte*, Officer Hardy's testimony that the victim "seemed like a girl that—that didn't know what else to do, and so she's finally coming to the police but didn't want [defendant] necessarily to get into a bunch of trouble."

ANSWER TO THIRD ASSIGNMENT OF ERROR

The trial court did not plainly err in failing to strike, *sua sponte*, Officer Hardy's testimony that, when he first responded in this case, his interactions with the victim led him to think that "this was a big deal, that this was a big case, that bad things happened, and we needed to step in and save this girl[.]"

ANSWER TO FOURTH ASSIGNMENT OF ERROR

The trial court did not plainly err in failing to strike, *sua sponte*, Officer Hardy's testimony that, in his opinion, "there was a lot of minimization about what actually occurred."

A. Combined Preservation

Defendant concedes that these claims of error are not preserved.

B. Combined Standard of Review

As noted, the question whether testimony constitutes impermissible "vouching" is one of law. *Black*, 289 Or at 261; *see also State v. Hunt*, 270 Or App 206, 210, 213, 346 P3d 1285 (2015). However, because these claims of error are not preserved, the rules governing plain-error review also apply. Beyond showing that the issue is one of law, defendant also must establish that the asserted error is "not reasonably in dispute" and that it "appears on the record, meaning that" this court "need not go outside the record or choose between competing inferences to find it." *Hunt*, 270 Or App at 210 (quoting *State v. Brown*, 310 Or 347, 355, 800 P2d 259 (1990)). And even if defendant establishes plain error under those principles, this court must still decide whether to exercise its discretion to correct the error. *Id.*

COMBINED ARGUMENT

Defendant's second through fourth assignments of error argue that the trial court plainly erred in failing to strike *sua sponte* three separate portions of

Officer Hardy's testimony. In defendant's view, the challenged portions of Hardy's testimony impermissibly vouched for the victim. Defendant's claims fail because the challenged testimony was not "true vouching" evidence, so the trial court did not plainly err in failing to strike it *sua sponte*.

A. Background

Officer Hardy was one of the officers who responded to Klein's apartment on the day police took defendant into custody. Tr 477. While two officers made contact with defendant, Hardy contacted the victim. Tr 478. Hardy described the circumstances and his interaction with the victim as follows; the portions defendant challenges are emphasized:

> I walked into the apartment. It was like walking into a hurricane. [The victim] was crying, she was sobbing, she was pacing back and forth, she appeared to be fearful. I was trying to calm her down to try to figure out what was going on. [Klein] was back in the living room sitting on the couch. I had to make sure that he put his gun away while trying to corral [the victim]. She was saying * * * "He hurt me, and if he gets in here he's going to hurt [Klein]." * * * I finally get her to stop for a second, and * * * I'm like, "What's—what's going on? You said he hurt you. What's going on?" And she just kind of blurts out, "I've been running for a month," or something along those lines, "away from my family. He's my boyfriend," or, "my ex-boyfriend. He's really good friends with my brother. He's abused me. I can't get away from him because he's friends with my family. My family doesn't know where I'm at," on and on and on. 'He choked me. He choked me for 12 seconds.' * * * 'and he's hurt me.' And then at that point she pulled down her shirt a little bit and I saw red marks around her neck and I saw bruises on her shoulders. And in the midst of all that, [Klein] blurted out, "He kidnapped her." * * *.

* * * * *

> [The victim] turned around and said, "Stop. You know, I don't want"—she basically said, "I don't know why I'm telling you this. I don't want him to get in trouble, but I don't want to get abused anymore." *She seemed like a girl that—that didn't know what else to do, and so she's finally coming to the police but didn't want [defendant] necessarily to get into a bunch of trouble.*

Tr 479-80 (emphasis added).

Hardy "continued to talk with [the victim] about what had happened, and she went through a long list of things." Tr 480. Hardy "finally got her to kind of calm down," but then "her mother showed up into the house. And then it just spun back up again, and her mom was just as spun up as she was." *Id.*

Hardy eventually "pulled [the victim] aside and tried to talk with her some more." Tr 481. She continued "explaining * * * the different things that had occurred" and Hardy asked her, "Did he rape you?" Tr 482. "And at that point it was the first time she went silent, and she looked down, and there was about 10 seconds of silence, and then she said no." *Id.* In the context of that testimony, the prosecutor asked Hardy "What was going through your head?" *Id.* Hardy responded,

> *That this was a big deal, that this was a big case, that bad things happened, and we needed to step in and save this girl is what was going through my mind.*

Id. (emphasis added).

Hardy then reviewed his training and experience in domestic violence investigations. Tr 483-84. After doing so, Hardy resumed his prior testimony that, in his opinion

> *there was a lot of minimization about what actually had occurred.* I was really trying to build rapport with her so she could trust me, I could help her feel safe so that she could try to divulge what had happened to someone she trusted and know that she's in a safe place. And I felt that when she told me no, that she specifically minimized a sexual assault that had occurred.

Tr 485 (emphasis added).

Defendant argues that the trial court plainly erred in failing *sua sponte* to strike as impermissible vouching the three portions of Hardy's testimony emphasized above. First, Hardy's statement—in the context of the victim disclosing some of defendant's conduct but directing Klein not to volunteer information—that the victim "seemed like a girl * * * that didn't know what else to do, and so she's finally coming to the police but didn't want [defendant] necessarily to get into a bunch of trouble." Second, Hardy's statement—in the context of the victim's hesitation and denial that defendant had raped her—that "this was a big deal, that this was a big case, that bad things happened, and we needed to step in and save this girl[.]" And third, Hardy's statement—again in the context of the victim's denial that defendant had raped her—that "there was a lot of minimization about what actually had occurred."

Defendant's argument fails because those statements are not "true vouching," so the trial court did not plainly err in failing to strike them *sua sponte*. And even if the trail court plainly erred, this court should decline to correct the error.

B. The challenged portions of Hardy's testimony do not constitute "true vouching," so the trial court did not plainly err in failing to strike them *sua sponte*.

As explained above, no witness may comment on the credibility of another witness. *Middleton*, 294 Or at 438. "'[T]rue' vouching" evidence is "one witness's testimony he or she believes that another witness is or is not credible, which a party offers to bolster or undermine the veracity of that other witness.'" *Hunt*, 270 Or App at 213 (quoting *State v. Corkill*, 262 Or App 543, 552, 325 P3d 796, *rev den*, 355 Or 751 (2014)).

A trial court has a duty to intervene *sua sponte* only when a witness's testimony constitutes "true vouching." *Hunt*, 270 Or App at 213. For example, in *Hunt*, this court held that the trial court did not plainly err by not striking a witness's statement that the victim's description of the defendant "was just the best of her knowledge at the time." *Id.* at 212-13. As this court explained, "[v]iewed in context, the statement d[id] not comment on [the victim's] credibility[.]" *Id.* at 213. Rather, it "explain[ed] why [the witness] did not more intensely question [the victim] about [the] defendant's physical

attributes." *Id.* "Put a different way," this court continued, "the statement 'did not supplant the jury's assessment of [the victim's] credibility.'" *Id.*

So too here. None of Hardy's challenged statements directly expressed an opinion that the victim was telling the truth. Those statements were thus not "true vouching," and the trial court had no *sua sponte* duty to strike them. *Corkill*, 262 Or App at 552-53. In context, Hardy's statements did not comment on the victim's credibility, they explained his impressions of the scene after responding to a 911 call about defendant banging on the apartment door, and having no knowledge of prior events. And they explained why the victim's apparent conflict between reaching out for police help and getting defendant in trouble led Hardy to believe that there may be significantly more to investigate in this case than the immediate circumstances surrounding the 911 call.

C. To the extent that the trial court erred in failing to strike Hardy's statements *sua sponte*, this court should decline to exercise its discretion to correct the error.

Even if the trial court plainly erred in failing to strike Hardy's statements *sua sponte*, this court should decline to correct the error for at least two reasons. First, had defendant objected to those statements, the trial court could have provided a curative instruction. *See State v. Nguyen*, 222 Or App 55, 66 n 4, 191 P3d 767 (2008), *rev den*, 345 Or 690 (2009) (declining to address unpreserved claim because, had the defendant raised the claim at trial, the need

for appeal might have been obviated); *see also State v. Reynolds*, 250 Or App 516, 536, 540, 280 P3d 1046, *rev den*, 352 Or 666 (2012) (Haselton, C.J., concurring in part and dissenting in part) (appellants should not be able to obtain more favorable result in unpreserved posture than if they had preserved the claim of error). Or the prosecutor could have rephrased or withdrawn her questions, or Hardy could have rephrased his testimony. *See State v. Cox*, 337 Or 477, 500, 98 P3d 1103 (2004), *cert den*, 546 US 830 (2005) (if petitioner's counsel had objected to certain evidence, the state might have chosen not to offer it).

Second, Hardy's statements were likely harmless; they did not likely supplant the jury's assessment of the victim's credibility, as shown by the jury's verdict acquitting defendant on a number of charges to which the victim testified. *Cf. State v. Kerne*, 289 Or App 345, 349-52, __ P3d __ (2017) (declining to correct plain error because it was harmless). That is especially true with respect to Hardy's testimony about the victim's minimization of events, because that statement related specifically to the victim's denial that defendant had raped her, and the jury did not find defendant guilty on that charge.

ANSWER TO FIFTH ASSIGNMENT OF ERROR

Even assuming that the trial court erred in failing to deliver a concurrence instruction on Count 6 (coercion), any error was harmless.

A. Preservation

Defendant concedes that this claim of error is not preserved.

B. Standard of Review

This court reviews a trial court's failure to deliver a jury concurrence instruction for legal error. *State v. Teagues*, 281 Or App 182, 187, 383 P3d 320 (2016) (citing *State v. Ashkins*, 357 Or 642, 648, 357 P3d 490 (2015)). Because this claim of error is unpreserved, however, the principles governing plain-error review, discussed *supra* at 21, also apply.

ARGUMENT

Defendant's fifth assignment of error challenges as plain error the trial court's failure to deliver a jury concurrence instruction on the coercion charge of which the jury convicted defendant. But even assuming that the trial court plainly erred, any error was harmless for the reasons explained in the Supreme Court's decision in *Ashkins*.

"Under Article I, section 11, of the Oregon Constitution, the requisite number of jurors must 'agree that the state has proved each legislatively defined element of a crime.'" *Teagues*, 281 Or App at 188 (quoting *State v. Pipkin*, 354 Or 513, 527, 316 P3d 255 (2013)). That issue of "jury concurrence" arises in "'two conceptually distinct situations'": (1) "'when a statute defines one crime but specifies alternative ways in which that crime can be committed'" and (2) "when the indictment charges a single crime 'but the evidence permits the jury

to find multiple, separate occurrences of that crime.'" *Teagues*, 281 Or App at 189 (quoting *Pipkin*, 354 Or at 516). Where, as here, a case poses the second of those scenarios, a concurrence instruction is required unless the state makes an election, confirmed by the trial court, that identifies for the jury the factual occurrence that is the subject of the charge. *See Teagues*, 281 Or App at 189 (citing *Ashkins*, 357 Or at 659)).

But the failure to give such a concurrence instruction, even in the absence of an election, is not always prejudicial. In *Ashkins*, for example, the defendant was charged with one count of first-degree rape, one count of sodomy, and one count of unlawful sexual penetration, all involving the same victim. 357 Or at 643-44. At trial, the victim testified to multiple, distinct occurrences of each offense, as well as other nonspecific and undifferentiated occurrences. *Id.* at 644-46. The defendant requested a concurrence instruction, but the trial court refused to give it. *Id.* at 646-47. The jury convicted the defendant of all three crimes. *Id.* at 647.

On review in that preserved posture, the Supreme Court concluded that the trial court erred in declining to give a concurrence instruction, since the evidence permitted the jury to find multiple separate occurrences of each charge and the state had not elected the specific occurrences to which each charge related. *Id.* at 659. But the court also concluded that the trial court's error was harmless. *Id.* at 660-63. In reaching that conclusion, the court explained that

the victim's "testimony was primarily nonspecific and undifferentiated; although she identified some occurrences at particular locations, most of the occurrences were described only generally, and without reference to a time frame." *Id.* at 662. The Supreme Court also emphasized that "[n]othing about defendant's theory of defense concerned particular occurrences of the sexual acts described by [the victim]." *Id.* "Rather, defense counsel focused on inconsistencies in [the victim's] statements and the absence of physical evidence to support the charges." *Id.* "In sum," the Supreme Court concluded,

> there was evidence that [the] defendant committed multiple acts of rape, sodomy, and unlawful sexual penetration against [the victim], but there was nothing to indicate that, in evaluating the evidence to determine if those offenses had been committed, the jury would have reached one conclusion as to some of the occurrences but a different conclusion as to others.

Id. at 662-63.

Here, the trial court's failure to deliver a concurrence instruction was harmless for the same reasons. The pertinent coercion charge required the jury to find that defendant

> knowingly compel[led] [the victim] to engage in conduct from which [she] had a legal right to abstain, by means of instilling in [her] a fear that if [she] refrained from the conduct compelled and induced, defendant would unlawfully cause physical injury to [her].

ER-2; Tr 849. As in *Ashkins*, the evidence in this case pertinent to that was largely nonspecific and undifferentiated. There was evidence of certain specific

occurrences of threats by defendant, such as when defendant threatened to crash his car and kill them both if the victim refused to be with him, Tr 325; or when defendant initiated sex in the basement of his parents' house and told the victim that if she screamed he would punch her teeth out, Tr 338. But the evidence also suggested ongoing, undifferentiated coercion throughout the entire episode, including the nonspecific and implied threats accompanying defendant's statements that defendant was going to keep the victim in the barn for a month, Tr 341; when defendant told the victim to return within 10 minutes from Klein's apartment the following day, Tr 370-71; or when the victim rejoined defendant after her work shifts, Tr 382.

As also with *Ashkins*, defendant's theory of defense did not "call[] into question [the victim's] description of any particular occurrence." *Cf. Ashkins*, 357 Or at 662. Rather, defendant focused on the victim's credibility, inconsistencies in her testimony, and her history of substance abuse in suggesting that the entire episode was "just four wild days" after defendant and the victim got "back together, and "something is off with [the victim's] perception of reality[.]" Tr 921; *see also* Tr 897, 910, 922 ("I don't know if it's too much drug use, something is wrong with her, or she just lies for no reason"; "[S]omething is off with her and this was just a these two got back together and did whatever they were going to do for two days and she does not recall events accurately.")

In light of that, and as with *Ashkins*, "there was evidence that defendant committed multiple acts" of coercion against the victim, "but there was nothing to indicate that, in evaluating the evidence to determine if" defendant committed that offense, "the jury would have reached one conclusion as to some of the occurrences but a different conclusion as to others." *Cf. Ashkins*, 357 Or at 662-63. As a result, the trial court's failure to deliver a jury concurrence instruction on the coercion charge was harmless.[4]

ANSWER TO SIXTH ASSIGNMENT OF ERROR

The trial court did not plainly err in instructing the jury on Count 5, first-degree kidnapping.

A. Preservation

Defendant concedes that this claim of error is not preserved.

B. Standard of Review

This court "review[s] unpreserved claims of instructional error in criminal cases 'pursuant to the court's traditional plain error doctrine,'"

---

[4] In *Mellerio v. Nooth*, 279 Or App 419, 435-36, 379 P3d 560 (2016), this court held that the failure to deliver a concurrence instruction on coercion charges was not harmless because the evidence disclosed distinct factual occurrences of coercion. This court distinguished *Ashkins* on the basis that, in *Mellerio*, "there were potentially significant circumstantial and evidentiary distinctions between the [] factual scenarios" that potentially supplied the basis for the coercion convictions. This case is more like *Ashkins*, however, and there are no "potentially significant circumstantial and evidentiary distinctions between" the various factual occurrences of coercion in this case.

discussed *supra* at 21. *State v. Simonsen*, 275 Or App 154, 157, 364 P3d 702 (2015) (quoting *State v. Varnornum*, 354 Or 614, 629, 317 P3d 889 (2013)).

ARGUMENT

Defendant's sixth assignment of error argues that the trial court plainly erred in instructing the jury on Count 5, the charge of first-degree kidnapping alleging, in part, that defendant "secretly confine[d] [the victim] in a place where she was not likely to be found[.]" ER-2; *see also* ORS 136.225(1)(b) and ORS 136.235 (collectively defining first-degree kidnapping in that way). As pertinent to that charge, the trial court instructed the jury that "the state must prove beyond a reasonable doubt" that defendant, "*secretly confined* [the victim]." Tr 848; eTCF 72 (emphasis added).

Defendant contends that the trial court plainly erred because it omitted the remainder of the statutory phrase "* * * in a place where the [victim] is not likely to be found." *See* ORS 163.225(1)(b). Defendant's argument fails to establish plain error, however, because it is at least plausible that the court's instruction requiring the jury to find "*secret* confinement" adequately informed the jury regarding that element of first-degree kidnapping. The asserted error is therefore not "obvious," so defendant has failed to establish plain error. *See Simonsen*, 275 Or App 159 (a "reasonable dispute" as to whether the trial court committed instructional error forecloses plain-error review). At a minimum, any error is sufficiently harmless to be unworthy of correction by this court.

A. Defendant has failed to establish plain error.

A trial court must instruct the jury on "all matters of law necessary for its information in giving its verdict." *State v. Gray*, 261 Or App 121, 130, 322 P3d 1094 (2014) (citing ORCP 59 B). Given that defendant failed to preserve this claim of error, the question in this case is whether the trial court "obvious[ly]" failed to instruct the jury on "all matters of law" when it instructed the jury that it had to find that defendant "secretly confine[d]" the victim, but omitted the phrase "in a place where [she was] not likely to be found."[5]

It is not obvious that the trial court erred. In *State v. Parkins*, 346 Or 333, 342, 211 P3d 262 (2009), the Supreme Court explained that word "secretly" in ORS 163.225(1)(b) means "*kept from knowledge or view*." *Id.* at

---

[5] Defendant suggests that the trial court omitted an entire, independent element of first-degree kidnapping from its instructions. But the phrase "[s]ecretly confines the [victim] in a place where the person is not likely to be found" appears to set out a single element of first-degree kidnapping. *See* ORS 163.225(1)(b) (setting out that element in one single phrase); *cf. State v. Pipkin*, 354 Or 513, 522, 316 P3d 255 (2013) (concluding that the single phrase "enters or remains unlawfully" is a single element of burglary crimes). At a minimum, it is not obvious that the phrase "in a place where the person is not likely to be found" is an element unto itself. The Supreme Court in *State v. Parkins*, 346 Or 333, 337, 211 P3d 262 (2009), referred to "the 'secretly confined' and 'place not likely to be found' *elements* of ORS 163.225(1)(b)" in the plural, but only in relation to discussing this court's decision in *State v. Montgomery*, 50 Or App 381, 386-87, 624 P2d 151 (1981), which considered "secretly confined" and "place not likely to be found" separately. Neither *Parkins* nor *Montgomery* purport specifically to address whether the phrase "[s]ecretly confines the person in a place where the person is not likely to be found" sets out one or more independent elements of a kidnapping charge.

342 n 2 (emphasis added). That is, the phrase "secretly confines," on its own, means to confine a person in such a way as to "keep [them] from knowledge or view." *See id.* A person confined in a manner as to be "ke[pt] from knowledge or view" would seem necessarily to be confined in a place "where [she] is not likely to be found." *See id.*; *see also State v. Cloutier*, 351 Or 68, 97-98, 261 P3d 1234 (2011) ("[A] proposed interpretation of a statute [that] creates some measure of redundancy is not, by itself, necessarily fatal. Redundancy in communication is a fact of life and of law.").

In light of that, the jury in this case was instructed that it had to find that defendant confined the victim in a manner to keep her from knowledge or view. *Parkins*, 346 Or at 342 n 2. It is difficult to understand how the jury was nonetheless deprived of a full understanding of the law without the remainder of the statutory phrase. At a minimum, the trial court's instruction plausibly informed the jury of "all matters of law necessary for its information in giving its verdict," *Gray*, 261 Or App at 130, so defendant has failed to establish that the trial court's instruction constituted plain error. *See Simonsen*, 275 Or App 159 (a "reasonable dispute" as to whether the trial court committed instructional error forecloses plain-error review).

B. Even if the trial court plainly erred, this court should decline to exercise its discretion to correct the error.

Alternatively, even if the trial court plainly erred in instructing the jury on Count 5, this court should decline to exercise its discretion to correct the error, for the same reasons explained above. That is, given the likelihood that the phrase "secretly confined" adequately conveyed to the jury the legal requirements of the first-degree kidnapping charge, any error in instructing the jury on that charge was sufficiently harmless to be unworthy of correction by this court. *Cf. Kerne*, 289 Or App at 349-52 (declining to correct plain error in omitting a required element of a charge because other instructions adequately posed for the jury the same question that the omitted element would have posed).[6]

ANSWER TO *PRO SE* ASSIGNMENTS OF ERROR

Defendant's *pro se* assignments of error and supporting arguments identify no basis for reversal.

---

[6] Defendant suggests that, if the trial court erred in instructing the jury on Count 5, this court must employ the federal harmless error standard in assessing whether the error requires reversal. But, because defendant's claim of error is unpreserved, that is not so. *See State v. Zavala*, 276 Or App 612, 619-20, 368 P3d 831 (2016), *rev'd on other grounds*, 361 Or 377 (2017) (where "a federal constitutional error is presented to [this court] in an unpreserved setting, [this court is] not governed by federal harmless error analysis, but instead by our own state law rules as to whether an unpreserved error is one that can and should be reversed").

ARGUMENT

Defendant advances two assignments of error in his *pro se* supplemental brief. His first assignment of error appears to challenge the trial court's denial of his request for oral argument on a motion he filed with the trial court. But defendant filed that motion after the notice of appeal was filed in this case and it does not appear to be one that the trial court had continuing jurisdiction to decide under ORS 19.270(5). Defendant's first assignment of error thus identifies no basis for reversing the judgment from which defendant appeals.

Defendant's second assignment of error appears to challenge the trial court's issuance of a search warrant *ex parte*. But that is the appropriate procedure for issuance of a search warrant. *See* ORS 133.545 and ORS 133.555 (setting out procedures for obtaining a search warrant, and noting (in ORS 133.555(4)) that, "[u]ntil the warrant is executed, the proceedings upon application for a search warrant shall be conducted with secrecy appropriate to the circumstances"); *see also State v. Swain*, 13 Or App 600, 604 n 1, 510 P2d 1341 (1973), *rev'd on other grounds*, 267 Or 527 (1974) (recognizing *ex parte* nature of search warrant application). If defendant wished to challenge the search warrant, he needed to pursue motions to controvert and to suppress before trial. *See* ORS 133.693. He did not.

Defendant's supporting arguments do not appear to correspond to the substance of those *pro se* assignments of error, and the state is generally unable

to discern the nature of defendant's arguments. In the absence of a cogent analysis, this court should decline to reach them. *See J.C. Compton Co. v. Brewster*, 187 Or App 709, 713, 69 P3d 719 (2003) (refusing to disentangle the appellant's arguments from the briefs and review the record to find support for them); *see also State v. Montez*, 309 Or 564, 604, 789 P2d 1352 (1990) (appellate courts decline to address contentions in the absence of "focused analysis"); *cf. Briggs v. Lamvik*, 242 Or App 132, 142 n 9, 255 P3d 518 (2011) (this court is not "required to engage in a diogenean search for the truth" of a party's indecipherable contentions).

Defendant makes one argument that the state is able to discern. He appears to seek relief because certain text messages between himself and the victim's mother show (in defendant's view) that the victim's mother misrepresented the nature of their text conversation at trial. Specifically, defendant suggests that the victim's mother's testimony misrepresented defendant's text messages as a confession to kidnapping, because the victim's mother texted defendant, "Did you lock up or tie up my daughter?" and defendant responded, "I'm not perfect." Tr 603-05. According to defendant, the actual text messages show that the conversation happened slightly differently, because his most immediate response to the victim's mother's question was "no" and his comment about not being "perfect" came later. *See* eTCF 362-68 (text messages). As the state understands defendant's argument,

that purported discrepancy between the victim's mother's trial testimony and the actual text messages is the "fraud on the court" that defendant has raised in a number of *pro se* filings.

One principal problem with defendant's argument is that the victim's mother's trial testimony in fact appears to have accurately described the text message conversation. Contrary to defendant's characterization, she testified that she sent defendant a message asking if he was "holding my daughter against her will" and that he responded, "No, it didn't happen like that." Tr 603. Again, later, the victim's mother testified that she asked him "Did you lock up or tie up my daughter?" and he responded "'It didn't happen like that,' or something like that" and then later responded, "I'm not perfect." Tr 604. In short, the jury heard that defendant's immediate response to the victim's mother's question was "No," so the factual premise of his argument is absent.

Regardless, however, defendant made no objection to the victim's mother's testimony, nor did he take any steps to impeach or clarify her testimony regarding their text message conversation. There is no basis for this court to grant defendant any relief on that ground now. This court should reject defendant's first and second *pro se* assignments of error.

CONCLUSION

This court should reject defendant's first assignment of error because the challenged portion of Detective Turnage's testimony was not tantamount to

stating that the victim was telling the truth. This court should reject defendant's second through fourth assignments of error because Officer Hardy's testimony was not "true vouching," so the trial court had no *sua sponte* obligation to strike it. This court should reject defendant's fifth assignment of error because the trial court's failure to deliver a concurrence instruction on the coercion charge was harmless under *Ashkins*. And this court should reject defendant's sixth assignment of error because it is not obvious that the trial court's "secret confinement" instruction failed adequately to instruct the jury on the legal requirements of first-degree kidnapping. This court should affirm the trial court's judgment.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General
BENJAMIN GUTMAN
Solicitor General

/s/ Jordan R. Silk
JORDAN R. SILK #105031
Assistant Attorney General
jordan.r.silk@doj.state.or.us

Attorneys for Plaintiff-Respondent
State of Oregon

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on December 29, 2017, I directed the original Respondent's Answering Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Andrew D. Robinson, attorneys for appellant, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(1)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b) and (2) the word-count of this brief (as described in ORAP 5.05(1)(a)) is 9,652 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(3)(b).

/s/ Jordan R. Silk
JORDAN R. SILK #105031
Assistant Attorney General
jordan.r.silk@doj.state.or.us

Attorney for Plaintiff-Respondent
State of Oregon

JRS:mkf/8679573

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, v. AUSTIN CALLAHAN BRAND, aka Austin Brand, Defendant-Appellant.	Multnomah County Circuit Court Case No. 14CR28021 CA A162224

APPELLANT'S *PRO SE* SUPPLEMENTAL BRIEF

Appeal from the Judgment of the Circuit Court
for Multnomah County
Honorable John A. Wittmayer, Judge

AUSTIN CALLAHAN BRAND
SID 16137792
SRCI
777 Stanton Blvd.
Ontario OR 97914

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
JORDAN R. SILK #105031
Assistant Attorney General
400 Justice Building
1162 Court Street NE
Salem, OR 97301
jordan.r.silk@doj.state.or.us
Phone: (503) 378-4402
Attorneys for Plaintiff-Respondent

[redacted]
APP. W

TABLE OF CONTENTS

STATEMENT OF THE CASE.....1

Jurisdiction.....1

Questions presented.....1

First assignment of error.....1

Second assignment of error.....3

CONCLUSION.....5

TABLE OF AUTHORITIES

Cases

State v. N.L. 237 Ore. App. 133; 239 p.3d 255: (2010).....2

Espinoza v. Evergreen Helicopters 356 Or 63, 376 p.3d 960, (2016).....2

Frank v. Delaware 438 US 154, 57 L Ed 2d 667, 98 S Ct 2674 (1978).....2,3

State v. Wright,JR., 266 Ore. 163; 511 p.2d 1223; (1973).....2,3

Fazzolari v. Portland School Dist. NO. 1J, 303 Or 1; 734 p.2d 1326, (1987).....4

Piazza v. Kellim,360 Ore. 58,377 p.3d 492; (2016).....4

Simmons v. U.S., 390 U.S. 377, 88 S Ct 967. 19 L Ed 2d 1247 (1968).....5

Couey v. Atkins, 357 Ore. 460, 355 P3d 866 (2015).....NA

Constitutional and Statutory Provisions

Or Const, Art I, sec.9.....1-5

Or Const, Art I, sec.12.....1-5

ORS 19.270.....1

DEFENDANT'S, PRO SE SUPPLIMENTARY BRIEF

STATEMENT OF THE CASE

Jurisdiction

This court has jurisdiction pursuant to ORS 19.270.

Questions presented

1. Are the underlining legal principles expressed in forum non conveniens applied to defendant/appellants Motion To Set Aside The Judgment On The Merits In The Interest Of Justice, inconsistent with defendants rights vested under Art. 1, Sec. 9 of the Oregon State Constitution and the 4th amendment of the U.S. Constitution by and through the 14th?

2. Was the defendant not able to show the none existence of probable cause, ER (104-07) among the harm that a reasonable person would foresee, where statement's were omitted based on an ex parte proceeding and must a adversarial proceeding be held for the issuance of a search warrant?

FIRST ASSIGNMENT OF ERROR

The trial judge erred when the judge denied an evidentiary hearing and oral argument on defendant's, pro se Motion To Set Aside The Judgment For Fraud Upon The Court On The Merits In The Interest Of Justice.

Preservation of Error

In the caption on defendant's "fraud-thereof motion",defendant requested oral argument and an evidentiary hearing. Ex (43).

Standard of Review

***we consider the original jurisdictional/dispositional judgment only. State v. N.L. 237 Ore. App. 133,141; 239 p.3d 255, 260: (2010) – Abuse of discretion. We review the trial court's predicate legal conclusions "without deference to determine whether proper principles of law where applied correctly," Rogers, 330 Ore. At 312, and its predicate factual findings-express or implicit-for any evidence in the record to support them. Espinoza v. Evergreen Helicopters 356 Or 63, 376 p.3d 960, 993-994 (2016)

Argument

This court should consider the jurisdictional/dispositional "fraud-thereof motion",order under the procedural doctrine of forum non conveniens. Espinoza v. Evergreen helicopters 359 Ore. 63; 376 p.3d 960; (2016). Of course, this case involves a criminal defendant carrying the burden under Frank v. Delaware 438 US 154, 57 L Ed 2d 667, 98 S Ct 2674 (1978), State v. Wright,JR., 266 Ore. 163,166; 511 p.2d 1223,1224; (1973), rather than a defendant in a civil case moving to dismiss for forum non conveniens, but the procedural principles should be applied consistently with defendants "fraud-thereof motion."

Although the application of forum non convience is reviewed for abuse of discretion, as a prerequisite to exercise of discretion, court must apply correct legal standard for determining scope of that discretion. Defendant points to the denial of an evidentiary hearing and oral argument as an implicit factual finding that defendant did not met his burden under Frank v. Delaware, (1978) supra, and State v. Wright,JR.,(1973) supra.

Here the state did not carry its burden establishing the Court of Appeals as proper court to provide adequate remedy for such fraud claim and the state's failure to display private and public interest factors, after defendant met his substantive law burden under Frank v. Delaware 438 US 154, 57 L Ed 2d 667, 98 S Ct 2674 (1978), State v. Wright,JR., 266 Ore. 163,166; 511 p.2d

1223,1224; (1973). Also the trial court abused its discretion by failing to accept as true all well-plead allegations in "fraud-thereof motion", pointing to OEC 612 violation, ex parte proceeding violation, bad faith by police, the statement's of Jolene Walker and the relation of such to probable cause, duty of police to included Jolene Walker's statement's and to seize, test and analyze text evidence, Jolene Walker's statement's being known before presentation of affidavit in support of the search warrant and Honorable Judge Wittmayer's forseeability on defendant testifying at trial to rehut cell phone evidence. As a result, the trial court failed to give sufficient credit to all of defendant's claims and struck an unreasonable balance in weighing the relevant private and public-interest factors, such as Ex (108-122), leading to an outcome-dismissal of the "fraud-thereof motion" that was an abuse of discretion and appellate court is a not proper forum.

SECOND ASSIGNMENT OF ERROR

The Honorable Eric J. Bergstom erred in issuing a search warrant on November 16, 2014 at 5:28 am on a proceeding ex parte instead of on an adversarial proceeding.

Preservation of Error

At defendants timely motion for new trial, based on new evidence and jury misconduct, the Honorable Judge Wittmayer with respect to the new evidence of text messages and the liability of such evidence stated. Ex (107). Tr 1136. Within one year from the entering of the criminal Judgment, defendant Brand, pro se moved the court to set aside the judgment for fraud upon the court on the merits in the interest of justice. Ex (43-102). On the second claim relied on by defendant in his "fraud-thereof motion" asserted "That the prior judgment of the court on the new trial order is no longer equitable that the judgment should have prospective application, and

upon such terms as are just." Ex (43-44). By way of affidavit in support of the "fraud-thereof motion" defendant in statement #3, 10 and 11, made reference to forseeability. Ex (45-48). By memorandum defendant presented, "Defendant moves that the prior judgment of the court denying the new trial motion is no longer equitable that the judgment should have prospective application, and upon such terms as are just. ER (55)

Defendant in reply to state's response to the issue of preservation presented, "*** that in short, reckless disregard of Jolene Walker's statements in "bad faith" from the affidavit in support of the search warrant precluded adjudication of probable cause, because without the statements defendant could not have shown the none existence of an alleged self incrimination and probable cause." ER (97)

Standard of Review

Foreseeability is a judgment about a course of events, a factual judgment that one often makes outside of any legal context. It therefore ordinarily depends on the facts of a concrete situation and, if disputed, is decided as an issue of fact. Fazzolari v. Portland School Dist. NO. 1J 303 Or 1,4; 734 p.2d 1326,1328, (1987)

As our prior decisions teach, it is the general nature of the harm at risk, not the precise nature of the harm suffered by a particular victim, that controls the analysis. Piazza v. Kellim,360 Ore. 58,87,377 p.3d 492, 509; (2016).

Argument

Judge Wittmayer acting as gatekeeper made a foreseeability judgment about the risk of defendant not testifying at trail in regards to the liability of the new evidence. Ex (107) Based on the "fraud thereof motion" it would be inappropriate to define the risk as being defendant testifying in trail to rebut Jolene Walker's statement's as the Judge observed. The risk of defendant testifying would also be to broad because it would encompass risks outside the theory

of liability and evidence offered. Likewise to narrow because it doesn't account for a rule of law. that if hypothetically Jolene Walker's statement's were included defendant would/could have asserted art.1 sec.9 OR. Con.,4th amendment grounds without denigration of his art.1 sec.12 OR, Con., 5th amendment rights in a pursuing trial Simmons v U.S., 390 U.S. 377,389-94, 88 S Ct 967, 19 L Ed 2d 1247 (1968) Based on defendant's "fraud-thereof motion" the theory and supporting evidence were related to an ex parte issuance of a search warrant, the risk of harm was in reference to an ex parte proceeding and courts have consistently recognized harm of 5th amendment rights in that risk. Also there was countervailing evidence to SW liberty interest.

CONCLUSION

Under the first error the court should assign counsel and remand for further proceedings

Under the second error the court should set aside the judgment for fraud upon the court and declare that all search warrants be issued on an adversarial proceeding.

Dated 8th day of June 20

Respectfully submitted,

Austin Brand

AUSTIN CALLAHAN BRAND
Snake River Correctional Institution
777 Stanton blvd.
Ontario, OR 97914

EXCERPT OF RECORD INDEX

Search warrant.....ER-36-41

Judgment new trial, transport, stay.....ER-42

Motion To Set Aside The Judgment For Fraud Upon The Court On The Merits In The Interest Of Justice.....ER-43-89

Letter of transmittal and compliance with ORAP 8.25.....ER-90

State's responds to Fraud-thereof Motion.....ER-91-94

Defendant's reply to state's response.....ER-95-102

Judgment fraud-thereof Motion.....ER-103

Transcript (pages 604-05).....ER-104-105

Transcript (page 933).....ER-106

Transcript (page 1136).....ER-107

Motion for counsel.....ER-108-109

Order on counsel.....ER-110

Motion for counsel.....ER-111-113

Order on counsel.....ER-114

Motions and orders in relation to fraud-thereof motion.....ER-115-122

COPY

ER
36

TO ANY POLICE OFFICER IN THE STATE OF OREGON, GREETINGS:

And to photograph, document, seize, and analyze as applicable using whatever force is reasonable and necessary, the following items

To document or photograph the execution of this search warrant by using digital cameras and/or any other video recording devices;

ER
37

To seize or swab any items of evidence that are believed to contain DNA evidence;

Any and all trace evidence including, but not limited to blood, saliva, semen, and other body fluids containing DNA;

Any and all latent fingerprints or palm prints or items that possess latent or palm prints;

Any and all blankets consistent with, but not limited to, a dark and light blue in color blanket;

Any and all cell phones and cell phone accessories, specifically for stored contacts and the contacts related information to include the contacts phone numbers, incoming calls, outgoing calls, incoming text messages, outgoing text messages, recent calls, voice messages, stored electronic documents, stored incoming pictures and videos, outgoing pictures and videos, stored pictures and videos, and any other stored electronic data on the phone;

Any photographs, images, videos in any type of format including, but not limited to digital, 35mm or VHS

A purse consistent with, but not limited to, a 'Betsy Johnsnn' purse with red and pink hearts on its exterior;

Any and all ownership documents pertaining to the vehicle;

All items of identification including, but not limited to items such as letters, bills, rent receipts, checks, driver's licenses, hotel receipts, notes, and diaries;

Any and all hand written, typed, or digital notes.

Any and all evidence related to a vehicle crash and/or hit and run;

ER
38

For evidence of or otherwise criminally possessed property that has been used or is possessed for the purpose of being used to conceal the commission of a crime

Any and all evidence related to the crime(s) of ORS 163.375 titled Rape in the First Degree and/or ORS 163.405 titled Kidnapping in the First Degree

-
-

You are further directed to make return of this warrant to me within five (5) days after execution thereof

This warrant may be issued any time day or night.

Hon. Eric J. Bergstrom

Issued under my hand at 5:29 AM, Nov 16, 2014 A.M./P.M.

Judge of the Circuit Court of the
State of Oregon for Multnomah County

COPY
ER
39

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON)
) SEARCH WARRANT
COUNTY OF MULTNOMAH)

IN THE NAME OF THE STATE OF OREGON

TO ANY POLICE OFFICER IN THE STATE OF OREGON, GREETINGS: You are hereby commanded to search and seize the following:

- The person of Austin Callahan Brand, a white male born on October 7th, 1986, who has an Oregon driver's license number of 7632317.

Further, I or my agent or designee, to include law enforcement and non-law enforcement personnel may for authorization to search for, seize and then test, if necessary, evidence of or information concerning the commission of the crime(s) of ORS 163.375 titled Rape in the First Degree, ORS 163.235 titled Kidnapping in the First Degree and/or 163.275 titled Coercion; contraband, the fruits of the crime, or things otherwise criminally possessed concerning the commission of the crime(s) of Rape in the First Degree, Kidnapping in the First Degree and/or Coercion; and any other physical evidence of the crime(s) of Rape in the First Degree, Kidnapping in the First Degree or Coercion.

And to photograph, document, seize, and analyze as applicable, using whatever force is reasonable and necessary, the following items:

To document or photograph the execution of the search warrant by using digital cameras and/or any other video recording devices:

EK
40

Four oral DNA swabs and/or a blood draw from the person of Austin Callahan Brand with the date of birth of October 7th, 1989

A suspect rape kit conducted on the person of Austin Callahan Brand with the date of birth of October 7th, 1989

To seize or swab any items of evidence that are believed to contain DNA evidence

Any and all trace evidence including, but not limited to blood, saliva, semen, and other body fluids containing DNA,

Any and all latent fingerprints or palm prints or items that possess latent or palm prints

For evidence of or otherwise criminally possessed, property that has been used, or is possessed for the purpose of being used to conceal the commission of a crime

Any and all evidence related to the charges of ORS 163.375 titled Rape in the First Degree and/or ORS 163.235 titled Kidnapping in the First Degree

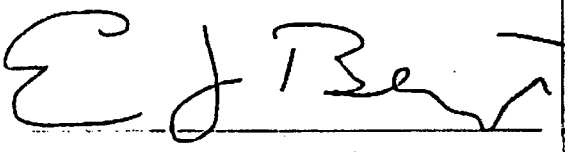
You are further directed to make return of this warrant to me within five (5) days after execution thereof.

_____ **This warrant may be issued any time day or night.**

Hon. Eric J. Bergstrom

5:20 AM, Nov 16, 2014

Issued over my hand on _____ ___, 2014, at _____ A.M/P.M.



Judge of the Circuit Court of the
State of Oregon for Multnomah County

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

ER 42

STATE OF OREGON
Plaintiff
v.
Defendant

Case No: 19CR

ORDER

Date of Hearing:

District Attorney _____ Bar No. _____ Reporter

Defense Attorney _____ Bar No _____ Tape # _____

Date Signed

JUDGE

Name of Judge (Type or Print)

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON)	
)	**Case No. 14-CR-28021**
Plaintiff,)	
)	**Defendant's, Pro Se**
v.)	**Motion To Set Aside The Judgment**
)	**For Fraud Upon The Court On**
AUSTIN CALLAHAN BRAND,)	**The Merits In The Interest Of Justice**
)	
Defendant, Pro Se.)	**(Oral Argument Requested)**
)	**(Evidentiary Hearing Requested)**

1. COMES NOW, defendant, pro se, requesting oral argument and estimates 30 minutes time needed, with official court reporting, and moves the court for an order to set aside the judgment for fraud upon the court, and upon the grounds and for the reason that there was extrinsic fraud in the affidavit in support of the search warrant. The Circuit court of the State of Oregon for the County of Multnomah has jurisdiction by virtue of Article VII (original), Section 9 of the Oregon State Constitution and ORS 19.270.

2. That the prior judgment of the court on the new trial order is no longer equitable that the judgment should have prospective application, and upon such terms as are just. The fraud as is herein contained violated defendant's Article 1, Section 9 of the Oregon Constitution, 4th Amendment of the U.S. Constitution by and through the 14th amendment to the States and Article 1, Section 12 of the Oregon Constitution, 5th Amendment of the U.S. Constitution by and through the 14th amendment to the States.

3. Also proposing an order of transportation under OUTCR 4.030 as the court may seem appropriate from defendant's current DOC place of confinement to the County of Multnomah custody.

Defendant submits the attached affidavit in support and exhibits in support of this motion.

Dated this 26 day of October 2016.

Austin Brand

AUSTIN CALLAHAN BRAND, pro se
SID#16137792
SRCI 777 Stanton blvd.
Ontario, Oregon 97914

POINTS AND AUTHORITIES

ORS 419B.923, (1) a, (7), (8)

ORCP 71 (A), (B), B (1), B (2), (C).

Article VII (original), Section 9, of the Oregon State constitution.

ORS 19.270 (1) e, (5) b.

Frank v. Delaware 438 US 154, 57 L Ed 2d 667, 98 S Ct 2674 (1978)

State v. Montigue 288 ore. 359; 605 p.2d 656; (1980)

State v. Wright 266 ore. 163; 511 p.2d 1223; (1973)

State v. Delong 357 ore. 365; 350 p.3d 433; (2015)

State v. Bailey 356 Or. 486; 338 p.3d 702; (2014)

State v. Wright, 315 Or. 124, 843 p.2d 436 (1992)

Mapp v. Ohio, 367 US 646, 81 S Ct. 1684 L Ed 2d 1081,(1961)

Wong Sun v. United States, 371 US 471, 83 S Ct 407, 9 L Ed 2d 441, (1963)

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON	)	
	)	**Case No. 14-CR-28021**
Plaintiff,	)	
v.	)	**Affidavit in Support of Motion to**
	)	**Set Aside Judgment for Fraud Upon**
AUSTIN CALLAHAN BRAND,	)	**The Court On The Merits In The**
	)	**Interest Of Justice**
Defendant.	)	

I, Austin C. Brand, proceeding pro se, being first duly sworn hereby depose and say that:

1. I am the defendant in the above cited cause.
2. I have at no point in time waived my Miranda rights as a defendant.
3. I did not testify as the defendant at the trial, but did testify at a preliminary hearing for state's motion for prior bad acts and new trial motion.
4. I have at no point in time gave consent to search nor be held in the custody of the State of Oregon.
5. On November 15, 2014 I was not detained for a parole violation.
6. I was not charged with a disorderly conduct in the above cited cause.
7. During the course of the trial, the alleged victim's mother testified. She indicated that she had a conversation with the defendant via text about whether or not he had kidnapped her daughter. A struggle of sorts ensued in which the mother tried to testify the reality of the text messages, in opposition to the mother's original statements to detectives of the defendant in answer, had texted to her that he wasn't perfect. There upon the state unlawfully used Oregon Rules of Evidence 612 Refreshing Witness Recollection and asked, "Do you remember telling the

detectives that you said - - you asked him, 'Did you tie her up and lock her up?' And he texted you back and said, quote, 'I'm not perfect.'" Mother testified "yes".

8. In the subsequent state's closing argument the state argued that the defendant has presented no evidence and then in immediate succession referenced the text message conversation between the victim's mother and defendant in which the state argued an admittance of the crime charged on behalf of defendant in conjunction with the text messages.

9. Evidence as is therein contained in defendant's Motion for New Trial, text messages are in fact not an admittance of the crime charged and are exculpatory in nature of innocence (See Exhibit 101).

10. As being in attendance at the hearing on defendant's Motion for New Trial, the Honorable Judge Wittmayer made a judgment on the motion for new trial and drew a nexus between the text message evidence and the inference that defendant should have testified to the text messages as therein contained were defendant's statement's thus knowledge of statement's and a rebuttal as defendant's testimony would therein contain.

11. Statements of Jolene Walker to detectives, that, she had text defendant, "did you tie her (Sarah Walker) up and lock her up?" and he (defendant) texted Jolene Walker back and said, "I'm not perfect" were recklessly disregarded in "bad faith" from the affidavit in support of the search warrant by affiant Charles Skeahan DPSST # 41834 in violation of an ex parte proceeding and the rules therein. Statements of Jolene Walker were known to affiant on November 15, 2014 prier to the presentation of the affidavit in support of the search warrant.

This precluded defendant adjudication of probable cause before a magistrate in violation of Article 1, § 9 of the Oregon State Constitution and the 4th Amendment to the U.S. Constitution by and through the 14th Amendment to the States and was fraud upon the court.

12. Phone-text message evidence of important potential value was known and was the basis of knowledge (See Exhibit 103, pg. 10-11, 334-340, and pg. 11 342-358), in the Affidavit in Support of search warrant. Phone-text message evidence per the requirement of Affidavit in Support of search warrant, and search warrant was not seized, tested or analyzed (See Exhibit 101) as represented and concern was not held for the destruction of evidence.

13. Fraud was the "but for" cause of the courts judgment on the motion for new trial, and defendant being compelled to testify in violation of Article I, §12, of the Oregon Constitution, U.S. Constitution, Article I § 5 by and through the 14th Amendment to the States.

14. In attendance at my sentencing the state, possibly as an ethics requirement, on record acquiesced that Sarah Walker (victim) recanted.

15. In attendance at the hearing on defendant's Motion for New Trial, the state, possibly as an ethics requirement, on record acquiesced that there was no lock on the door, that victim had multiple opportunities to leave during the course of the alleged crime, but was kept there with words.

16. A conversation between officer Frutiger and defendant occurred when police were thereupon the arrest, before any knowledge of an alleged crime, officer Frutiger learned defendant was a registered sex offender and told defendant he (Frutiger) "would do anything in his power to get defendant off the streets".

ER 48
4

I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF AND I UNDERSTAND THAT IT IS MADE FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY UNDER PERJURY.

Dated this 26 day of October 2016.

Respectfully submitted,

Austin C. Brand
Sid No. 16137792
Snake River Correctional Institution
777 Stanton Boulevard
Ontario, OR 97914

State of Oregon
County of Multnomah

Signed and sworn to (or affirmed) before me on 10-26, 2016 by Brand Austin C.

Notary Public – State of Oregon
My commission expires 5-8-16

OFFICIAL STAMP
MARICELA M ROJAS
NOTARY PUBLIC - OREGON
COMMISSION NO. 928078
MY COMMISSION EXPIRES MAY 08, 2018

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON **Plaintiff,** **v.** **AUSTIN CALLAHAN BRAND,** **Defendant, Pro Se.**	**Case No. 14-CR-28021** **Defendant's, Pro Se Memorandum in Support of Motion to Set Aside the Judgment for Fraud Upon the Court On The Merits In The Interest Of Justice (Evidentiary Hearing Requested) (Oral Argument Requested)**

INTRODUCTION

Defendant files this Memorandum in conjunction with the MOTION TO SET ASIDE THE JUDGMENT FOR FRAUD UPON THE COURT ON THE MERITS IN THE INTEREST OF JUSTICE, he files in compliance with ORS 419 B.923 and ORCP 71.

In pertinent part, ORS 419 B.923 (1) Provides: Except as otherwise provided in this section, on motion and such notice and hearing as the court may direct, the court may modify or set aside any order or judgment made by it. Reasons for modifying or setting aside an order or judgment include, but are not limited to:

> (1) (a)Clerical mistakes in judgments, orders or other parts of the record and errors in the order or judgment arising from oversight or omission. These mistakes and errors may be corrected by the court at any time on its own motion or on the motion of a party and after notice as the court orders to all parties who have

appeared. During the pendency of an appeal, an order or judgment may be corrected as provided in subsection (7) of this section.

***

(7) A motion under subsection (1) of this section may be filed with and decided by the trial court during the time an appeal from a judgment is pending before an appellate court. The moving party shall serve a copy of the motion on the appellate court. The moving party shall file a copy of the trial court's order or judgment in the appellate court within seven days of the date of the trial court order or judgment. Any necessary modification of the appeal required by the court order or judgment must be pursuant to rule of the appellate court.

(8) This section does not limit the inherent power of a court to modifying an order or judgment within a reasonable time or the power of a court to set aside an order or judgment for fraud upon the court.

ORCP 71 (A), (B), B(1), B(2), (c), apply to and regulate relief from judgment or order in criminal actions. The following portions of ORCP 71 are pertinent to defendant's motion:

> A. **CLERICAL MISTAKES.** Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on it's own motion or on the motion of any party and after such notice to all parties who have appeared, if any, as the court orders. During the pendency of an appeal, a judgment may be corrected as provided in subsection (2) of section B of this rule.
>
> B. **MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE, ETC.**
>
> **B.** (1) **By MOTION.** On motion and upon such terms are just, the court may relieve a party or such party's legal representative from a judgment for the following reasons; *** (c) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;*** or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application. A motion for reasons (a), (b), (c) shall be accompanied by a pleading or motion under rule 21 A. Which contains an assertion of a claim or defense. The motion shall be made within a reasonable time, and for reasons (a), (b), and (c) not more than one year after the receipt of notice by the moving party of the judgment. A copy of a motion filed within one year after the entry of the judgment shall be served on all parties as provided in Rule 9B, and all other motions filed under this rule shall be served as provided in Rule 7. A motion under this section does not affect the finality of a judgment or suspend its operation.
>
> **B.(2) When Appeal pending.** A motion under section A. or B. may be filed with and decided by the trial court during the time an appeal from a

judgment is pending before an appellate court. The moving party shall serve a copy of the motion on the appellate court within seven days of the date of the trial court order. Any necessary modification of the appeal required by the court order shall be pursuant to rule of the appellate court.

C. RELIEF FROM JUDGMENT BY OTHER MEANS. This rule does not limit the inherent power of a court to modify a judgment within a reasonable time *** , or the power of a court to set aside a judgment for fraud upon the court.

PRO SE

Johnson v. premo 355 Ore. 866; 33 p.3d 288; 2014 Ore. LEXIS 627
Church v. Gladden, 244 Ore. 308, 417 p.2d 993 (1966):

(1) (a) Defendant Brand, asked his counsel to file a motion seeking the same relief as stated herein this **motion for fraud upon the court on the merits in the interest of justice.** (b) Appellate Counsel explicitly declined to do so, as an ethics requirement and attorney of Record David J. Culich has not answered calls for representation. (2) Defendant Brand, pro se, has a good faith belief that counsel's failure to file the requested motion results from counsel's failure to render suitable representation. (3) Defendant wrote and called multiple times for representation of attorney of record David J. Culich to no avail. The Judgment of the court is a "nisi" and defendant must show cause why it should be withdrawn.

Jurisdiction

ORS 19.270 **Appellate jurisdiction of Supreme Court and Court of Appeals; trial court jurisdiction to enter appealable judgment.**

(1) The supreme court of the Court of appeals has jurisdiction of the cause when the notice of appeal has been served and filed as provided in ORS 19.240, 19.250 and 19.255. The trial court may exercise those powers in connection with the appeal as are conferred by law, and retains jurisdiction in the matter for the following purposes:

***

(e) Deciding a motion for relief from judgment under ORCP 71 B.

***

(5) Notwithstanding the filing of a notice of appeal, the trial court has jurisdiction:

***

(b) To enter an order or supplemental judgment under ORCP 71 or ORS 19.275, 107.105(4) or 107.452; and ***

OREGON STATE CONSTITUTION
ARTICLE VII (Original)
THE JUDICIAL DEPARTMENT

Section 9. Jurisdiction of circuit courts. All judicial power, authority, and jurisdiction not vested by this Constitution, or by laws consistent therewith, exclusively in some other Court shall belong to the Circuit Courts, and they shall have appellate jurisdiction, and supervisory control over the County Courts, and all other inferior Courts, Officers, and tribunals.

GROUNDS TO SET ASIDE THE JUDGMENT FOR FRAUD UPON THE COURT

The grounds to set aside the judgment for fraud upon the court on the merits in the interest of justice are extrinsic fraud of statements recklessly disregarded in bad faith (of informant mother, Jolene Walker) from the affidavit in support of the search warrant. Jolene Walker's original statement to detectives, that, she had text defendant, "did you tie her up and lock her up?" and he (defendant) texted Jolene Walker back and said, Quote. "I'm not perfect." Non-disclosure of this information precluded defendant adjudication of probable cause before a magistrate.

Central to the constitutional guarantee is that the search may be made only if a judicial officer, not a police officer or prosecutor, is convinced by trustworthy information under oath that there is probable cause for authorizing the search. Citing *State v. Montigue,288 Or.359,369;605 p.2d 656;(1980).*

Non disclosure of this information is extrinsic fraud as its not an issue at the trial level, but a *ex parte* hearing pertaining to rights encompassing of Article 1, § 9 of the Oregon Constitution, 4th amendment of the U.S. Constitution.

Dunkin v. Dunkin, 162 Ore. App. 500,505; 986 P.2d 706 (1999). "Wife argues that the fraud that she alleged does amount to extrinsic fraud, because husband's nondisclosure precluded an adjudication of the parties' interests in the 1989 disclosure case."

That argument may not have been the dispositive issue for the courts ruling, but sufficiently exemplifies in subject matter of ORCP 71(C). That fraud was extrinsic to trial of a pre-dissolution case, where information was not disclosed in breach of a fiduciary duty. In the present case there is nondisclosure of statements of the mother (Jolene walker) from the affidavit in support of the search warrant, that was used to exploit and take advantage of article 1, section 12 of the Oregon State constitution that is derived from the earlier violation of article 1, section 9 of the Oregon State constitution.

Citing *Blue Horse v. Sisters of Providence in Oregon*, 113 Ore. App. 82,86; 830 P.2d 611; (1992).

> "Since ORCP 71C was enacted, we have held that the inherent power to set aside a judgment is within the court's discretion, but does not arise absent extraordinary circumstances such as fraud. *Renniger and Renniger*, 82 Or App 706, 711, 730 P2d 37 (1986); *Vinson*, 57 OR App 355, 359, 644 P.2d 635, rev den 293 Or 456 (1982). We have also said that "[t]he inherent power to modify a judgment recognized in ORCP 71C is limited to technical amendments and extraordinary circumstances, such as extrinsic fraud." *Adams and Adams*, 107 Or A[[93, 96, 811 P2d 919 (1991)."

Procedural posture

Because of the lack of criminal case law pertaining to ORCP 71 (c), defendant uses some civil case law as an adjunct to the enforcement of the criminal law. Citing *United States v. Janis*, 428 US 433, 463, 96 S Ct 3021, 49 L ED2d 1046, (1975).

"To be sure, the Elkis case was a federal criminal proceeding and the present case is civil in nature. But our prior decisions make it clear that this difference is irrelevant for Fourth Amendment exclusionary rule purposes where, as here, the civil proceeding serves as an adjunct

to the enforcement of the criminal law. *See Plymouth Sedan v. Pennsylvania,* 380 US 693, 14 L Ed 2d 170, 85 S Ct 1246."

In the matter of M.L. and R. L. Children D.H.S. v. T.L. 358 Ore. 679; (2016) the court in the footnotes portion of the case law, the court referenced ORS 419 B. 923 and the legislative history in applicability to ORCP 71:

"In particular, the pertinent legislative history shows that the statute's drafters imported several grounds for setting aside a judgment set out in ORCP (71), but intended not to limit the grounds to a "closed universe" of those that it enumerated. Tape recording, senate committee on judiciary, HB 2611, Apr. 30, 2001, Tape 115, side B (statement of Michael Livington Oregon Department of Justice, Appellate Division).

The separation of the word "fraud" in 71(1)(c) from 71(C) in tells that it is a special proceeding in that it is a proceeding of the rules rather than the rules, but is inclusively applicable to 71(b)(1) for jurisdiction requirements and ORAP 8.25. *see* state v. Kurtz, 350 ore. 65, 75, 249 p.3d 1271 (2011) (Terms such as "including but not limited to" typically convey an intent that the enumerated "examples be read in a nonexclusive sense")

ORCP 71(C) when read under the authority of PGE v. Bureau of labor and Industries 317 ore. 606, 856 p.2d 1143 (1993), the text provides that:

Relief from judgment by other means

Then the context, of, fraud give's the reader an intent that there is some other means by which the judgment is to be in this case set aside under a judge made rule.

In Boyd v. United States 116 US 616, 623, 29 LED 746 (1886) the court found:

It is a maxim that consuetudo est optimus interpres legum; and another maxim that contemporanea expositio est optima et fortissima in lege.

In Stone v. powell 428 US 465,500, 97 S Ct 3037, 49 LED 2d 1067 (1976), Mr. Chief Justice Burger, in a separate concurring opinion, talked about the wrong way the exclusionary rule was going as evidence of guilt is excluded from trial, then referenced that the rule can be modified, from Judge Henry Friendly's observation's: "[t]he same authority that empowered the court to supplement the [fourth] amendment by the exclusionary rule a hundred and twenty-five years after its adoption, likewise allows it to modify that rule as the 'lessons of experience' may teach." The bill of rights as a code of criminal procedure, 53 calif L Rev 929, 957-953 (1965).

Defendant moves that the prior judgment of the court denying the new trial motion is no longer equitable that the judgment should have prospective application, and upon such terms as are just.

Citing Jansen v. Atiyeh 96 ore. App.54,60; 771 p.2d 298; (1989): The court in Lubben v. Selective Service Systems Local Bd. No.27, supra, 453 F.2d at 650, applied FRCP 60(b)(5) and held that, for a decision to be "based on" a prior judgment within the meaning of that subsection, "the prior judgment must be a necessary element of the decision, giving rise, for example, to the cause of action or a successful defense."

Defendant met all requirements of the court for application of a new trial pertaining to new evidence, but the court's judgment that the defendant could have testified to the evidence is the "*But For*" cause of the fraud upon the court.

Quoting *State of Oregon v. Bailey*, 356 Ore. 486,495; 338 P.3d 702,708: (2014)

The exclusionary rule applies not only to the "direct products" of unconstitutional invasions of Fourth Amendment rights, but also to the indirect or derivative "fruits" of those invasions. See *Wong Sun*, 371 U.S. 471,484,83 S Ct 407, 9 Led 2d 441, (1963)("The exclusionary prohibition extends as well to the indirect as the direct products of such invasions." (citation omitted.)). In this context, the "indirect" fruit refers to "evidence [that] was acquired by

the police after some initial Fourth Amendment violation." *United States v. Crews*, 445 U.S. 463, 471, 100 S Ct 1244, 63 L Ed 2d 537 (1980) (emphasis in original).

Without the "bad faith" of the affiant leaving out an objective pertaining to the cell phone evidence in connection to Jolene Walker's statement's, evidence would have been discovered and defendant would not have been compelled to testify to the evidence as it would have been found as an objective in conjunction with the affiant's basis of knowledge in the execution of the search warrant.

Facts:

Defendant was tried before a jury on April 13, 2015 and a guilty verdict was rendered on April 20, 2015. The UCJ temporary sentencing order and entering of a judgment was on March 25th, 2016. Defendant presented a motion for New Trial and Memorandum in Support of Motion for New Trial on April 1, 2016. Oral Argument for New Trial on record was held on April 25, 2016, where Judge Wittmayer made a judgment of why the Motion for New Trial should be deemed denied. A rational nexus was evidenced from the "new evidence" of the text messages and an inference was drawn that because these text messages were made by defendant, defendant could have taken the stand in trial and testified to the text message, as therein defendant's testimony contained would be a rebuttal. An order was entered denying Motion for New Trial, denying motion for stay of execution and defendant to be transported to D.O.C.

Said text messages during the course of the trial, the victim's mother testified. She indicated that she had a conversation with the defendant via text about whether or not he had kidnapped her daughter. A struggle of sorts ensued in which the witness tried to testify the reality of the text message thereupon the prosecutor unlawfully used ORE 612 statements used to refresh witness's memory and asked if witness told detectives that the defendant had text to her

that he wasn't perfect in reference to the conversation about whether or not he had kidnapped her daughter. Witness testified "yes". In the state's subsequent closing arguments, the state argued that the defendant has presented no evidence and then referenced the text message conversation between the victim's mother and defendant in which the defendant admitted to the alleged crime. The new evidence of text messages shows that it was not an admittance of guilt on defendants' part (See Exhibit 101).

Detective Charles Skeahan put forward a statement (See Exhibit 103, pg.12, 370-380), in which he "knew" evidence would be found by and through, "search, analysis, and seizure" of affiant basis of knowledge of cell phone evidence and investigations (*see* Exhibit 103, pg.10-11,334-358). The affidavit in support of search warrant had detective Charles Skeahan's basis of knowledge from his experience and credentials as a detective (*see* Exhibit 103, pg.1-2, 10-36) that evidence of potential important value to the present case would be found in the black Samsung smart phone exhibit 101 (*see* Exhibit 103 pg.10-11, 334-358) through a search analysis and seizure of the below listed person, vehicle, residence, and it's curtilage located within the county of Multnomah and the county of Clackamas in the state of Oregon (*see* Exhibit 103, pg.12, 370-380). Affiant Charles Skeahan then went on to request the court to issue a search warrant for 8809 southeast 190th avenue, city of Damascus, county of Clackamas, state of Oregon; A gray 2001 Mitsubishi mirage bearing Oregon license plate 621EYN and vehicle Identification Number JA3AY11A91Uo44o16; The person of AUSTIN CALLAHAN BRAND, a white male born on October 7th, 1989 who has an Oregon driver's license number of 7832317 (*see* Exhibit 103, pg.12, 380-392) for the following items; to document or photograph the execution of the search warrant by using digital cameras and/or any other video recording devises; (*see* Exhibit 103, pg.12, 390-394) cell phone incoming text messages, outgoing text messages, any and all hand written, typed, or digital notes, any and all evidence related to the

crime(s) and to seize, test, and analyze those items (*see* Exhibit 103, pg.12-14, lines 398-404, 420-422, 430-434). Affiant Charles Skeahan then requested permission to execute the prayed for search warrant for any time day or night for the following reasons to prevent the destruction of said evidence and that concern would be held for the destruction of contraband that may be located within the above mentioned premises , should the officers be discovered prior to their entry of said premises (*see* Exhibit 103, pg.14, 434-446). Then detective Charles Skeahan, DPSST# 41834, affiant swore under oath or affirmation before the Honorable Eric J. Bergstrom and stamped with a official seal by Lori L Schmit a public notary.

Detective Marciano and affiant had prior knowledge of the Samsung smart phone being in use, although it had a "cracked screen" (Exhibit 103 pg. 7, line 236-238), but returned a chain of title receipt or property receipt # 62258 from suspect (defendant), listed "broken" that was seized under the search warrant issued from the affidavit in support.

The affiant gave false pretense in "bad faith" to the magistrate, with reckless disregard for the truth, there is no statement included in the affidavit in support of the search warrant of Jolene Walker's (the alleged victim's mother) allegation that Defendant had admitted to the alleged crime in a text message, that was known to the officers before the presentation of the affidavit in support of search warrant.

Basis of knowledge

ORS 131.005 (11) "probable cause" means that there is a substantial objective basis for believing that more likely than not an offense has been committed and a person to be arrested has committed it.

The term "substantial objective basis" is not legislatively defined, but, when it pertains to the grounds for a decision, a "basis" is a legal term which refers to the "[t]he reason or point that

something (as a legal claim or argument) relies on for validity." Black's Law Dictionary 772 (9th ed 2009); See Datt v. Hill 347 Ore. 672, 676, 227 P.3d 714 (2010) (describing legal meaning of "ground" as synonymous with "basis").

The "basis" of "substantial objective basis" that is an element of "probable cause" and is synonymous with exhibit 101 that is symbolic of "basis". "Basis" is at Exhibit 103, pg.11, 342-358, the following:

"I know that people will often time use cell phones to text message as a form of communication. I know from experience that these messages can be used as forms of evidence. I know from training and experience that names and phone numbers collected out of the memory of cell phones can provide investigators with information that could assist in the investigation they are currently working.
I know from training and experience that cellular telephones and their electronic address books, incoming and outgoing phone calls, text messages, photographs and similar items can contain valuable information including but not limited to phone numbers, photographs taken during a criminal act and text messages containing incriminating statements. Furthermore, I am aware that cellular telephones, their electronic address books, text messages, photographs and similar items can assist in determining the location of the cellular phone and/or caller at a particular date and time. I also know that cell phones often contain "apps" for social media which include, but are not limited to Facebook, Snapchat, and Twitter. That these types of 'apps' contain valuable information similar to images, communication and times of the images and communication which can be valuable evidence for the investigation being conducted."

And in Exhibit 103, pg.10-11, line 334-340:

"I know from my professional experience as a police officer that often time's people involved in criminal investigations document their criminal behavior. I have personally seen that suspect's document in many ways to include, but not limited to: written letters, written notes, receipts, ledgers and writings on calendars. I also know that this type of evidence can be located on a computer, in a cell phone, on a person, within a home or a vehicle."

The truth of the knowledge presented is by virtue of the affidavit and the various officer(s') of their office and in the performance of official duties and by virtue of the application for the search warrant (and to seize, test, and analyze the above mentioned items), an element of knowingly to the extrinsic fraud. Phone text message-evidence was required to be seized, tested and analyzed in accordance with the affidavit submitted by Detective Charles Skeahan, but was

not because detective Charles Skeahan recklessly disregarded the truth pertaining to Jolene Walker's statements. By Affiants own statements there was no information shown to support the Affiants suspicions that there would be evidence on the phone. Leaving the search warrant with out the other half of probable cause.

MISREPRESENTATION

Detective Skeahan personally represented a request to the court to issue a search warrant for the vehicle, residence, curtilage, and outbuildings and the defendant, Austin C. Brand, for the following items;

To document or photograph the execution of the search warrant by using digital cameras and/or any other video recording devices;

Any and all cell phones and cell phone accessories, specifically for stored contacts and the contacts related information to include the contacts phone numbers, incoming calls, outgoing calls, incoming text messages, outgoing text messages, recent calls, voice messages, stored electronic documents, stored incoming pictures and videos, outgoing pictures and videos, stored pictures and videos, and any other stored electronic data on the phone;

Any and all hand written, typed, or digital notes,

Any and all evidence related to the crime(s)(see Exhibit 103, pg.12, line 390-394, pg.12, line 398-404, pg.13, 420-422, pg.13, line 430-432.)

Permission was requested to execute the prayed for search warrant (in all its fullness and totality), (see Exhibit 103, pg.14, line 434-436). Concern was represented and was to be held for the great potential for the destruction of contraband that may be within the above mentioned premises, should the officers be discovered prior to their entry of said premises and were responsible to prevent the destruction of said evidence (see Exhibit 103, pg.14, line 440-446), but

concern was not held and the officer(s') was the very person(s') perpetrating the miscarriage of justice. The scope of the search warrant was not met when Detective Charles Skeahan failed to complete the actions he personally represented, in reliance of Exhibit 101, that was destroyed or suppressed, same, same. The court was reliant upon the basis of knowledge, representations', intensity of search represented, veracity of affiant and concern held for the great potential of destruction of evidence as an obligation and requirement of the affiant, to the detriment of defendant Brand and the interest of justice.

Veracity

Present in the affidavit in support you have "probable cause" for a search warrant being delegated to the officer who is requesting the warrant (Detective Charles Skeahan DPSST # 41834, affiant) who throughout the affidavit in support is not sworn to the statements of the "victim informer" of "citizen informer", but is vouching and filtering the unsworn statements and reading police reports of the various different officers (Detective Dan Marciano, Detective Aaron Turnage, officer Mathew Hardy).

In state v. Montigue 288 ore. 359; 605 p.2d 656;(1980), the court ruled that the informant's veracity was presumed by revealing his name, but as in contrast when it is an affidavit of a prosecutor or police officer, Justice Douglas noted this in his concurrence in Mapp, 367 US, at 670, 6 L Ed 2d 1081, 81 S Ct 2d 1081, 81 S Ct 1684, 16 Ohio Ops 2d 384, 86 Ohio L Abs 513, 84 ALR2d 933, (1961) where he quoted from *Wolf v* Colorado. 388 US 25, 42, 93 L Ed 1782, 69 S Ct 1359 (1949); " ' Self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered.' "

State v Montigue, Supra. at {288 ore. 362} the court set the "two pronged" test of veracity as follows:

1. The affidavit must set forth informant's "basis of knowledge."

2. The affidavit must set forth facts showing the informant's "veracity," either by showing:

a. The informant is credible, or
b. That his information is reliable.

Defendant is only concerned with the veracity of the affiant.

Citing Franks v. Delaware, supra, at [438 US 171] The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant.

An affidavit in support is a binary presentation of a detailed alleged situation (crime) and a recital of facts that are in the knowledge of affiant through years of police work. The "basis of knowledge" of the affiant is at Exhibit 103, pg.10, 334-340, and pg.11, 370-380 of the affidavit in support of the search warrant. The veracity of the affiant is like a fail safe for the administration of justice and is extremely important. The credibility of an affiant is encompassing of the affiants years of background as a police officer as referenced earlier and of the "good faith" or "bad faith" of the affidavits contents. The reliability of an affiant is his basis of knowledge and of the representations and concern held in the affidavits contents.

The veracity of the affiant in the present case comes insuffient or impeached as the affiant is leaving out Jolene Walker's statements in violation of having that information put before a magistrate for probable cause.

Central to the constitutional guarantee is that the search may be made only if a judicial officer, not a police officer or prosecutor, is convinced by trustworthy information under oath that there is probable cause for authorizing the search. Citing *State v. Montigue,288 Or.359,369;605 p.2d 656;(1980).*

Then exploits or takes advantage of that constitutional guaranty in defiance of affiants "basis of knowledge" and representations as referenced earlier in this memorandum in support which is a brake down of affiants credibility and reliability.

ARGUMENT

Affiant gave a false pretense with reckless disregard for the truth in the affidavit in support of the search warrant in bad faith, to the magistrate, concealing the objective to the black Samsung smart phone of the mother's (Jolene Walker's) original statement that "did you tie her up and lock her up?" and he texted you back and said, quote. "I'm not perfect."

These statements were known to the affiant before the affidavit in support was presented to the magistrate.

Whatever the judgment may be as to the relevancy of the alleged misstatements, the integrity of the affidavit was directly placed in issue by petitioner in his allegation that the affiants did not, as claimed, speak directly to Lucas and Morrison. Whether such conversations took place is surely a matter "within the personal knowledge of the affiant[s]." Citing *Franks v. Delaware, Supra*, at [438 US 164]

Because courts have been more troubled about authorizing searches on the hearsay statements of unnamed "police informants," the reaction seems to {288 Ore. 370} be that when this problem is not presented, a judge needs no further assurance of the informant's probable

truthfulness before issuing a warrant. But this reflex is a patent non sequitur. Citing *State v. Montigue*, supra, at {288 Or. 370}.

This was also in violation of ORS 135.185 holding defendant to answer; use of hearsay evidence, in part:

When hearsay evidence was admitted at the preliminary hearing, the magistrate, in determining the existence of probable cause, shall consider:

(1) the extent to which the hearsay quality of the evidence affects the weight it should be given; and

(2) the likelihood of evidence other than hearsay being available at trial to provide the informant furnished by hearsay at the preliminary hearing.

Because the magistrate never had the opportunity to consider the evidence at the preliminary hearing to determine the existence of probable cause at the hearing as evidence was not emitted in "bad faith" (concerning the mother's original statements made to police). (see State v. Wright, 315 Or. 124, 843 p.2d 436 (1992)

Leaving out information also violated the affiants oath, where in *Franks v. Delaware, Supra*, at [438 US 165] In deciding today that, in certain circumstances, a challenge to a warrant's veracity must be permitted, we derive our ground from language of the Warrant Clause itself, which surely takes the affiant's good faith as its premise: "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation..." Judge Frankel, in United States v Halsey, 257 F Supp 1002, 1005 <***pg. 678**>(SDNY 1966), affd, Docket No. 31369 (CA2, June 12, 1967) (unreported), put the matter simply: "[W]hen the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a *truthful* showing" (emphasis in original). This does not mean "truthful" in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be

founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. But surely it is to be "truthful" in the sense that the information put forth is believed or appropriately accepted by the affiant as true.

Leaving out witnesses statements (mother, Jolene Walker) was intended to deceive the court and keep it blind to the potential value of the evidence leaving the court with a "naked power" (Black's Law word 8th Ed.) over the assessment of probable cause. The court had no corresponding interest in the mother's statement's pertaining to probable cause and as the identity and statements were not presented in the affidavit in support of search warrant. By reason of *Mapp v. Ohio*, 367 US 646, 6 L Ed 2d 1081, 81 S Ct. 1684 (1961) that rule is applicable to the States.

State v. Montigue, Supra, at {288 Ore. 371} The adequacy of the affidavit to allow the issuing judge to believe the informant's statements in the first place. *McCray v. Illinois*, 386 US 300,315, 18 L Ed 2d 62, 82 S Ct 1056, reh den 386 US 1042, 18 L Ed 2d 616, 87 S Ct 1474 (1967), The court found in the dissent:

The police, instead of going to a magistrate and making a showing of "probable cause" based on their informant's tip-off, acted on their own. They, rather than the magistrate, became the arbitrators of "probable cause."

In *Franks v. Delaware, Supra*, at {438 US 156} the court set the threshold or hurdle for when a hearing is to be held: with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at defendant's request.

The statement's of Jolene Walker were necessary to the finding of probable cause because without the statements of Jolene Walker there was no objective to the search and the search was based only on police suspicion. The other half of probable cause was missing.

"But for" the cause of fraud upon the court defendant would not have been compelled to testify and the judgment of the court.

CONCLUSION

State v. Wright 266 ore. 163, 166; 511 p.2d 1223; (1973), the court found:

The reasoning of the opinion of the court of Appeals ran thusly: (1) defendant had the burden of establishing the falseness of the facts set forth in the Affidavit for the warrant; (2) there was no evidence submitted which tended to prove that the informant did not exist or that the information was unreliable and the affidavit, as well as the affiant's in-court testimony, indicated the informant did exist and that the information was reliable; (3) therefore, defendant did not carry his burden.

In the present case defendant has carried his burden. Defendant has established the falseness of the facts set forth in the Affidavit for the warrant (see Exhibit 103, pg.10, at334-340, pg.11, at 342-358, pg.12, at 370-380, pg.12, at 388-394, pg. 12, at 398-404, pg.13, at 420-422, pg.14, at 430-434, pg.14, at 434-436, pg. 14, at 440-444) in reliance of evidence submitted which proves that the information was unreliable, and is misrepresented see Exhibit 101.

The primary meaning of "Judicial Integrity" in the context of evidentiary rules is that the court must not commit or encourage violations of the constitution, in the present case you have evidence suppressed by officer(s) in defiance of the "basis" of probable cause which was the primary ground relied on for validity by the court in the issuance of the search warrant. The

focus of the evidence is actual innocents and the interest of justice all upon the Judicially created exclusionary rule to sanction the affiant, various officers and the State's Attorney (Amber Kinney) through its deterrent effect in the setting aside of the judgment against defendant. And defendant is serving two copies of this motion on the State, an extra for the affiant in the hopes of deterring future violations of this nature.

In State v. McDaniel, 115 Or 187, 194, 231 Pac 965, 237 Pac 373 (1925) the court said that this constitutional provision is to be strictly construed in favor of the individual who invokes its protection. The supreme Court of the United States similarly views the function of the Fourth Amendment. In Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 392, 91 S Ct 1999, 29 L Ed2d 619 (1971) that court noted that the Fourth Amendment "guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures ***" (emphasis added).

For the reason stated above, the court should set aside the judgment for fraud upon the court.

Dated October 26, 2016.

AUSTIN CALLAHAN BRAND
SID#16137792
SRCI
777 Stanton blvd.
Ontario, Oregon 97914

E 6.
58

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON)
) ss.
COUNTY OF MULTNOMAH)

AFFIDAVIT IN SUPPORT OF SEARCH WARRANT
ORDER TO SEAL

1.

I, Charles Skeahan, being first duly sworn on oath, hereby depose and say:

I am a Police Detective employed by the City of Gresham Police Department, assigned as a criminal investigator to the Gresham Police Investigations Division. I am a sworn police officer and have been in excess of 10 years. I am currently assigned to the Gresham Police Department Special Enforcement Team (SET), which is charged with investigating crimes in Gresham and the Multnomah County area. These crimes include but are not limited to, Sex Crimes, Assault, Possession and Distribution of Controlled Substances and Property Crimes as defined in the Oregon Revised Statues.

I was assigned to the patrol division for over 5 years and during that time was also assigned as a Field Training Officer, training new Police Officers for in excess of three years. I was also assigned to the Trimet Transit Police Division for approximately 5 years. I also hold a Firearms Instructor position with the Gresham Police Department after my certification with the NRA.

During my career as a police officer, I have become familiar with criminal investigations and the collection of evidence that support those criminal investigations. In my 10 years as a police officer with the Gresham Police Department, I have investigated a multitude of cases involving assaults, suspicious deaths, sex offenses, burglaries, fraud, stolen vehicles, thefts, robberies, drug crimes including possession, distribution, and firearm cases. I have been involved in many narcotics investigations to include the following illicit drugs: methamphetamine, cocaine, heroin, and marijuana. During my assignment as a police officer, I have attended State of Oregon, Gresham Police Department, public and private sector training including the Basic Police Academy (2003), training which

EXhibit 103
Page 1 OF 14

provided instruction in a variety of areas of criminal investigation. In my capacity as a law enforcement officer, I have testified as an officer and witness to property, narcotic and personal crimes. I have also been a member of the Multnomah County Major Crime Team.

2.

On 11/15/2014 I was called into the to help on scene Gresham Police Department Detective Dan Marciano, #51095 and Detective Aaron Turnage #51413 with the investigation of an incident regarding a reported Kidnap and an Assault. I contacted primary Officer Matthew Hardy, #45956 of the Gresham Police Department who told me he responded to [redacted] n Gresham, Multnomah County, Oregon regarding a 911 police call he was responding to. Officer Hardy told me the he heard the Bureau of Emergency Communication, (BOEC) Dispatcher say over the police radio that a victim called and was reporting that a man known by the caller to be Austin Brand was trying to break down his front door to get to a female named Sarah. Officer Hardy also told me that he heard the BOEC Dispatcher say that the caller had a pistol.

I reviewed the call summary of incident PG 14-66089 and excerpts of the original call from BOEC are quoted below:

"2014-11-15 12:37:56 man trying to break down door"

"2014-11-15 12:39:15 (m) man is brand.austin.24. comp says that he is after Sarah. comp has a pistol"

"2014-11-15 12:39:27 (m) comp is in the living rm"

"2014-11-15 12:40:03 m) austin is assoc w/silv 2 dr sedan

Officer Hardy told me told me after he arrived and calmed the situation he took the original statement report from Steven Duane Klien, date of bi [redacted] and Sarah Sarah Walker, date of birth [redacted] Officer Hardy told me Steven told him that Steven called 911 dispatch to report that a male known to him by the name of Austin Brand was attempting to break in the front door of his apartment. Officer Hardy told me assisting Officer Ryan Gleason, #43439 and assisting Officer Matthew Fruitiger, #52800

Exhibit 103
page 2 of 14

EF 70

of the Gresham Police Department had a male thought to be Austin Brand detained per Officer Hardy's investigation. Officer Hardy told me this same Austin Brand was later arrested for Disorderly Conduct II and taken back to GPD for questioning. I conducted a Portland Police Data System, (PPDS) search of Austin Brand and found him to be a white male 6'00", 200 pounds with brown hair and brown eyes with a last known address at 5228 Northeast Hoyt Street #B Portland, Multnomah County, Oregon. I also know from the same PPDS search that Austin is associated with [redacted] Drive Damascus, which is located in Clackamas County, Oregon. I also visually checked the male who was transported back to GPD and found the male to be Austin Brand.

Officer Hardy also told me he interviewed Sarah Walker at the scene. Officer Hardy told me Sarah told him that she has had an abusive relationship with Austin. Officer Hardy told me Sarah told him that she ran from her family because Austin is close with her brothers and had to get away from everyone because of the abuse. Officer Hardy told me Sarah told him that she went to stay at Steven's apartment and Austin ended up locating her there on the evening of 11/12/2014, a Wednesday. Officer Hardy told me Sarah told him Austin talked her into meeting with him at his car, which was parking in the parking lot of Steven's apartment. Officer Hardy told me Sarah told him during the time Sarah and Austin were talking Austin became physically violent in the form of choking her until her body went limp. Officer Hardy told me Sarah told him she tried to get out of the car after Austin let her neck go, however Austin pulled her back in the car and drove away with her inside.

Officer Hardy told me Sarah told him Austin drove his car wildly from Steven's apartment to Austin's father's house, which is located in Clackamas County, Oregon. Officer Hardy told me Sarah told him Austin crashed his car while they were driving, so there was front end damage to the front of Austin's car.

I know the following by reading a verbatim quote from Officer Hardy's primary police report regarding Sarah's statement about what Austin did to her while she was being kept against her will. Per Officer Hardy's report Sarah is referred to as "Walker" and Austin is referred to as "Brand".

Exhibit 103
page 3 of 14

"Brand told her to get out of the car and she refused. He grabbed her thigh and squeezed so tight. She told me, "He is so strong and it hurt so bad." Later Walker showed me a large bruise around the circumfrance of her entire upper thigh.

Walker told me that she went with him into one of the buildings. Walker told me that Brand stripped her clothes off of her until she was completely naked. She told me that she tried to fight him and may have blackened his eye, but she did not know. She told me that Brand picked her up and "scissored" her in half and ran her naked folded up in his arms, trying tocover her mouth. She tried to scream for the family members but was unable to because he had her squeezed so tight she could barely breath.

Walker told me that Brand built a secret room in the barn and he threw her in there on a concrete floor with a blue blanket. She stayed in this room all night freezing and thought Brand was going to kill her. At some point he told her that he was going to keep her in the room for 30 days to "get her clean off of methadone." He also told her that "You will be like a dog." "You have to have your mouth covered." He told her that he quit his $15 and hour construction job so he could take care of her.

I asked Walker how she got away. She told me that Brand got a call from his PO and he had to come in for a drug test. He had to go to Salem because that is where he is supposed to live, but he doesn't." He knew he was going to get sanctioned for 90 days because he has been using and drinking alcohol. Walker told me that Brand picked her up, still covered in the blue blanket and naked and put her in his car. He told her that she will not be able to get away from him and that he will "knock her front teeth out" if she tries to get away.

While driving to Salem Brand "changed his attitude" and became "nice" again. He told her that she was going to have to take his car home when he got sanctioned and that she couldn't tell anyone about this because, "It's really bad. This is Coercion. I was doing this for you to get clean." He

Exhibit 103
Page 14 of 14

also told her that he had told her sister that he was going to do this last week so it would be considered premeditated.

Brand did not get sanctioned and he came out of the PO meeting estatic. She told him that she just got a new job and if she didn't show up they would start looking for her. He had already taken money from her and he needed more so he let her go to work. She did not go back with him and that is why she ended back at Klein's apartment and he was there today."

Officer Hardy told me Sarah told him she was able to get away and head back to Steven's apartment after returning to the Gresham area. Officer Hardy also told me he personally witnessed injuries to Sarah's upper body, thigh area and ankle. Officer Hardy told me Sarah told him after the police arrived she recognized her purse in a gray Mitsubishi that she knew as Austin's car; this was the same car that Austin drove her in during the assault. Officer Hardy also told me Sarah told him her purse is a blue zipper bag with red and pink hearts. Officer Hardy told me Gresham Detectives were called in and took over the investigation and ordered an officer to stay with the car pending this investigation.

I know from speaking with Detective Graham that the plate on the car is Oregon License Plate 621EYN. I conducted a Web Law Enforcement Data System, (WebLEDS) search per Oregon Department of Motor Vehicles, (DMV) and found the license plate to be registered to a 2001 Mitsubishi Mirage two door. At the time of this affidavit the vehicle is listed as sold with buyer information on file. Detective Graham told me he personally saw a blue colored purse with red and pink hearts, and a blue colored blanket folded in clear view from the outside.

I know from speaking with Detective Marciano that he witnessed the interview with Sarah when she was transported back to the Gresham Police Department. Detective Marciano told me Sarah told him Austin did find her at Steven's apartment and talked her into going outside with him and ended up getting into the gray Mitsubishi. Detective Marciano told me Sarah explained to him that Austin used his forearm to choke her while she was in the passenger seat and that he pulled her back into the car to prevent her escape. Detective Marciano told me Sarah said Austin drove her to his father's house.

Exhibit 107
page 5 of 14

I conducted a Computer Criminal History, (CCH) search of Austin Brand and found that he is the respondent in a current restraining order that precludes him from having contact with a person by the name of Paige Brand. I know from speaking with Detective Turnage that Paige is the teenage sister of Austin and Paige still lives at her father's house. I know from the CCH search that Paige lives at [redacted] Damascus, Clackamas County, Oregon. Detective Turnage told me he produced Clackamas County Tax record photos of 8809 Southeast 190th Drive and showed the photos to Sarah during her interview. Detective Turnage told me Sarah recognized the property as not only Austin's father's house, but the same place that Austin took her to during his assault of her.

Detective Marciano told me Sarah told him when they arrived at Austin's father's house Austin took her to, and in the sliding glass doors that lead to the basement of the main house on the property. Detective Marciano told me Sarah told him Austin forced Sarah's clothes off until she was naked and forced her to have sex with him under fear of further physical abuse. Detective Marciano told me Sarah told him during the sexual act Austin ejaculated while he was on top of Sarah as they were on the floor of the basement.

Detective Marciano also told me Sarah explained to him that the property is monitored by video surveillance and may have recorded some of the events. Detective Marciano told me Sarah told him after she was forced to have sex with Austin; he picked Sarah up, covered her mouth and ran her to an adjacent barn that is on the same property. Detective Marciano told me Sarah told him that Austin was going to make her stay in a prepared room in the barn for a period of thirty days so she would get clean.

Detective Marciano told me Sarah described the room Austin locked her in inside the barn as a dark four sided room with a very high ceiling. Detective Marciano told me Sarah told him three of the walls were still under construction or unfinished with pink insulation between the studs in the walls and the forth wall being a part of the exterior wall of the barn itself. Detective Marciano told me Sarah told him the floor was concrete and had only a mattress at the time. Detective Marciano told me Sarah told him she was forced to stay in the locked room over night with only a flashlight, a t-shirt and a few blankets, one of which was dark blue on one side, light blue on the other side with tassels around the edge.

Exhibit 103
page 6 of 14

Detective Marciano told me Sarah told him the next day Austin forced Sarah back into the gray Mitsubishi to head to Salem to meet with his parole officer, however Sarah was able to talk Austin into going back to Steven's apartment so she could get some clothes. Detective Marciano told me Sarah told him Austin agreed to take Sarah back to Steven's apartment, but told Sarah that if she doesn't return within two minutes he would hurt everyone she loves. Detective Marciano told me Sarah told him Steve was at the apartment when she arrived to get her clothes and told him what she could about the assault and showed Steven her injuries.

Detective Marciano told me Sarah told him after getting more clothes they drive to Salem and Sarah was under the impression that Austin was going to get revoked and get arrested, then she was going to take the Mitsubishi and head back to Gresham. Detective Marciano told me Sarah told him Austin was supposed to be living in the Salem area and hasn't been, Sarah said Austin also was expecting to give a bad urinalysis, which would violate him.

Detective Marciano told me Sarah told him Austin didn't get arrested and came back out of the parole office within a matter of minutes. Detective Marciano told me Sarah told him Austin took Sarah back to the Portland to get a methadone treatment. Detective Marciano told me Sarah told him she saw an opportunity to escape as she was in the methadone clinic and Austin was waiting for her outside. Detective Marciano told me Sarah told him she found a friend and was able to sneak out of the clinic and get a ride back to Steven's apartment. Detective Marciano told me Sarah told him not long after she returned to Steven's apartment Austin arrived and was trying to force his way into the apartment. Detective Marciano told me Sarah told him she returned to Steven's apartment on 11/15/2014.

Detective Marciano told me Sarah told him she was taken by Austin on 11/12/2014 and by the time she was able to get away it was 11/15/2014. Detective Marciano told me Sarah told him she spent the first night in the barn, then the next two nights sleeping in the gray Mitsubishi. Detective Marciano told me Sarah told him Austin has a black Samsung smart phone with a cracked screen that Austin used during her kidnaping. Detective Marciano told me Sarah told him that several people including her father, Austin's father and other relatives were calling him looking for Sarah. Detective Marciano told me Sarah to him at one point she heard Austin talking to his father about

Exhibit 103
page 7 of 14

why his father saw them on the surveillance video at Austin's fathers house. Detective Marciano also told me Sarah told him she believed Austin's black Samsung cell phone is still in the gray Mitsubishi.

3.

I reviewed pictures of the Clackamas County Tax Assessment property photos [redacted] S[redacted]ive Damascus, Clackamas County, Oregon and found the main house to be a multilevel, single family residence with tan colored horizontal siding and a red shingle roof. The house has two garage doors on the east side of the structure toward the north corner and a bay window on the east side near the south corner. The front door is on the east side of the main house structure and is accessible via a flight of stairs that lead to a raised porch. The main house is located toward the east side of the property and faces Southeast 190th Drive.

4.

I reviewed pictures of the Clackamas County Tax Assessment property photos of [redacted] So[redacted]e Damascus, Clackamas County, Oregon and found the barn to be located near the northwest area of the property. The barn has a gray composite roof and three dormer windows that face to the east and three dormer windows that face to the west. The main large opening door faces to the north.

5.

After reviewing the available information regarding Austin Brand a white male, date of birth 10/07/1989, I have personally made an investigation and corroborated the following particulars:

1. PPDS shows Austin Callahan Brand, date of birth 10/07/1989, to be a white male, 6'04" 200 pounds, to have an Oregon Driver's License, (ODL) number of 7832317; and a State Identification, (SID) number of 16137792; and an

Exhibit 103
Page 8 of 14

associated address of 5228 Northeast Hoyt Street Portland; and an associated address of 8809 Southeast 190th Street Damascus.

2. 2. Oregon Department of Motor Vehicles via WEBLEDS shows Austin Callahan Brand, date of birth 10/07/1989 and ODL number 7832317, to be 6'01" 189 pounds, and to have an associated address of 16503 Southeast Gordon Street Milwuakie; and an associated address of 8809 Southeast 190th Drive as of 11/16/2014.

3. 3. Oregon Computerized Criminal History, (CCH) shows Austin Callahan Brand, date of birth 10/07/1989, to be a white male, 6'00" 180 pounds, SID number 16137792.

6.

I know that evidence and/or objects left at a scene often times contain the Deoxyribonucleic Acid, which is commonly known as (DNA);

DNA from trace evidence can be compared to DNA from possible suspects. Based on my knowledge, training and experience I know the Oregon State Police Crime Lab can test items of physical evidence for the existence of blood, hair, saliva and other bodily fluids and trace evidence to determine its origin or donor. I know this testing can be comparison testing or identification testing to include DNA forensic testing;

That trace evidence such as hair and body fluids from both the victim and suspect are often left at the crime scene;

Specimens, samples and objects at a crime scene may contain DNA genetic material that will aid in identification of those responsible for such crimes;

Trace evidence including blood, saliva and other body fluids contain, "DNA" even after the fluid is in a dry state;

Trace evidence left at a scene still occupied gets destroyed intentionally and un-intentionally as the length of time increases;

That trace evidence of all types but specifically DNA can be found on all types of surfaces and objects including, but not limited to clothing, surfaces, weapons, toothbrushes, condoms and that DNA will be found for extended periods of time up to several years;

Exhibit 103
Page 9 OF 14

Trace evidence such as hair and body fluids from both the victims and the suspects involved in a crime are often left at the scenes.

7.

I know from my training and experience as a police officer and more specifically as a Detective that:

Evidence and/or objects left at a crime scene often times contain Deoxyribonucleic Acid, which is commonly known as (DNA). Specimens, samples, and objects at a crime scene may contain DNA genetic material that will aid in the identification of those responsible for such crimes;

Trace evidence, including blood, saliva, semen, and other body fluids contain "DNA" even after the fluid is in a dry state;

DNA can be obtained from a piece of evidence. The information is then entered into CODIS, the Combined DNA Index System maintained by the Federal Bureau of Investigation (FBI). CODIS houses DNA profiles from convicted offenders, forensic specimens, population samples and other specimen types. The information is searched at the state level, and then the national level for matches to offenders' DNA, or DNA from other unsolved cases.

8.

Subjects who are involved in criminal activity often leave identifiable latent fingerprints and palm prints at the scene or on evidence used in the commission of the crime, which can be developed and compared to rolled fingerprints and palm prints of future potential suspects.

9.

I know from my professional experience as a police officer that often time's people involved in criminal investigations document their criminal behavior. I have personally

Exhibit 103
Page 10 of 14

seen that suspect's document in many ways to include, but not limited to: written letters, written notes, receipts, ledgers and writings on calendars. I also know that this type of evidence can be located on a computer, in a cell phone, on a person, within a home or a vehicle.

10.

I know that people will often time use cell phones to text message as a form of communication. I know from experience that these messages can be forms of evidence.

I know from training and experience that names and phone numbers collected out of the memory of cell phones can provide investigators with information that could assist in the investigation they are currently working.

I know from training and experience that cellular telephones and their electronic address books, incoming and outgoing phone calls, text messages, photographs and similar items can contain valuable information including but not limited to phone numbers, photographs taken during a criminal act and text messages containing incriminating statements. Furthermore, I am aware that cellular telephones, their electronic address books, text messages, photographs and similar items can assist in determining the location of the cellular phone and/or caller at a particular date and time. I also know that cell phones often contain "apps" for social media which include, but are not limited to Facebook, Snapchat, and Twitter. That these types of "apps" contain valuable information similar to images, communication and times of the images and communication which can be valuable evidence for the investigation being conducted.

11.

I know from training and experience that people often carry evidence of their own true identity in their vehicles. These items of identification include, vehicle registration forms, driver's licenses or identification cards, credit card receipts, mail, proof of automobile insurance, and tools engraved or marked with the identifying numbers or names of persons owning a vehicle.

Exhibit 103
page 11 of 14

Based on the information presented in this affidavit, I have probable cause to believe that the crime of Oregon Revised Statutes 163.375 titled Rape in the First Degree, ORS 163.235 titled Kidnapping in the First Degree and/or ORS 163.275 titled Coercion; contraband, the fruits of the crime, or things otherwise criminally possessed concerning the commission of the crime(s) of Rape in the First Degree, Kidnapping in the First Degree, and/or Coercion; and any other physical evidence of the crime(s) of Rape in the First Degree, Kidnapping in the First Degree, and or Coercion; and that evidence relevant to this criminal investigation will be found through a search, analysis, and seizure of the below listed person, vehicle, residence, and it's curtilage located within the County of Multnomah and the County of Clackamas in the State of Oregon:

- 8809 Southeast 190th Avenue, City of Damascus, County of Clackamas, State of Oregon;
- A gray 2001 Mitsubishi Mirage bearing Oregon license plate 621EYN and Vehicle Identification Number JA3AY11A91U044016;
- The person of Austin Callahan Brand, a white male born on October 7th, 1989, who has an Oregon driver's license number of 7832317.

13.

I therefore request the above-entitled Court to issue a search warrant for the above listed person, vehicle, residence, curtilage and outbuildings for the following items;

To document or photograph the execution of the search warrant by using digital cameras and/or any other video recording devices;

All items of identification including, but not limited to items such as letters, bills, rent receipts, checks, driver's licenses, hotel receipts, notes, and diaries;

Any and all cell phones and cell phone accessories, specifically for stored contacts and the contacts related information to include the contacts phone numbers, incoming calls, outgoing calls, incoming text messages, outgoing text messages, recent calls, voice

Exhibit 103
Page 12 OF 14

messages, stored electronic documents, stored incoming pictures and videos, outgoing
402 pictures and videos, stored pictures and videos, and any other stored electronic data on the phone;

404 Any photographs, images, videos in any type of format including, but not limited to digital, 35mm or VHS;

406 Any and all surveillance footage and/or digital media storage devices that contain video surveillance footage;

408 Any underwear consistent with, but not limited to, a pink or black thong;

Any portions of carpet located in the basement and/or lower level or the residence;

410 Any mattress and/or box spring located in the barn on the property;

Any drop light located in the barn on the property;

412 To seize or swab any items of evidence that are believed to contain DNA evidence;

Any and all trace evidence including, but not limited to blood, saliva, semen, and other
414 body fluids containing DNA;

Any and all latent fingerprints or palm prints or items that possess latent or palm prints;

416 Any and all blankets consistent with, but not limited to, a dark and light blue in color blanket;

418 A purse consistent with, but not limited to, a 'Betsy Johnson' purse with red and pink hearts on its exterior;

420 Any and all ownership documents pertaining to the vehicle;

Any and all hand written, typed, or digital notes,

422 Any and all evidence related to a vehicle crash and/or hit and run;

Four oral DNA swabs and/or a blood draw from the person of Austin Callahan Brand
424 with the date of birth of October 7th, 1989;

A suspect rape kit conducted on the person of Austin Callahan Brand with the date of
426 birth of October 7th, 1989;

To seize or swab any items of evidence that are believed to contain DNA evidence;

428 For evidence of or otherwise criminally possessed, property that has been used, or is possessed for the purpose of being used to conceal the commission of a crime;

Exhibit 103
Page 13 OF 14

Any and all evidence related to the crime(s) of ORS 163.375 titled Rape in the First Degree, ORS 163.235 titled Kidnapping in the First Degree and/or ORS 163.275 titled Coercion;

And to seize, test, and analyze the above mentioned items.

Permission is requested to execute the prayed for search warrant anytime day or night for the following reasons:

- Concern is held for the great potential for the destruction of contraband that may be located on the above mentioned person due to the fact that semen, pubic hair, and other bodily fluids are easily removable.
- Concern is held for the great potential for the destruction of contraband that may be within the above mentioned premises, should the officers be discovered prior to their entry of said premises.
- Gresham Police Department personnel are currently securing the vehicle and its contents under visual surveillance to prevent the destruction of said evidence.
- Concern is held for the destruction or unintentional overwriting of video surveillance that may be within the above mentioned premises

Detective Charles Skeahan, DPSST #41834, Affiant.

Subscribed and sworn to before me this 16 day of November, 2014:

Hon. Eric J. Bergstrom

5:27 AM, Nov 16, 2014

Judge of the Circuit Court of the

State of Oregon for Multnomah County.

Exhibit 103
page 14 of 14

OFFICIAL SEAL
LORI L SCHMIT
NOTARY PUBLIC - OREGON
COMMISSION NO. 471792
MY COMMISSION EXPIRES OCTOBER 16, 2018

Reimaged - ER 82

~~Defendant's~~ plaintiffs Exhibit 101 1 OF 7

Reimaged - ER 83

Exhibit 101
2 of 7

Reimaged - ER 84

Exhibit 101
3 of 7

Reimaged - ER 85

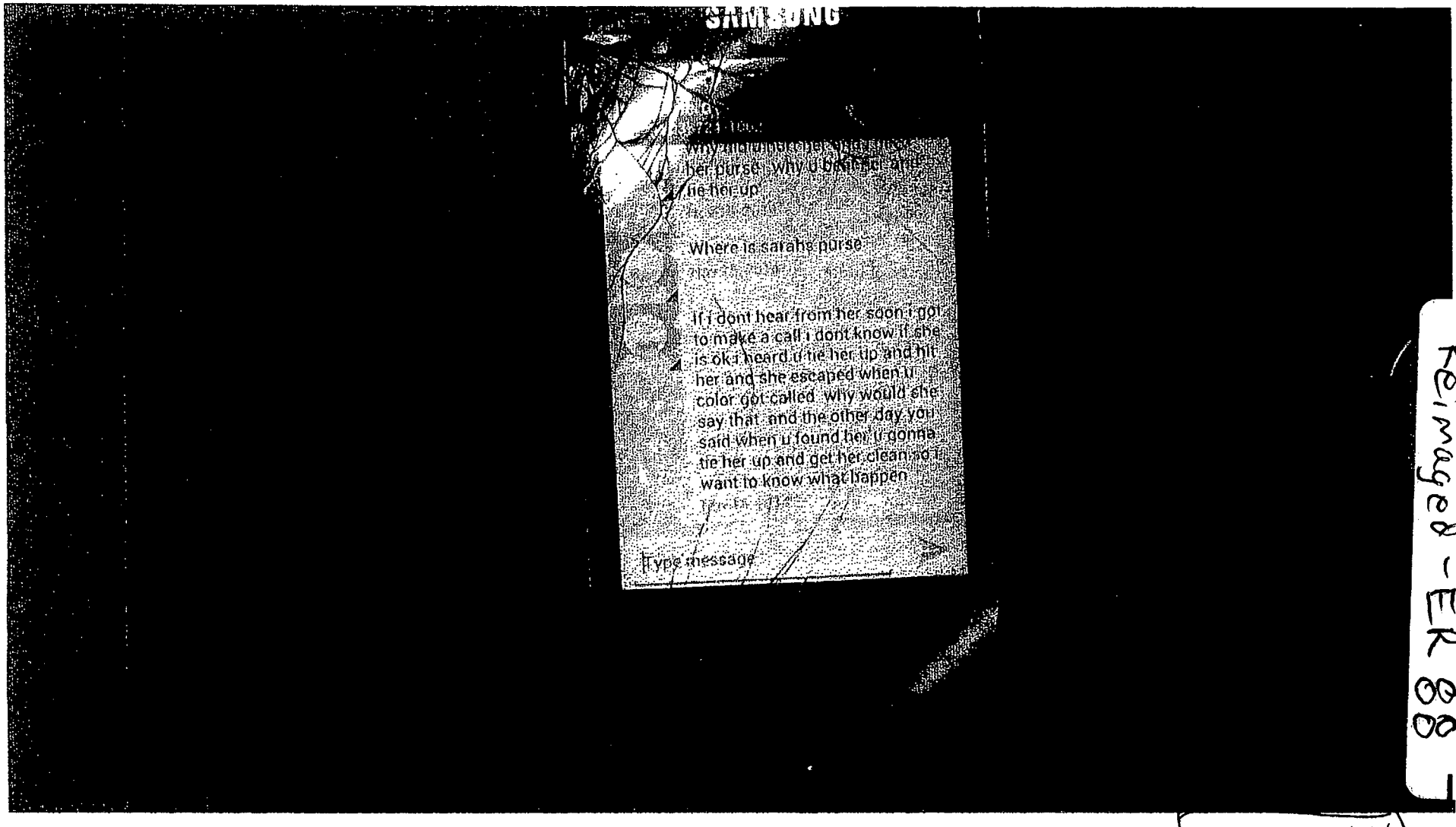
Exhibit 101
4 OF 7

Reimaged - ER 86

Exhibit 101
5 of 7

Reimaged-ER 87

Exhibit 101
6 of 7



Reimaged - ER 88

Exhibit 101
7 OF 7

****

CERTIFICATE OF SERVICE

CASE NAME: State of Oregon, plaintiff v. AUSTIN CALLAHAN BRAND, defendant, pro se

CASE NUMBER: 14-CR-28021

COMES NOW, AUSTIN CALLAHAN BRAND, pro se, and certifies the following:

That I am incarcerated by the Oregon Department of Corrections at Snake River Correctional Institution.

That on the 26 day of October, 2016, I personally placed in the Correctional Institution's mailing service A TRUE COPY of the following:

Defendant's, pro se, MOTION TO SET ASIDE THE JUDGMENT FOR FRAUD UPON THE COURT ON THE MERITS IN THE INTEREST OF JUSTICE

I placed the above in a securely enclosed, postage prepaid envelope, to the person(s) named at the places addressed below:

Oregon Court of Appeals
Records Division
1163 state st.
Salem, OR 97301

Multnomah County Courthouse
Clerk of the Court
1021 SW 4th Avenue
Portland, OR 97204

Office of Public Defense Services
Appellate Division
ATTN: Andrew Robinson
1175 Court Street NE
Salem, OR 97301

Distric Attorneys Office
Amber Kinney x2
Multnomah County Courthouse
1025 SW Fourth Ave.
Portland, OR 97204

Judge John A. Wittmayer
Circuit Court of the State of Oregon
Multnomah County Courthouse
1025 SW Fourth Ave.
Portland, OR 97204

Austin Brand

Austin Brand sid# 16137792
SRCI
777 Stanton Blvd.
Ontario, OR 97914

OCT 3 1 2016

AUSTIN CALLAHAN BRAND
SID#16137792
SRCI
777 Stanton Blvd.
Ontario, OR 97914

October 26, 2016

OREGON COURT OF APPEALS
ATTN: Record Section
1163 State st.
Salem, OR 97301

Re: Court of Appeals Case No.A162224
Office of Public Defense Services, file No. 65790
Multnomah County Circuit Court Case No. 14-CR-28021

To Whom It My Concern,

Enclosed please find a MOTION FOR RELIEF FROM JUDGMENT UNDER ORCP 71 B. This is a letter of transmittal identifying this Motion To Set Aside The Judgment For Fraud Upon The Court On The Merits In The Interest Of Justice, pursuant to ORAP 8.25 as a motion for relief from judgment under ORCP 71 B. This motion is filed by AUSTIN CALLAHAN BRAND, Pro Se, in the Circuit Court of the State of Oregon, for the County of Multnomah.

Sincerely,

x _____

AUSTIN CALLAHAN BRAND

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON,

Plaintiff,

vs.

AUSTIN BRAND,

Defendant.

Case No. 14-CR-28021

STATE'S RESPONSE TO DEFENSE MOTION TO SET ASIDE THE JUDGMENT FOR FRAUD UPON THE COURT ON THE MERITS IN THE INTEREST OF JUSTICE

The state, by and through Deputy District Attorneys Amber Kinney, respectfully requests this court to deny the defendant's pro se motion to set aside the judgment for fraud upon the court on the merits in the interest of judgment.

FACTS

The defendant was convicted by jury verdict on April 20, 2015. The defendant was convicted of five counts: Kidnapping in the First Degree, Coercion, Assault in the Fourth Degree, Menacing, and Recklessly Endangering Another Person. The defendant moved for arrest of judgment. On March 25, 2016, the court denied the defendant's motion for arrest of judgment. The defendant was sentenced on March 26, 2016. The defendant moved for a new trial pursuant to ORS 136.535. On April 25, 2016, the court denied defendant's motion for a new trial. The defendant now moves this court to set aside the judgment.

Multnomah County District Attorney's Office
1021 S.W. Fourth Avenue, Room 600
Portland, Oregon 97204
Phone (503) 988-3162 Fax (503) 988-3643

ARGUMENT

The defendant has filed a motion to set aside the judgment. In doing so, the defendant alleges fraud on the part of the state, and thereby argues that the judgment should be set aside. The defendant cites two sources of authority: ORS 419B.923 and ORCP 71B.

I. ORS 419B.923 applies to dependency cases

ORS 419B.923 falls within the dependency code of the Oregon Revised Statute. This section does not apply to criminal cases. It is therefore not relevant to the defendant's case. Furthermore, if we are looking for an equivalent statute in the criminal code, the statute that is the most similar to ORS 419B.923 is ORS 136.535 New Trial, which incorporates ORCP 64. The defendant already moved this court for a new trial, and on April 25, 216, this court denied defendant's motion for a new trial.

II. ORCP 71B applies to civil cases

The defendant also cites ORCP 71B as authority for this court to set aside his judgment. However, ORCP 71B applies to civil cases. The state is not aware of any rule within the Oregon Revised Statutes that incorporates ORCP 71B.

III. Defendant's assertion of fraud

The defendant asserts that the state committed fraud and engaged in misconduct. The state did not engage in any fraud or misconduct, and the defendant does not have any evidence that fraud or misconduct occurred. These allegations should not bear any weight in defendant's argument, as they are simply not true.

Multnomah County District Attorney's Office
1021 S.W. Fourth Avenue, Room 600
Portland, Oregon 97204
Phone (503) 988-3162 Fax (503) 988-3643

CONCLUSION

The defendant has failed to cite any statutory authority that governs his request for the judgment to be set aside. The court should deny defendant's motion.

Respectfully submitted on this 16th day of December, 2016.

Amber Kinney
Oregon State Bar #077063
Deputy District Attorney

Multnomah County District Attorney's Office
1021 S.W. Fourth Avenue, Room 600
Portland, Oregon 97204
Phone (503) 988-3162 Fax (503) 988-3643

CERTIFICATE OF SERVICE

I hereby certify that I have served the within **STATE'S RESPONSE TO DEFENSE MOTION TO SET ASIDE THE JUDGMENT FOR FRAUD UPON THE COURT ON THE MERITS IN THE INTEREST OF JUSTICE** on the 16th day of December, 2016, by sending via mail, and email, a true copy thereof, certified by me as such, addressed to:

Circuit Court Clerk
106 Multnomah County Courthouse
1021 SW Fourth Avenue
Portland, Oregon 97204

Inmate: Austin C. Brand
SWIS 777714
SID 16137792
Department of Corrections
2575 Center St. NE
Salem, OR 97301-4667

Courtesy Copy to the Court
Trial Judge: Wittmayer
Multnomah County Courthouse
1021 SW Fourth Avenue
Portland, Oregon 97204

By _____
Amber Kinney, OSB 077063
Deputy District Attorney

Dated this 16th day of December, 2016

Multnomah County District Attorney's Office
1021 S.W. Fourth Avenue, Room 600
Portland, Oregon 97204
Phone (503) 988-3162 Fax (503) 988-3643

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON **Plaintiff,** **v.** **AUSTIN CALLAHAN BRAND,** **Defendant, Pro Se.**	**Case No. 14-CR-28021** **DEFENDANT'S, pro se REPLY TO STATE'S RESPONSE**

Defendant Brand, pro se, replies to State's response, and respectfully requests this court to Set Aside The Judgment On The Merits In The Interest Of Justice, as Defendant's motion is not fatally flawed and has met his burden of proof by a preponderance of the evidence. And submits the attached exhibit 104 in addendum to motion for fraud thereof.

I. In reply, to the State's facts, the defendant was sentenced on march 25th, 2016, the same day as the hearing was held for defendant's motion for arrest of judgment, not on march 26th, 2016 as the State alleges.

II. In reply, to the State's first contention, the defendant does realize the esoteric application and position of ORS 419B.923 in placement of the Oregon Revised Statutes. As presented to the court in the motion for fraud thereof, In the matter of M.L. and R.L. children D.H.S. v. T.L. 358 Ore. 679, (2016), the court referenced ORS 419B.923 and the legislative history in applicability to ORCP 71. Also, In the matter of the adoption of Hallford v, Smith, 120 Ore. App. 57; 852 p.2d 249; (1993), (footnote 8), the court concluded that ORCP 71 is not available to a person seeking relief from an adoption judgment.

The defendant would also like to point out to the court that it would make no logical sense to provide a statutory authority and remedy for dependency cases, but to allow fraud upon the court in a criminal case and to provide no statutory authority. The placement of the statute is simply because dependency cases and the remedy asserted in the motion for fraud thereof, this judge-made law, falls under the same authority, Article VII, (original), section 9 of the Oregon State Constitution.

If the court does not accept this position defendant asks the court to take the liberty to derive authority directly from Article VII, (original), section 9 of the Oregon State Constitution, as it has been conferred by all and is not in contention in the State's response. Citing, Stone v. powell 428 US 465, 97 S Ct 3037, 49 LED 2d 1067 (1976), "the court stated that the State's were to provide a 'full and fair' opportunity for litigation of 4th amendment issues."

The State further alleges that defendant has waived his right to present Fraud thereof to the court as defendant should have brought fraud thereof to the courts attention in the form of a motion for new trial, that has been previously presented to the court.

Citing, Huffman v. Alexander, 197 Ore. 283, 350; 253 p.2d 289; (1953),

The books are full of cases suggesting the existence of a judicial game of battledore and shuttlecock, wherein claimants, over long periods of years, are tossed from state to federal, and back to state, and again to federal courts, in the protracted attempt to determine by what procedure relief should be given, assuming that it is merited. That the situation could become intolerable is illustrated by a study of the cases which originated in Illinois and have gone thence to federal courts.

New trial motions are traditionally recognized and granted by courts for new evidence and jury misconduct and are reviewed on a different standard of law such as a new evidence test, or harmless error for others. Arrest of Judgment is likewise a different standard of law, the withholding of judgment because of some error apparent from the facts of the record. To set aside a Judgment is traditionally recognized by courts and goes back to English law, in the form

of some violation of equitability by either party. New Trial, Arrest of Judgment, set aside the Judgment, these words have meaning in law and that is exactly what defendant is contending in his "Motion To *Set Aside* The Judgment," that in short, reckless disregard of Jolene Walker's statements in "bad faith" from the affidavit in support of the search warrant precluded adjudication of probable cause, because without the statements defendant could not have shown the none existence of an alleged self incrimination and probable cause.

III. In reply, to the State's second contention, that ORCP 71B applies to civil cases and on examination of ORCP 71.

D. WRITS AND BILLS ABOLISHED

Writs of coram nobis, coram vobis, audita querela, bills of review, and bills in the nature of a bill of review are abolished, and *the procedure for obtaining any relief from a judgment shall be by motion* (emphasis added) or by an independent action.

B. (1) *By motion.* (emphasis added)

C. RELIEF FROM JUDGMENT BY OTHER MEANS

This rule (emphasis added) does not limit the inherent power of a court to modify a judgment within a reasonable time, ***or the power of a court to set aside a judgment for fraud upon the court.

ORPC 71 C. which does not describe any particular physical material way of moving the court to set aside the judgment such as "by motion" ,but references "This rule" in reference to ORCP 71 as a whole. As stated in ORCP 71 D., the procedure for obtaining any relief from a judgment shall be *"by motion"* (emphasis added), therefore the words "by motion" would intend using ORCP 71 **B. (1) By motion,** as a procedural legal means to present and move the court for such "old school" writs that are abolished by ORCP D., the court in, Huffman v. Alexander, supra, "in which was a habeas corpus proceeding gave an opinion that recognized these 'old school' writs and the need to provide a procedure to affectively assert relief that the courts have

historically recognized in these writs now abolished by ORCP D. That need for a Procedure is, *this rule* ORCP 71."

The defendant would also like to point out that there is a negative pregnant in the State's second contention, of no denial that ORCP 71 C., applies to defendant Brand's, pro se, motion for fraud thereof. Final answer defendant is of legal course using ORCP C. **RELIEF FROM JUDGMENT BY OTHER MEANS,** which intends a judge-made rule of law, as such his motion is titled, Set Aside The Judgment For Fraud Upon The Court***.

IV. In reply, to the State's third contention, defendant submit's in addendum exhibit 104, to the motion for fraud thereof, exhibit 104 has a date of November 15, 2014 before the application for a search warrant, a police report, by author Matthew Hardy #45956 containing the statements of informant Jolene Walker, that, were not presented to the court in the affidavit in support of the search warrant (see exhibit 103). Officer Matthew Hardy was in contact with the affiant Charles Skeahan #41834 and shared knowledge with the affiant (see exhibit 103), within the sprit of the collective knowledge doctrine.

Citing, State v. Holdorf, JR., 355 Ore.812, 825; 333 p.3d 982, 990; (2014), in considering the totality of the circumstances confronting them, police officers often reasonably rely on information provided to them by other officers to determine whether to stop a suspect. We have recognized that there are circumstances where a police officer may act based on the shared knowledge of the police when effectuating an arrest:

"The collective knowledge doctrine focuses on the shared knowledge of the police as a unit rather than merely on the knowledge of the officer who acts. The doctrine therefore permits a police officer to act if the officer reasonably relies on instructions from an officer who has probable cause." *State v. Soldahl*, 331 Ore. 420, 427, 15 P.3d 564 (2000). That recognition "in no way undermines the probable cause requirement. The doctrine merely views law enforcement agencies as a unit." *Id.* at 428. We hold that the collective knowledge doctrine also applies when a police officer reasonably relies on information from other officers in making a determination that a stop is justified based on articulable facts that criminal activity is afoot. *See generally Lichty*, 313 Ore. 579, 585; 835 p.2d 904; (1992) (totality of circumstances considered by police officers included reasonable reliance on information from informant).

Defendant Brand, pro se, has met his burden of proof by a preponderance of the evidence (see Franks v. Delaware, 438 US 154, 98 S Ct 2674, 57 L ED 2d 667 (1978))

To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true.

In determining whether any fact in issue has been proved by a preponderance of the evidence in the case, the jury (Judge) may, unless otherwise instructed, consider testimony of all witnesses, regardless of who may have called them and all exhibits received in evidence, regardless of who may have produced them.

Preponderance of the evidence is a lower standard of proof needed for an Oregon Rules of Professional Conduct violation, so defendant would ask the court to include Amber Kinney in the sanction of the setting aside the judgment, as the premise of the exclusionary rule to deter potential future violations of this nature.

Citing, Mapp v. Ohio 367 US 643, 658, 81 S Ct 1684, 6 L Ed 2d 1081, (1961), Denying shortcuts to only one of two cooperating law enforcement agencies tends naturally to breed legitimate suspicion of "working arrangements" whose results are equally tainted.

CONCLUSION

Citing, Weeks v. United State, 232 US 383,392, 58 LED 652,(1914):

This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all intrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts, which are

charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

The State denies fraud without any affidavits, exhibits, or authorities to back it up. Not stating specifically or any particular detail in force, relied upon by defendant of grounds, so that defendant can cure any insufficiency. Defendant Brand, pro se, has met his burden of proof to every element of fraud upon the court. The court should Set Aside The Judgment For Fraud Upon The Court On The Merits In The Interest Of Justice. Citing, State v. Wright, JR., 266 Ore. 163, 167; 511 P.2d 1223, 1225; (1973):

> The method of disposing of criminal cases should not be allowed to become unnecessarily time-consuming.

Dated January 13, 2017.

Dated this 13 day of January 2017

AUSTIN CALLAHAN BRAND, pro se
SID#16137792
SRCI
777 Stanton blvd.
Ontario, Oregon 97914

During the middle of these statements, Walker's mother Jolene and brother Cody, showed up at the apartment. Jolene was also hysterical and angry. She was yelling that she was going to kill Brand and that he admitted to her on text messages that he tied Sarah up. Sarah denied this and said, "He didn't tie me up mom. That's like another six years if he did that." I feel bad. I don't want him to get in trouble, but I don't want to be beat anymore."

Sarah said that she was also in fear for the rest of her family. She told me that Brand's brother was crazy and would kill someone for putting his brother in jail.

Detective Turnage was assigned to the call.

I transported Jolene and Sarah Walker to GPD. Walker's brother and Klein were also transported to GPD. Klein had to leave before he was able to be interviewed. Brand was transported to GPD and placed in a holding cell.

Detective Turnage continued the investigation.

4. ACTION RECOMMENDED

Author HARDY, MATTHEW D (45956) Date/Time 11-15-2014

Subject ACTION RECOMMENDED

Attach to additional reports.

*** END OF HARDCOPY *** v.140717

Exhibit 104
Defendant's

****

CERTIFICATE OF SERVICE

CASE NAME: State of Oregon, plaintiff v. AUSTIN CALLAHAN BRAND, defendant, pro se

CASE NUMBER: 14-CR-28021

COMES NOW, AUSTIN CALLAHAN BRAND, pro se, and certifies the following:

That I am incarcerated by the Oregon Department of Corrections at Snake River Correctional Institution.

That on the 13 day of January, 2017, I personally placed in the Correctional Institution's mailing service A TRUE COPY of the following:

Defendant's, pro se, REPLY TO STATE'S RESPONSE

I placed the above in a securely enclosed, postage prepaid envelope, to the person(s) named at the places addressed below:

Distric Attorneys Office
Amber Kinney
Multnomah County Courthouse
1025 SW Fourth Ave.
Portland, OR 97204

Multnomah County Courthouse
Clerk of the Court
1021 SW 4th Avenue
Portland, OR 97204

Judge John A. Wittmayer
Circuit Court of the State of Oregon
Multnomah County Courthouse
1025 SW Fourth Ave.
Portland, OR 97204

Office of Public Defense Services
Appellate Division
ATTN: Andrew Robinson
1175 Court Street NE
Salem, OR 97301

Austin Brand sid# 16137792
SRCI
777 Stanton Blvd.
Ontario, OR 97914

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON,	)	
	)	
Plaintiff,	)	Case No. 14CR28021
	)	
v.	)	ORDER ON DEFENDANT'S, PRO SE
	)	MOTION TO SET ASIDE THE JUDGMENT
AUSTIN CALLAHAN BRAND,	)	FOR FRAUD UPON THE COURT ON THE
	)	MERITS IN THE INTERST OF JUSTICE
Defendant.	)	

On October 31, 2016, Defendant filed his Pro Se Motion To Set Aside The Judgment For Fraud Upon The Court On The Merits In The Interest Of Justice, requesting both oral argument and an evidentiary hearing. On December 16, 2016, the State filed its response to Defendant's motion, and on January 23, 2017, the Defendant filed his reply to the State's response.

Based upon the written submissions of the parties, as set forth above, IT IS HEREBY ORDERED AS FOLLOWS:

1. Defendant's request for oral argument is DENIED.
2. Defendant's request for an evidentiary hearing is DENIED.
3. Defendant's Pro Se Motion To Set Aside The Judgment For Fraud Upon The Court On The Merits In The Interest Of Justice is DENIED.

Dated this 25th day of January, 2017.

John A. Wittmayer
Circuit Court Judge

A Okay.
Q -- word-for-word. But you remember that you had an interview with detectives that night?
A Yes
Q Okay. And you remember talking to them about this text message conversation you had with Mr. Brand?
A Yeah, they took my phone for quite a few days.
Q Okay. Do you remember saying that you -- and I can show you this. This is just -- I will show this to you to refresh your recollection, this highlighted portion right here.
(Pause.)
Q Does that refresh your recollection?
A Yeah.
Q And can you tell me what you texted him and what he texted back?
A I texted him, "Did you lock up or tie up my daughter?" And he text me back that, "It didn't happen like that," or something like that, was one of the texts I do remember getting.
Q Do you remember him texting you back and saying, quote, "I'm not perfect"?
A Yes.
Q He wrote that back to you?
A And that was -- yeah. I can't remember exactly what I text him when he text that one back to me.
Q Do you remember telling the detectives that you said --

you asked him, "Did you tie her up and lock her up," and he texted you back and said, quote, "I'm not perfect."?

A Yes.

Q Do you remember telling the detectives that he stopped coming to your house on Wednesday, that would be the 12th, on this day, that you had had contact --

A That he stopped staying there, yeah.

Q That he quit coming around your house on Wednesday?

A Uh-huh, yes.

Q Do you remember telling the detectives that you had had daily contact with him leading up to this point?

A Yes.

Q And Wednesday you told the detectives that you -- that he stopped coming over to your house on Wednesday, but that you received a text from him on Wednesday night; is that right?

A I don't remember.

Q You don't remember?

A I honestly don't remember.

(Counsel confer.)

Q Okay. So this is that same transcript again, just to refresh your recollection.

(Pause.)

A Yes, I remember that -- I kind of remember that texting, yeah.

Q Okay. So what -- so he did text you that night, on

next morning has nothing to do -- does not contradict a material element of the State's case at all. In fact, there's not a single piece of evidence offered by the Defense, not a single piece of evidence, that contradicts any material element in the State's case. And by material element, I'm talking about the elements that I have to prove to you beyond a reasonable doubt. These elements in every count. There is no evidence presented that contradicts any of this, no alternative story, nothing. The fact that Sarah Brand (sic) may or may not have been in their house the next morning does not mean that she wasn't kidnapped. You see what I'm saying? It doesn't mean that it didn't -- that the rape was not forced on her. No evidence presented by the Defense that contradicts any of these material elements.

Now, I'm just going to summarize a couple of points in evidence that you did here. Admissions out of the Defendant's own mouth. When he was speaking to David Walker on the phone, and David Walker, Sarah's dad, was confronting him, did you take my daughter? Did you take her? And he said, yeah, yeah, I took your daughter. I took her against her will. There's nothing you're going to do about it. That was the conversation he had with her daughter (sic). That's an admission of kidnapping.

When he was texting with Jolene Walker, Sarah's mother, she's also confronting him, did you do this, did you do this? And he says, quote, I'm not perfect. I'm not perfect.

This case really does, as Mr. Walsh pointed out, hinge

of fact at the time, and that's the best I can say.

THE COURT: All right. Thank you.

Defendant's Motion for New Trial is denied.

With respect to the text message issue, he was, of course, a party to the conversation. He could have testified about it had he chose to. I'm not suggesting he should have at all. That's totally within his right to choose to testify or not, but he had that choice had he decided to exercise that choice.

I think that the contents of the screen shots had very little substantive value and were not likely to have changed the result of the trial. That's a high standard that the Defendant has to meet in order to suggest this newly-discovered evidence would have changed the result of the trial. And he certainly could have had the phone examined, although he apparently chose not to for whatever reasons he thought sufficient. And his investigator and his counsel (inaudible).

There's absolutely no reason to think there was any juror misconduct at all based on either one of the text message -- or, excuse me -- Facebook postings from the juror. So motion's denied.

MR. CELUCH: And, Judge --

THE COURT: We'll do a minute order?

MR. CELUCH: Fine. And just --

THE COURT: And would you put on the minute order the

Austin Callahan Brand
SID # 16137792
SRCI
777 Stanton Blvd.
Ontario, OR 97914

March 10, 2017

Oregon Court of Appeals
Bldg. 1163 State st.
Salem, OR 97310

Re: Office of Public Defense Services No. 65790
Court of Appeals Case No. A162224
Multnomah County Circuit Court Case No. 14CR28021

To Whom It May Concern:

Pursuant to ORS 138.480., I, Austin Callahan Brand respectfully request that the Oregon Court of Appeals, direct the Public Defense Services Commission to provide representation of adequate legal counsel for the above Appellate case Number and/or for the primary purpose of representation in an AUSTIN CALLAHAN BRAND's, pro se Motion To Set Aside The Judgment For Fraud Upon The Court On The Merits In The Interest Of Justice, filed with the Multnomah County Circuit Court pursuant to ORAP 8.25, ORCP 71(C), Franks v. Delaware 438 US 154, 98 S Ct 2674, 57 L Ed 667, (1978) and other authorities. Motion for Fraud Thereof was served on the Court of Appeals on October 26, 2016 and other parties as required by law. Order denying Motion for Fraud Thereof was on a date of January 25, 2017 and said Order was filed in the Court of Appeals on a date of January 30, 2017 when Appellant/Defendant Brand received notice and a copy through the mail.

Appellant, Brand has a good faith belief that he has no legal counsel to represent him in the matter of the Motion for Fraud Thereof, as his Appellant Attorney Andrew D. Robinson was not a "party" to the Motion for Fraud Thereof in the Multnomah County Circuit Court proceedings as it was out side his scope of representation. Also Appellant Attorney Andrew D. Robinson went elegantly in depth about why an appeal could not be filed on the Motion for Fraud Thereof. Appellant Attorney Andrew D. Robinson may not therefore be a "party" to the Motion for Fraud Thereof in any legal form, citing In RE Grimes Estate 170 ore. 204; 131 p.2d 448; (1942). Appellant attorney Andrew D. Robinson has informed me that he will not assign error to the "Fraud" motion in appellant's direct appeal brief.

Appellant, Brand has a good faith belief that the Motion for Fraud Thereof and the Judgment of the Circuit Court of Multnomah County therewith deprived Appellant/defendant, Brand of liberty as consistent with the applicable case law applied to Appellant Brand's legal position. The Court of appeals will most likely be inadequately informed of the jurisdictional/disposition of the "fraud" motion, by and through presentation of a 5 page pro se

brief. Newer case law of, Espinoza v. Evergreen Helicopters 359 ore. 63; 376 P.3d 960; (2016) and forum non conveniens is likely to apply, which would mean that care should be taken so that appellant is not deprive of a remedy in this forum of the Court of Appeals. Also it would be unfair not to appoint counsel for the "Fraud" motion within the meaning of, Stone v. Powell 428 US 465, 97 S Ct 3037, 49 LED 3d 1067 (1976) or in the alternative direct already appointed appellant attorney Andrew D. Robinson at the Office of Public Defense Services, to apply representation.

Sincerely,

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

AUSTIN CALLAHAN BRAND, aka Austin Brand,
Defendant-Appellant.

Multnomah County Circuit Court No. 14CR28021

Court of Appeals No. A162224

ORDER DENYING MOTION REGARDING COUNSEL

Appellant himself has filed a "To Whom It May Concern" letter in which he requests, pursuant to ORS 138.480, appointment of additional counsel to represent him respecting his "Motion To Set Aside The Judgment For Fraud Upon The Court * * * " filed at Multnomah County Circuit Court. In the alternative, appellant requests that the court direct appellant's appointed counsel on appeal to assign error to the matter in the opening brief. The motions are denied.

Appellant's first request for relief is denied because this court has no authority to appoint counsel to represent appellant in the trial court. Appellant's alternative request for relief is denied because the court expects an attorney to exercise professional judgment in determining which issues, if any, to raise on appeal, and an attorney has an ethical duty to refrain from raising any issue that is not at least arguably meritorious. *State v. Balfour*, 311 Or 434, 814 P2d 1069 (1991); *see also Jones v. Barnes*, 463 US 745, 751, 103 S Ct 3308, 77 Led 2d 987 (1983) (defendants, indigent or not, have no right to compel counsel to press even a non-frivolous issue requested by a client, if counsel decides as a matter of professional judgment not to raise the issue).[1] Therefore, if counsel, in the exercise of professional judgment declines to raise an issue on appeal, this court has no authority to direct counsel to do otherwise.

The opening brief is due April 4, 2017.

James W. Nass 03/28/2017 7:36 AM
JAMES W. NASS
APPELLATE COMMISSIONER

c: Andrew D Robinson Benjamin Gutman Austin Callahan Brand ej

[1] Moreover, a party may assign error on appeal only to a trial court ruling rendered before entry of judgment or as memorialized in the judgment being appealed. The trial court could not have ruled on appellant's motion before entry of the judgment being appealed; therefore, the "fraud" motion is not within the scope of this appeal.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, v. AUSTIN CALLAHAN BRAND, Aka Austin Brand, Defendant-Appellant.	) Multnomah County Circuit Court) Case No. 14CR28021)) CA Case No.A162224))))))

MOTION TO APPOINT COUNSEL FOR ORCP 71(C)
FRAUD THEREOF MOTION

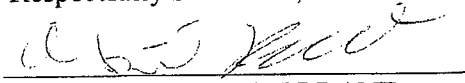
COMES NOW, AUSTIN CALLAHAN BRAND, pro se and moves this court for an order directing the Office of Public Defense Services to provide representation pursuant to ORS 138.480, for an ORCP 71(C) Fraud Thereof Motion to test the validity of that judgment in which has deprived Appellant, Austin Brand, pro se, of his liberty, in a criminal proceeding.

This motion is based upon the Motion To Set Aside The Judgment For Fraud Upon The Court On The Merits In The Interest Of Justice, filed with the Multnomah County Circuit Court pursuant to ORAP 8.25, ORCP 71(C), Franks v. Delaware 438 US 154, 98 S Ct 2674, 57 L Ed 667, (1978) and other authorities. Motion for Fraud Thereof was served on the Court of Appeals on October 26, 2016 and other parties as required by law. Order denying Motion for Fraud Thereof was on a date of January 25, 2017 and said Order was filed in the Court of Appeals on a date of January 30, 2017 when Appellant/Defendant Brand received notice and a copy through

the mail. And the need for counsel, for or other than Appellant Attorney Andrew D. Robinson which has explicitly declined to assigh error to the motion for Fraud Thereof.

Dated this 31 day of March, 2017.

Respectfully Submitted,



AUSTIN CALLAHAN BRAND, pro se
SID#16137792
SRCI
777 Stanton blvd.
Ontario, Oregon 97914

CERTIFICATE OF SERVICE

CASE NAME: _____ v. _____

CASE NUMBER: (if known) _____

COMES NOW, _____, and certifies the following:

That I am incarcerated by the Oregon Department of Corrections at _____.

That on the _____day of _____, 20____, I personally placed in the Correctional Institution's mailing service A TRUE COPY of the following:

_____

_____

I placed the above in a securely enclosed, postage prepaid envelope, to the person(s) named at the places addressed below:

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

(Signature)

Print Name_____

S.I.D. No.: _____

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

AUSTIN CALLAHAN BRAND, aka Austin Brand,
Defendant-Appellant.

Multnomah County Circuit Court
14CR28021

A162224

ORDER DENYING APPOINTMENT OF ALTERNATE COUNSEL AND GRANTING *PRO SE* SUPPLEMENTAL BRIEF

Appellant has filed a motion for appointment of alternate counsel on appeal. The motion is denied. In the alternative the court will allow appellant to file a *pro se* supplemental brief.

The *pro se* supplemental brief is due May 30, 2017, shall not exceed five pages in length and must be submitted to counsel for filing in proper form.

Erika L. Hadlock 04/25/2017 6:28 PM
ERIKA L. HADLOCK
CHIEF JUDGE, COURT OF APPEALS

c: Andrew D Robinson
Benjamin Gutman
Austin Callahan Brand

km

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, v. AUSTIN CALLAHAN BRAND, Aka Austin Brand, Defendant-Appellant.	) Multnomah County Circuit Court) Case No. 14CR28021)) CA Case No.A162224))))))

MOTION FOR EXTENSION OF TIME ON PRO SE BRIEF AND MOTION FOR LEAVE OF COURT FOR ADDITIONAL PAGE COUNT

COMES NOW, AUSTIN CALLAHAN BRAND, pro se and moves this court for extension of time on appellant's pro se brief and leave of the court for additional page count pertaining to his ORAP 5.92. Supplemental pro se brief.

For extension of time, notice of appeal was filed on May 26, 2016. On April 25, 2017 the court of appeals allow preemptive leave to file a pro se supplemental brief and the brief is due on May 30, 2017 as attached order. The date the extension is requested being June 28, 2017. This is the first request by appellant Brand, pro se and the defendant-appellant is incarcerated at Snake River Correctional Institution.

Defendant-Appellant Brand, pro se seeks leave of the court for ORAP 5.92.(2), stating in part;

*** Unless the court orders otherwise, the statement of the case, including the statement of facts, and the argument together shall be limited to five pages.

Defendant-Appellant Brand, pro se plans to bring fourth to the Court of Appeals a claim of Fraud thereof in a criminal case, being so the claim is exceedingly complex, not only to the merits of the claim, but issues of preservation and the facts applied. Defendant-Appellant Brand, pro se will also be asserting other equitable rules of law in relation to his assertion of review. This issue of "Fraud" thereof must also be evaluated for a ORAP 5.12 rule. Not being able to sufficiently fit and articulate the concepts involved, being that it's a 5 page pro se brief will prejudice Defendant-Appellant Brand on all manners of presentation.

Dated this 12 day of May, 2017.

Respectfully Submitted,

AUSTIN CALLAHAN BRAND, pro se
SID#16137792
SRCI
777 Stanton blvd.
Ontario, Oregon 97914

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

AUSTIN CALLAHAN BRAND, aka Austin Brand,
Defendant-Appellant.

Multnomah County Circuit Court
14CR28021

A162224

ORDER DENYING APPOINTMENT OF ALTERNATE COUNSEL AND GRANTING *PRO SE* SUPPLEMENTAL BRIEF

Appellant has filed a motion for appointment of alternate counsel on appeal. The motion is denied. In the alternative the court will allow appellant to file a *pro se* supplemental brief.

The *pro se* supplemental brief is due May 30, 2017, shall not exceed five pages in length and must be submitted to counsel for filing in proper form.

Erika L. Hadlock 04/25/2017 6:28 PM
ERIKA L. HADLOCK
CHIEF JUDGE, COURT OF APPEALS

c: Andrew D Robinson
Benjamin Gutman
✓Austin Callahan Brand

km

****

CERTIFICATE OF SERVICE

CASE NAME: State of Oregon, plaintiff v. AUSTIN CALLAHAN BRAND, defendant, pro se

CASE NUMBER: 14-CR-28021, A162224

COMES NOW, AUSTIN CALLAHAN BRAND, pro se, and certifies the following:

That I am incarcerated by the Oregon Department of Corrections at Snake River Correctional Institution.

That on the 12 day of May , 2017, I personally placed in the Correctional Institution's mailing service A TRUE COPY of the following:

Defendant's, pro se, **MOTION FOR EXTENSION OF TIME ON PRO SE BRIEF AND MOTION FOR LEAVE OF COURT FOR ADDITIONAL PAGE COUNT**

I placed the above in a securely enclosed, postage prepaid envelope, to the person(s) named at the places addressed below:

Oregon Court of Appeals
1163 state st.
Salem, OR 97301

ELLEN F. ROSENBLUM#753239
Attorney General
Benjamin Gutman#160599
Solicitor General 400 Justice Building
1162 Court Street NE
Salem, Or 97301

Office of Public Defense Services
Appellate Division
ATTN: Andrew Robinson
1175 Court Street NE
Salem, OR 97301

Austin Brand sid# 16137792
SRCI
777 Stanton Blvd.
Ontario, OR 97914

ER
116

OREGON JUDICIAL DEPARTMENT
Appellate Court Records Section

May 22, 2017

Austin Callahan Brand
SID# 16137792
SRCI
19 777 Stanton Blvd.
Ontario, OR 97914

RE: State of Oregon v. Austin Callahan Brand
CA A162224

The court has received your motion for an extension of time and extended pro se supplemental brief. **This letter is to notify you that the court will be taking no action on both of your motions.** Your attorney is Andrew Robinson, and anything filed with the court must be filed through your counsel.

Sincerely,

Appellate Court Records Section

c: Andrew D Robinson
Benjamin Gutman
Austin Callahan Brand

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, v. AUSTIN CALLAHAN BRAND, aka Austin Brand, Defendant-Appellant.	Multnomah County Circuit Court Case No. 14CR28021 CA A162224

APPELLANT'S MOTION – SUPPLEMENT RECORD

The attached documents were filed in the trial court after the trial court file was electronically transmitted to this court. In order to ensure that the record on appeal is sufficient to allow review, defendant, through counsel, moves this court for an order to supplement the record with the attached documents.

Counsel contacted opposing counsel Jennifer S. Lloyd, Attorney-in-Charge Criminal Appeals, and she does not object to this motion.

//

//

//

//

//

Office of Public Defense Services • Appellate Division
1175 Court St. NE • Salem, Oregon 97301-4030
Telephone: (503) 378-3349 • Fax: (503) 378-2163

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

AUSTIN CALLAHAN BRAND, aka Austin Brand,
Defendant-Appellant.

Multnomah County Circuit Court No. 14CR28021

Court of Appeals No. A162224

ORDER DENYING MOTION TO SUPPLEMENT THE RECORD

Appellant's attorney has moved the court to supplement the record to include appellant's *pro se* motion to set aside the judgment from which he appeals for fraud, which motion defendant filed after entry of the judgment on appeal. For the reasons that follow, the motion is denied.

The record on appeal is limited to the record made in the trial court on the basis of which the trial court rendered the decision memorialized in the judgment being appealed. The trial court did not have before it the documents filed after entry of the judgment from which this appeal was taken. Therefore, the documents are not properly part of the record of this appeal. Also, it appears that appellant was represented by counsel in the trial court and, as such, any document filed with the trial court must be filed through counsel. Appellant himself filed the motion to aside the judgment; therefore, the motion was not properly before the trial court.

Appellant's brief is due 14 days from the date of this order.

James W. Nass 05/02/2017 3:52 PM
JAMES W. NASS
APPELLATE COMMISSIONER

c: Andrew D Robinson
Benjamin Gutman

ej

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, v. AUSTIN CALLAHAN BRAND, aka Austin Brand, Defendant-Appellant.	Multnomah County Circuit Court Case No. 14CR28021 CA A162224

APPELLANT'S RENEWED MOTION FOR EXTENDED SUPPLEMENTAL *PRO SE* BRIEF

Defendant, through counsel, renews his motion for leave to file an extended supplemental *pro se* brief not to exceed 20 pages. Defendant has represented to counsel that he needs additional space to complete the brief because of the complexity of his claim. Specifically, he intends to raise a claim that is not only complex on its merits, but also involves complex preservation issues and factual issues. Defendant states that being limited to five pages will prejudice him because he is unable to articulate the claim within that limit.

Opposing counsel objects to this motion.

//

//

//

//

Office of Public Defense Services • Appellate Division
1175 Court St. NE • Salem, Oregon 97301-4030
Telephone: (503) 378-3349 • Fax: (503) 378-2163

ER 121

I certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this motion will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Benjamin Gutman, #160599, Solicitor General, attorney for respondent.

DATED May 31, 2017.

Respectfully submitted,

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

Signed
By Andrew Robinson at 9:52 am, May 31, 2017

ANDREW D. ROBINSON OSB #064861
DEPUTY PUBLIC DEFENDER
Andrew.Robinson@opds.state.or.us

Attorneys for Defendant-Appellant
Austin Callahan Brand

Office of Public Defense Services • Appellate Division
1175 Court St. NE • Salem, Oregon 97301-4030
Telephone: (503) 378-3349 • Fax: (503) 378-2163

ER 122

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

AUSTIN CALLAHAN BRAND, aka Austin Brand,
Defendant-Appellant.

Multnomah County Circuit Court
14CR28021

A162224

ORDER DENYING EXTENDED SUPPLEMENTAL PRO SE BRIEF

Appellant has moved for leave to file an extended supplemental *pro se* brief in this case.

The motion is denied with leave to renew if appellant explains why the specific issues he wishes to raise in his *pro se* brief cannot be summarized in 5 pages.

Erika L. Hadlock 05/25/2017 12:05 PM
ERIKA L. HADLOCK
CHIEF JUDGE, COURT OF APPEALS

c: Andrew D Robinson
Benjamin Gutman

vb

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

Brief length

I certify that (1) I do not have the ability to provide a word count as the brief was prepared *pro se*; (2) this brief complies with the page limitation in ORAP 5.05(2)(c); and (3) the number of pages in this brief is five pages.

Type size

I certify that the size of the type in this brief could not be determined as the brief was prepared *pro se*.

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Appellant's *Pro Se* Supplemental Brief to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on June 27, 2017.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Appellant's *Pro Se* Supplemental Brief will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Benjamin Gutman, #160599, Solicitor General, and Jordan R. Silk, #105031, Assistant Attorney General, attorneys for Plaintiff-Respondent.

Respectfully submitted,

ERNEST G. LANNET
CHIEF DEFENDER
CRIMINAL APPELLATE SECTION

OFFICE OF PUBLIC DEFENSE SERVICES

Signed
By Andrew Robinson at 8:29 am, Jun 27, 2017

ANDREW D. ROBINSON OSB #064861
DEPUTY PUBLIC DEFENDER
Andrew.Robinson@opds.state.or.us

Attorneys for Defendant-Appellant
Austin Callahan Brand

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, v. AUSTIN CALLAHAN BRAND, aka Austin Brand, Defendant-Appellant.	Multnomah County Circuit Court Case No. 14CR28021 CA A162224

APPELLANT'S OPENING BRIEF AND EXCERPT OF RECORD

Appeal from the Judgment of the Circuit Court
for Multnomah County
Honorable John A. Wittmayer, Judge

ERNEST G. LANNET #013248
Chief Defender
Criminal Appellate Section
ANDREW D. ROBINSON #064861
Deputy Public Defender
Office of Public Defense Services
1175 Court Street NE
Salem, OR 97301
Andrew.Robinson@opds.state.or.us
Phone: (503) 378-3349
Attorneys for Defendant-Appellant

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
400 Justice Building
1162 Court Street NE
Salem, OR 97301
benjamin.gutman@doj.state.or.us
Phone: (503) 378-4402
Attorneys for Plaintiff-Respondent

[redacted]

App. X

TABLE OF CONTENTS

STATEMENT OF THE CASE 1

Nature of the Proceeding 1

Nature of the Judgment 1

Jurisdiction 2

Notice of Appeal 2

Questions Presented 2

Summary of Arguments 3

Summary of Facts 6

FIRST ASSIGNMENT OF ERROR 15

The trial court erred by admitting Detective Turnage's testimony that SW's failure to promptly report defendant's conduct was an example of the phenomenon of delayed reporting in domestic violence cases.

Preservation of Error 15

Standard of Review 18

Argument 18

I. The trial court erred by admitting Detective Turnage's testimony that SW's failure to promptly report defendant's conduct was an example of the phenomenon of delayed reporting in domestic violence cases. 18

II. The error was not harmless. 23

SECOND ASSIGNMENT OF ERROR 25

The trial court erred by failing to strike Officer Hardy's testimony that during his interview with SW, "[s]he seemed like a girl that – that didn't know what else to do, and so she's finally coming to the police but didn't want [defendant] necessarily to get into a bunch of trouble."

THIRD ASSIGNMENT OF ERROR 25

The trial court erred by failing to strike Officer Hardy's testimony that during his interview with SW, what was "going through his mind" was "that this was a big deal, that this was a big case, that bad things happened, and we needed to step in and save this girl[.]"

FOURTH ASSIGNMENT OF ERROR 25

The trial court erred by failing to strike Officer Hardy's testimony that when he interviewed SW, his "opinion was that there was a lot of minimization about what had actually occurred."

Preservation of Error 26

Standard of Review 27

Argument 27

I. The trial court erred by failing to strike Hardy's vouching testimony. 27

II. The error was not harmless. 29

FIFTH ASSIGNMENT OF ERROR 31

The trial court erred by failing to give a jury instruction requiring concurrence on a particular occurrence of the coercion charge in Count 6.

Preservation of Error 31

Standard of Review 33

Argument 33

I. The trial court erred by failing to give a concurrence instruction for Count 6. 33

II. The error was not harmless. 36

SIXTH ASSIGNMENT OF ERROR 37

The trial court erred by failing to instruct the jury that defendant committed the first-degree kidnapping charge in Count 5 only if the confinement occurred in a place where the alleged victim was not likely to be found.

Preservation of Error....38

Standard of Review....38

Argument....39

I. The trial court erred by failing to instruct the jury to determine whether defendant confined the alleged victim in a place where she was not likely to be found. 39

II. The error was not harmless. 40

CONCLUSION....42

TABLE OF AUTHORITIES

Cases

Ailes v. Portland Meadows, Inc.,
312 Or 376, 823 P2d 956 (1991) 26, 31, 32, 33, 38

B.A. v. Webb,
253 Or App 1, 289 P3d 300 (2012),
rev den, 353 Or 428 (2013) 26

Mellerio v. Nooth,
279 Or App 419, 379 P3d 560 (2016) 34

Neder v. United States,
527 US 1, 119 S Ct 1827, 144 L Ed 2d 35 (1999) 41

Simpson v. Coursey,
224 Or App 145, 197 P3d 68 (2008),
rev den, 346 Or 184 (2009) 23, 24, 26, 30

State v. Abraham,
265 Or App 240, 335 P3d 293 (2014) 23

State v. Beauvais,
357 Or 524, 354 P3d 680 (2015) 21, 22

State v. Cook,
340 Or 530, 135 P3d 260 (2006) 41

State v. Corkill,
262 Or App 543, 325 P3d 796 (2014) 26, 28

State v. Criswell,
282 Or App 146, 386 P3d 58 (2016) 18, 27

State v. Ferguson,
247 Or App 747, 271 P3d 150 (2012) 23, 29

State v. Gaines,
275 Or App 736, 365 P3d 1103 (2015) 31, 32

State v. Gray,
261 Or App 121, 322 P3d 1094 (2014) 39

State v. Hale,
335 Or 612, 75 P3d 448 (2003) 32

State v. Higgins,
258 Or App 177, 308 P3d 352 (2013),
rev den, 354 Or 700 (2014).....25, 27, 28

State v. Keller,
315 Or 273, 844 P2d 195 (1993) 19, 27

State v. Logston,
270 Or App 296, 347 P3d 352 (2015) 23

State v. Lopez-Minjarez,
350 Or 576, 260 P3d 439 (2011) 40

State v. Lotches,
331 Or 455, 17 P3d 1045 (2000) 31, 32, 38

State v. Lowell,
249 Or App 364, 277 P3d 588,
rev den, 352 Or 378 (2012).....23, 26, 29

State v. Lupoli,
348 Or 346, 234 P3d 117 (2010) 19, 21

State v. McCarthy,
251 Or App 231, 283 P3d 391 (2012) 19, 20, 21

State v. Middleton,
294 Or 427, 657 P2d 1215 (1983) 18, 27

State v. Milbradt,
305 Or 621, 756 P2d 620 (1988) 18, 27

State v. Parkins,
346 Or 333, 211 P3d 262 (2009) 40, 41

State v. Pervish,
202 Or App 442, 123 P3d 285 (2005),
rev den 340 Or 308 (2006) 32

State v. Pierce,
235 Or App 372, 232 P3d 978 (2010) 38

State v. Quinn,
290 Or 383, 623 P2d 630 (1981),
overruled on other grounds by State v. Hall, 339 Or 7 (2005) 39

State v. Teagues,
281 Or App 182, 383 P3d 320 (2016) 32, 33, 36

State v. Villanueva–Villanueva,
262 Or App 530, 325 P3d 783 (2014) 23

State v. Wright,
281 Or App 399, 383 P3d 385 (2016) 27, 32, 33

United States v. Gaudin,
515 US 506, 115 S Ct 2310, 132 L Ed 2d 444 (1995) 39

Constitutional and Statutory Provisions

US Const, Amend VI 39

Or Const, Art I, § 11 ..... 33, 39

ORS 138.040 1

ORS 161.405 1

ORS 163.160 1

ORS 163.187 1

ORS163.190 1

ORS 163.195 1

ORS 163.225 40

ORS 163.225(1)(b) 40

ORS 163.235 1

ORS 163.235(1) 40

ORS 163.275 ..... 1, 35

ORS 163.375 1

ORS 164.225 1

ORS 811.140 1

APPELLANT'S OPENING BRIEF

STATEMENT OF THE CASE

Nature of the Proceeding

This is a criminal appeal in which defendant, Austin Callahan Brand, seeks reversal of convictions for first-degree kidnapping, coercion, first-degree assault, menacing, and recklessly endangering another person. The state charged defendant with first-degree rape, ORS 163.375 (Count 1); four counts of first-degree kidnapping, ORS 163.235 (Counts 2-5); two counts of coercion, ORS 163.275 (Counts 6 and 7); attempted first-degree burglary, ORS 164.225 and ORS 161.405 (Count 8); two counts of fourth-degree assault, ORS 163.160 (Counts 9 and 10); strangulation, ORS 163.187 (Count 11); menacing, ORS163.190 (Count 12); recklessly endangering another person, ORS 163.195 (Count 13); and reckless driving, ORS 811.140 (Count 14). *Indictment*, ER1-4.

Nature of the Judgment

A jury found defendant guilty of first-degree kidnapping in Count 5, coercion in Count 6, fourth-degree assault in Count 9, menacing in Count 12, and recklessly endangering another person in Count 13. The jury found defendant not guilty of first-degree kidnapping in Count 3, coercion in Count 7, attempted first-degree burglary in Count 8, fourth-degree assault in Count 10,

strangulation in Count 11, and reckless driving in Count 14. The court dismissed Counts 1, 2, and 4 on the state's motion. *Judgment*, ER-21-27.

For Count 5, the trial court sentenced defendant to 180 months of incarceration. For Count 6, the court sentenced defendant to 25 months of incarceration. For each of Counts 9, 12, and 13, the court sentenced defendant to one year of incarceration. *Id.*

Jurisdiction

This court has jurisdiction pursuant to ORS 138.040.

Notice of Appeal

The Multnomah County Circuit Court entered the judgment on April 1, 2016. Defendant timely filed a motion for new trial. On April 26, 2016, the trial court entered an order denying defendant's motion. On May 26, 2016, defendant timely filed notice of appeal.

Questions Presented

1. Did a police detective impermissibly vouch for the credibility of the alleged victim by testifying that he believed that she failed to promptly report the charged crimes because of "fear of continued assaults"?

2-4. A police officer testified that during his interview with the alleged victim,

> "[s]he seemed like a girl that – that didn't know what else to do, and so she's finally coming to the police but didn't want [defendant] necessarily to get into a bunch of trouble."

In addition, the officer testified that what was "going through his mind" during the interview was

> "that this was a big deal, that this was a big case, that bad things happened, and we needed to step in and save this girl[.]"

Finally, the officer testified that his

> "opinion was that there was a lot of minimization about what had actually occurred."

Was the testimony impermissible vouching?

5. When the evidence substantiates multiple occurrences of a charged crime and the state makes no election, must the trial court instruct that jury that the requisite number of jurors must agree on one of the multiple occurrences?

6. When the defendant is charged with kidnapping on a "secret confinement" theory, must the trial court instruct the jury to determine whether the defendant confined the alleged victim in a place where she was not likely to be found?

Summary of Arguments

1. Under Oregon law, a witness may not vouch for the credibility of another witness's testimony or out-of-court statements. Here, a police detective testified regarding the phenomenon of delayed reporting in domestic violence cases. In that context, he further testified that the alleged victim's failure to

promptly report the charged conduct was because of "fear of continued assaults." Because the testimony implied that he believed the alleged victim's allegations, the testimony constituted vouching. The trial court erred by admitting that vouching testimony.

The error likely affected each verdict, for two reasons. First, there is a heightened risk of harm when the central issue in the trial is the credibility of the vouched-for statements. Second, there is a heightened risk of harm when the trial was a close one, as shown by acquittals on some charges and by non-unanimous guilty verdicts. Because those factors were present here, the detective's testimony that the victim's delayed report was attributable to fear (as opposed to fabrication) could have affected each verdict, and this court must reverse the convictions.

2-4. "True vouching evidence" is evidence that expresses a belief that another witness's testimony or an out-of-court statement is or is not credible, which a party offers to bolster or undermine the credibility of the statement. A trial court has a duty to strike such evidence *sua sponte* and plainly errs by failing to do so. Here, the court overlooked the three instances of true vouching evidence quoted above in the questions presented. Each instance was offered for a vouching purpose and expressed either the witness's belief in the inculpatory aspects of the alleged victim's initial statements to the police, or his disbelief in the exculpatory aspects of those statements. Because each instance was true

vouching evidence, the trial court had a duty to strike it *sua sponte* and plainly erred by failing to do so. Each error was harmful for the same reasons as the first vouching issue: the central issue at trial was the alleged victim's credibility, and the trial was extremely close. This court should reverse the convictions.

5. When the evidence substantiates multiple, separate occurrences of a charged crime, and the state does not make an election that resolves the issue, the trial court must instruct the jury that the requisite number of jurors must agree on one of the multiple occurrences. Here, the evidence substantiated at least two separate occurrences of the coercion charge in Count 6, and the state made no election. Consequently, the trial court was required to give a concurrence instruction and plainly erred by failing to do so. The error was harmful and requires reversal, because jurors could have disagreed about which occurrence had been proven.

6. A trial court must instruct the jury to decide every element of a charged crime. Here, for the first-degree kidnapping charge in Count 5, the court neglected to instruct the jury to decide whether defendant had confined the alleged victim in a place where she was not likely to be found. Because that is an element of the charged form of kidnapping, the trial court's omission was plain error. The error was harmful, because there was little or no evidence regarding how often people visited the barn where defendant purportedly

confined the alleged victim. In addition, the alleged victim's sister testified that defendant had told her that he intended to keep the alleged victim in the barn. In that context, a reasonable juror could have doubted whether the barn was a place where she was not likely to be found. Accordingly, the error requires reversal of the conviction in Count 5.

Summary of Facts

SW's Testimony

At trial, the alleged victim, SW, testified about her relationship with defendant and the events of November 12-15, 2014. Defendant and SW had been in a romantic relationship since the end of 2013. Tr 245. She had known defendant since she was about ten years old because he was a family friend and close friend of her younger brother. Tr 245-46.

On May 1, 2014, while they were at the Sandy River, defendant became angry with SW. He threw a pulled pork sandwich at her and then punched her in the eye. Tr 249.

SW is a recovering heroin addict. Tr 258. She started a methadone program in the Spring or Summer of 2014. Tr 260. SW did not want to have a child while she was taking methadone. Defendant wanted her to quit the methadone program so that they could have a child together. Tr 266-67.

On October 7, 2014, SW moved in with Klein, a friend from the methadone program, in order to get away from defendant. Tr 274. She told her family that she was moving out of state. Tr 274-75.

On November 9 or 10, defendant learned that SW was staying at Klein's apartment and went there to speak with her. Tr 277. Defendant told her that her family wanted to see her, so she went with him to their house, Tr 279, but they turned her away because Klein had called them and revealed that she had been criticizing them. Tr 279-80. SW and defendant then drank at a bar before returning to Klein's apartment, where they had sex. Tr 281-82.

On the evening of Wednesday, November 12, defendant knocked on Klein's door. Klein told defendant and SW to talk outside. Tr 283-84. They sat and talked in defendant's car. Tr 284. Defendant told SW that he wanted her to return to her parents' house so that she and defendant could be together again. Tr 285. When SW refused, defendant jumped on her and strangled her. Tr 286. SW briefly lost consciousness. The next thing she remembered was the car pulling out of the parking lot. Tr 288. She opened the door and tried to get out but she could not. Tr 288-89. Defendant reached across her to close the door. Tr 289. Eventually, she stopped trying to get out. Tr 289, 320.

About 15 minutes later, defendant stopped the car on a country road. Tr 320-21. They were stopped on the road for 45 minutes to an hour, while they talked and argued. Tr 323. After that, defendant drove around for a while.

Defendant became angry when SW again told him that she did not want to have a relationship with him. Tr 324-25. He started speeding and threatening to crash the car. Tr 25. At some point, defendant drove the car into a telephone pole. Tr 329.

Eventually, they arrived at defendant's parents' house on a rural property near Damascus. Tr 334. SW estimated that they arrived there about six hours after defendant took her from Klein's apartment. Tr 322. Defendant led SW to the back of the house where they entered the basement area through a sliding glass door. Tr 334. In the basement, defendant told SW two or three times that if she screamed or made noise he would knock her teeth out. Tr 338. They had sex. Tr 338-39. Although SW did not resist, she did not consent. Tr 339. She believed that if she resisted, defendant would knock her teeth out. Tr 339.

After they had sex, defendant told SW that he was going to keep her at his family's property and force her to withdraw from methadone using beer and marijuana. Tr 341. SW was naked and defendant would not allow her to put on her clothes. Tr 342. When she started resisting and yelling, defendant picked her up and carried her towards a nearby barn. He squeezed her hard enough to prevent her from making much noise. The way defendant was holding her was very painful. Tr 343-44.

There was a small room inside the barn. Defendant found a light and plugged it in. Tr 345. The floor was concrete. The room contained a lot of

spiders and spider egg sacs. Defendant brought a mattress and blankets to the room. Tr 349, 355. He also brought a soda for SW and beer for himself. Tr 355. They had sex again two or three times during the night. Tr 356-57. Defendant told SW that his ultimate plan was to force her to withdraw from methadone and get her pregnant while keeping her in the barn for thirty days. Tr 359-60. He told her that he would bring her food at night after his family had gone to sleep and that she would be bound and gagged while he was away. Tr 361-62.

Eventually, SW fell asleep. She was awakened by defendant at 10:00 a.m. the next morning (Thursday, November 13). Tr 358. Defendant was on post-prison supervision in Polk County. Tr 552. Defendant was crying because he had learned that he had to go to Polk County that day to submit a urine sample as a condition of his supervision. Tr 362-63. Defendant was certain that he would be arrested upon submitting the sample because he had been drinking alcohol and smoking marijuana. Tr 363. Defendant told SW that the plan had changed and that he was going to take her to Polk County. In the event that he was arrested, she could keep his car. Tr 364.

Before travelling to Polk County, defendant took SW to Klein's apartment to get some clothes. Tr 369. He waited in the car. Defendant threatened SW and instructed her to return to the car within 10 minutes. Tr 370-72. In the apartment, Klein saw bruises on SW's arms and body. Tr 371-

72. SW did not call the police from Klein's apartment because she believed that defendant would be arrested upon submitting the urine sample in Polk County. Tr 372-73.

After stopping at Klein's apartment, defendant took SW to the methadone clinic. Once again, defendant waited in the car. Tr 373. When SW retuned, defendant was angry, because Klein had called SW's father to report that she was in trouble, and SW's father had called defendant. Tr 374.

During the drive to Polk County, defendant urged SW not to tell anyone else about his conduct. Tr 376. In Dallas, they went to Wal-Mart and Safeway. In the stores' surveillance videos, SW can be seen behaving affectionately towards defendant. Tr 377. SW explained that during the drive, she touched defendant's arm and was being nice to him, because he was upset about the prospect of being arrested, and because he told her that he felt bad about what he had done to her. Tr 378.

SW waited in the car while defendant visited his parole officer. Her plan was to wait until she was certain that defendant had been arrested, and then she would take his car and keep it while he was in jail. Tr 378-79. At trial, she did not know why she did not just take the car and leave immediately. Tr 379. Defendant unexpectedly returned about 20 minutes later and they drove back to Portland. *Id.*

Defendant dropped SW off at Klein's apartment so she could rest before her shift as a bartender started at 6:00 p.m. *Id.* She did not call the police because she did not want defendant to go to prison for 30 years and because he had apologized during the Polk County trip. Tr 379-80. She also wanted to make sure nothing prevented her from working her shift that night. Tr 380.

SW's father came to the bar where she worked that night to find out what was going on between her and defendant. She told him everything was fine. Tr 380-81. Defendant also visited the bar off and on during SW's shift. Tr 380. Defendant wanted SW to come with him when her shift ended and he pounded on the windows to see what was taking so long. Tr 381. SW considered calling the police but she was not ready to do that yet and decided to wait two more days until Saturday. Tr 381-82. Defendant waited in the parking lot until the bar closed. Tr 382. SW did not tell her coworker what was going on. She left the bar with defendant when her shift ended. Tr 382.

They spent that night in his car. Defendant took SW to the methadone clinic in the morning. Tr 383. SW went home to Klein's apartment to get some rest and then went to work again at 6:00 p.m. (Friday, November 14). Defendant came to the bar again and waited until SW's shift was over. Tr 384. When SW got off work in the early morning hours of November 15, defendant was very emotional. SW's father was calling them and harassing them. *Id.*

Defendant told SW that they were going to leave town in the morning. Tr 384-85. SW insisted on going to the methadone clinic first. Defendant took her to the clinic and waited for her in the car. Tr 385-86. He refused to let SW take her purse into the clinic. Tr 387.

SW met Klein inside the clinic. Tr 386. Instead of returning to defendant, she surreptitiously left with Klein and returned with him to his apartment. Tr 388. Klein wanted to go the police station or call the police but SW wanted to go to her mother's house. Before they could leave the apartment, defendant arrived and began pounding on the door. Tr 388-89. Klein called the police. Tr 390.

SW described having bruises to her collarbones and her thigh as a result of defendant's conduct. Tr 390.

Officer Hardy's Testimony

Officer Hardy was one of the officers who responded to Klein's apartment. He interviewed SW there. She reported that defendant had hurt her, abused her, choked her, transported her from one place to another, and grabbed her thigh hard enough to cause extreme pain. Tr 479, 481. She showed Hardy a bruise on her thigh. Tr 481. SW told Hardy that she did not want defendant to get into trouble, but that she also did not want to be abused anymore. Hardy testified that SW "seemed like a girl that – that didn't know what else to do, and

so she's finally coming to the police but didn't want [defendant] necessarily to get into bunch of trouble." Tr 480.

Hardy asked SW if defendant had raped her. She was silent for ten seconds before responding that he had not. Hardy told the jury that during the interview, what was "going through [his] mind" was that "this was a big deal, that this was a big case, that bad things happened, and we needed to step in and save this girl[.]" Tr 482. After describing his training and experience with domestic violence cases, Hardy told the jury that in his opinion, "there was a lot of minimization about what had actually occurred." Tr 484-85. Hardy also testified that victims of domestic violence frequently delay reporting their abuse. Tr 486.

Officer Frutiger's Testimony

Officer Frutiger was one of the officers who responded to Klein's apartment. Frutiger made small talk with defendant while Officer Hardy interviewed SW. Defendant told Frutiger that he was there to take SW back to her parents' house, but that Klein had a gun and that SW was afraid to leave. Tr 310. Eventually, Hardy radioed Frutiger and instructed him to take defendant into custody. Tr 311.

Detective Turnage's Testimony

Detective Turnage helped to execute a search warrant at defendant's family's property. There was a barn with a small room inside with no windows.

The room had a concrete floor. There was a mattress on the floor and two beverage cans. The room was very dirty and contained spider egg sacs. Tr 742.

Turnage interviewed SW at the police department on the day defendant was arrested and spoke to her again a day or two later. Tr 731. After describing his extensive training and experience regarding domestic violence cases, Turnage testified that such cases often involve delayed reporting. Tr 753. He explained that in his opinion, SW did not report defendant's conduct when she had an opportunity to do so because she was afraid of continued assaults and because she was afraid that defendant would follow through on his threats to her family. Turnage explained that SW's failure to promptly report defendant's conduct was typical of a victim of domestic violence. Tr 757.

Detective Terway's Testimony

Detective Terway helped to execute the search warrant at defendant's family's property and he described the property in detail for the jury. The property is within one mile of the Multnomah County line. Tr 712. There are two residences on the property, in addition to the barn. Tr 714. There was a sliding glass door leading to the basement of defendant's parents' house. A pathway led from that door "right down to the barn." Tr 717. The barn was about a hundred yards from the house. Tr 719.

//

//

KW's Testimony

KW is SW's sister. Tr 627. She testified that defendant was very possessive with SW, to the extent that he "wouldn't let her out of his sight" and would follow her to the bathroom sometimes. Tr 629. While SW was staying at Klein's, defendant would spend time at SW's family's house. While there, he asked KW if she wanted to help him look for SW at Klein's. Tr 634. On one occasion, defendant told KW that he loved SW and that he "wanted to take her and put her in the barn and wean her off methadone[.]" Tr 637.

FIRST ASSIGNMENT OF ERROR

The trial court erred by admitting Detective Turnage's testimony that SW's failure to promptly report defendant's conduct was an example of the phenomenon of delayed reporting in domestic violence cases.

Preservation of Error

After defendant was arrested, Detective Turnage conducted three interviews with SW. Tr 731. When the prosecutor asked Turnage whether "we had a situation here with a delayed report[,]" defense counsel stated that he had a "matter for the Court." Tr 746.

After the jury left the courtroom, defense counsel told the court that the prosecutor appeared to be offering psychological evidence about the nature of domestic violence. Tr 747. To provide a frame of reference for defendant's

objection, the court invited the prosecutor to make an offer of proof. In response, the prosecutor stated that she intended to ask Turnage "whether delayed reporting is common in domestic violence, why it happens, why crimes of domestic violence go unreported, [and] whether he would assess this as a typical behavior of a domestic violence victim." Tr 748.

Defendant objected to that proposed testimony on several grounds, including that the state had not established that the officer had sufficient training and experience to testify about the phenomenon of delayed reporting in domestic violence cases. In addition, as pertinent here, defendant told the court that

> "it then turns into a form of witness vouching; that it's saying there are these acts that you took, and I'm telling the jury, it's okay to do that because that means you're still a victim. And that's just always an improper line of testimony, to say that -- you know, basically, he can't say I believe this person. That's essentially what they're doing. We have these acts in front of us. I have this training and experience, and I'm telling the jury, through my continuation in this testimony, that if he doesn't outright say I believe it, he's at least implying that by acting on it and accepting it. And he will say this is common in the domestic violence arena, which is then witness vouching."

Tr 749-50.

The trial court stated that it would allow the prosecutor to make a further attempt to establish Turnage's qualifications and invited defendant to renew his objection thereafter:

> "So what we ought to do is, we bring the jury back in, you do whatever you think you want to do with the witness on his qualifications, feel free to make your objection, and I'll rule on it."

Tr 750.

Defendant asked the court for a continuing objection in the event that his objection was overruled. Tr 751. The court told defendant that he did not need to "object to every, single question." Defendant agreed, but told the court that "if they change topics a little bit, I might say, 'I renew the objection.'" The court told defendant to do "what you think you need to do." *Id.*

When the jury returned, the prosecutor questioned Turnage further to demonstrate his training and experience regarding domestic violence. Tr 752-53. Defendant renewed his objection, and the trial court overruled it. Tr 753.

The prosecutor then asked Turnage to describe the phenomenon of delayed reporting in domestic violence cases. *Id.* After Turnage described the phenomenon, the prosecutor asked him, "[SW's] behavior in this case, can you explain her behavior?" Tr 755. Defendant objected: "Judge, I'm going to renew my objection." *Id.* The court again overruled the objection. *Id.* Turnage asked the prosecutor to clarify her question: "With respect to what?" *Id.* She responded: "With respect to why she didn't go to the police immediately upon having a – having an opportunity to report?" *Id.*

Turnage then testified, in part, as follows[1]:

> "Sure. [SW], in this case -- you guys have heard the facts. [SW], in this case, had some opportunity to get away, escape, leave, go, run, call, talk to the police, do what have you -- or do whatever. There were those opportunities that were afforded to her and she chose not to do those. When I spoke to [SW] it became clear to me the reason she chose not to do those was under fear, fear of continued assaults against herself."

Tr 755-56.

Standard of Review

Whether a trial court admitted impermissible vouching evidence is reviewed for legal error. *State v. Criswell*, 282 Or App 146, 156, 386 P3d 58 (2016).

Argument

I. The trial court erred by admitting Detective Turnage's testimony that SW's failure to promptly report defendant's conduct was an example of the phenomenon of delayed reporting in domestic violence cases.

Under Oregon law, a witness may not testify that another witness is telling the truth. *State v. Middleton,* 294 Or 427, 438, 657 P2d 1215 (1983); *see also State v. Milbradt*, 305 Or 621, 629-30, 756 P2d 620 (1988) ("We have said before, and we will say it again, but this time with emphasis – we really mean it * * *. The assessment of credibility is for the trier of fact [.]"). The rule excludes not only evidence that vouches as to the credibility of trial testimony,

---

[1] The transcript pages pertinent to this assignment of error are included at ER-7-18 (Tr 746-57).

but also evidence that vouches as to the credibility of an out-of-court statement. *State v. Keller,* 315 Or 273, 286, 844 P2d 195 (1993). "Applying that principle is a straightforward matter when one witness states directly that he or she believes another witness, or that the other witness is honest and truthful. However, statements that fall short of such overt vouching also may be impermissible." *State v. Lupoli,* 348 Or 346, 358, 234 P3d 117 (2010).

For example, in *State v. McCarthy*, 251 Or App 231, 232, 283 P3d 391 (2012), the alleged victim reported that the defendant had sexually abused her several years earlier. She was interviewed at a child abuse assessment center by Lustig-Butts. At trial, Lustig-Butts testified that "something called delayed disclosure is the norm for children because they have fear, they have shame, they're afraid of not being believed, and so they will not disclose for a while—or ever." *Id.* at 233. When the prosecutor asked Lustig-Butts whether she "f[ound] those factors in this case," Lustig-Butts responded affirmatively and explained that the alleged victim

> "delayed her disclosure because of fear. She was told not to tell because she would tear the family apart, and so she was – entered into the secrecy, that fear. She was afraid she wouldn't be believed because of that as time went on."

Id.

This court held that that testimony was inadmissible vouching. *Id.* at 235-236. In particular, even though Lustig-Butts may not have explicitly

vouched for the alleged victim's credibility, her testimony about delayed reporting "not merely in general terms, but as it related to the complainant's circumstances in this case necessarily was based on her assessment of the complainant's credibility and, thus, amounted to impermissible vouching." *Id.* at 236.

This case closely resembles *McCarthy*. Here, Turnage first testified in general terms about the phenomenon of delayed reporting in domestic violence cases, and then testified that SW did not report defendant's conduct sooner because of "fear":

> "[SW], in this case, had some opportunity to get away, escape, leave, go, run, call, talk to the police, do what have you -- or do whatever. There were those opportunities that were afforded to her and she chose not to do those. When I spoke to [SW] it became clear to me the reason she chose not to do those was under fear, fear of continued assaults against herself."

Tr 755-56.

Thus, Turnage told the jury that SW's failure to report defendant's conduct sooner was an example of the phenomenon of delayed reporting in domestic violence cases. In particular, her delayed reporting was attributable to "fear of continued assaults," rather than being evidence that she had fabricated the allegations. Just like the testimony in *McCarthy*, Turnage's testimony necessarily was based on his assessment of SW's credibility during their interview. As such, it amounted to impermissible vouching.

To be sure, in *McCarthy*, the absence of physical evidence of sexual abuse demonstrated that Lustig-Butts' testimony was necessarily based on her credibility assessment, rather than something else. *See* 251 Or App at 235-36 (discussing the challenged testimony in light of *Lupoli*, 348 Or at 361-62 (holding that a child sexual abuse diagnosis is necessarily based on a credibility assessment when there is no physical evidence of abuse)). Here, there was certain physical evidence, including evidence that SW had been assaulted, in the form of bruises to her body. *See, e.g.*, Tr 481. But the physical evidence does not show that Turnage's conclusion was based on something more than a credibility assessment. Even in the context of child sexual abuse, "the mere presence of physical evidence of abuse is not enough to make a diagnosis of child sexual abuse automatically admissible, when that diagnosis otherwise rests on what a jury reasonably could perceive to be a credibility-based evaluation." *State v. Beauvais*, 357 Or 524, 537, 354 P3d 680 (2015). In particular, a diagnosis of child sexual abuse amounts to something more than vouching only when

> "(1) physical evidence meaningfully corroborates the alleged type of abuse; (2) the expert significantly relies on that physical evidence in making the diagnosis of sexual abuse; and (3) the causal relationship between the physical evidence and the diagnosis is sufficiently complex such that a lay trier of fact cannot assess the connection as well as an expert."

Id. at 538.

Of course, this case involves a domestic violence investigator's conclusion that SW's allegations were true, rather than a diagnosis of child sexual abuse. But the principle is the same. Under the reasoning of *Beauvais*, Turnage's testimony that SW's delayed report was attributable to fear rather than fabrication *might* have told the jury something it could not determine on its own, if (1) the physical evidence meaningfully corroborated the specific allegations, (2) Turnage relied on the physical evidence in reaching his conclusion, and (3) his domestic violence expertise was necessary to fully understand the connection between the physical evidence and the allegations.

But nothing in Turnage's testimony suggests that his conclusion was based on anything other than a credibility assessment. And even if that assessment was based in part on the physical evidence, the jury did not need an expert to explain the connection between the evidence and the allegations, and, in any case, no such explanation was offered in support of the testimony at issue here. Thus, despite the presence of certain physical evidence, this is still a case in which the witness's conclusion that the allegations were true was based on a credibility assessment that should have been left to the jury, rather than an application of the witness's expertise to the physical evidence. Because Turnage's testimony was impermissible vouching, the trial court erred by admitting it over defendant's objection.

II. The error was not harmless.

This court may affirm a conviction despite the erroneous admission of vouching evidence only if there is little likelihood that the admission of the evidence affected the verdict. *See State v. Ferguson*, 247 Or App 747, 755, 271 P3d 150 (2012) (applying standard). There is a heightened possibility that vouching evidence will affect the verdict when the credibility of the vouched-for statements is the central factual issue. *See State v. Lowell,* 249 Or App 364, 370, 277 P3d 588, *rev den,* 352 Or 378 (2012) (in "a case that boil[s] down, in large part, to a credibility contest between the victim and defendant, evidence commenting on the credibility of either was likely to be harmful"). An evidentiary error is also more likely to be harmful in a close case, as demonstrated by a non-unanimous verdict. *See, e.g., State v. Logston,* 270 Or App 296, 307, 347 P3d 352 (2015); *State v. Abraham,* 265 Or App 240, 247, 335 P3d 293 (2014); *State v. Villanueva–Villanueva,* 262 Or App 530, 535, 325 P3d 783 (2014).

In that regard, this case resembles *Simpson v. Coursey,* 224 Or App 145, 148, 197 P3d 68 (2008), *rev den,* 346 Or 184 (2009), a post-conviction relief case. There, a police officer had testified in the underlying criminal trial that the alleged victim was "very honest, very straightforward." This court "readily" concluded that the vouching testimony was harmful:

> "The jury heard a uniformed police detective vouch for the victim's honesty. The possibility that the testimony affected the verdict is magnified by the fact that the criminal trial appears to have been an extremely close case for the jury. It returned a verdict of acquittal on three of the four counts of sexual abuse, and its guilty verdict on the fourth count was by a 10 to 2 vote. The charges * * * turned on whether the jury believed the victim's testimony. Thus, the possibility that [the police officer's] testimony vouching for the credibility of the victim affected the verdict is very real."

Id. at 154.

Here, as in *Simpson*, the vouching testimony came from a police detective. But the detective did not merely comment on SW's candid appearance or demeanor, as in *Simpson*. He did more than that. Turnage testified that SW's failure to report defendant's conduct when she had the chance was attributable to her fear that defendant would follow through on his threats of violence, rather than being attributable to the fact that the allegations were fabricated. The testimony thus implied that Turnage believed the allegations whose veracity was the subject of the trial. Moreover, as in *Simpson*, the trial was extremely close, as evidenced by the numerous acquittals and non-unanimous guilty verdicts. *See Verdict*, ER-5-6; Tr 957-66 (acquittals in Counts 3, 7, 8, 10, 11, and 14; 10-2 votes in Counts 5, 6, 9, and 12). Most importantly, as in *Simpson*, the state's case depended largely on persuading the jury to believe SW's story. Under those circumstances, there is a significant

possibility that the error affected verdicts. Consequently, this court must reverse each conviction.

SECOND ASSIGNMENT OF ERROR[2]

The trial court erred by failing to strike Officer Hardy's testimony that during his interview with SW, "[s]he seemed like a girl that – that didn't know what else to do, and so she's finally coming to the police but didn't want [defendant] necessarily to get into a bunch of trouble."

THIRD ASSIGNMENT OF ERROR

The trial court erred by failing to strike Officer Hardy's testimony that during his interview with SW, what was "going through his mind" was "that this was a big deal, that this was a big case, that bad things happened, and we needed to step in and save this girl[.]"

FOURTH ASSIGNMENT OF ERROR

The trial court erred by failing to strike Officer Hardy's testimony that when he interviewed SW, his "opinion was that there was a lot of minimization about what had actually occurred."

//

//

---

[2] Defendant submits a combined argument in support of assignments 2-4.

Preservation of Error

In assignments 2-4, defendant seeks plain-error review. This court has discretion to review an unpreserved error of law that is obvious and apparent from the record. *Ailes v. Portland Meadows, Inc.*, 312 Or 376, 381-82, 823 P2d 956 (1991). Here, as explained below, during Officer Hardy's testimony, the trial court failed to strike three instances of "true vouching evidence," that is, "one witness's testimony that he or she believes that another witness is or is not credible, which a party offers to bolster or undermine the veracity of that other witness." *State v. Corkill*, 262 Or App 543, 552, 325 P3d 796, 802 (2014). Although there was no vouching objection, the trial court's failure to strike such testimony *sua sponte* is subject to plain error review. *See State v. Higgins*, 258 Or App 177, 308 P3d 352 (2013), *rev den*, 354 Or 700 (2014) (plain error for trial court not to exclude true vouching evidence); *B.A. v. Webb*, 253 Or App 1, 10-17, 289 P3d 300 (2012), *rev den*, 353 Or 428 (2013) (same); *State v. Lowell*, 249 Or App 364, 366–67, 277 P3d 588, *rev den*, 352 Or 378 (2012) (same).

In determining whether to correct plain error, this court considers, among other things, the gravity of the error and the ends of justice. *Ailes*, 312 Or at 382 n 6. Here, there is a heightened risk that the admission of so much vouching evidence affected the verdicts, because the central issue in the trial was SW's credibility, and because the case was a close one, as evidenced by the numerous acquittals and non-unanimous verdicts. *See Simpson,* 224 Or App at

154 (heightened risk that error affected verdicts in close case where outcome turned on credibility of vouched-for statements). In that context, the ends of justice and the gravity of the error compel review. *See also Higgins*, 258 Or App 182-83 (ends of justice and gravity of the error required court to review plain error in admitting true vouching evidence in a trial that was effectively a "credibility contest"). *See also State v. Wright*, 281 Or App 399, 406, 383 P3d 385 (2016) (where convictions reflect serious felonies and the error was not harmless, the gravity of the error compels review).

Standard of Review

Whether a trial court admitted impermissible vouching evidence is reviewed for legal error. *Criswell*, 282 Or App at 156.

Argument

I. The trial court erred by failing to strike Hardy's vouching testimony.

As previously noted, under Oregon law, a witness may not testify that another witness is telling the truth. *Middleton,* 294 Or at 438; *Milbradt,* 305 Or at 629-30. The rule excludes not only evidence that vouches as to the credibility of trial testimony, but also evidence that vouches as to the credibility of an out-of-court statement. *Keller,* 315 Or at 286.

Whether a trial court has a duty to strike vouching evidence *sua sponte* is a distinct question from the admissibility of such testimony upon a proper

objection. There are questions and comments that may run afoul of the vouching rule without constituting what this court has termed "true 'vouching' evidence, that is, one witness's testimony that he or she believes that another witness is or is not credible, which a party offers to bolster or undermine the veracity of that other witness." *Corkill*, 262 Or App at 552.

But this court has repeatedly held that a trial court has a duty to spontaneously exclude true vouching evidence. *See, e.g., Higgins,* 258 Or App at 181 (plain error for trial court to admit mother's testimony that she "knew for sure" that her daughter was not lying about being raped by the defendant); *B.A.*, 253 Or App at 10-17 (plain error for trial court to admit testimony from mental-health professionals that the plaintiff's reports of abuse were credible); *Lowell,* 249 Or App at 366-67 (trial court plainly erred by allowing a detective to comment directly on the defendant's credibility by stating that he did not think the defendant "was being very honest and upfront" and that the defendant's statements were of a type that showed "that somebody is not being truthful").

Here, the trial court overlooked three plain instances of "true vouching evidence" during Officer Hardy's testimony. First, Officer Hardy testified that during his interview with SW, "[s]he seemed like a girl that – that didn't know what else to do, and so she's finally coming to the police but didn't want [defendant] necessarily to get into a bunch of trouble." Tr 479-80. Second, when the prosecutor asked him "[w]hat was going through your head" during

the interview, Hardy responded "that this was a big deal, that this was a big case, that bad things happened, and we needed to step in and save this girl[.]" Tr 482. Third, when the prosecutor asked Hardy what his opinion was about SW's behavior during the interview, Hardy testified that his "opinion was that there was a lot of minimization about what had actually occurred." Tr 485.

In the first two instances, Hardy told the jury directly that during the interview, he believed the domestic violence allegations SW was making. In the third instance, by contrast, Hardy told the jury directly that he did not believe that SW was telling the whole truth about defendant's conduct. The first two instances were offered to bolster the credibility of SW's allegations and the third instance was offered to diminish the credibility of the exculpatory implication of her failure to make further allegations. Because each piece of testimony was true vouching evidence, the trial court had a duty to strike it *sua sponte* and erred by failing to do so.

II. The error was not harmless.

As noted, this court may affirm a conviction despite the erroneous admission of vouching evidence only if there is little likelihood that the admission of the evidence affected the verdict. *See Ferguson*, 247 Or App at 755 (applying standard). When the credibility of the vouched-for statements was the central issue in the trial, and the case was a close one, vouching evidence is especially likely to have affected the verdict. *See Lowell,* 249 Or

App at 370 (vouching evidence likely to be harmful in "credibility contest"); *Simpson*, 224 Or App at 154 (heightened risk that error affected verdicts in close case where outcome turned on credibility of vouched-for statements).

Here, as previously discussed, the case was very close, as shown by the acquittals and by the non-unanimous guilty verdicts. Moreover, SW's credibility was the central issue in the trial. In that context, Officer Hardy told the jury, based on his training and experience in domestic violence cases, that he believed SW's statements during the interview. Those statements included allegations that defendant had hurt her, that he had abused her, that she was choked, that she was transported from one place to another, and that defendant had caused her extreme pain by grabbing her thigh. Furthermore, Hardy told the jury that in his training and experience he believed she was "minimizing" defendant's conduct. Tr 479-82. Hardy's vouching testimony bolstered the credibility of SW's ultimate allegations, by vouching for the allegations in the initial interview, and by "vouching against" her failure to make further allegations in that interview.

Of course, defendant was acquitted of the charges that arose from some of the allegations that Hardy repeated (strangulation and first-degree kidnapping on an asportation theory). And Hardy also did not specifically repeat allegations corresponding to the charge of first-degree kidnapping on a secret confinement theory, the coercion charge, the menacing charge, or the recklessly

endangering charge. But that does not mean that Hardy's credibility assessment regarding the overall story did not affect the guilty verdicts. The jury could have relied on his assessment of the credibility of SW's initial disclosure when it decided what aspects of her ultimate story were worthy of belief. Because Hardy's credibility assessment could have affected each guilty verdict in that way, this court must reverse each conviction.

FIFTH ASSIGNMENT OF ERROR

The trial court erred by failing to give a jury instruction requiring concurrence on a particular occurrence of the coercion charge in Count 6.

Preservation of Error

Defendant seeks plain-error review. This court has discretion to review an unpreserved error of law that is obvious and apparent from the record. *Ailes* 312 Or at 381-82. Because instructional error is a matter of law that this court reviews without reference to anything beyond the record, *State v. Lotches*, 331 Or 455, 472, 17 P3d 1045 (2000), it is ordinarily eligible for plain-error review whenever the error is "obvious." *State v. Gaines*, 275 Or App 736, 746, 365 P3d 1103 (2015).

Here, the court's error in failing to give a concurrence instruction for Count 6 is obvious. In particular, there can be no dispute as to whether, when the record supports multiple, separate occurrences of the charged crime, the trial

court must either require the state to make an election as to which occurrence it will proceed on, or instruct the jury that the requisite number of jurors must agree on one of the multiple occurrences. *See State v. Teagues*, 281 Or App 182, 189, 383 P3d 320 (2016) (so holding); *see, e.g., State v. Hale*, 335 Or 612, 627-30, 75 P3d 448 (2003) (court plainly erred in failing to require concurrence when there were multiple occurrences of the predicate crimes to aggravated murder); *Lotches*, 331 Or at 467-69 (same). And for the reasons discussed below, there can be no dispute as to whether the evidence substantiated two occurrences of the coercion charge in Count 6. Nor did the state did make an election that resolved the concurrence problem. Consequently, the trial court plainly erred by failing to give a concurrence instruction. *See also Wright*, 281 Or App at 406 (trial court plainly erred by failing to give a concurrence instruction when the record supported liability on alternative legal theories); *Gaines*, 275 Or App at 748 (same).

In deciding whether to review an unpreserved issue, this court considers, among other things, the competing interests of the parties, the gravity of the error, and the ends of justice. *Ailes*, 312 Or at 382 n 6. On at least three occasions, Oregon appellate courts have corrected plain error in failing to require jury concurrence on a particular occurrence of the crime. *Hale*, 335 Or at 630; *Lotches*, 331 Or at 466; *State v. Pervish*, 202 Or App 442, 466, 123 P3d 285 (2005), *rev den* 340 Or 308 (2006). When such an error is not harmless,

the ends of justice, the gravity of the error, and the interests of the parties warrant plain-error review. *See Wright*, 281 Or App at 406 (error's gravity compels exercise of *Ailes* discretion when error could have affected serious felony verdict). Here, as explained below, the court's failure to give a concurrence instruction for Count 6 could have affected a serious felony verdict. Consequently, this court should review and correct it.

Standard of Review

Whether a trial court was required to give a concurrence instruction is reviewed for legal error, viewing the evidence in support of the instruction in the light most favorable to defendant. *Teagues*, 281 Or App at 187.

Argument

I. The trial court erred by failing to give a concurrence instruction for Count 6.

Under Article I, section 11, of the Oregon Constitution,[3] when the record supports multiple, separate occurrences of a charged crime, the trial court must either require the state to make an election as to which occurrence it will proceed on, or instruct the jury that the requisite number of jurors must agree on one of the multiple occurrences. *Teagues*, 281 Or App at 189 (citing

---

[3] Article I, section 11, of the Oregon Constitution, provides, in part: "[I]n the circuit court ten members of the jury may render a verdict of guilty or not guilty[.]"

State v. Ashkins, 357 Or 642, 659, 357 P3d 490 (2015) and *State v. Houston*, 147 Or App 285, 292, 935 P2d 1242 (1997)).

For example, in *Mellerio v. Nooth*, 279 Or App 419, 429-30, 379 P3d 560 (2016), a post-conviction relief case, the petitioner alleged that trial counsel was ineffective for failing to request concurrence instructions on two counts of coercion, each of which named a different victim. The evidence showed that at one point during the night of the charged crimes, the petitioner told the victims not to report his conduct to specific third parties, the Colemans. In addition, the evidence showed that later that night, the petitioner told the victims not to report his conduct to the police. The evidence thus substantiated two occurrences of coercion for each charge, one pertaining to the Colemans and one pertaining to the police. *Id.* at 425. This court held that because the record supported two "temporally, spatially, and substantively distinct occurrences" of coercion for each charge, *id.* at 432, trial counsel's failure to request concurrence instructions was ineffective assistance of counsel, *id.* at 431, and prejudiced the petitioner, because the jurors could have based their individual verdicts on different occurrences. *Id.* at 435-36.

This case resembles *Mellerio*. In Count 6, the state charged defendant with committing the crime of coercion by compelling SW to engage in conduct

by threating her with injury.[4] The evidence substantiated at least two separate occurrences of that charge. In one occurrence, SW testified that when she and defendant stopped to pick up clothes at Klein's apartment before traveling to Polk County, defendant waited in the car and made threats to induce her to "come back down." Tr 371-72. In another occurrence, after their return from Polk County, SW rejoined defendant after her shift at work was over. Tr 382.

To be sure, in the first occurrence, SW mentioned threats to her family, but she did not specifically mention threats of injury to herself. Tr 371. Similarly, in the second occurrence, SW did not specifically mention that defendant had threatened her with injury. But the jury could have inferred that defendant's earlier threats of injury to SW (and, indeed, the abusive nature of their relationship in general) instilled her with fear that he would injure her if she did not comply with his wishes on these two occasions. That possibility

---

[4] ORS 163.275 provides, in part:

> "(1) A person commits the crime of coercion when the person compels or induces another person to engage in conduct from which the other person has a legal right to abstain, or to abstain from engaging in conduct in which the other person has a legal right to engage, by means of instilling in the other person a fear that, if the other person refrains from the conduct compelled or induced or engages in conduct contrary to the compulsion or inducement, the actor or another will:
>
> "(a) Unlawfully cause physical injury to some person[.]"

was heightened by the "delayed reporting" testimony described in the first assignment of error, in which Detective Turnage told the jury that he believed that SW failed to report defendant's conduct sooner out of "fear of continued assaults." Tr 755-56. Because the record substantiated those separate occurrences of the coercion charge in Count 6, either an election or a concurrence instruction was required. Because there was no election, the trial court erred by failing to give a concurrence instruction.

II. The error was not harmless.

A trial court's failure to give a concurrence instruction is not harmless when, given the evidence and the parties' theories, jurors could have based their verdicts on different occurrences. *Teagues*, 281 Or App at 194.

Here, jurors could have reached different conclusions about which of the two occurrences of Count 6 was proven beyond a reasonable doubt. For example, some jurors might have accepted the occurrence when SW rejoined defendant after stopping for clothes at Klein's apartment, while rejecting the occurrence when she rejoined him after work. Notably, there was evidence that the couple were on good terms again during the trip to Polk County. In light of that evidence, a juror who believed that SW was afraid of injury when she rejoined defendant after stopping at Klein's apartment (in the immediate aftermath of the frightening barn episode) might have doubted whether she was

still afraid of injury when she rejoined defendant after her shift was over, which occurred after their apparent Polk County rapprochement.

On the other hand, other jurors might have accepted the occurrence when SW rejoined defendant after her shift was over, while rejecting the occurrence following the stop at Klein's apartment. In that regard, SW testified that defendant had told her that if he was arrested in Polk County, she could keep his car, and that she expected defendant to be arrested. In light of that evidence, a juror who believed that SW was compelled by threats of injury when she rejoined defendant after her shift might have doubted whether she was compelled by threats of injury when she rejoined him after the stop at Klein's on the way to Polk County.

For those reasons, without a concurrence instruction or an election, the jurors could have convicted defendant in Count 6 while disagreeing about which occurrence had been proven. Because the error could have affected the verdict in that way, this court should reverse and remand the conviction.

SIXTH ASSIGNMENT OF ERROR

The trial court erred by failing to instruct the jury that defendant committed the first-degree kidnapping charge in Count 5 only if the confinement occurred in a place where the alleged victim was not likely to be found.

Preservation of Error

Defendant requests plain-error review. This court has discretion to review an unpreserved error of law that is obvious and apparent from the record. *Ailes*, 312 Or at 381-82.

The error here meets those criteria. "[T]he question of what must be included in a jury instruction is a question of law, and what was or was not included is determined readily by examining the instructions that were given." *Lotches*, 331 Or at 472. The error is also obvious, for the reasons explained below. Accordingly, this court has discretion to review and correct the error.

In deciding whether to do so, this court considers the competing interests of the parties, the gravity of the error, and the ends of justice. *Ailes*, 312 Or at 382 n 6. Here, the error is grave, because it allowed the jury to find defendant guilty without finding every element of the crime. Because of the missing instruction, the verdict does not reflect a genuine determination of guilt. Moreover, the state has no legitimate interest in upholding a wrongful conviction, and review would serve the ends of justice. This court should review the error.

Standard of Review

This court reviews jury instructions for errors of law. *State v. Pierce*, 235 Or App 372, 374, 232 P3d 978 (2010).

Argument

I. The trial court erred by failing to instruct the jury to determine whether defendant confined the alleged victim in a place where she was not likely to be found.

Under the Sixth Amendment to the United States Constitution[5] and Article I, section 11,[6] of the Oregon Constitution, a criminal defendant has a right to a jury trial on every element of the crime. *United States v. Gaudin,* 515 US 506, 510, 115 S Ct 2310, 132 L Ed 2d 444 (1995); *State v. Quinn*, 290 Or 383, 400, 623 P2d 630 (1981), *overruled on other grounds by State v. Hall*, 339 Or 7 (2005). To give effect to the right to a jury trial, a trial court must instruct the jury to decide all the elements of the charged crimes. *State v. Gray*, 261 Or App 121, 130, 322 P3d 1094 (2014).

Here, in Count 5, the state charged defendant with committing first-degree kidnapping by secretly confining the alleged victim "in a place where

---

[5] The Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

[6] Article I, section 11, provides, in part:

> "In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury[.]"

she was not likely to be found." *Indictment*, ER-2. The fact that the confinement occurs in a place where the victim is not likely to be found is an element of the charged form of first-degree kidnapping. *See* ORS 163.235(1) (defining first-degree kidnapping to require violation of ORS 163.225); ORS 163.225(1)(b) (defining the form of second-degree kidnapping in which the victim is secretly confined "in a place where [the victim] is not likely to be found"). *See also State v. Parkins*, 346 Or 333, 343-44, 211 P3d 262 (2009) (reversing first-degree kidnapping conviction where, even if victim was secretly confined, no reasonable juror could have found that the confinement occurred in a place where she was not likely to be found).

But the trial court's instructions omitted that element of the charge. ER-19-20 (Tr 847-48). The instructions required the jury to find that defendant secretly confined the victim, but not that he did so in a place where she was not likely to be found. *Id.* Because that fact is an essential element of the pertinent form of kidnapping, defendant had a right to a jury trial on that fact, and the trial court erred by failing to provide one.

II. The error was not harmless.

This court will reverse a conviction for instructional error if the verdict could have been based on the theory of criminal responsibility contained in the erroneous instruction. *State v. Lopez-Minjarez*, 350 Or 576, 585, 260 P3d 439 (2011). Because failing to instruct on an element is a violation of the United

States Constitution, in addition to being an error under state law, this court must also apply the federal test for harmless error. *State v. Cook,* 340 Or 530, 544, 135 P3d 260 (2006). Under that test, a court's omission of an element is harmless only if it appears beyond a reasonable doubt that the error did not contribute to the verdict. *Neder v. United States*, 527 US 1, 15, 119 S Ct 1827, 144 L Ed 2d 35 (1999).

Here, the jury might not have convicted defendant in Count 5 if it had been instructed on the "not likely to be found" element. Notably, the state presented little or no evidence regarding how often defendant's family visited the barn where defendant confined SW. In addition, according to KW, defendant had actually told her that he was planning to keep SW in the barn. Tr 637. Under those circumstances, a reasonable juror could have doubted whether the barn was a place where SW was not likely to be found. *See Parkins*, 346 Or at 344 (even if victim was secretly confined in bedroom, it was not a place where she was not likely to be found, because victim's sister knew she was there). Accordingly, the trial court's failure to instruct on that element requires reversal.

//

//

//

CONCLUSION

Under each of the first four assignments of error, this court should reverse each conviction and remand for further proceedings.

Under the fifth assignment of error, this court should reverse the coercion conviction in Count 6 and remand for further proceedings.

Under the sixth assignment of error, this court should reverse the first-degree kidnapping conviction in Count 5 and remand for further proceedings.

Respectfully submitted,

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

Signed
By Andrew Robinson at 1:27 pm, May 02, 2017

ANDREW D. ROBINSON OSB #064861
DEPUTY PUBLIC DEFENDER
Andrew.Robinson@opds.state.or.us

Attorneys for Defendant-Appellant
Austin Callahan Brand

EXCERPT OF RECORD INDEX

Indictment ER-1-4

Verdict ER-5-6

Transcript (pages 746-57) ER-7-18

Transcript (pages 847-48) ER-19-20

Judgment ER-21-27

eCourt Case Information Register ER-28-35

Indictment Nbr 103 DA Unit DV GJ Room 728

ER-1

In the Circuit Court of the State of Oregon
For Multnomah County

STATE OF OREGON

Plaintiff,

v.

AUSTIN CALLAHAN BRAND
DOB: 10/07/1989

Defendant(s).

Court Nbr 14-CR-28021 DA 2308830-1
Crime Report GP 14-712649

DOMESTIC VIOLENCE
BALLOT MEASURE 11

Indictment for Violation of

ORS 163.375 (1)
ORS 163.235 (2,3,4,5)
ORS 163.275 (6,7)
ORS 164.225 (8)
ORS 163.160 (9,10)
ORS 163.187 (11)
ORS 163.190 (12)
ORS 163.195 (13)
ORS 811.140 (14)

4TH JUDICIAL DIST

FILED
CIRCUIT COURT
MULTNOMAH COUNTY
14 NOV 24 PM 2:35

The above-named defendant(s) are accused by the Grand Jury of Multnomah County, State of Oregon, by this indictment of crime(s) of COUNT 1 - RAPE IN THE FIRST DEGREE - CONSTITUTING DOMESTIC VIOLENCE, COUNT 2 - KIDNAPPING IN THE FIRST DEGREE, COUNT 3 - KIDNAPPING IN THE FIRST DEGREE - CONSTITUTING DOMESTIC VIOLENCE, COUNT 4 - KIDNAPPING IN THE FIRST DEGREE, COUNT 5 - KIDNAPPING IN THE FIRST DEGREE - CONSTITUTING DOMESTIC VIOLENCE, COUNT 6,7 - COERCION - CONSTITUTING DOMESTIC VIOLENCE, COUNT 8 - ATTEMPTED BURGLARY IN THE FIRST DEGREE, COUNT 9,10 - ASSAULT IN THE FOURTH DEGREE - CONSTITUTING DOMESTIC VIOLENCE, COUNT 11 - STRANGULATION - CONSTITUTING DOMESTIC VIOLENCE, COUNT 12 - MENACING - CONSTITUTING DOMESTIC VIOLENCE, COUNT 13 - RECKLESSLY ENDANGERING ANOTHER PERSON, COUNT 14 - RECKLESS DRIVING, committed as follows:

COUNT 1
RAPE IN THE FIRST DEGREE - CONSTITUTING DOMESTIC VIOLENCE

The said Defendant(s), **AUSTIN CALLAHAN BRAND**, on or between November 12, 2014 and November 15, 2014, in the County of Multnomah, State of Oregon, or within one mile of the County of Multnomah, State of Oregon, did unlawfully and knowingly, by forcible compulsion, engage in sexual intercourse with **SARAH WALKER**, contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

The state further alleges that at the time of the conduct alleged herein, the defendant and **SARAH WALKER** were family or household members as defined by ORS 135.230(4),

COUNT 2
KIDNAPPING IN THE FIRST DEGREE- CONSTITUTING DOMESTIC VIOLENCE

The said Defendant(s), **AUSTIN CALLAHAN BRAND**, on or between November 12, 2014 and November 15, 2014, in the County of Multnomah, State of Oregon, did unlawfully and knowingly, without consent or legal authority, take **SARAH WALKER** from one place to another, with intent to interfere substantially with the personal liberty of **SARAH WALKER**, and with the purpose to further the commission of and attempt to further the commission of Rape in the First Degree, as defined in ORS 163.375 of **SARAH WALKER**, contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

The state further alleges that at the time of the conduct alleged herein, the defendant and **SARAH WALKER** were family or household members as defined by ORS 135.230(4),

COUNT 3
KIDNAPPING IN THE FIRST DEGREE - CONSTITUTING DOMESTIC VIOLENCE

14CR28021
IN
Indictment
1512373

The said Defendant(s), **AUSTIN CALLAHAN BRAND**, on or between November 12, 2014 and November 15, 2014, in the County of Multnomah, State of Oregon, did unlawfully and knowingly, without consent or legal authority, take **SARAH WALKER** from one place to another, with intent to interfere substantially with the personal liberty of **SARAH WALKER**, and with the purpose of terrorizing **SARAH WALKER**, contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

The state further alleges that at the time of the conduct alleged herein, the defendant and **SARAH WALKER** were family or household members as defined by ORS 135.230(4),

COUNT 4

KIDNAPPING IN THE FIRST DEGREE- CONSTITUTING DOMESTIC VIOLENCE

The said Defendant(s), **AUSTIN CALLAHAN BRAND**, on or between November 12, 2014 and November 15, 2014, in the County of Multnomah, State of Oregon, or within one mile of the County of Multnomah, State of Oregon, did unlawfully and knowingly, without consent or legal authority, secretly confine **SARAH WALKER** in a place where she was not likely to be found, with intent to interfere substantially with the personal liberty of **SARAH WALKER**, and with the purpose to further the commission of and attempt to further the commission of Rape in the First Degree, as defined in ORS 163.375 of **SARAH WALKER**, contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

The state further alleges that at the time of the conduct alleged herein, the defendant and **SARAH WALKER** were family or household members as defined by ORS 135.230(4),

COUNT 5

KIDNAPPING IN THE FIRST DEGREE - CONSTITUTING DOMESTIC VIOLENCE

The said Defendant(s), **AUSTIN CALLAHAN BRAND**, on or between November 12, 2014 and November 15, 2014, in the County of Multnomah, State of Oregon, or within one mile of the County of Multnomah, State of Oregon, did unlawfully and knowingly, without consent or legal authority, secretly confine **SARAH WALKER** in a place where she was not likely to be found, with intent to interfere substantially with the personal liberty of **SARAH WALKER**, and with the purpose of terrorizing **SARAH WALKER**, contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

The state further alleges that at the time of the conduct alleged herein, the defendant and **SARAH WALKER** were family or household members as defined by ORS 135.230(4),

COUNT 6

COERCION - CONSTITUTING DOMESTIC VIOLENCE

The said Defendant(s), **AUSTIN CALLAHAN BRAND**, on or between November 12, 2014 and November 15, 2014, in the County of Multnomah, State of Oregon, did unlawfully and knowingly compel and induce **SARAH WALKER** to engage in conduct from which **SARAH WALKER** had a legal right to abstain, by means of instilling in **SARAH WALKER** a fear that if **SARAH WALKER** refrained from the conduct compelled and induced, defendant would unlawfully cause physical injury to **SARAH WALKER**, contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

The state further alleges that at the time of the conduct alleged herein, the defendant and **SARAH WALKER** were family or household members as defined by ORS 135.230(4),

COUNT 7

COERCION - CONSTITUTING DOMESTIC VIOLENCE

The said Defendant(s), **AUSTIN CALLAHAN BRAND**, on or between November 12, 2014 and November 15, 2014, in the County of Multnomah, State of Oregon, did unlawfully and knowingly compel and induce **SARAH WALKER** to engage in conduct from which **SARAH WALKER** had a legal right to abstain, by means of instilling in **SARAH WALKER** a fear that if **SARAH WALKER** refrained from the conduct compelled and induced, defendant would unlawfully cause physical injury to **KYLEE WALKER**, contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

The state further alleges that at the time of the conduct alleged herein, the defendant and **SARAH WALKER** were family or household members as defined by ORS 135.230(4),

COUNT 8

ATTEMPTED BURGLARY IN THE FIRST DEGREE

The said Defendant (s), **AUSTIN CALLAHAN BRAND**, on or about November 15, 2014, in the County of Multnomah, State of Oregon, did unlawfully and intentionally attempt to enter and remain in a dwelling located at 18503 East Burnside Street, Portland, Oregon, with the intent to commit the crime of Kidnap therein, contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

The state further alleges that the above-described offense occurred in an occupied dwelling.

COUNT 9

ASSAULT IN THE FOURTH DEGREE - CONSTITUTING DOMESTIC VIOLENCE

The said Defendant(s), **AUSTIN CALLAHAN BRAND**, on or between November 12, 2014 and November 15, 2014, in the County of Multnomah, State of Oregon, did unlawfully and intentionally and knowingly cause physical injury to **SARAH WALKER**, contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

The state further alleges that at the time of the conduct alleged herein, the defendant and **SARAH WALKER** were family or household members as defined by ORS 135.230(4),

COUNT 10

ASSAULT IN THE FOURTH DEGREE - CONSTITUTING DOMESTIC VIOLENCE

The said Defendant(s), **AUSTIN CALLAHAN BRAND**, on or between November 12, 2014 and November 15, 2014, in the County of Multnomah, State of Oregon, or within one mile of the County of Multnomah, State of Oregon; did unlawfully and intentionally and knowingly cause physical injury to **SARAH WALKER**, contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

The state further alleges that at the time of the conduct alleged herein, the defendant and **SARAH WALKER** were family or household members as defined by ORS 135.230(4),

COUNT 11

STRANGULATION - CONSTITUTING DOMESTIC VIOLENCE

The said Defendant(s), **AUSTIN CALLAHAN BRAND**, on or about November 12, 2014, in the County of Multnomah, State of Oregon, did unlawfully and knowingly impede the normal breathing and blood circulation of **SARAH WALKER** by applying pressure on the throat and neck of **SARAH WALKER**, contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

The state further alleges that at the time of the conduct alleged herein, the defendant and **SARAH WALKER** were family or household members as defined by ORS 135.230(4),

COUNT 12

MENACING - CONSTITUTING DOMESTIC VIOLENCE

The said Defendant(s), **AUSTIN CALLAHAN BRAND**, on or between November 12, 2014 and November 15, 2014, in the County of Multnomah, State of Oregon, did unlawfully and intentionally attempt to place **SARAH WALKER** in fear of imminent serious physical injury, contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

The state further alleges that at the time of the conduct alleged herein, the defendant and **SARAH WALKER** were family or household members as defined by ORS 135.230(4),

COUNT 13

RECKLESSLY ENDANGERING ANOTHER PERSON

The said Defendant(s), **AUSTIN CALLAHAN BRAND**, on or between November 12, 2014 and November 15, 2014, in the County of Multnomah, State of Oregon, did unlawfully and recklessly create a substantial risk of serious physical injury to **SARAH WALKER**, contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

COUNT 14

RECKLESS DRIVING

The said Defendant(s), **AUSTIN CALLAHAN BRAND**, on or between November 12, 2014 and November 15, 2014, in the County of Multnomah, State of Oregon, did unlawfully and recklessly drive a vehicle upon a public highway and premises open to the public, in a manner that endangered the safety of persons or property, contrary to the statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

Dated at Portland, Oregon, in the county aforesaid, on NOVEMBER 24, 2014.

Witnesses
Examined Before the Grand Jury
in person (unless noted)
Matthew D Hardy
Sarah Walker
Aaron Turnage
Steve Klein
Jolene Walker
Rene Breedlove

A TRUE BILL

/S/ Susanne Evers
Alternate Foreperson of the Grand Jury

ROD UNDERHILL (883246)
District Attorney
Multnomah County, Oregon

By _____ Deputy

Security Amount (Def - BRAND) $250,000 + $250,000 + $250,000 + $250,000 + $250,000 + $10,000 + $10,000 + $20,000 + $5,000 + $5,000 + $5,000 + $5,000 + $2,500 + $2,500

AFFIRMATIVE DECLARATION

The District Attorney hereby affirmatively declares for the record, as required by ORS 161.566, upon the date scheduled for the first appearance of the defendant, and before the court asks under ORS 135.020 how the defendant pleads to the charge(s), the State's intention that any misdemeanor charged herein proceed as a misdemeanor. AMBER KINNEY OSB 077063 //bkf

Pursuant to 2005 Or Laws ch. 463 sections 1 to 7, 20(1) and 21 to 23, the State hereby provides written notice of the State's intention to rely at sentencing on enhancement facts for any statutory ground for the imposition of consecutive sentences codified under ORS 137.123 on these counts or to any other sentence which has been previously imposed or is simultaneously imposed upon this defendant.

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON,

Plaintiff,

v.

AUSTIN CALLAHAN BRAND,

Defendant.

Case No. 14CR28021

VERDICT

We the jury, being first duly empaneled and sworn in the above entitled case, do find our verdict as follows:

- *At least 10 or more jurors much agree on your verdict.*
- *With respect to Counts 1 – 12, for which there is an additional question, you are not to address the additional questions if your verdict on the charge is "not guilty." If you answer the additional question, at least 10 of the jurors who voted to find the defendant guilty of the charge must agree upon the answer to the additional question.*

Ct.	Charge	Variable Allegation	Verdict		Additional Question	
			Not Guilty	Guilty	No	Yes
1	Rape in the First Degree				Family or Household Members?	
3	Kidnapping in the First Degree	Intent to interfere substantially with personal liberty, by taking from one place to another	10		Family or Household Members?	
5	Kidnapping in the First Degree	Intent to interfere substantially with personal liberty, secretly confine		10	Family or Household Members?	
						✓ 10
6	Coercion	Threat of physical injury to Sarah Walker		10	Family or Household Members?	
						✓ 10

Exhibit C
1 of 2

Ct.	Charge	Variable Allegation	Verdict		Additional Question	
			Not Guilty	Guilty	No	Yes
7	Coercion	Threat of physical injury to Kylee Walker	12		Family or Household Members?	
8	Attempt Burglary in the First Degree		12		Occupied Dwelling?	
9	Assault in the Fourth Degree	In Multnomah county		~~10~~ 10	Family or Household Members?	✓ ~~10~~ 10
10	Assault in the Fourth Degree	In Multnomah County or Within one mile of Multnomah County	10	2	Family or Household Members?	
11	Strangulation		11		Family or Household Members?	
12	Menacing		2	10	Family or Household Members?	X-10
13	Recklessly Endangering Another Person			12		
14	Reckless Driving		12			

DATED this 20th day of April, 2015.

Presiding Juror

Exhibit C
2 of 2

Q Why not?
A The messages had been deleted by the time they got to me and we were unable to recover them. Sometimes we recover -- I'm not a cell phone expert. Sometimes I know when we plug them in we recover things and sometimes we can't. The rhyme or reason, I don't understand. I don't know. But I do know that we tried and we weren't able to get them.
Q You tried and were unable to recover those? Do you know who deleted those messages?
A I don't.
Q Okay. I would like to -- you have extensive training and experience specifically in domestic violence; is that right?
A Yes.
Q Okay. And you have already gone through your education and training with regards to domestic violence. It's 70 percent of your caseload. Can you tell me, this was a domestic violence incident; is that right?
A Yes, it was.
Q Okay. And what was -- we had a situation here with a delayed report; is that right?
MR. WALSH: Judge, I have a matter for the Court.
THE COURT: Sit tight, jurors.
(Sidebar discussion held - off the record.)
THE COURT: Jurors, I think we have five minutes' worth of work to do without you. So if you'll wait for us in the jury

room, I'm hoping it's five minutes.

(Jury exited courtroom at 2:25 p.m.)

(Whereupon, the following proceedings were held in open court outside the presence of the jury:)

THE COURT: Okay. So, Mr. Walsh?

MR. WALSH: Judge, so I think we all know where we're at because we just had a sidebar off the record. What the State is establishing is, they're attempting to get a foundation for sort of psychological evidence about the nature of domestic violence.

THE COURT: Well, we don't know that yet.

MR. WALSH: But they sort of established --

THE COURT: We could --

MR. WALSH: I apologize. They sort of went through it --

THE COURT: Why don't we have Ms. Kinney tell us where she's headed, make a -- just make an offer of proof so that it will provide a basis for Mr. Walsh to respond.

MS. KINNEY: Absolutely, Your Honor.

THE COURT: What are you -- where are you intending to go on this issue with this witness?

MS. KINNEY: I am trying to establish a foundation of his experience, training, and education specifically with domestic violence, and qualify him to be able to give his opinion and assessment of this situation, this domestic --

THE COURT: And what opinion questions would you be asking him?

MS. KINNEY: Whether -- I would like to ask him about the -- whether delayed reporting is common in domestic violence, why it happens, why crimes of domestic violence go unreported, whether he would assess this as a typical behavior of a domestic violence victim.

THE COURT: Anything else? Any other opinion questions you would ask him?

MS. KINNEY: No, I believe that's it, Your Honor.

THE COURT: Okay. Thank you.

Mr. Walsh?

MR. WALSH: So --

THE COURT: Now, with that offer of proof.

MR. WALSH: Yes, Judge. Judge, one, I think it's basic foundation, that this officer, who I am not being critical of, does not have the either medical or psychological training to discuss these matters.

THE COURT: Let me ask Ms. Kinney. Have you finished your questions for the witness about his qualifications?

MS. KINNEY: I could guide him through it a little bit more, Your Honor.

THE COURT: All right. So --

MS. KINNEY: Okay.

THE COURT: -- we'll see where that goes.

MS. KINNEY: Okay. Sorry.

MR. WALSH: Well, because I think we could -- do you want me to keep going and --

THE COURT: Yeah, yeah.

MR. WALSH: Right. Right. So --

THE COURT: Yeah. And then when we bring the jury back in we'll let her try to establish foundation. You can object again and I'll rule -- I'll rule, I'll flush out the legal issues.

MR. WALSH: Right.

THE COURT: Go ahead.

MR. WALSH: Judge, that it is, at a basic level, speculation. It is asking one witness to speculate on the motives, behaviors, and justification for acts that other witnesses took and try and explain that to the jury as an expert witness. It ties back to my position that an officer's training and experience is not a blank check for qualifications as an expert, and that police training, we may get into more of the foundation, by itself is not -- because it is not at, you know, the -- he has not interviewed in a psychological setting, and had interviews with folks, and is not able to render that opinion, such as say a Ph.D. might be able to do.

Judge, beyond speculation, it then turns into a form of witness vouching; that it's saying there are these acts that you took, and I'm telling the jury, it's okay to do that because that

means you're still a victim. And that's just always an improper line of testimony, to say that -- you know, basically, he can't say I believe this person. That's essentially what they're doing. We have these acts in front of us. I have this training and experience, and I'm telling the jury, through my continuation in this testimony, that if he doesn't outright say I believe it, he's at least implying that by acting on it and accepting it. And he will say this is common in the domestic violence arena, which is then witness vouching.

THE COURT: Thank you. Any response you care to make, Ms. Kinney?

MS. KINNEY: Your Honor, I believe that he will be -- I have already laid a significant foundation. And I believe that --

THE COURT: You want -- you said you wanted to do some more of that.

MS. KINNEY: I will do a little bit more, and I do believe that he will be absolutely qualified to answer these questions.

THE COURT: Right. So what we ought to do is, we bring the jury back in, you do whatever you think you want to do with the witness on his qualifications, feel free to make your objection, and I'll rule on it.

MR. WALSH: And then, Judge, if I am not successful, I want to make sure that I am -- that objection is ongoing for --

THE COURT: That's -- make your record however you want to, but I understand your position.

MR. WALSH: If --

THE COURT: I don't think you have to object to every, single question.

MR. WALSH: No, but if they change topics a little bit, I might say, "I renew the objection."

THE COURT: All right. Do what you think you need to do.

MR. WALSH: Thank you.

THE COURT: Bring the jury back in.

It was four minutes. I asked you how long that would be. You said five.

MR. WALSH: Well, yesterday I got in trouble. I said an hour plus. And then you said --

THE COURT: It was an hour.

MR. WALSH: You were mad when it was one-ten.

THE COURT: Plus is a little --

MR. WALSH: It wasn't that bad. Right.

THE COURT: Well, that's all a matter of opinion.

Bring them in.

And by the way, a pepper is a fruit, not a vegetable.

MS. KINNEY: A what?

THE COURT: A pepper is a fruit, not a vegetable.

(Jury summoned.)

(Whereupon, the following proceedings were held in open court in the presence of the jury:)

THE COURT: Okay. Be seated, everybody. Go ahead, Ms. Kinney.

DIRECT EXAMINATION (CONTINUED)

BY MS. KINNEY:

Q What training -- I know you went through this a little bit. I just want to write it down again. What training did you specifically go through with regards to domestic violence?

A Sure. And I don't have the class titles in front of me. I received my initial training at the academy with regards to domestic violence investigations. Since then, I have taken a class on victims involving domestic violence, perpetrators and domestic violence. I have probably had over a hundred hours of classes specifically dealing with domestic violence training.

Q And in over a hundred hours of training over what period of time?

A Over my career.

Q Over your career? Okay. And currently your caseload, you said, is about 70 percent domestic violence incidents?

A Correct.

Q And historically, through your career, have you always worked in domestic violence, dating back to even patrol?

A I've worked -- yes, I've worked in domestic violence since the first day I was a police office. It's something we

respond to every, single day.

Q So throughout your career you have been working in domestic violence?

A Indeed.

Q Okay. Thank you.

MS. KINNEY: Those are all of the foundation questions that I have. I --

MR. WALSH: So at this time I would renew the objection --

THE COURT: Overruled.

MR. WALSH: -- as we discussed.

BY MS. KINNEY:

Q We -- in this case involving Ms. Walker and Mr. Brand, we have a situation of delayed report. What is delayed report?

A Delayed report where -- it's just that. It's where the victim may take time to report. It might be an hour, it might be two weeks, or it could be never. That's something we see often in domestic violence cases.

Q Why is this common in domestic violence?

A There's several reasons. In a domestic violence case, from somebody from the outside looking in that has never been involved in a domestic violence case, and has never been on the receiving end of a batterer, it would be easy for somebody to make the call, why is this person staying with this person. Why is this person continuing to be abused? However, when you're in

that relationship a couple of things are occurring. One, that is the only source you have. That's the only person you know. Oftentimes, because domestic violence situations are such controlling in nature, your friends, your family have been separated and pushed away from you. You no longer have those contacts. So the only person me, as the victim, knows is that person who's abusing me. Therefore, you stay. Whenever you stay in that relationship, there may be some love there. You may absolutely love that person, and you may know that by telling on them they may get in trouble. They may go to jail. If they go to jail, there may be lots of financial resources. Let's say in the case where somebody has children. Now the breadwinner is in jail and nobody's taking care of the kids.

There's a psychological dependency on that person; there's a codependency on that -- in that batterer relationship. I, as the victim, am codependent on that person because he's the only person I know in my world. There's also something called Stockholm Syndrome. Stockholm Syndrome is where a hostage -- sometimes we see it in a hostage situation, but a hostage or a victim will actually side with the perpetrator because there's some good qualities. Maybe they agree with some of the stuff they're doing. It becomes -- they almost become a friend to that person and, therefore, they don't want to get them in trouble. That's kind of what I've been talking about here.

So those are some of the reasons why you'd have delayed

report. There's obviously lots and lots of them. But in my experience, that's some of the reasons.

Q And, obviously, in cases you respond to, there has been a report, but do -- in your training and experience do you believe there are a lot of incidents of domestic violence that have not and never get reported?

MR. WALSH: Judge, objection; speculation.

THE COURT: Overruled.

THE WITNESS: Yes.

BY MS. KINNEY:

Q And is that for the same reasons that you just described?

A Yeah, it's -- yeah, for some of those reasons. I mean, everybody has their own reasons, but, yeah, those are some of the reasons. Absolutely.

Q Okay. Ms. Walker's behavior in this case, can you explain her behavior?

MR. WALSH: Judge, I'm going to renew my objection.

THE COURT: Overruled.

THE WITNESS: With respect to what?

BY MS. KINNEY:

Q With respect to why she didn't go to police immediately upon having a -- having an opportunity to report?

A Sure. Ms. Walker, in this case -- you guys have heard the facts. Ms. Walker, in this case, had some opportunity to get

away, escape, leave, go, run, call, talk to the police, do what have you -- or do whatever. There were those opportunities that were afforded to her and she chose not to do those. When I spoke to Ms. Walker it became clear to me the reason she chose not to do those was under fear, fear of continued assaults against herself. She knows that -- and by talking to her, and I also concur with her thoughts because of my training and experience and what I've been doing -- domestic violence situations tend to increase in severity, not decrease. This was a very major thing. From looking at it, no matter which angle you look at it, the set of circumstances we're discussing are very, very major, and Sarah knows that. She knows that there's a fear that Mr. Brand will go back to jail. She knows that if she tries to escape, he's told her that he's going to knock her teeth in and that he is going to hurt her. He's also threatened her family. He knows that he -- that her family trusts him, and that her family is a phone call away if she escapes and tries to run away. The family is unaware as to what's going on, and a phone call, he could be in contact with the family and, simply, she was scared that if she tried to get away then he was going to hurt her and/or her family.

She told me that she had a plan. She says, "I have a plan. We will get -- I was going to get through this. I'm bidding time." At times she told him that she loved him. At times she told him that, you know, "No, I want to have your baby. I want to be there with you. I want to -- no, I love you,

honey." Those are all -- that's all a coping mechanism to help her keep from getting assaulted and get to the end of the day. At the end of the day, it's self-preservation, and we do crazy things -- people do crazy things when they're trying to have self-preservation and preserve their own safety.

And that's what this case is. She knew what she was in was a bad situation. She told me she knew that if she tried to get away he would capture her. In the barn, where's she going to run? She's in the middle of nowhere. And he -- she told me that she was not going to try to escape because she was in fear that somebody, her or her family, would get hurt at the hands of Mr. Brand, or Mr. Brand's family, and that caused her great concern. And she was willing to take the abuse and live this out until she could fulfill her plan for self-preservation.

Q Is this behavior -- I know that maybe not to this extreme, but is this type of behavior typical of a victim of domestic violence?

A Absolutely. That's why there's repeat -- victims in domestic violence, they go back, they want to stay in that relationship -- or they don't want to but they choose to stay in that relationship for a multitude of reasons, and this is just another example of it. This one is extreme, but it's another example.

Q Okay. Thank you.

MS. KINNEY: I have no further questions.

injury to self or another person, or in fear that the person or another person will immediately or in the future be kidnapped.

Sexual intercourse has its ordinary meaning and occurs on any penetration, however slight. Emission is not required.

Oregon a law provides that a person commits the crime of kidnapping of the first degree, constituting domestic violence, if with an intent to interfere substantially with another's personal liberty and without consent or legal authority, that person takes another person from one place to another or secretly confines another person with the purpose to terrorize the victim.

With respect to Count 3, in this case, to establish the crime of kidnapping in the first degree, constituting domestic violence, as alleged in Count 3, the State must prove beyond a reasonable doubt the following elements:

1) That the act occurred on or between November 12, 2014 and November 15, 2014;

2) That Austin Callahan Brand acting without consent or legally authority took Sarah Walker from one place to another;

3) That Austin Callahan Brand had the intent to interfere substantially with Sarah Walker's personal liberty;

4) That Austin Callahan Brand acted with the purpose to terrorize Sarah Walker;

5) At the time of the act, Sarah Walker was a person who had cohabited with the Defendant or was a person who had been

involved in a sexually intimate relationship with the Defendant.

Number 5, in this case, to establish -- excuse me, Count 5. In this case, to establish the crime of kidnapping in the first degree, constituting domestic violence, as alleged in Count 5, the State must prove beyond a reasonable doubt the following elements:

1) That the act occurred on or between November 12, 2014 and November 15, 2014;

2) That Austin Callahan Brand, acting without consent for legal authority secretly confined Sarah Walker;

3) That Austin Callahan Brand had the intent to interfere substantially with Sarah Walker's personal liberty; and

4) That Austin Callahan Brand acted with a purpose to terrorize Sarah Walker;

5) That at the time of the act, Sarah Walker was a person who had cohabited with the Defendant or was a person who had been involved in a sexually intimate relationship with the Defendant.

Oregon a law provides that a person commits the crime of coercion, constituting domestic violence, when the person compels or induces another person to engage in conduct that the other person has the illegal right to abstain by means of instilling in that other person a fear that if the other person engages in conduct contrary to the compulsion or inducement, the act will unlawfully cause physical injury to some person.

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

State of Oregon, Plaintiff	)	
	)	Case No.: 14CR28021
vs.	)	
	)	JUDGMENT
Austin Callahan Brand, Defendant	)	Case File Date: 11/17/2014 District Attorney File #: 2308830-1V

DEFENDANT

True Name: Austin Callahan Brand
Date Of Birth: 10/07/1989
Fingerprint Control No (FPN): JMUL114646513
Alias(es): Austin Brand

Sex: Male
State Identification No (SID): 16137792OR

HEARING

Proceeding Date: 03/25/2016
Court Reporter: Recording, FTR

Defendant appeared in person and was in custody. The defendant was represented by Attorney(s) DAVID J CELUCH, OSB Number 952291. Plaintiff appeared by and through Attorney(s) AMBER KINNEY, OSB Number 077063.

COUNT(S)

It is adjudged that the defendant has been convicted on the following count(s):

Count 5 : Kidnapping in the First Degree - Constituting Domestic Violence

Count number 5, Kidnapping in the First Degree - Constituting Domestic Violence, 163.235, Felony Class A, committed on or about 11/12/2014. Conviction is based upon a Jury Verdict of Guilty on 04/20/2015.

Sentencing Guidelines

The Crime Severity Classification (CSC) on Count Number 5 is 10 and the Criminal History Classification (CHC) is C.

This sentence is pursuant to the following special factors:

- Sentence per ORS 137.700

The court finds substantial and compelling reason for an Upward Durational Departure, as stated on the record. This departure is pursuant to the following aggravating or mitigating factor(s):

- Defendant on supervision/release status.

Incarceration

Defendant is sentenced to the custody of Oregon Dept of Corrections, for a period of 180 month(s). Defendant is remanded to the custody of the Multnomah Sheriff for transportation to the Oregon Dept of Corrections for service of this sentence. Defendant not to be transported to Dept. of Corrections without order of the Court. Defendant may receive credit for time served.

The Defendant may not be considered by the executing or releasing authority for any form of Reduction in Sentence, Conditional or Supervised Release Program, Temporary Leave From Custody, Work Release. Defendant not eligible for any form of Reduction in Sentence, Conditional or Supervised Release Program, Work Release until after 90 months have been served. The Defendant may not be considered for release on post-prison supervision under ORS 421.508(4) upon successful completion of an alternative incarceration program.

It is ordered that the Defendant serve a minimum of 90 month(s).

Post-Prison Supervision

The term of Post-Prison Supervision is 3 year(s). If the Defendant violates any of the conditions of post-prison supervision, the defendant shall be subject to sanctions including the possibility of additional imprisonment in accordance with the rules of the State Sentencing Guidelines Board.

Statutory Provisions

Defendant is ordered to submit blood or buccal sample and thumbprint pursuant to ORS 137.076.

Monetary Terms

Defendant shall be required to pay the following amounts on this count:

Fees and Assessments: Payable to the Court.

Type	Amount	Modifier	Reduction	Actual Owed
Fine - Felony	$200.00	Waived	$200.00	$0.00
Total	$200.00		$200.00	$0.00

Count 6 : Coercion - Constituting Domestic Violence

Count number 6, Coercion - Constituting Domestic Violence, 163.275, Felony Class C, committed on or about 11/12/2014. Conviction is based upon a Jury Verdict of Guilty on 04/20/2015.

Sentencing Guidelines

The Crime Severity Classification (CSC) on Count Number 6 is 7 and the Criminal History Classification (CHC) is B.

This sentence is pursuant to the following special factors:

- This is a Presumptive Sentence

Incarceration

Defendant is sentenced to the custody of Oregon Dept of Corrections, for a period of 25 month(s). Defendant is remanded to the custody of the Multnomah Sheriff for transportation to the Oregon Dept of Corrections for service of this sentence. Defendant may receive credit for time served.

The Defendant may be considered by the executing or releasing authority for any form of reduction in sentence, temporary leave from custody, work release, or program of conditional or supervised release authorized by law for which the Defendant is otherwise eligible at the time of sentencing. The Defendant may not be considered for release on post-prison supervision under ORS 421.508(4) upon successful completion of an alternative incarceration program.

This sentence shall be concurrent with the following cases Count 5.

Post-Prison Supervision

The term of Post-Prison Supervision is 35 month(s). If the Defendant violates any of the conditions of post-prison supervision, the defendant shall be subject to sanctions including the possibility of additional imprisonment in accordance with the rules of the State Sentencing Guidelines Board.

Statutory Provisions

Defendant is ordered to submit blood or buccal sample and thumbprint pursuant to ORS 137.076.

Monetary Terms

Defendant shall be required to pay the following amounts on this count:

Fees and Assessments: Payable to the Court.

Type	Amount	Modifier	Reduction	Actual Owed
Fine - Felony	$200.00	Waived	$200.00	$0.00

Total	$200.00		$200.00	$0.00

Count 9 : Assault in the Fourth Degree - Constituting Domestic Violence

Count number 9, Assault in the Fourth Degree - Constituting Domestic Violence, 163.160(2), Misdemeanor Class A, committed on or about 11/12/2014. Conviction is based upon a Jury Verdict of Guilty on 04/20/2015.

Incarceration

Defendant is sentenced to the custody of County Jail, for a period of 1 year(s). Defendant is remanded to the custody of the Multnomah County Sheriff for transportation to the Supervisory Authority for service of this sentence. Defendant may receive credit for time served.

The Defendant may be considered by the supervisory authority for any form of alternative sanction authorized by ORS 423.478, and the Defendant shall pay any required per diem fees.

This sentence shall be concurrent with the following cases Counts 5 & 6.

Monetary Terms

Defendant shall be required to pay the following amounts on this count:

Fees and Assessments: Payable to the Court.

Type	Amount	Modifier	Reduction	Actual Owed
Fine - Misdemeanor	$100.00	Waived	$100.00	$0.00
Total	$100.00		$100.00	$0.00

Count 12 : Menacing - Constituting Domestic Violence

Count number 12, Menacing - Constituting Domestic Violence, 163.190, Misdemeanor Class A, committed on or about 11/12/2014. Conviction is based upon a Jury Verdict of Guilty on 04/20/2015.

Incarceration

Defendant is sentenced to the custody of County Jail, for a period of 1 year(s). Defendant is remanded to the custody of the Multnomah County Sheriff for transportation to the Supervisory Authority for service of this sentence. Defendant may receive credit for time served.

The Defendant may be considered by the supervisory authority for any form of alternative sanction authorized by ORS 423.478, and the Defendant shall pay any required per diem fees.

This sentence shall be concurrent with the following cases Counts 5, 6 & 9.

Monetary Terms

Defendant shall be required to pay the following amounts on this count:

Fees and Assessments: Payable to the Court.

Type	Amount	Modifier	Reduction	Actual Owed
Fine - Misdemeanor	$100.00	Waived	$100.00	$0.00
Total	$100.00		$100.00	$0.00

Count 13 : Recklessly Endangering Another Person

Count number 13, Recklessly Endangering Another Person, 163.195, Misdemeanor Class A, committed on or about 11/12/2014. Conviction is based upon a Jury Verdict of Guilty on 04/20/2015.

Incarceration

Defendant is sentenced to the custody of County Jail, for a period of 1 year(s). Defendant is remanded to the custody of the Multnomah County Sheriff for transportation to the Supervisory Authority for service of this sentence. Defendant may receive credit for time served.

The Defendant may be considered by the supervisory authority for any form of alternative sanction authorized by ORS 423.478, and the Defendant shall pay any required per diem fees.

This sentence shall be concurrent with the following cases Counts 5, 6, 9 & 12.

Monetary Terms

Defendant shall be required to pay the following amounts on this count:

Fees and Assessments: Payable to the Court.

Type	Amount	Modifier	Reduction	Actual Owed
Fine - Misdemeanor	$100.00	Waived	$100.00	$0.00
Total	$100.00		$100.00	$0.00

COUNTS DISPOSED WITH NO CONVICTION

Count # 3, Kidnapping in the First Degree is Acquitted.

Count # 7, Coercion is Acquitted.

Count # 8, Attempt to Commit a Class A Felony is Acquitted.

Count # 10, Assault in the Fourth Degree is Acquitted.

Count # 11, Strangulation is Acquitted.

Count # 14, Reckless Driving is Acquitted.

Count # 1, Rape in the First Degree is Dismissed.

Count # 2, Kidnapping in the First Degree is Dismissed.

Count # 4, Kidnapping in the First Degree is Dismissed.

If convicted of a felony or a crime involving domestic violence, you may lose the right to buy, sell, transport, receive, or possess a firearm, ammunition, or other weapons in both personal and professional endeavors pursuant to ORS 166.250, ORS 166.291, ORS 166.300, and/or 18 USC 922(g).

MONEY AWARD

Judgment Creditor: State of Oregon
Judgment Debtor: Austin Callahan Brand

Payees are to be paid as ordered under Monetary Terms.

Money Award total does not include reduced amounts of $700.00 as stated in the individual counts.

The court may increase the total amount owed by adding collection fees and other assessments. These fees and assessments may be added without further notice to the defendant and without further court order.

Subject to amendment of a judgment under ORS 137.107, money required to be paid as a condition of probation remains payable after revocation of probation only if the amount is included in the money award portion of the judgment document, even if the amount is referred to in other parts of the judgment document.

Any financial obligation(s) for conviction(s) of a violation, which is included in the Money Award, creates a judgment lien.

Payment Schedule

Payment of the fines, fees, assessments, and/or attorney's fees noted in this and any subsequent Money Award shall be scheduled by the clerk of the court pursuant to ORS 161.675.

Payable to:

Multnomah County Circuit Court
1021 SW Fourth Avenue
Portland, Oregon 97204
P: 503-988-3235, option 3
F: http://courts.oregon.gov/multnomah

Signed: 4/1/2016 02:32 PM

Dated the _____ day of _____, 20_____

Signed: _____

Circuit Court Judge John A. Wittmayer

REGISTER OF ACTIONS

CASE NO. 14CR28021

State of Oregon vs Austin Callahan Brand

§
§
§
§
§
§
§
§

Case Type: **Offense Felony**
Date Filed: **11/17/2014**
Location: **Multnomah**
Booking Number: **1321152**
District Attorney Number: **2308830-1V**

PARTY INFORMATION

Defendant **Brand, Austin Callahan *Also Known As* Brand, Austin**

Male White
DOB: 1989
6' 1", 189 lbs

8809 SE 190th Drive
Damascus, OR 97089
SID: OR16137792
Other Agency Numbers
777714 Multnomah County Sheriff

Attorneys
DAVID J CELUCH
Retained
503 224-4045(W)

~~Pro SeDEFENSE CONSORTIUM PORTLAND~~
~~*Court Appointed*~~
~~503-295-2996(W)~~

~~ERNEST WARREN, Jr~~
~~*Court Appointed*~~
~~503-228-6656(W)~~

~~WILLIAM J WALSH~~
~~*Court Appointed*~~
~~503-224-7977(W)~~

Plaintiff **State of Oregon**

AMBER KINNEY
503 988-3162(W)

TRACI ANDERSON
503 988-6076(W)

CHARGE INFORMATION

Charges: Brand, Austin Callahan	Statute	Level	Date
1. Rape in the First Degree	163.375	Felony Class A	11/12/2014
2. Kidnapping in the First Degree	163.235	Felony Class A	11/12/2014
3. Kidnapping in the First Degree	163.235	Felony Class A	11/12/2014
4. Kidnapping in the First Degree	163.235	Felony Class A	11/12/2014
5. Kidnapping in the First Degree	163.235	Felony Class A	11/12/2014
6. Coercion	163.275	Felony Class C	11/12/2014
7. Coercion	163.275	Felony Class C	11/12/2014
8. Attempt to Commit a Class A Felony	161.405(2)(b)	Felony Class B	11/15/2014
9. Assault in the Fourth Degree	163.160(2)	Misdemeanor Class A	11/12/2014
10. Assault in the Fourth Degree	163.160(2)	Misdemeanor Class A	11/12/2014
11. Strangulation	163.187	Misdemeanor Class A	11/15/2014
12. Menacing	163.190	Misdemeanor Class A	11/12/2014
13. Recklessly Endangering Another Person	163.195	Misdemeanor Class A	11/12/2014
14. Reckless Driving	811 140	Misdemeanor Class A	11/12/2014
999. Recklessly Endangering Another Person	163.195	Misdemeanor Class A	11/16/2014
999. Menacing	163.190	Misdemeanor Class A	11/16/2014
999. Menacing	163.190	Misdemeanor Class A	11/16/2014
999. Rape in the First Degree	163.375	Felony Class A	11/16/2014
999. Coercion	163.275	Felony Class C	11/16/2014
999. Coercion	163.275	Felony Class C	11/16/2014
999. Coercion	163.275	Felony Class C	11/16/2014
999. Assault in the Fourth Degree	163.160(2)	Misdemeanor Class A	11/16/2014
999. Kidnapping in the First Degree	163.235	Felony Class A	11/16/2014

999. Kidnapping in the First Degree	163.235	Felony Class A	11/16/2014
999. Kidnapping in the First Degree	163.235	Felony Class A	11/16/2014

EVENTS & ORDERS OF THE COURT

DISPOSITIONS

11/17/2014 **Disposition**
- 999. Coercion
  - No Complaint
- 999. Coercion
  - No Complaint
- 999. Coercion
  - No Complaint
- 999. Assault in the Fourth Degree
  - No Complaint
- 999. Recklessly Endangering Another Person
  - No Complaint
- 999. Menacing
  - No Complaint
- 999. Menacing
  - No Complaint
- 999. Rape in the First Degree
  - No Complaint
- 999. Kidnapping in the First Degree
  - No Complaint
- 999. Kidnapping in the First Degree
  - No Complaint
- 999. Kidnapping in the First Degree
  - No Complaint

Created: 11/17/2014 1:57 PM

11/25/2014 **Plea** (Judicial Officer: Greenlick, Michael A)
- 6. Coercion
  - Not Guilty
- 11. Strangulation
  - Not Guilty
- 2. Kidnapping in the First Degree
  - Not Guilty
- 1. Rape in the First Degree
  - Not Guilty
- 3. Kidnapping in the First Degree
  - Not Guilty
- 4. Kidnapping in the First Degree
  - Not Guilty
- 5. Kidnapping in the First Degree
  - Not Guilty
- 7. Coercion
  - Not Guilty
- 9. Assault in the Fourth Degree
  - Not Guilty
- 10. Assault in the Fourth Degree
  - Not Guilty
- 8. Attempt to Commit a Class A Felony
  - Not Guilty
- 12. Menacing
  - Not Guilty
- 13. Recklessly Endangering Another Person
  - Not Guilty
- 14. Reckless Driving
  - Not Guilty

Created: 11/25/2014 10:11 AM

04/20/2015 **Disposition** (Judicial Officer: WITTMAYER, JOHN)
- 11. Strangulation
  - Acquitted
- 2. Kidnapping in the First Degree
  - Dismissed
- 3. Kidnapping in the First Degree
  - Acquitted
- 4. Kidnapping in the First Degree
  - Dismissed
- 7. Coercion
  - Acquitted
- 10. Assault in the Fourth Degree
  - Acquitted
- 8. Attempt to Commit a Class A Felony
  - Acquitted
- 14. Reckless Driving
  - Acquitted

Created: 04/20/2015 3:46 PM

10/23/2015 **Disposition** (Judicial Officer: WITTMAYER, JOHN)

1. Rape in the First Degree
Dismissed
Created: 10/23/2015 4:15 PM

03/25/2016 **Disposition** (Judicial Officer: WITTMAYER, JOHN)
6. Coercion
Convicted
5. Kidnapping in the First Degree
Convicted
9. Assault in the Fourth Degree
Convicted
12. Menacing
Convicted
13. Recklessly Endangering Another Person
Convicted
Created: 03/25/2016 4:33 PM

03/25/2016 **Sentence** (Judicial Officer: WITTMAYER, JOHN)
5. Kidnapping in the First Degree
Incarceration
Duration: 180 Months
Minimum: 90 Months
Agency: Oregon Dept of Corrections
Comments: Defendant not to be transported to Dept. of Corrections without order of the Court.
Remand
Credit Time Served
Statute: 137.750
Eligibility: Eligible Some
Additional Eligibility: Defendant not eligible for any form of Reduction in Sentence, Conditional or Supervised Release Program.
Work Release until after 90 months have been served.
Alternative Incarceration: Not Eligible
Post-Prison Supervision Duration: 3 Years
Sentencing Details
Decision Date: 03/25/2016
Sentencing Guidelines
Crime Severity: 10
Criminal History: C
Special Factors: Sentence per ORS 137.700
Durational Departure: Up
Other Reasons: Defendant on supervision/release status.
Statutory Provisions
Provision Type: Blood and Buccal Sample
Fee Totals:

	Amount	Reduction	Owed
Fine - Felony	$200.00	$200.00	$0.00
Fee Totals $	$200.00	$200.00	$0.00
Fee Modifier		Waived	

Created: 03/28/2016 4:00 PM

03/25/2016 **Sentence** (Judicial Officer: WITTMAYER, JOHN)
6. Coercion
Incarceration
Duration: 25 Months
Agency: Oregon Dept of Corrections
Remand
Credit Time Served
Concurrent Cases: Count 5
Statute: 137.750
Eligibility: Eligible All
Alternative Incarceration: Not Eligible
Post-Prison Supervision Duration: 35 Months
Fee Totals:

	Amount	Reduction	Owed
Fine - Felony	$200.00	$200.00	$0.00
Fee Totals $	$200.00	$200.00	$0.00
Fee Modifier		Waived	

Sentencing Details
Decision Date: 03/25/2016
Sentencing Guidelines
Crime Severity: 7
Criminal History: B
Special Factors: This is a Presumptive Sentence
Statutory Provisions
Provision Type: Blood and Buccal Sample
Created: 03/28/2016 4:31 PM

03/25/2016 **Sentence** (Judicial Officer: WITTMAYER, JOHN)
9. Assault in the Fourth Degree
Incarceration
Duration: 1 Year
Agency: County Jail
Remand
Credit Time Served
Concurrent Cases: Counts 5 & 6
Statute: 137.752

Eligibility: Eligible
Fee Totals:

	Amount	Reduction	Owed
Fine - Misdemeanor	$100.00	$100.00	$0.00
Fee Totals $	$100.00	$100.00	$0.00
Fee Modifier		Waived	

Created: 03/28/2016 4:46 PM

03/25/2016 **Sentence** (Judicial Officer: WITTMAYER, JOHN)
12. Menacing
Incarceration
Duration: 1 Year
Agency: County Jail
Remand
Credit Time Served
Concurrent Cases: Counts 5, 6 & 9
Statute: 137.752
Eligibility: Eligible
Fee Totals:

	Amount	Reduction	Owed
Fine - Misdemeanor	$100.00	$100.00	$0.00
Fee Totals $	$100.00	$100.00	$0.00
Fee Modifier		Waived	

Created: 03/28/2016 4:48 PM

03/25/2016 **Sentence** (Judicial Officer: WITTMAYER, JOHN)
13. Recklessly Endangering Another Person
Incarceration
Duration: 1 Year
Agency: County Jail
Remand
Credit Time Served
Concurrent Cases: Counts 5, 6, 9 & 12
Statute: 137.752
Eligibility: Eligible
Fee Totals:

	Amount	Reduction	Owed
Fine - Misdemeanor	$100.00	$100.00	$0.00
Fee Totals $	$100.00	$100.00	$0.00
Fee Modifier		Waived	

Created: 03/28/2016 4:53 PM

OTHER EVENTS AND HEARINGS

11/17/2014 **Arraignment** (2:30 PM) (Judicial Officer Jones, Edward J)
Result: Held
Created: 11/17/2014 5:54 AM

11/17/2014 **Motion - Recognizance Release**
Created: 11/17/2014 8:05 AM

11/17/2014 **Order - No Contact** (Judicial Officer: Waller, Nan G)
signed by RAO
Signed: 11/16/2014
Created: 11/17/2014 11:27 AM

11/17/2014 **Arraignment** (Judicial Officer: Jones, Edward J)
Created: 11/17/2014 2:45 PM

11/17/2014 **Information**
Created: 11/17/2014 4:36 PM

11/17/2014 **Order - Appear** (Judicial Officer: Jones, Edward J)
Signed: 11/17/2014
Created: 11/17/2014 4:46 PM

11/17/2014 **Order - Appointing Counsel** (Judicial Officer: Jones, Edward J)
Attorney:
Signed: 11/18/2014
Created: 11/20/2014 11:27 AM

11/18/2014 **Affidavit - Probable Cause**
Created: 11/18/2014 8:17 AM

11/20/2014 **Notice - Representation**
Created: 11/21/2014 8:10 AM

11/24/2014 **Indictment**
Created: 11/24/2014 3:06 PM

11/25/2014 *CANCELED* **Hearing - Preliminary** (9:30 AM) (Judicial Officer Greenlick, Michael A)
Indicted
Created: 11/17/2014 2:46 PM

11/25/2014 **Arraignment** (9:30 AM) (Judicial Officer Greenlick, Michael A)
Result: Held
Created: 11/24/2014 3:41 PM

11/25/2014 **Warrant - Return of Service**
Created: 11/25/2014 8:12 AM

11/25/2014 **Arraignment** (Judicial Officer: Greenlick, Michael A)
Created: 11/25/2014 10:10 AM

11/25/2014 **Order - Appear** (Judicial Officer: Greenlick, Michael A)
Signed: 11/25/2014
Created: 11/25/2014 4:58 PM

12/10/2014 **Certificate - Victim Notification**

Created: 12/12/2014 1:30 PM
01/06/2015 **Call - Regular** (9:00 AM) (Judicial Officer Waller, Nan G)
Swis Booking Date: 11/16/14 Custody: MCIJ Parole Hold Clackamas County Hold
Result: Held
Created: 11/25/2014 10:09 AM
01/09/2015 **Call - Regular** (9:00 AM) (Judicial Officer Albrecht, Cheryl A.)
Swis Booking Date: 11/16/14 Custody: MCIJ Parole Hold Clackamas County Hold
Result: Held
Created: 01/06/2015 9:21 AM
02/06/2015 **Call - Regular** (9:00 AM) (Judicial Officer Waller, Nan G)
Swis Booking Date: 11/16/14 Custody: MCIJ Parole Hold Clackamas County Hold Ext 60 days thru 3/16 per CAA
Result: Held
Created: 01/09/2015 9:19 AM
03/03/2015 **Hearing - Case Management** (10:15 AM) (Judicial Officer Frantz, Julie E.)
02/24/2015 Reset by Court to 03/03/2015
Created: 11/25/2014 8:31 AM
03/09/2015 **Call - Regular** (9:00 AM) (Judicial Officer Waller, Nan G)
Swis Booking Date: 11/16/14 Custody: MCIJ Parole Hold Clackamas County Hold Ext 60 days thru 3/16 per CAA
Result: Held
Created: 02/06/2015 9:23 AM
03/10/2015 **Call - Regular** (9:00 AM) (Judicial Officer Waller, Nan G)
Swis Booking Date: 11/16/14 Custody: MCIJ Parole Hold Clackamas County Hold Ext 60 days thru 3/16 per CAA
Result: Held
Created: 03/09/2015 10:43 AM
03/11/2015 **Call - Regular** (9:00 AM) (Judicial Officer Waller, Nan G)
Swis Booking Date: 11/16/14 Custody: MCIJ Parole Hold Clackamas County Hold Ext 60 days thru 3/16 per CAA Transport Requested per NGW
Result: Held
Created: 03/10/2015 9:21 AM
03/13/2015 **Call - Regular** (9:00 AM) (Judicial Officer Waller, Nan G)
Swis Booking Date: 11/16/14 Custody: MCIJ Parole Hold Clackamas County Hold Ext 60 days thru 3/16 per CAA
Result: Held
Created: 03/11/2015 10:15 AM
04/07/2015 **Motion - Evidentiary**
Created: 04/07/2015 4:21 PM
04/08/2015 **Notice - Trial**
An notice to have a fast & speedy trial for defendant.
Created: 04/08/2015 9:25 AM
04/10/2015 **Call - Regular** (9:00 AM) (Judicial Officer Waller, Nan G)
Swis Booking Date: 11/16/14 Custody: MCIJ Parole Sanction to 03/16/15 Clackamas County Hold Ext 60 days thru 3/16 per CAA Ext 60 days thru 5/15 per NGW
Result: Held
Created: 03/13/2015 9:23 AM
04/13/2015 **Trial** (10:00 AM) (Judicial Officer WITTMAYER, JOHN)
04/13/2015, 04/14/2015, 04/15/2015, 04/16/2015, 04/17/2015, 04/20/2015
3.5 Days Transport Requested
Result: Held
Created: 04/10/2015 11:01 AM
04/13/2015 **Motion - Accelerate Trial**
Motion from defendant for a speedy trial
Created: 04/13/2015 9:20 AM
04/13/2015 **Order** (Judicial Officer: Bergstrom, Eric J.)
ALLOWING DEF CIVILIAN CLOTHING
Signed: 04/13/2015
Created: 04/14/2015 1:28 PM
04/14/2015 **Motion - Accelerate Trial**
Slip from Tammy to have a speedy trial
Created: 04/14/2015 2:11 PM
04/14/2015 **Waiver - Jury Trial**
Created: 04/15/2015 4:35 PM
04/15/2015 **Order - Transport Prisoner** (Judicial Officer: WITTMAYER, JOHN)
An order to transport witness from Clackamas County Jail for Court 4/15/2015 at 9:00 am to Judge Wittmayer's court.
Signed: 04/13/2015
Created: 04/15/2015 10:21 AM
04/21/2015 **Order - Appear** (Judicial Officer: WITTMAYER, JOHN)
FP: 4/28/15 @ 8:30
Signed: 04/20/2015
Created: 04/22/2015 9:43 AM
04/21/2015 **Verdict**
Created: 04/22/2015 3:02 PM
04/22/2015 **Jury - Instructions**
Created: 04/22/2015 3:04 PM
04/28/2015 **Hearing - Further Proceedings** (8:30 AM) (Judicial Officer WITTMAYER, JOHN)
Created: 04/20/2015 3:42 PM
05/01/2015 **Hearing - Further Proceedings** (10:00 AM) (Judicial Officer WITTMAYER, JOHN)
Transport Requested
Created: 04/28/2015 8:44 AM
05/04/2015 **Order** (Judicial Officer: WITTMAYER, JOHN)
Reset Trial
Signed: 05/01/2015
Created: 05/05/2015 8:54 AM
07/08/2015 **Motion - Compel Production**
Created: 07/08/2015 11:12 AM
07/13/2015 **Hearing - Settlement Conference** (3:30 PM) (Judicial Officer Marshall, Christopher J)
Created: 07/07/2015 11:10 AM

07/17/2015 **Hearing - Motion** (8:30 AM) (Judicial Officer WITTMAYER, JOHN)
Transport Requested; Motion to Compel Grand Jury Testimony
Result: Held
Created: 07/10/2015 1:18 PM

07/17/2015 **Order** (Judicial Officer: WITTMAYER, JOHN)
Present release and/or custody status is continued; State to produce to Jg. Wittmayer for in camera inspection the notes of Grand Jurors.
Signed: 07/17/2015
Created: 07/20/2015 8:22 AM

07/23/2015 **Hearing - Substitution Of Attorney** (3:30 PM) (Judicial Officer Frantz, Julie E.)
Personality Conflict
Result: Held
Created: 07/21/2015 2:43 PM

07/28/2015 *CANCELED* **Trial** (9:00 AM) (Judicial Officer WITTMAYER, JOHN)
Other
Created: 05/01/2015 10:24 AM

07/29/2015 **Order - Substituting Attorney** (Judicial Officer: Frantz, Julie E.)
Signed: 07/23/2015
Created: 07/29/2015 10:07 AM

07/30/2015 **Notice - Representation**
Created: 07/30/2015 4:29 PM

08/18/2015 **Hearing - Substitution Of Attorney** (2:00 PM) (Judicial Officer Frantz, Julie E.)
Defendant wants to go pro se
Result: Held
Created: 08/17/2015 4:11 PM

08/19/2015 **Order** (Judicial Officer: Frantz, Julie E.)
The court orders the audio record sealed from 2:36:21 to 2:49:32pm on 8/18/15 FTR 137.
Signed: 08/18/2015
Created: 08/19/2015 1:07 PM

08/19/2015 **Order** (Judicial Officer: Frantz, Julie E.)
& Waiver Of Counsel
Signed: 08/18/2015
Created: 08/20/2015 2:15 PM

08/20/2015 **Order** (Judicial Officer: Frantz, Julie E.)
Defendant waived right to counsel. Ernest Warren to remain on this case as legal advisor.
Signed: 08/18/2015
Created: 08/20/2015 8:18 AM

08/27/2015 **Motion - Mistrial**
Created: 08/27/2015 2:44 PM

08/27/2015 **Motion - Dismissal**
Created: 08/27/2015 5:00 PM

09/04/2015 **Hearing - Further Proceedings** (8:15 AM) (Judicial Officer WITTMAYER, JOHN)
Transport Requested
08/11/2015 Reset by Court to 09/04/2015
09/04/2015 Reset by Court to 09/04/2015
Result: Held
Created: 07/24/2015 8:38 AM

09/04/2015 **Order** (Judicial Officer: WITTMAYER, JOHN)
Motion hear'g: 10/23/15 @ 9. Trial: 11/2-9/15
Signed: 09/04/2015
Created: 09/08/2015 2:54 PM

09/25/2015 **Response**
TO DEFENSE MOTION TO DISMISS FOR DOUBLE JEOPARDY
Created: 09/25/2015 4:53 PM

09/25/2015 **Response**
TO DEFENSE MOTION FOR MISTRIAL
Created: 09/25/2015 4:53 PM

10/01/2015 **Motion - Amend**
Pro Se Motion for Mistrial
Created: 10/02/2015 8:49 AM

10/02/2015 **Motion - Compel Discovery**
Created: 10/05/2015 8:51 AM

10/02/2015 **Motion - Compel Discovery**
Created: 10/05/2015 8:51 AM

10/12/2015 **Response**
Created: 10/13/2015 9:02 AM

10/13/2015 **Motion - Mistrial**
Created: 10/13/2015 3:26 PM

10/22/2015 **Motion - Quash**
SUBPOENA AND TESTIMONY of William Walsh
Created: 10/22/2015 11:33 AM

10/23/2015 **Hearing - Motion** (9:00 AM) (Judicial Officer WITTMAYER, JOHN)
Transport Requested
Result: Held
Created: 09/04/2015 10:14 AM

10/26/2015 **Order - Pending Judgment** (Judicial Officer: WITTMAYER, JOHN)
Dismissal on Ct 1/MOS w/Prejudice
Signed: 10/23/2015
Created: 10/26/2015 12:01 PM

10/26/2015 **Order** (Judicial Officer: WITTMAYER, JOHN)
On Def's Post-Trial Motions
Signed: 10/23/2015
Created: 10/26/2015 3:08 PM

10/30/2015 **Order** (Judicial Officer: WITTMAYER, JOHN)

Motion to compel absent transcript is denied
Signed: 10/30/2015
Created: 11/02/2015 10:13 AM

11/03/2015 *CANCELED* **Trial** (9:00 AM) (Judicial Officer WITTMAYER, JOHN)
Other
Created: 09/04/2015 9:59 AM

11/04/2015 **Motion - Dismissal**
Created: 11/04/2015 12:00 PM

11/12/2015 **Motion**
Created: 11/12/2015 1:10 PM

11/13/2015 **Response**
Created: 11/16/2015 9:00 AM

11/16/2015 **Order - Substituting Attorney** (Judicial Officer: WITTMAYER, JOHN)
Signed: 11/16/2015
Created: 12/17/2015 11:31 AM

11/20/2015 **Reply**
Defendant's pro se reply to State's response
Created: 11/27/2015 9:34 AM

12/18/2015 **Hearing** (10:00 AM) (Judicial Officer WITTMAYER, JOHN)
scheduling conference
Created: 12/15/2015 11:02 AM

12/21/2015 **Order - Presentence Investigation** (Judicial Officer: WITTMAYER, JOHN)
Hrg: 1/29/16 at 3pm
Signed: 12/18/2015
Created: 12/21/2015 9:33 AM

01/29/2016 **Request - Extension**
Created: 01/29/2016 4:27 PM

03/23/2016 **Memorandum**
Created: 03/23/2016 9:32 AM

03/23/2016 **Motion**
Amend To Arrest of Judgment
Created: 03/29/2016 2:17 PM

03/24/2016 **Memorandum - At Law**
Created: 03/25/2016 9:08 AM

03/24/2016 **Exhibit**
Created: 03/25/2016 9:08 AM

03/25/2016 **Hearing - Sentencing** (3:30 PM) (Judicial Officer WITTMAYER, JOHN)
sentencing and motion; transport requested
01/29/2016 Reset by Court to 02/23/2016
02/23/2016 Reset by Court to 03/25/2016
Result: Held
Created: 12/18/2015 10:25 AM

03/28/2016 **Order** (Judicial Officer: WITTMAYER, JOHN)
Def's motions are denied
Signed: 03/25/2016
Created: 03/29/2016 9:21 AM

03/28/2016 **Order - Pending Judgment** (Judicial Officer: WITTMAYER, JOHN)
Ct 5
Signed: 03/25/2016
Created: 03/29/2016 9:52 AM

03/28/2016 **Order - Pending Judgment** (Judicial Officer: WITTMAYER, JOHN)
Ct 6
Signed: 03/25/2016
Created: 03/29/2016 9:55 AM

03/28/2016 **Order - Pending Judgment** (Judicial Officer: WITTMAYER, JOHN)
Ct 9
Signed: 03/25/2016
Created: 03/29/2016 9:56 AM

03/28/2016 **Order - Pending Judgment** (Judicial Officer: WITTMAYER, JOHN)
Ct 12
Signed: 03/25/2016
Created: 03/29/2016 9:57 AM

03/28/2016 **Order - Pending Judgment** (Judicial Officer: WITTMAYER, JOHN)
Ct 13
Signed: 03/25/2016
Created: 03/29/2016 10:03 AM

04/01/2016 **Judgment - Offense General** (Judicial Officer: WITTMAYER, JOHN)
Signed: 04/01/2016
Created: 04/01/2016 3:05 PM

04/01/2016 **Closed**
Created: 04/01/2016 3:06 PM

04/01/2016 **Motion - New Trial**
Created: 04/01/2016 4:42 PM

04/01/2016 **Disposition - Reported**
Created: 04/01/2016 7:32 PM

04/14/2016 **Response**
Created: 04/14/2016 11:22 AM

04/25/2016 **Hearing - Motion** (8:30 AM) (Judicial Officer WITTMAYER, JOHN)
Motion for New Trial; Transport Requested
Result: Held
Created: 03/25/2016 4:31 PM

04/26/2016 **Order** (Judicial Officer: WITTMAYER, JOHN)
Def's Motion for New Trial and Motion for Stay of Execution is Denied

Signed: 04/25/2016
Created: 04/26/2016 11:35 AM

FINANCIAL INFORMATION

	Defendant Brand, Austin Callahan	
	Total Financial Assessment	0.00
	Total Payments and Credits	0.00
	Balance Due as of 05/19/2016	**0.00**
03/28/2016	Transaction Assessment	0.00
03/28/2016	Transaction Assessment	0.00
03/28/2016	Transaction Assessment	0.00
03/28/2016	Transaction Assessment	0.00
03/28/2016	Transaction Assessment	0.00
03/28/2016	Transaction Assessment	0.00

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 9,846 words.

Type size

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

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Appellant's Opening Brief to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on May 2, 2017.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Appellant's Opening Brief will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Benjamin Gutman, #160599, Solicitor General, attorney for Plaintiff-Respondent.

Respectfully submitted,

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

Signed
By Andrew Robinson at 1:28 pm, May 02, 2017

ANDREW D. ROBINSON OSB #064861
DEPUTY PUBLIC DEFENDER
Andrew.Robinson@opds.state.or.us

Attorneys for Defendant-Appellant
Austin Callahan Brand

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

AUSTIN CALLAHAN BRAND, aka Austin Brand,
Defendant-Appellant.

Multnomah County Circuit Court No. 14CR28021

Court of Appeals No. A162224

ORDER STRIKING MOTION FILED *PRO SE*

Appellant himself, and not through counsel, has moved for reconsideration of the court's order of August 31, 2017, striking his *pro se* motion on the ground that appellant is represented by counsel and, as between appellant and the court, counsel is appellant's exclusive representative and any motion must be filed through counsel. On the same ground, the court strikes appellant's motion for reconsideration.[1]

09/29/2017
8:53 AM

ERIKA L. HADLOCK
CHIEF JUDGE, COURT OF APPEALS

c: Andrew D Robinson
Jordan R Silk

ej

[redacted]
App. 4

[1] Appellant suggests that he has a "private interest" different from his interest as a defendant and appellant in this case, and that Article I, Section 10, of the Oregon Constitution allows him to appear *pro* se in a court of law even though he is represented by counsel. Appellant is mistaken. If the court were to rule on the motion, it would deny reconsideration.

RECEIVED
SEP 18 2017

65790 AR

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, v. AUSTIN CALLAHAN BRAND, Aka Austin Brand, Defendant-Appellant.	) Multnomah County Circuit Court) Case No. 14CR28021)) CA Case No.A162224))))))

RECONSIDER MOTION TO VACATE AND REMAND UNDER FORUM NON CONVENIENS

COMES NOW, AUSTIN CALLAHAN BRAND, pro se in the matter of "Fraud thereof-motion"as stated by Attorney Andrew D. Robinson #064861, petitions for reconsideration identifying a private interest and for rights under Art.1, Sec. 10 of the Oregon State Constitution and moves this court to remand to the trial court to reconsider motion to vacate order on DEFENDANT'S, PRO SE MOTION TO SET ASIDE THE JUDGMENT FOR FRAUD UPON THE COURT ON THE MERITS IN THE INTEREST OF JUSTICE, dated the 25th day of January, 2017, on the grounds of forum non conveniens raising an issue of jurisdiction.

Defendant/appellant Brand, pro se Seeks relief from the Circuit Court of the State of Oregon For the County of Multnomah, different from the Court of Appeals. Incl Affidavit in support,

FACTS

[redacted]
App. 2

Multnomah County Circuit Court entered a criminal judgment on April 1, 2016. On April 26, 2016 the trial court entered an order denying defendant's timely motion for new trial. On May 26, 2016 defendant timely filed notice of appeal. On October 26, 2016 defendant, pro se, made a timely ORCP 71, ORAP 8.25 (and other authority), MOTION TO SET ASIDE THE JUDGMENT FOR FRAUD UPON THE COURT ON THE MERITS IN THE INTEREST OF JUSTICE, on one of the claims relied on defendant contended, that the prior judgment of the court on the new trial order is no longer equitable that the judgment should have prospective application, and upon such terms as are just. State of Oregon Responded on December 16, 2016, and Defendant's, pro se, Reply was on January 13, 2017 in regards to "Fraud thereof-motion". And on January 25, 2017 the Honorable Circuit Court Judge John A. Wittmayer entered an order on the "Fraud thereof-motion" denying oral argument, denying evidentiary hearing and denying the "Fraud thereof-motion". On May 02, 2017 Attorney Andrew D. Robinson OSB#064861 under Ernest G. Lannet for defendant-appellant Brand, respectfully submitted Appellant's opening brief and excerpt of record. On June 27, 2017 Attorney Andrew D. Robinson under ORAP 5.92 by defendant-appellant Brand's, PRO SE brief and excerpt of record, raised the "Fraud thereof-motion" in two claims of error that are intimate under the doctrine of forum non conveniens, respectfully. The Plaintiff-Respondent Attorney General Ellen F. Rosenblum, and Solicitor General Benjamin Gutman, have not as of present filed a responds brief and no Court of Appeals judgment has been entered. Defendant-appellant Brand, has made a "good faith"effort to litigate in the jurisdiction of the Oregon Court of Appeals using the doctrine forum non convienens to no avail, order on motion to vacate-~~attachment 1.~~ Refer to

Argument

Kerr v. Bradbury, 340 Or 241, 250' 131 p.3d 737, 742; (2006)
From this point forward, this court will be guided by the principles from Bonner Mall quoted above and the observation in that case that vacatur is an "extraordinary remedy" to which a party must show an "equitable entitlement." Id., 513 U.S. at 26. Moreover, as the Supreme Court further observed in Bonner Mall, any choice regarding the application of vacatur must "take account of the public interest. 'Judicial precedents are presumptively correct and valuable to the legal community as a whole."

Espinoza v. Evergreen Helicopters 356 Or 63, 105, 376 p.3d 960,987-88, (2016),
In sum, considering the nature of forum non conveniens as an extraordinary equitable remedy and the deference owed to every plaintiff's forum choice, we hold that a {359 Ore. 106} trial court may dismiss or stay an action for forum non conveniens only when the moving party demonstrates that there is an adequate alternative forum available, and that the relevant private and public-interest considerations weigh so heavily in favor of litigating in that alternative forum that it would be contrary to the ends of justice to allow the action to proceed in the plaintiff's chosen forum.

The above cited portions for the use of vacatur (Kerr v. Bradbury, supra) and the doctrine of forum non conveniens (Espinoza v. Evergreen Helicopters, supra) being both an "extraordinary remedy" with the principles of equability, defendant-appellant affirmatively says in the context of his claim of "fraud thereof-motion" should be applied in the motion to vacate as a vehicle (procedure) with forum non conveniens applied or as the test in circumstance of the "fraud thereof-motion" be an extraordinary circumstance in which defendant is entitled to.

Citing, *Blue Horse v. Sisters of Providence in Oregon*, 113 Ore. App. 82, 86; 830 P.2d 611; (1992).

"Since ORCP 71C was enacted, we have held that the inherent power to set aside a judgment is within the court's discretion, but does not arise absent extraordinary circumstances such as fraud. *Renniger and Renniger*, 82 Or App 706, 711, 730 P2d 37 (1986); *Vinson*, 57 OR App 355, 359, 644 P.2d 635, rev den 293 Or 456 (1982). We have also said that "[t]he inherent power to modify a judgment recognized in ORCP 71C is limited to technical amendments and extraordinary circumstances, such as extrinsic fraud." *Adams and Adams*, 107 Or A[[93, 96, 811 P2d 919 (1991)."

I Private-Interest

Appellant-defendant Brand, has made a "good faith" effort to prosecute his "fraud thereof-motion" in the jurisdiction of the Court of Appeals, but as a private interest has no

attorney and the Court will not allow him to present a motion to vacate order on "fraud thereof-motion" dated the 25th day of January, 2017, to open the door to litigation on defendant's second assignment of error encompassing of the "fraud thereof-motion". As such Appellant-defendant Brand, to be clear has made multiple attempts to get legal counsel to prosecute his "fraud thereof-motion", (*see*, Defendant's pro se, appellate brief ER-108-114). Also in the original "fraud thereof-motion" to the trial court appellant-defendant never affirmatively waived counsel to the contrary appellant-defendant sought out his attorney of record to prosecute his "fraud thereof-motion", but was under an one year dead line to present this defense, (*see*, Defendant's pro se, appellate brief ER-51). In Defendant's pro se, appellate brief ER-110 the Honorable Appellate Commissioner James W. Nass, order regarding counsel correctly touched on the subject of counsel, quoting "Appellant's first request for relief is denied because this court has no authority to appoint counsel to represent appellant in the trial court", defendant's position for the proposition that his appellant counsel Andrew D. Robinson can prosecute the "fraud thereof-motion" is that if forum non conveniens applies as is contended and the jurisdiction under such went to the trial court to the Court of Appeals then counsel Andrew D. Robinson was not originally a party and had no allocation of authority in the trial court, so when the jurisdiction went to the Court of Appeals Andrew D. Robinson likewise has no allocation of authority, (*see*, In RE Grimes Estate 170 Or 204; 131 p.2d 448; (1942)), not a party. As a private interest under forum non conveniens defendant-appellant Brand can not prosecute "fraud thereof-motion" and has no attorney with allocation of authority to prosecute and asks that the Court of Appeals to remand for the trial court to consider appointment of counsel and will be able to have family retain counsel in trial court. OR, Const. 1,11. 6th US.

II Public-Interest

Under forum non conveniens there should also be a remand to consider vacatur because the whole purpose of the "fraud thereof-motion" is in the nature of a suppression motion being a sanction for violations of OR. CONST. Art.1, Sec.9 and 4th amendment U.S. CONST., and it defeats the whole concept of such when Appellant/defendant has to do prison time, the police-State wins every day for using fraud upon the court to arrest/convict, so the Circuit Court would have a more expeditious connection in that respect. Also the rule of law being applied goes to the heart of a civilize society (*see* Boyd v. United States 29 LED 746, 116 US 616 (1886)), citing, Weeks v. United State, 232 US 383,392, 58 LED 652,(1914):

> This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all intrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

The trial court is also intimately familiar with the facts and totality of the case both for the State of Oregon and the Court so it would not be a great burden on the court.

Under, Kerr v. Bradbury, 340 Or 241;131 p.3d 737, 742; (2006) being a case for the principle of Vacatur and application of in Oregon jurisprudence largely adopting the principles announced in Bonner Mall should also stand by the procedural remand to the trial court when presented with a motion to vacate because it would be fair for the trial court to first consider forum non conveniens principles applied to vacate. U.S. Bancorp Mortgage Company v. Bonner Mall Partnership, 513 U.S. 18, 29, 115 S. Ct. 386, 130 L. Ed. 2d 233 (1994).

Of course even in the absence of, or before considering the existence of, extraordinary circumstances, a court of appeals presented with a request for vacatur of a district-court judgment may remand the case with instructions that the district court consider the request, which it may do pursuant to Federal Rule of Civil Procedure 60(b).

CONCLUSION

There can be no judgment enforceable for fraud upon the court to set aside the judgment because the Court of Appeals will not vacate the order dated the 25th day of January, 2017 and defendant will be without remedy for his person and property OR. CONST. Art.1, Sec 10 and that alone makes the Court of Appeals an inconvenient forum and should remand to the Circuit Court.

Espinoza v. Evergreen Helicopters 356 or 63, 98, 376 p.3d 960, 983 (2016)

> Finally, even when a factual issue does bear directly on the merits, making factual findings as to issues outside of the pleadings for purposes of deciding a forum non conveniens motion does not violate "a party's right to trial on disputed questions of material fact." Simply put, determining whether to stay or dismiss an action for forum non conveniens "does not entail any assumption by the court of substantive law-declaring power." For that reason, a trial court's factual findings made for the purpose of deciding a forum non conveniens motion are distinct from any finding on the merits.(internal citations omitted).

Dated this 8 day of September, 2017.

Respectfully Submitted,

AUSTIN CALLAHAN BRAND, pro se
SID#16137792
SRCI
777 Stanton blvd.
Ontario, Oregon 97914

IN THE COURT OF APPEALS FOR THE STATE OF OREGON

STATE OF OREGON **Plaintiff-Respondent** **v.** **AUSTIN CALLAHAN BRAND,** **Defendant-Appellant**	**Case No. 14-CR-28021** **CA Case No.A162224** **Affidavit In Support Of Reconsider Motion To Vacate And Remand Under Forum Non Conveniens**

I, Austin C. Brand, proceeding pro se, being first duly sworn hereby depose and say that:

1. Motion for Fraud thereof was prosecuted Pro Se by appellant/affiant Austin Callahan Brand and attorney of record David Culich and appellant attorney Andrew Robinson was not a legal representative pertaining to the motion for Fraud thereof in any capacity and the State of Oregon never Objected.
2. Appellant/affiant herein has not waived his right to an attorney pertaining to legal representation involved in the motion for Fraud thereof, but has pursued representation by and through attorney of record David Culich to no avail and asked for help from appellant attorney Andrew Robinson, but was told by Andrew Robinson that he had no allocation of representation.
3. A Request by appellant/affiant to Andy Simrin #914310, Attorney at law to prosecute "fraud thereof-motion", but was told it would be a waste of money in the Court of Appeals. Also a request to the ACLU of Oregon for representation was made.
4. By phone conversation on September 8th, 2017 appellant/affiant's Brother, Preston M, Brand said, family would retain Danial C. Lorenz #782871, Attorney at Law to prosecute "fraud thereof-motion" if appellant/affiant could get it back to the

jurisdiction of the Circuit Court of Multnomah, but was decided to be to expensive and uncertain in the Court of Appeals.

5. Appellant/affiant has made a "good faith" effort to prosecute "fraud thereof-motion" in the jurisdiction of the Court of Appeals, being said there will be no way for the Court of Appeals to render an Order to set aside the judgment for fraud upon the court without first vacating the 25th day of January, 2017 order and therefor there will be no enforceable judgment and Appellant/affiant will be without remedy.
6. Being imprisoned at Snake River Correctional Institution defendant/appellant will not be able to be present in the Court of Appeals and will have no meaningful day in court to argue his "fraud thereof-motion" as there are words unsaid and articulations unclear and Court of Appeals is an inconvenient forum.

I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF AND I UNDERSTAND THAT IT IS MADE FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY UNDER PERJURY.

Dated this 8 day of September 2017.

Respectfully submitted,

Austin C. Brand
Sid No. 16137792
Snake River Correctional Institution
777 Stanton Boulevard
Ontario, OR 97914

State of Oregon
Court of Appeals
Signed and sworn to (or affirmed) before me on 9.8, 2017 by Brand Austin C.

Notary Public – State of Oregon
My commission expires 5.8.18

OFFICIAL STAMP
MARICELA M ROJAS
NOTARY PUBLIC - OREGON
COMMISSION NO. 928078
MY COMMISSION EXPIRES MAY 08, 2018

****

CERTIFICATE OF SERVICE

CASE NAME: State of Oregon, plaintiff-Respondent v. AUSTIN CALLAHAN BRAND, defendant-Appellant, pro se in matter of "fraud thereof-motion" as stated by Attorney Andrew D. Robinson #064861

CASE NUMBER: 14-CR-28021
CA A162224

COMES NOW, AUSTIN CALLAHAN BRAND, pro se, and certifies the following:

That I am incarcerated by the Oregon Department of Corrections at Snake River Correctional Institution.

That on the 8th day of September, 2017, I personally placed in the Correctional Institution's mailing service A TRUE COPY of the following:

Defendant's, pro se, Reconsider motion to vacate and remand under forum non conveniens 3 Affidavit in Support

I placed the above in a securely enclosed, postage prepaid envelope, to the person(s) named at the places addressed below:

Office of Public Defense Services
Appellate Division
ATTN: Andrew Robinson
1175 Court Street NE
Salem, OR 97301

Oregon Court of Appeals
1163 State Street
Salem, Oregon 97301

Ellen F. Rosenblum #753239
Attorney General
Benjamin Gutman #160599
Solicitor General
400 Justice Building
1162 Court Street NE
Salem, Oregon 97301

Austin Brand sid# 16137792
SRCI
777 Stanton Blvd.
Ontario, OR 97914

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

AUSTIN CALLAHAN BRAND, aka Austin Brand,
Defendant-Appellant.

Multnomah County Circuit Court No. 14CR28021

Court of Appeals No. A162224

ORDER STRIKING *PRO SE* MOTION

Appellant himself moves the court to vacate an order rendered by the trial court entered on January 25, 2017, denying appellant's *pro se* motion under ORCP 71 to set aside the judgment of conviction and sentence.

The court strikes the motion to vacate on the ground that appellant is represented by counsel and, as between appellant and the court, counsel is appellant's exclusive representative and any motion must be filed through counsel. ORS 9.320 (where party appears by attorney, written proceedings must be through attorney); *Johnson v. Premo*, 355 Or 866, 333 P3d 288 (2014) (court does not recognize "hybrid" representation whereby party represented by counsel may file motions with the court).

That principle applies regardless of whether counsel has declined or failed to file the motion at the client's request, because counsel is expected to exercise professional judgment and to decline to file any motion counsel determines not to be arguably meritorious.[1]

James W. Nass 08/31/2017 2:59 PM
JAMES W. NASS
APPELLATE COMMISSIONER

c: Andrew D Robinson
Jordan R Silk
ej

---

[1] In any event, the court gave appellant leave to file a *pro se* supplemental brief and appellant, in that brief, appears to make essentially the same argument he makes in his motion. Therefore, the court will have the opportunity to consider appellant's argument when this appeal is submitted to a merits department after the appeal is at issue on the briefs.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, v. AUSTIN CALLAHAN BRAND, Aka Austin Brand, Defendant-Appellant.	) Multnomah County Circuit Court) Case No. 14CR28021)) CA Case No.A162224))))))

MOTION TO VACATE

COMES NOW, AUSTIN CALLAHAN BRAND, pro se in the matter of "Fraud thereof-motion"as stated by Attorney Andrew D. Robinson #064861 and moves this court to vacate order on DEFENDANT'S, PRO SE MOTION TO SET ASIDE THE JUDGMENT FOR FRAUD UPON THE COURT ON THE MERITS IN THE INTEREST OF JUSTICE, dated the 25th day of January, 2017.

FACTS

Multnomah County Circuit Court entered a criminal judgment on April 1, 2016. On April 26, 2016 the trial court entered an order denying defendant's timely motion for new trial. On May 26, 2016 defendant timely filed notice of appeal. On October 26, 2016 defendant, pro se, made a timely ORCP 71, ORAP 8.25 (and other authority), MOTION TO SET ASIDE THE JUDGMENT FOR FRAUD UPON THE COURT ON THE MERITS IN THE INTEREST OF JUSTICE, on one of the claims relied on defendant contended, that the prior judgment of the

court on the new trial order is no longer equitable that the judgment should have prospective application, and upon such terms as are just. State of Oregon Responded on December 16, 2016, and Defendant's, pro se, Reply was on January 13, 2017 in regards to "Fraud thereof-motion". And on January 25, 2017 the Honorable Circuit Court Judge John A. Wittmayer entered an order on the "Fraud thereof-motion" denying oral argument, denying evidentiary hearing and denying the "Fraud thereof-motion". On May 02, 2017 Attorney Andrew D. Robinson OSB#064861 under Ernest G. Lannet for defendant-appellant Brand, respectfully submitted Appellant's opening brief and excerpt of record. On June 27, 2017 Attorney Andrew D. Robinson under ORAP 5.92 by defendant-appellant Brand's, PRO SE brief and excerpt of record, raised the "Fraud thereof-motion" in two claims of error that are intimate under the doctrine of forum non conveniens, respectfully. The Plaintiff-Respondent Attorney General Ellen F. Rosenblum, and Solicitor General Benjamin Gutman, have not as of present filed a responds brief and no Court of Appeals judgment has been entered.

Vacate "Fraud thereof Order"

The basis to vacate the "fraud thereof-motion" largely centers around a procedural-jurisdictional issue. ORS 138.053. ORAP 8.25(3) contemplates that orders under ORCP 71A or B may be appealable. But an order in a *criminal* case is still only appealable if chapter 138 says so. If, somehow, an order under ORCP 71A or B imposed a sentence, it would be subject to an appeal governed by ORAP 8.25(3). But because this is a criminal case and the orders do not satisfy ORS 138.053(1), they cannot be appealed separately from the underlying judgment. Also considering that the notice of appeal has been filed in the present case rendering jurisdiction in the Oregon Court of Appeals, except for a limited purpose to the Circuit Courts.

As such defendant in his PRO SE supplementary brief assigned error in two respects to his "fraud thereof-motion", first under the doctrine of forum non conveniens (Espinoza v.

Evergreen Helicopters 356 or 63, 376 p.3d 960, (2016)), and the second an advancement of his "fraud thereof-motion" under the legal theory of foreseeability (Fazzolari v. Portland School Dist. NO. 1J 303 Or 1; 734 p.2d 1326, (1987)) that is connected to the outcome of the first assignment of error under forum non conveniens, to enable the Oregon Court of Appeals to have jurisdiction of the "fraud thereof-motion" depending on, if, it is a proper and convenient forum. To be certain defendant has not asserted any other jurisdictional/dispositional doctrine besides forum non conveniens in which the application of such does not have bearing on the merit of his "fraud thereof-motion".

Espinoza v. Evergreen Helicopters 356 or 63, 98, 376 p.3d 960, 983 (2016)

Finally, even when a factual issue does bear directly on the merits, making factual findings as to issues outside of the pleadings for purposes of deciding a forum non conveniens motion does not violate "a party's right to trial on disputed questions of material fact." Simply put, determining whether to stay or dismiss an action for forum non conveniens "does not entail any assumption by the court of substantive law-declaring power." For that reason, a trial court's factual findings made for the purpose of deciding a forum non conveniens motion are distinct from any finding on the merits.(internal citations omitted).

The Court of Appeals has jurisdiction (among other authority) of the "fraud thereof-motion" by, ORCP 71 (B)(2)***The moving party shall file a copy of the trial court's order in the appellate court within seven days of the date of the trial court order.***

Which defendant contents is an equivalent to a procedural devise conferring jurisdiction over the "fraud thereof-motion" to the Court of Appeals on completion, *see*, Wills v. Wills 203 Or. 479, 480; 280 p.2d 410, 411; (1955) and along with ORAP 8.25 (letter of transmittal).

Argument

Kerr v. Bradbury, 340 Or 241, 250' 131 p.3d 737, 742; (2006)

From this point forward, this court will be guided by the principles from Bonner Mall quoted above and the observation in that case that vacatur is an "extraordinary remedy" to which a party must show an "equitable entitlement." Id., 513 U.S. at 26. Moreover, as the Supreme Court further observed in Bonner Mall, any choice regarding the application of vacatur

must "take account of the public interest. 'Judicial precedents are presumptively correct and valuable to the legal community as a whole.'"

As in forum non conveniens, vacatur is an extraordinary remedy. *See* Espinoza, 359 Ore. At 106. It would be unfair to defendant when he is contenting that the "fraud thereof-motion" having a procedural application under the doctrine of forum non conveniens now having a bar to bringing his "fraud thereof-motion" anew, to have the issue litigated on the merits because of a procedural bar of the present order entered on the 25th day of January, 2017. It would be unjust and against fair play for the "fraud thereof-motion" on contention by defendant, pro se to be meritorious in his ORAP 5.92 brief to have bar to be heard. The court recognized the burden of bringing claims anew under forum non conveniens, *see* Espinoza. 359 Ore. At 109. Regarding the provision of ORCP 71 C, the Supreme Court has explained that the provision "is a reservation of inherent trial court authority, not a source of inherent authority." State v. Ainsworth, 346 Ore. 524, 532, 213 P3d 1225 (2009)

Duke Power Co. v. Greenwood County, 299 US 259-268; 81 L Ed 178; (1936), being a good case for the application of the present procedural proposition, in which the court largely recited the order of the court in the context of a procedural bar to re-litigate the issue in the lower court being more than obvious in that light that the proper procedure was a matter of vacatur. Also in a different light a "duty of the appellate court".

Taking into account the public interest in this matter as a whole would weigh heavily in favor of defendant Brand, as without this matter being in front of the court properly would in turn be a bar to litigation, and more then likely result in the absents of an opinion of the court, resulting in a gross take away from the public interest. There has not been an opinion directly on these lost and forgotten rights since the 1950's in Huffman v. Alexander, 197 Or. 283; 253 p.2d 289; (1953).

Conclusion

As a procedural issue defendant moves the court to vacate the order entered on the 25th day of January, 2017 in connection to his "fraud thereof-motion", 5 page brief and to open the door to litigation.

Dated this 15th day of August, 2017.

Respectfully Submitted,

AUSTIN CALLAHAN BRAND, pro se
SID#16137792
SRCI
777 Stanton blvd.
Ontario, Oregon 97914

****

CERTIFICATE OF SERVICE

CASE NAME: State of Oregon, plaintiff-Respondent v. AUSTIN CALLAHAN BRAND, defendant-Appellant, pro se in matter of "fraud thereof-motion" as stated by Attorney Andrew D. Robinson #064861

CASE NUMBER: 14-CR-28021
CA A162224

COMES NOW, AUSTIN CALLAHAN BRAND, pro se, and certifies the following:

That I am incarcerated by the Oregon Department of Corrections at Snake River Correctional Institution.

That on the 15th day of August, 2017, I personally placed in the Correctional Institution's mailing service A TRUE COPY of the following:

Defendant's, pro se, Motion to Vacate

I placed the above in a securely enclosed, postage prepaid envelope, to the person(s) named at the places addressed below:

Office of Public Defense Services
Appellate Division
ATTN: Andrew Robinson
1175 Court Street NE
Salem, OR 97301

Oregon Court of Appeals
1163 State Street
Salem, Oregon 97301

Ellen F. Rosenblum #753239
Attorney General
Benjamin Gutman #160599
Solicitor General
400 Justice Building
1162 Court Street NE
Salem, Oregon 97301

Austin Brand sid# 16137792
SRCI
777 Stanton Blvd.
Ontario, OR 97914