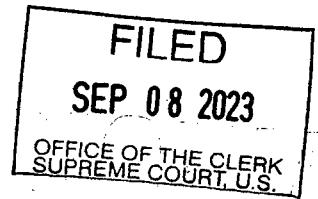


23-5641

NO. _____



IN THE
SUPREME COURT OF THE UNITED STATES

MARVIN RANDALL - PETITIONER

vs.

STATE OF OREGON - RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
OREGON SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

MARVIN RANDALL #23509566

TRCI

82911 BEACH ACCESS RD

UMATILLA, OR 97882

QUESTION(S) PRESENTED

No evidence indicated that the petitioner was in Oregon at the times relevant to this case. Can the State of Oregon regulate the conduct of an individual who is not a resident of that state and at all times relevant to the case, was never present in the state, who allegedly posted advertisements on a website visible in Oregon and communicated with another individual to allegedly aid a prostitution enterprise based in Oregon.

Did the state of Oregon have jurisdiction to prosecute and try the petitioner for compelling prostitution under ORS 167.017(1)(c) and promoting prostitution under ORS 167.012(1)(c) in the absence of evidence that the petitioner was not located in the state of Oregon at the time of the events in this case?

LIST OF PARTIES

All parties appear in the caption of the case on the
cover page.

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The opinion of the Oregon Supreme Court is reported at 371 Or. 175 and is included at Appendix A. The opinion of the Oregon Court of Appeals is reported at 324 Or. App. 411 and is included at Appendix B.

JURISDICTION

The date on which the highest state court decided my case was June 15, 2023. A copy of that decision appears at Appendix A.

The jurisdiction of this Court is invoked under 28 U.S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

INVOLVED

Section I of the Fourteenth Amendment to the
United States Constitution provides:

“All persons born or naturalized in the
United States, and subject to the
jurisdiction thereof, are citizens of the
United States and of the State wherein they
reside. No State shall make or enforce any
law which shall abridge the privileges or
immunities of citizens of the United States;
nor shall any State deprive any person of
life, liberty, or property, without due
process of law; nor deny to any person
within its jurisdiction the equal protection
of the laws.”

As applied here the relevant jurisdiction statute,
ORS 131.215(1) provides:

“Except as otherwise provided in ORS
131.205 to 131.235, a person is subject to
prosecution under the laws of this state for
an offense that the person commits by the
conduct of the person or the conduct of
another for which the person is criminally
liable if:

(1) “conduct that is an element of the
offense or the result that is an element
occurs within this state.”

The Compelling Prostitution statute at issue in this case under ORS 167.017(1)(c) provides:

“(1) A person commits the crime of compelling prostitution if the person knowingly:

“****

“(c) “aids or facilitates the commission of prostitution or attempted prostitution by a person under 18 years of age.”

The promoting prostitution statute at issue here under ORS 167.012(1)(c) provides:

“(1) A person commits the crime of promoting prostitution if, with intent to promote prostitution, the person knowingly:

“****

“(c) Receives or agrees to receive money, goods, property, services or something else of value, other than as a prostitute being compensated for personally rendered prostitution services, pursuant to an agreement or understanding that the money, goods, property, services or something else of value is derived from a prostitution activity[.]”

STATEMENT OF THE CASE

Historical Facts

This is a case of first impression. In brief, this case concerns the petitioner's involvement with Oregon residents in creating and posting advertisements to various websites for a then 17-year-old victim and her mother¹ advertising the victim's availability for prostitution services which led to several "dates" in Vancouver, Washington.

A detective in Beaverton, Oregon saw the advertisements, believed that the victim was underage and investigated. The investigation uncovered several addresses for the petitioner in Southern California; Phoenix, Arizona; Yuma, Arizona; and Alamogordo, New Mexico. Petitioner was arrested in El Paso, Texas entering the United States from Mexico. At the time of the arrest,

¹ The mother was charged separately from the petitioner and the state did not assert an aid-and-abet theory or a conspiracy at trial.

the petitioner was living in Cuidad Juarez, Mexico. The petitioner also provided bank account information to the victim's mother when she offered to send money for helping to post the ads and to pay posting fees. The address on the bank account was a PO Box in Yuma, Arizona. A check the petitioner wrote himself and was deposited into the account bore an Alamogordo, New Mexico address.

Trial Court History

In August 2019, the petitioner was indicted by a grand jury in Washington County, Oregon for four counts of violating ORS 167.017(1)(c) (Compelling Prostitution) and two counts of violating ORS 167.012(1)(c) (Promoting Prostitution) which occurred between March 10, 2018 and April 6, 2018. The petitioner waived a jury and opted for a bench trial which began on January 5, 2021.

The petitioner moved for judgments of acquittal on all counts after the state rested. The petitioner argued

that the state failed to establish jurisdiction over the petitioner in Oregon because the petitioner's conduct did not occur in Oregon and a result element of the offense did not occur in Oregon. The petitioner argued that the state had not established a basis for jurisdiction in Oregon².

² At one point early during argument, defense counsel appeared to misspeak or misunderstand a compound question from the trial court and agreed with the court either (1) that all was required was to aid or facilitate an act of prostitution or attempted prostitution or (2) that jurisdiction would be proper in Oregon simply based on the ads having been viewed in Oregon. The latter point would be inconsistent with the entire balance of the petitioner's argument. Defense immediately continued to argue that the prostitution conduct had occurred in Washington, which appeared to address the trial court's prior comment about prostitution or attempted prostitution. Defense counsel's statement did not feature in the trial court's ruling on the jurisdictional issue, which was issued the next day after additional argument.

The state first cast the petitioner's argument as a venue issue that should have been raised pretrial. As to jurisdiction, the state argued that jurisdiction lay in either Oregon or Washington, and that the crimes were chargeable in Oregon because the victim, her mother and the detective who saw the ads were all in Washington County, Oregon.

The trial court expressed reservations about the jurisdictional argument but reserved ruling until the next day. The next day, the state again mixed venue with jurisdiction, but the court directed the state towards the jurisdictional issue. The state argued that Oregon had jurisdiction "if either one of the cause elements³ or the result elements of the crime occurs in the state of Oregon." The state argued that the petitioner was the "cause" of the victim being prostituted, that the results of

³ As discussed below, ORS 131.215 states that jurisdiction lies in Oregon if either "the *conduct* that is an element of the offense or the *result* that is an element occurs" in Oregon. (emphasis added)

the petitioner's conduct occurred in Oregon, that people in Oregon saw the posts, and that dates were planned to occur at the victim and her mother's Beaverton apartment. The court inquired about the petitioner's argument that acts of prostitution occurred in Washington, and the state replied that all the petitioner had to do was facilitate an attempt by the victim, which occurred in Oregon and thus the acts in Washington were irrelevant.

The trial court denied the petitioner's motion based on its view that jurisdiction could "lie in two or more places" and that "Oregon is the most proper jurisdiction." It reached the conclusion because "the acts of communicating and setting up prostitution and even the actual, an attempt to prostitution at the very least occurred here in Oregon be it mostly by the mother and her *** boyfriend." Further, in the court's view, as to bringing in the defendant and the allegations against him,

again, the majority of this and all the acts actually did occur here in Oregon."

History on Appeal

Petitioner assigned error to the denial of his motion for judgment of acquittal on jurisdictional grounds as to all six counts. Petitioner argued that, by statute, either the *conduct* that was an element of the offense or the *result* that was an element of the offense had to occur in Oregon (ORS 131.215(1) creates criminal jurisdiction based on the conduct and the result elements of the substantive offense and whether these elements occurred in Oregon). Importantly, the state charged the petitioner as a principal and did not argue that he was liable for aiding or abetting the victim or her mother's conduct or allege any conspiracy allegation, and thus, petitioner argued, the state had to show that the petitioner's *own* conduct that was an element occurred in Oregon. Petitioner argued that both compelling and promoting prostitution had conduct and circumstance

elements, but no result elements, and that no evidence showed that the *petitioner's conduct* that constituted an element of either crime occurred in Oregon.

The state responded that the petitioner failed to preserve his appellate arguments, that his appellate argument conflicted with his position at trial, and that he invited any error. It also argued that petitioner's appellate arguments were not plain error because the legislature could have understood each offense to contain a result element, and those result elements did occur in Oregon.

Alternatively, it asserted that even if compelling prostitution contained a single conduct element, that conduct occurred in Oregon or at least it was "not obvious that the conduct occurred only outside of Oregon" because the petitioner could have been acting through an agent in Oregon (a website visible in Oregon). As to promoting prostitution, the state argued that the petitioner agreed to receive money from the victim's

mother while she was in Oregon, and that the agreement occurs in both places.

Petitioner addressed the state's preservation and invited error arguments in a reply brief. Petitioner also argued that the state could not rely on an agency theory on appeal because it had not relied on that factual theory at trial.

The Oregon Court of Appeals affirmed without opinion on February 23, 2023. The petitioner filed a petition for review with the Oregon Supreme Court. The Oregon Supreme Court denied discretionary review on June 15, 2023.

REASONS FOR GRANTING THE WRIT

This case presents significant questions of state law that arise under ORS 131.215, ORS 167.012(1)(c), and ORS 167.017(1)(c) and whether those laws can be enforced outside the state of Oregon or the United States. Because this case challenges the sufficiency of the evidence, it also implicates the Due Process Clause of the

Fourteenth Amendment. *Jackson v Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

Contrary to the state's view, the petitioner's arguments are preserved, and he did not invite any error. Petitioner raised the issue of whether he could be liable for any of the offenses in Oregon given the lack of evidence that he was in Oregon at the time of his conduct; petitioner and the state both identified ORS 131.215(1) as the relevant source of law; and the petitioner argued that his "conduct didn't occur here and the result didn't occur here." *State v Hitz*, 307 OR 183, 188, 766 P.2d 373 (1988) "raising an issue is the most important part of preservation." Furthermore, given that the petitioner raised the issue and cited the relevant authority, the court had an "independent duty" to correctly construe and apply the statutes at issue irrespective of the petitioner's (and the state's) arguments. *Strasser v State*, 368 Or 238, 260, 489 P.3d 1025 (2021). There are no procedural

obstacles or factual disputes that would hinder review of this case.

ARGUMENT

As relevant to this case, jurisdiction for a crime lies in Oregon if either the conduct or the result that is an element of the offense occurred in Oregon. ORS 131.215(1). This is, not any conduct, and not any result of that conduct- but the conduct or the result that is an element of the offense. Here, the state did not meet either of those jurisdictional prerequisites with respect to the allegations of compelling or promoting prostitution with the petitioner. Consequently, the state lacked jurisdiction to prosecute him.

The state relied on ORS 131.215(1), which provides that:

Except as otherwise provided in ORS 131.205 to 131.235⁴, a person is subject to prosecution under

⁴ORS 131.205 is the definitional provision for jurisdiction statutes.

ORS 131.215 is the primary jurisdictional provision. ORS 131.225 concerns (1) conduct that occurs in Oregon but produces results that

the laws of this state for an offense that the person commits by the conduct of the person or the conduct of another for which the person is criminally liable if:

(1) "Either *the conduct that is an element of the offense or the result that is an element* occurs within this state."

(Emphasis added.)

Thus, ORS 131.215(1) creates criminal jurisdiction based on the conduct and result elements of the substantive offense at issue and whether or not those elements occurred in Oregon⁵. Here, the substantive offenses at issue-compelling prostitution under ORS 167.017(1)(c) and promoting prostitution under ORS

are lawful in the jurisdiction where they occur or (2) conduct that occurs outside Oregon and produces results in Oregon that would be lawful where the conduct occurred, unless the actor intentionally or knowingly caused the result to occur in Oregon. Finally, ORS 131.235 concerns jurisdiction for homicide offenses.

⁵ There are three types of substantive elements: conduct, circumstance, and the result elements. *State v Haltom*, 366 Or 791, 798, 472 P.3d 246 (2020).

167.012(1)(c)- contain *only* conduct elements (and potentially circumstance elements, which do not factor into the analysis under ORS 131.215(1)). And no evidence indicated that the petitioner's conduct which satisfied those conduct elements, occurred in Oregon.

“Conduct’ means an act or omission and its accompanying mental state” ORS 161.085(4). An “act” is a bodily movement. ORS 161.085(1). “Conduct elements” are elements that “describe[] the nature, that is, the essential character, of a proscribed act or omission.” *State v Simonov*, 358 Or 531,546, 368 P.3d 11 (2016).

I. Compelling Prostitution, ORS 167.017(1)(c), has a conduct and a circumstance element. The state failed to show that the petitioner’s conduct, which might satisfy the conduct element included in compelling prostitution, occurred in Oregon.

The state charged the petitioner with four counts of compelling prostitution under ORS 167.017(1)(c). That section provides that:

(1) A person commits the crime of compelling prostitution if the person knowingly:

(c) “*Aids or facilitates* the commission of prostitution or attempted prostitution by a person under 18 years of age.

(Emphasis added.)

ORS 167.017(1)(c) contains a conduct element (aids or facilitates the commission of prostitution or attempted prostitution”) and potentially, a distinct circumstance element (“by a person under 18 years of age⁶”). “Aids” and “facilitates” are verbs that describe conduct. See *Webster’s Third New Int’l Dictionary* 44 (unabridged ed 2002) (defining “aid” as “to give help or

⁶The court need not resolve the nature of by a person under “18 years of age” because even if it were a distinct circumstance element (and not part of the preceding conduct element), circumstance elements do not factor into jurisdiction under ORS 131.215(1).

support to: FURTHER, FACILITATE, ASSIST***to give assistance: be of use: HELP); *Id.* at 812 (defining “facilitate” as “to make easier or less difficult: free from difficulty or impediment*** to lessen the labor of (as a person): ASSIST, AID). “[T]he commission of prostitution or attempted prostitution” is the object of those verbs—the clause that describes what must be aided or facilitated.

Importantly, here, the state argued petitioner’s guilt as a principal. It did not assert that the petitioner was guilty for the mother’s conduct under an aiding or abetting theory or any other theory for which the petitioner could be liable for the conduct of another. See ORS 161.155 (defining circumstances in which a person is liable for the criminal conduct of another person); *State v. Phillips*, 354 Or 598, 605-06, 317 P.3d 236 (2013) (noting “the elements necessary to prove accomplice liability ordinarily will be separate from and in addition to the elements necessary to prove the principal’s liability for an underlying offense”). Thus, aid-and-abet liability for the

mother's conduct is not at issue here. See, e.g. *State v Burgess*, 352 Or 499, 504-08, 287 P.3d 1093 (2012) (state cannot seek to uphold conviction based on principal liability when it asserted accomplice liability at trial). Consequently, although ORS 131.215 includes jurisdiction "for an offense that the person commits by the conduct of the person or the *conduct of another for which the person is criminally liable* (emphasis added)", the operative question here is the petitioners own conduct.

The state's theory was the petitioner aided and facilitated the victim's prostitution or attempted prostitution when he posted ads on Backpage on March 10th (Count 1), March 11th (Count 2), and April 6th (Count 5), and that he aided and facilitated the same on March 12th (Count 3) when he removed a Backpage ad at the mother's request, offered to build the victim her own

website⁷ and solicited and received photos of the victim for that website.

However, no evidence indicted that the petitioner was in Oregon at the time he engaged in any of those acts of “aiding” or “facilitating.” That is the *conduct element of the offense* that had to occur *in Oregon* to create jurisdiction here. The fact that the petitioner’s conduct had downstream consequences that happened to end in Oregon is relevant only to the jurisdiction insofar as those end results constituted *elements of the crime*, but discussed above, there is no result element in ORS 167.017(1)(c). The fact that actual acts of attempted prostitution may have occurred in Oregon (such as the creation of an ad on the internet that is visible to

⁷ *Cernansky v. Lefebvre*, 88 F.Supp.3d 299 (D. Vermont 2015) “non-resident defendant’s mere creation of a website viewable by persons within a forum does not establish general personal jurisdiction over the defendant.”

residents in Oregon⁸) is also insufficient – petitioner was not prosecuted for aiding and abetting prostitution under ORS 167.007 (defining the offense of prostitution) or for aiding and abetting victim or the victim's mother's conduct that occurred in Oregon. Instead, the petitioner was charged for his *own* direct conduct of aiding and facilitating those acts. In the absence of evidence that petitioner's acts of aiding and facilitating occurred in

⁸See *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir.2008), cert. denied, 555 U.S. 1171, 129 S.Ct. 1318, 173 L.Ed.2d 585 (2009) “ad visible and transaction conducted using the website eBay as a conduit does not affect the jurisdictional outcome for dismissal of case”; *Hepp v Facebook et al.*, 476 F.Supp.3d 81 (E.D. Pennsylvania 2021) “Court dismissed claims against Czech based web company since it was not “at home” in the district”; *Brown v. Web.com Group, Inc.*, 57 F.Supp.3d 345, 354 (S.D.N.Y., 2014), “web-based sales and solicitations ... usually are not satisfactory grounds for...jurisdiction”; *Mink v AAAA Development LLC*, 190 F.3d 333 (5th Cir. 1999), “a website accessible in the state of Texas does not fulfill the requirement for personal jurisdiction.”

Oregon, Oregon lacked jurisdiction to prosecute the petitioner for compelling prostitution under ORS 131.215(1).

Oregon courts have decided few cases under ORS 131.215, but those decisions favor the petitioner's argument.⁹ For example, in *State v Smith*, 51 Or App 223, 625 P.2d 1321, *rev den*, 291 Or 118 (1981), the defendants, members of the Yakima Tribe, argued that the Oregon courts lacked personal jurisdiction to prosecute them under the statutes that prohibited the

⁹ In argument at the motion for judgment of acquittal phase and in closing, the state relied on *State v Nash*, 41 Or App 789, 598 P.2d 1297 (1979). Jurisdiction was not at issue in that case. There, the defendant and victim hatched a plan in Washington to prostitute the victim in Oregon, he drove her to Portland, and when they arrived, he took the victim around Portland to show her places to find customers. *Nash*, 41 Or App at 791. Even in the petitioner's view jurisdiction would be proper in Oregon in that case, because the defendant aided or facilitated the victim's attempted prostitution *while he was in Oregon*.

possession of fish unlawfully taken in another state.

While the court agreed that jurisdiction to prosecute the unlawful taking of the fish was unclear, it readily noted that that was not what the Oregon statutes prohibited.

Rather, the statutes prohibited *possession*, and under ORS 131.215(1), the defendant's conduct of possessing the fish "occurred within this state." *Smith* demonstrated that it is the conduct prohibited in the substantive statute and where the conduct occurred that controls, at least in the absence of a result element, which was not at issue in *Smith*.

The same holds true when one commits the operative conduct through an agent *in Oregon*. In *State v Olson*, 91 Or App 290, 754 P.2d 626 (1988), the victim and the defendant made a deal in Idaho that the defendant would sell the victim two trucks. While purportedly delivering them to the victim in Oregon, the defendant called the victim, who was then in Oregon, and requested \$360 to repair one of the trucks and complete

the delivery. He told the victim to send the money using a truck stop service in Oregon to wire funds to Idaho, and the victim did so, but the defendant never delivered the trucks. The defendant argued the case should have been dismissed due to lack of jurisdiction because no “element of the crime occurred in Oregon” apparently referencing ORS 131.215(1). The state argued that the defendant “obtained” the money in Oregon, which was an element of theft (citing ORS 164.015(1)). The court agreed with the state because the defendant had “obtained” the victim’s money *in Oregon* utilizing the truck stop wire service as his agent. Thus, even though the defendant was not personally in Oregon, the conduct that is an element of theft still occurred in Oregon by use of an agent that *was* in Oregon¹⁰.

¹⁰ The trial record reflects that Backpage was based in the Netherlands, had no physical location within Oregon in order for *Olson* to apply, nor did the state definitively establish the location of the petitioner at the times relevant to this case. Additionally, cases

In its response brief on direct appeal, the state included an assertion that “defendant used agents within Oregon to aid and facilitate... prostitution or attempted acts of prostitution.” The state appears to raise an issue both as a merits argument in support of the trial court’s ruling and as a reason why any potential plain error may not be “obvious.” Petitioner has not sought plain error review, and does not further address that issue. As to the merits, the state cannot rely on agency theory on appeal because it did not raise that argument below. “This court may not affirm [a] defendant’s conviction using a different legal or factual theory” than the state asserted at trial. *State v Gonzalez-Aguilar*, 287 Or App 410, 403 P.3d 539 (2017). That is because “requiring a defendant to

cited in *Olson- Williams v A.C. Burdick & Co.*, 63 Or. 41, 125 P. 844 (1912) and *US Pipe v Northwestern Agencies*, 284 Or. 167, 171, 585 P.2d 691 (1978) involved parties that were domiciled in Oregon and transactions that were carried out in Oregon. See footnote 8 regarding jurisdiction of websites.

challenge or rebut***undecided factual and legal issues for the first time on appeal does not comport with a system of appellate review premised on ensuring fairness to an opposing party by permitting the opposing party to respond to a contention and by otherwise not taking the party by surprise." *Burgess*, 352 Or at 506. Thus, it is "fundamentally unfair***to sustain [a] defendant's conviction on a separate factual and legal theory that has been proffered by the state for the first time on appeal."

The state did not assert an agency theory in this case, and such a theory is not purely a question of law. The state's theory was that the petitioner's own conduct directly created jurisdiction in Oregon. The record is insufficient to support an agency argument, or at the very least, had the state asserted an agency theory, the record would have developed differently. For example, the record does not contain evidence of the terms of service for

Backpage¹¹ or any other service the petitioner may have used, which might be relevant to the question of an agency relationship because they could bear on the legal and factual relationship between a user and a business. As it was, petitioner did not have notice of an agency theory and thus did not have a chance to develop a factual record that may have rebutted it. Accordingly, the state's failure to pursue this distinct factual and legal theory of liability in the trial court renders it "fundamentally unfair" to sustain the petitioner's conviction on that basis now. *Burgess*, 352 Or at 504. The Oregon courts should not have entertained the state's agency theory on appeal.

Finally, the same basic principle that the conduct defined by the crime has to occur in Oregon applies to the crime of omission. *State v McGill*, 115 Or App 122, 836 P.2d 1371 (1992). In McGill, the defendant, a "tribal Indian who live[d] on the Warm Spring Indian

¹¹ Petitioner notes again that trial record reflects that Backpage was domiciled in the Netherlands.

Reservation," rented a television from a store in Madras, Oregon and failed to return it after he defaulted on the rental contract. The state charged him under ORS 164.140(1)(a), which provides that a person commits criminal possession of rented or leased property if the person "knowingly *fails to return* the item within 10 business days from the mailing of the demand" to return the item (emphasis added). The defendant argued that Oregon lacked jurisdiction to prosecute him because he was on the reservation when he stopped making payments and continued to possess the television, and thus, the reservation was the location of the offense. But the court held that the "gravamen of the offense is not possession, but failure to return the set to the rental shop in Madras." Thus, the crime is one of omission and under ORS 131.215(5), "jurisdiction resides in the place where the legal duty omitted is required to be performed. See also ORS 131.215(5) (jurisdiction lies in Oregon if "[t]he offense consists of the omission to perform a legal duty

imposed by the law of this state with respect to domicile, residence or a relationship to a person, thing or transaction in this state). Thus, the court looked into the “gravamen” of the conduct that the substantive statute prohibited, there, an omission that occurred when the defendant failed to return the television to the store *in Oregon*, thus making jurisdiction proper in Oregon.

Here, no evidence indicted that the petitioner’s conduct that violated the gravamen of ORS 167.017(1)(c) – aiding or facilitating an act or attempted act of prostitution – occurred in Oregon. And the state never even contended that it did. In the absence of such evidence, petitioner was entitled to acquittal on the compelling prostitution charges.

**II. Promoting Prostitution, ORS 167.012(1)(c),
has a conduct and a circumstance element.**

The state failed to show that the petitioner’s conduct, which might satisfy the conduct

**element included in promoting
prostitution, occurred in Oregon.**

The state alleged in Counts 4 and 6 of the indictment under ORS 167.012(1)(c), which provides:

“(1) A person commits the crime of promoting prostitution if, with intent to promote prostitution, the person knowingly:

“(c) Receives or agrees to receive money, goods, property, services or something else of value, other than as a prostitute being compensated for personally rendered prostitution services, pursuant to an agreement or understanding that the money, goods, property, services or something else of value is derived from a prostitution activity.”

As with compelling prostitution, ORS 167.012(1)(c) contains a conduct element and potentially a circumstance element, but no result element. The conduct element is “Receives or agrees to receive money, goods, property, services or something else of value.” “Receive” and “agree” are verbs that describe conduct (i.e. acts). See *Webster's Third Int'l Dictionary* 43 (defining

“agree”), 1894 (defining “receive”). The second element-
“pursuant to an agreement or understanding that the
money, goods, property, services or something else of
value is derived from a prostitution activity”- potentially
describes a distinct circumstance element, but if so, it
does not factor into jurisdiction under ORS 131.215(1).

The state’s theory of the petitioner’s conduct was
that he agreed to receive money from the victim’s mother
when he twice provided her with his bank account
information. Critically, however, no evidence indicated
that petitioner actually “received” any money – the state
adduced no evidence of transactions between the victim’s
mother and the petitioner. Thus, the only operative
theory of the promoting prostitution counts that the state
argued was that the petitioner “agreed” to receive money.

But again, no evidence indicated that the
petitioner’s conduct – sending his bank account
information in apparent agreement to receive money –
occurred in Oregon. If there had been a deposit, then

petitioner would arguably have used an Oregon agent to “receive” that money, and *Olson*, discussed above, would be squarely on point. But here, unlike *Olson*, petitioner never utilized an agent in Oregon for the actual receipt of money. In the absence of evidence that petitioner’s act of agreement occurred in Oregon, Oregon lacked jurisdiction to prosecute him for that act.

In its arguments to the contrary the state relied on principles of venue and other jurisdictional provisions, neither of which have bearing here¹². In *State v Harris*, 242 Or App 438, 256 P.3d 156 (2011), the defendant was in Multnomah County, Oregon when she agreed to provide prostitution services in a telephone conversation with an

¹² The state made these arguments in both regard to compelling and promoting prostitution, but because the arguments rely on the bilateral nature of an agreement, which is not an element of compelling prostitution but is an element of promoting prostitution as alleged here, petitioner addresses them here in the context of the promoting prostitution counts.

undercover detective who was in Washington County, Oregon. The court noted that venue was sufficient in Washington County if at least one element occurred there, and that the prostitution statute criminalized the “offer” or “agreement” without further action. Based on the meanings of “offer” and “agreement,” the court concluded that both terms “contemplated the presence and participation of another party in the completed commission of the act,” and thus concluded that an “offer or agreement transmitted over the telephone is occurring simultaneously where the parties to the conversation are located.”

A similar conclusion was reached in *State v Allen*, 115 Or App 347, 838 P.2d 633 (1992), *rev den* 317 Or 584 (1993). In *Allen*, the defendant, who was charged with conspiracy to commit aggravated murder in Marion County, Oregon based on a telephone call that occurred while he was in Clackamas County, Oregon and his co-

defendant was in Marion County. The court concluded venue was proper in either county.

However, the venue statutes are different from the jurisdictional statutes in an important way. The basic venue statute, ORS 131.305(1), operates like ORS 131.215(1) in the sense that it locates venue where the “conduct that constitutes the offense or a result that is an element of the offense occurred.” But ORS 131.315(1) provides that “if conduct constituting elements of an offense or results constituting elements of an offense occur in two or more counties, trial of the offense may be held in any of the counties concerned.” And that statute factored into the decisions in both *Allen* and *Harris*.

Harris, 242 Or App at 441; *Allen*, 115 Or App at 349¹³.

¹³ The *Allen* court also cited ORS 131.315(9) which specifically concerns venue for conspiracy cases and provides that “[i]f the offense is criminal conspiracy, trial of the offense may be held in any county in which any act or agreement that is an element of the

The jurisdictional statutes do not contain a similar “choice of jurisdiction” provision. Instead, the jurisdiction statute is focused on the conduct of the particular defendant or of another for whom the defendant is liable under ORS 161.155:

“A person is criminally liable for the conduct of another person constituting a crime if:

“****

“(2) With the intent to promote or facilitate the commission of the crime the person:

“****

(b) Aids or abets or agrees or attempts to aid or abet such other person in planning or committing the crime.”¹⁴

And ORS 131.215(1) refers back to “the conduct” (i.e. the conduct of the person), which must occur “within this state” to establish jurisdiction.

offense occurs.” 115 Or App at 349. The state did not allege a conspiracy in this case.

¹⁴ Petitioner notes again that the state did not charge him or argue his guilt under an aid-and-abet theory.

The state also relied on a case construing ORS 131.215(4), which provides that jurisdiction lies in Oregon when “[c]onduct occurring within this state establishes complicity in the commission of, or an attempt, solicitation or conspiracy to commit an offense in another jurisdiction which also is an offense under the law of this state.” *State v Self*, 75 Or App 230, 706 P.2d 975 (1985). In *Self*, the defendant was charged with solicitation of another to possess and deliver cocaine when he placed a phone call from the jail in Lane County, Oregon and proposed a deal to get money for his bail that involved the acquisition of cocaine in San Francisco. The court concluded that ORS 131.215(4) permitted the state to “charge a person in Oregon with the crime of soliciting possession of cocaine in California” because possession of cocaine was unlawful in both states. *Self* did not construe ORS 131.215(1), and the provision it did construe concerns conduct *in Oregon* related to crimes in *other jurisdictions*. It has no bearing on this case.

Here, if the petitioner agreed to receive money, no evidence indicated that he did so while he was in Oregon. Consequently, Oregon lacked jurisdiction to prosecute him for his conduct.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Marvin Randall, Pro Per, Petitioner
Date: September 6, 2023

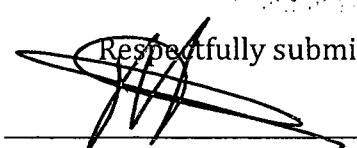
CERTIFICATE OF COMPLIANCE WITH RULE 33

Brief Length

I certify that this brief complies with (1) the word count limitation and (2) the word count is 5,709.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 6, 2023.


Respectfully submitted,

Marvin Randall, Pro Per, Petitioner