IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. THOMAS HARRY BRAY, Defendant-Appellant, Respondent on Review,	Deschutes Co Circuit Court Case No. 11FE1078 CA A152162 SC No. S064843 (Control)
STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. THOMAS HARRY BRAY, Defendant-Appellant, Petitioner on Review.	SC No. S064846

BRIEF OF *AMICI CURIAE* CRIME VICTIM J.B., NATIONAL CRIME VICTIM LAW INSTITUTE, NATIONAL CENTER FOR VICTIMS OF CRIME, AND OREGON CRIME VICTIMS LAW CENTER IN SUPPORT OF PETITIONER STATE OF OREGON

Review of the decision of the Court of Appeals
on appeal from a judgment of the Circuit Court for Deschutes County
Honorable Stephen Tiktin, Judge
Opinion Filed: October 12, 2016
Author of Opinion: Honorable David Schuman
Before: Devore, Presiding Judge; Garrett, Judge; and Schuman, Senior Judge

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(*Parties continued on next page*)

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STATEMENTS OF INTEREST OF *AMICI CURIAE*

J.B. is the victim of the sexual assault in the underlying criminal case against the defendant, and she is the person whose computer is the subject of this appeal. J.B. has a personal stake and privacy interest in the outcome of this appeal.

The National Crime Victim Law Institute (NCVLI) is a nonprofit educational and advocacy organization located at Lewis and Clark Law School in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training; promoting the National Alliance of Victims' Rights Attorneys and Advocates; researching and analyzing developments in crime victim law; and litigating as *amicus curiae* issues of national importance regarding crime victims' rights in cases nationwide. NCVLI also provides information to crime victims and crime victims' attorneys through its website, www.ncvli.org.

The National Center for Victims of Crime (NCVC), a nonprofit organization based in Washington, D.C., is a leading resource and advocacy organization for all victims of crime. The mission of NCVC is to forge a national commitment to help victims of crime rebuild their lives. Dedicated to

serving individuals, families, and communities harmed by crime, NCVC, among other efforts, advocates laws and public policies that create resources and secure rights and protections for crime victims. To that end, NCVC has filed *amicus curiae* briefs in cases across the country to advance the rights and interests of crime victims, including victims of sexual assault.

The Oregon Crime Victims Law Center (the "Center") is a nonprofit organization that provides crime victims across Oregon with no-cost legal representation in asserting and enforcing their rights in criminal proceedings in Oregon's state, federal and tribal courts including issues surrounding privacy rights and interests. The Center also provides victims with non-legal assistance. A significant number of the Center's cases involve representation of victims of sexual assault.

This case involves issues that directly impact J.B. and which are fundamental to the privacy rights and interests of all Oregon crime victims. *Amici* submit this brief in aid of the Court's task of determining the correct rule of law governing a criminal defendant's ability to compel a search of a victim's electronically stored information over her and the prosecutor's objection.

STATEMENT OF MATERIAL FACTS

Amici curiae reference and incorporate the Statement of the Case submitted as part of the state's brief on the merits.

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Amici curiae adopt the Question Presented and Proposed Rule of Law submitted with the state's brief on the merits.

INTRODUCTION

> [I]llegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.[1]

In this case, the Court of Appeals deviated so far from legal modes of procedure that it erased the state and federal constitutional rights of crime victims. The Court of Appeals determined that the trial court's denial of defendant's motion for an order compelling production of the victim's personal computer for a forensic examination to search for possible impeachment evidence is grounds for reversal of defendant's conviction of rape, sodomy, strangulation and assault. Relying on *State v. Cartwright,* 336 Or 408, 85 P3d 305 (2004) and *United States v. Nixon,* 418 US 683, 94 S Ct 3090, 41 L Ed 2d 1039 (1974), the Court of Appeals announced a new rule. According to the Court of Appeals, all witnesses, including crime victims, have an "'expansive

[1] *Boyd v. United States*, 116 US 616, 635, 6 S Ct 524, 29 L Ed 746 (1886).

duty' to accommodate a criminal defendant's 'broad right' to compel production of evidence"—a right that trumps any and all constitutional rights of the crime victim. *State v. Bray*, 281 Or App 584, 612, 383 P3d 883 (2016).

This ruling came after the victim personally, and through the prosecutor, asserted her constitutional rights to privacy, to refuse defense discovery requests, and to freedom from unreasonable search and seizure. In its ruling, the Court of Appeals evidenced distain for the victim's rights, referring to Article I, section 42, of the Oregon Constitution as "the so-called Crime Victims' Bill of Rights," 281 Or App at 588, and conducted no meaningful analysis of the victim's rights and interests in her electronically stored information despite the stated purpose of Article I, section 42 "to ensure that a fair balance is struck between the rights of crime victims and the rights of criminal defendants in the course and conduct of criminal * * * proceedings[.]" Or Const Art I, § 42(1).[2]

Today, almost 20 years after the Oregon Constitution was amended to require courts to "accord crime victims due dignity and respect" and to "fair[ly] balance" the victim's and defendant's rights, the Court of Appeals' decision is shocking in both outcome and reasoning. *Id.*

[2] Further losing sight of these rights, the Court of Appeals afforded more weight and consideration to its assessment of the state's failure to abide the trial court orders than it did to the fundamental privacy rights and interests at stake.

If allowed to stand, the Court of Appeals' decision would leave victims' private information subject to invasion without the fundamental protections afforded to others whose computers may be searched only pursuant to a warrant based on probable cause or a recognized exception to the warrant requirement. This decision cannot stand.

ARGUMENT

I. AN ORDER COMPELLING THE VICTIM TO PRODUCE HER PERSONAL COMPUTER AND ALLOW DEFENDANT TO CONDUCT A SPECULATIVE FORENSIC SEARCH OF HER ELECTRONICALLY STORED INFORMATION VIOLATES THE VICTIM'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS.

A. The Victim's Right To Be Free From Unreasonable Search And Seizure Under Both The Federal And Oregon Constitutions Would Be Violated If The Trial Court Were To Issue The Requested Order To Compel.

All individuals have a constitutional right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." US Const, Amend VI; *accord* Or Const, Art I, § 9 ("No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure[.]"). The constitutional right to be free from unreasonable search and seizure protects "'offenders as well as * * * the law abiding.'" *United States v. Lefkowitz*, 285 US 452, 464, 52 S Ct 420, 76 L Ed 877 (1932); *accord State v. McDaniel*, 115 Or 187, 242, 237 P 373 (1925)

(addressing the legality of a search and stating that "[w]e are not unmindful of the duty of courts to safeguard the constitutional rights of the guilty as well as the innocent"). "'[T]he touchstone of [Fourth] Amendment analysis [is] * * * the question whether a person has a 'constitutionally protected reasonable expectation of privacy.'" *Oliver v. United States*, 466 US 170, 177, 104 S. Ct. 1735, 80 L Ed 2d 214 (1984) (quoting *Katz v. United States*, 389 US 347, 88 S Ct 507, 19 L Ed 2d 576 (1967)).[3] A court order compelling production of an individual's private property for the purpose of a forensic examination is a search under both the Fourth Amendment and Article I, section 9.

In this case, it is undisputed that the victim has a constitutionally protectable privacy interest in her personal computer and its contents. *See Bray*, 281 Or App at 608 (noting that "[d]efendant does not, and could not, deny that J[.B.] has a privacy interest in the contents of her computer" and citing *Riley v. California*, — US —, 134 S Ct 2473, 2489, 189 L Ed 2d 430 (2014)

[3] Under Oregon law, the privacy protected "'is not the privacy that one reasonably *expects* but the privacy to which one has a *right*.'" *State v. Newcomb*, 359 Or 756, 764, 375 P3d 434 (2016) (quoting *State v. Campbell*, 306 Or 157, 164, 759 P2d 1040 (1988) (emphasis in original)). While the test for determining protectable privacy interests differ under the Fourth Amendment and Article I, section 9, "at least in how [they are] articulated," this Court has recognized that "[i]n application, however, the Fourth Amendment privacy test takes into account the same and similar considerations as the test under Article I, section 9, and the two tests often lead to the same result in like circumstances." *Id.* at 774.

and *United States v. Andrus*, F3d 711, 718 (10th Cir 2007)). In the face of this right, defendant sought a court order compelling production of the victim's personal computer to allow a forensic examination to search for the victim's Internet search terms and digital copies of any private journal entries that she *may* have saved on her computer. There can be no doubt that the victim's constitutional right to be free from unreasonable search and seizure under state and federal law is implicated in this request.

Despite the clarity of the issue, the Court of Appeals failed to apply constitutional analysis under either the Fourth Amendment or Article I, section 9 of the Oregon Constitution. Instead, it elected to examine the trial court's decision purely on whether defendant's statutory subpoena *duces tecum* satisfied the reasonableness test described in *United States v. Nixon* and the procedure outlined in *State v. Cartwright* – each of which is inapposite. *See Bray*, 281 Or App at 612-14.[4]

[4] The Court of Appeals also relied on a number of other cases that have no bearing on this case as they involve administrative subpoenas and grand jury subpoenas, each of which is qualitatively different from ordinary trial subpoenas *duces tecum* in criminal cases. *See, e.g., Wilson v. United States*, 221 U S 361, 31 S Ct 538, 55 L Ed 2d 771 (1911) (addressing a corporate officer's refusal to produce corporate records pursuant to a grand jury subpoena *duces tecum*); *Hale v. Henkel*, 201 US 43, 26 S Ct 370, 50 L Ed 652 (1906) (same); *Oklahoma Press Pub. Co. v. Walling*, 327 US 186, 66 S Ct 494, 90 L Ed 614 (1946) (addressing an administrative subpoena *duces tecum*); *see also United States v. R. Enterprises, Inc*., 498 US 292, 298-99, 111 S Ct 722, 112 L

The cases are inapposite for at least two reasons. First, neither *Nixon* nor *Cartwright* involves a Fourth Amendment claim. Second, the privacy interests at stake in those cases were each less substantial than the recognized constitutional privacy interest in one's personal computer and its contents. Specifically, *Nixon* addressed a "generalized interest in confidentiality" in recorded conversations of meetings conducted at the White House, 418 US at 713; and *Cartwright* involved a board of directors' recording of employees' statements of alleged incidences of workplace harassment, 336 Or at 410-11.

Here, the victim was faced with a forensic *search* of the electronically stored information on her personal computer. The individual privacy interests at issue in this case are strikingly similar to the individual privacy interests addressed in *Riley v. California*, 134 S Ct 2473. In *Riley*, the United States Supreme Court addressed whether the warrantless search incident to arrest doctrine applied to cell phones found on individuals who were lawfully arrested. The Court concluded that the Fourth Amendment requires the

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Ed 2d 795 (1991) (observing that the Fourth Amendment exclusionary rule does not apply to grand jury proceedings because grand jury subpoenas and ordinary subpoenas *duces tecum* for criminal trials serve different purposes); *United States v. Golden Valley Elec. Ass'n*, 689 F3d 1108, 1116 (9th Cir 2012) (explaining that "[g]rand jury and administrative subpoenas function in similar ways" as both "'investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not'"); *State v. McGee*, 347 Or 261, 269–70, 220 P3d 50 (2009) (distinguishing a grand jury subpoena *duces tecum* from an ordinary trial subpoena *duces tecum*).

government to secure a warrant upon a showing of probable cause or establish that a recognized exception to the warrant applies. *Id.* at 2493. In reaching its conclusion, the Court distinguished a search of the contents of a cell phone from a search of other physical objects. *See, e.g., id.* at 2488-89 ("Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse."). As the Court explained, an individual's cell phone (which is in essence a handheld computer) typically contains "a digital record of nearly every aspect of [the owner's] li[fe]," and may contain records of "Internet search and browsing history * * * [that] reveal an individual's private interests or concerns"; therefore, significant privacy interests are at stake, making a search of the electronic information stored in a cell phone quantitatively and "qualitatively different" from a search of other objects. *Id.* at 2490. Noting that modern cell phones "are in fact mini-computers," *id.* at 2489, with the capacity to store many different types of personal information, the Court observed that a search of an individual's cell phone is potentially even more intrusive than a search of a house. *Id.* at 2491 ("Indeed, a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house[.]" (Emphasis in original.)).

As noted earlier, the constitutional right to be free from unreasonable search and seizure protects all persons equally. Applying *Riley* to this case, the

Court must conclude that the electronically stored information in the victim's personal computer is entitled to Fourth Amendment protection.[5]

The Court of Appeals' apparent reliance on the purported reasonableness or limitations as to the scope of defendant's proposed forensic search cannot save its flawed reasoning. First, as the Supreme Court observed in *Riley* when faced with the government's argument that proper protocols may be developed to limit the search of computer data, "the Founders did not fight a revolution to gain the right to * * * protocols. The possibility that a search might extend well beyond papers and effects in the physical proximity of an arrestee is yet another reason that the privacy interests here dwarf those in [prior case law]" and a warrant is generally required. *Id.* at 2491. A subpoena *duces tecum* is simply not a proper substitute for a search warrant.

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[5] While this Court has not yet addressed an individual's state constitutional privacy interests in a personal computer and its contents, the victim's personal computer and its contents undoubtedly fall within the protection of Article I, section 9. *See, e.g.*, *State v. Owens*, 302 Or 196, 206, 729 P2d 524 (1986) (finding that "Article I, section 9, protects privacy and possessory interests"); *State v. Smith*, 327 Or 366, 372–73, 963 P2d 642 (1998) (observing that Article I, section 9 protects both private space and privacy interest because "private *space* and privacy *interests* often are inextricably intertwined" (emphasis in original)); *Newcomb*, 359 Or at 764 (explaining that "the right to privacy that Article I, section 9, protects is the freedom from scrutiny as 'determined by social and legal norms of behavior, such as trespass laws and conventions against eavesdropping'") (quoting *State v. Campbell*, 306 Or at 170).

The victim is entitled to the full protection of the Fourth Amendment and Article 1, section 9 of the Oregon Constitution. The Court of Appeals' decision barely acknowledges these protections, apparently based solely upon the victim's status as the victim, and not the defendant. This Court should reverse the Court of Appeals and affirm the trial court's order denying defendant's motion to compel.[6]

B. The Victim's State Constitutional Right to Refuse Defendant's Discovery Requests Would Be Violated If The Trial Court Were To Issue The Requested Order To Compel.

Throughout this case, both the victim and the prosecutor, on the victim's behalf, have asserted the victim's state constitutional right to refuse defense discovery requests under Article I, section 42 of the Oregon Constitution. Specifically, Article I, section 42(1)(c) provides that a crime victim has:

> The right to refuse an interview, deposition or other discovery request by the criminal defendant or other person acting on behalf of the criminal defendant provided, however, that nothing in this paragraph shall restrict any other constitutional right of the defendant to discovery against the state[.]

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[6] While the trial court did not deny defendant's motion on the basis of the Fourth Amendment or Article I, section 9, this Court may affirm the trial court's decision on any alternative ground supported by the record. *See State v. Nielsen*, 316 Or 611, 629-32, 853 P2d 256 (1993).

Or Const Art I, § 42(1)(c).[7] When construing a constitutional provision, this Court examines the plain meaning of the words, and "[t]he requirement that [the Court] give effect to the words of an enactment is doubly applicable when the law in question is a constitutional amendment adopted by the voters." *Nw. Nat. Gas Co. v. Frank*, 293 Or 374, 381, 648 P2d 1284 (1982).

In *State v. Bray*, 352 Or 809, 291 P3d 727 (2012), this Court examined whether defendant's request that a clone of the victim's computer hard drive be preserved under seal for purposes of appellate review—and the trial court's order granting that request—qualified as "discovery" for purposes of Article I, section 42. The Court explained that the term "discovery" "[o]rdinarily * * * refers to '[c]ompulsory disclosure, at a party's request, of information that relates to the litigation[.]'" 352 Or at 818. The Court questioned whether the voters intended to limit the term "discovery" to pretrial discovery,

[7] Even before Article I, section 42 was adopted, Oregon case law was clear that the trial court cannot order crime victims to submit to defense discovery requests. *See, e.g.*, *State ex rel. Beach v. Norblad*, 308 Or 429, 781 P2d 349 (1989) (concluding the circuit court lacked authority to order widow of murder victim to make her house, where crime occurred, available to defense investigators to photograph, measure, etc., because victim's widow was not a party to the case); *State ex rel. O'Leary v. Lowe*, 307 Or 395, 769 P2d 188 (1989) (concluding the circuit court lacked authority to order child victim to submit to pretrial interview by defense investigator); *State v. Hiatt*, 303 Or 60, 733 P2d 1373 (1987) (concluding the circuit court lacked authority to order rape victim to submit to pretrial psychological evaluation by defense psychiatrist).

notwithstanding the absence of the word "pretrial" in the constitutional provision. *See id.* at 818-19. The Court resolved that appeal without deciding "whether context limits the meaning of the term 'discovery.'" *Id.* at 819.

In this case, too, the Court need not determine the scope of the term "discovery" in Article I, section 42. The facts, however, leave no doubt that defendant was using the subpoena *duces tecum* as an investigative discovery device to search the victim's electronically stored information in the hopes of unearthing impeachment evidence. *Cf. Nixon*, 418 US at 698-99 (observing that "certain fundamental characteristics of the subpoena duces tecum in criminal cases" include the fact that "it was not intended to provide a means of discovery" and "not intended as a general 'fishing expedition'"), 701 (noting that "[g]enerally, the need for evidence to impeach witnesses is insufficient to require its production" via a subpoena *duces tecum*). In the face of this, the trial court properly denied defendant's motion to compel. The Court of Appeals' decision to the contrary violates the victim's right to refuse discovery.

II. DEFENDANT HAS FAILED TO SHOW THE TRIAL COURT'S DENIAL OF HIS MOTION TO COMPEL VIOLATED ANY OF HIS CONSTITUTIONAL RIGHTS.

While less than clear, it seems the Court of Appeals determined that the denial of defendant's motion to compel violated defendant's constitutional rights under the Confrontation and Compulsory Process Clauses of the Sixth

Amendment. *See* 281 Or App at 900 (observing that "'[i]t is the manifest duty of the courts to vindicate [the Sixth Amendment Confrontation Clause]" and quoting *Nixon*; and observing defendant has a constitutional right to compulsory process). Neither the Confrontation Clause nor the Compulsory Process Clause entitles defendant to the issuance of the order to compel.

A. The Trial Court's Denial of Defendant's Motion to Compel Did Not Violate Defendant's Constitutional Right to Confront Witnesses.

The confrontation clauses under both the Sixth Amendment and Article I, section 11 of the Oregon constitution afford a criminal defendant the right to cross-examine witnesses. *See Pennsylvania v. Ritchie*, 480 US 39, 52–53, 107 S Ct 989, 94 L Ed 2d 40 (1987) (plurality) (addressing the scope of the confrontation right under the Sixth Amendment and explaining that the confrontation right is "designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination"); *State v. Kitzman*, 323 Or 589, 603, 920 P2d 134 (1996) (explaining that the confrontation right under Article I, section 11 "guarantees that the defendant has an opportunity to cross-examine the witness against him" and "enabl[es] the defendant to demonstrate to the jury the witness' demeanor when confronted by the defendant").

Defendant's rights in this respect are not absolute. *See, e.g.*, *State v. Lajoie*, 316 Or 63, 79, 849 P2d 479 (1993) (observing that the Supreme Court has determined that "a defendant's Sixth Amendment rights are not absolute" and "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process" (citing *Michigan v. Lucas*, 500 US 145, 149, 111 S Ct 1743, 114 L Ed 2d 205 (1991) (internal quotations omitted))); *Kitzman*, 323 Or at 603 (stating that "this court also has recognized that there are some limitations on a defendant's confrontation rights").

The Supreme Court has explained that "'the Confrontation Clause only guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" *Ritchie,* 480 US at 53 (plurality) (emphasis in original) (quoting *Delaware v. Fensterer*, 474 US 15, 20, 106 S Ct 292, 88 L Ed 2d 15 (1985)); *United States v. Owens*, 484 US 554, 559, 108 S Ct 838, 98 L Ed 2d 951 (1988) (restating the rule that "[T]he Confrontation Clause guarantees only "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish" (quoting *Kentucky v. Stincer*, 482 US 730, 739, 107 S Ct 2658, 96 L Ed2d 631 (1987) (emphasis in original; internal quotation marks omitted)). Therefore,

"[n]ormally the right to confront one's accusers is satisfied if defense counsel receives wide latitude at trial to question witnesses." *Ritchie*, 480 US at 53.

While this Court has not addressed this precise issue under state law,[8] federal courts have consistently declined to find a Confrontation Clause violation where the trial court did not limit a defendant's cross-examination of a witness on a particular issue. *See, e.g., Vasquez v. Kirkland*, 572 F3d 1029, 1032-34, 1038 (9th Cir 2009) (concluding defendant's confrontation right was not violated where "the trial court provided the defendant the opportunity for effective cross-examination" by placing "no limits on the scope or duration of cross-examination"); *Ross v. Dist. Attorney of the Cty. of Allegheny*, 672 F3d 198, 208 (3d Cir 2012) ("We agree with our sister circuits, and hold that

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[8] This Court has not expressly determined whether Article I, section 11 guarantees a right to "effective" cross-examination. The Court of Appeals, however, has stated that "the right of confrontation includes the right to engage in effective cross-examination to impeach witnesses who are called by the state." *State v. Maxwell*, 172 Or App 142, 148, 18 P3d 438 (2001), *rev den*, 332 Or 559 (2001); *accord State v. Wixom*, 275 Or App 824, 841, 366 P3d 353 (2015), *rev den*, 359 Or 166 (2016) ("Like the Sixth Amendment, the confrontation clause in Article I, section 11, concerns the opportunity for effective cross-examination at trial[.]"). To the extent defendant may request that this Court construe Article I, section 11 to include a right to *effective* cross-examination, and such construction would conflict with the victim's constitutional rights under the Crime Victims' Bill of Rights, the Court must reject defendant's argument. *See* Or Const Art I, § 42(2) ("Nothing in this section reduces a criminal defendant's rights under the Constitution of the United States. *Except as otherwise specifically provided, this section supersedes any conflicting section of this Constitution.*" (Emphasis added.)); *accord* Or Const Art I, § 43(2).

[defendant] was not denied a 'full and fair opportunity' to cross-examine [the witness]" where "[t]here were no 'specific statutory or court-imposed restriction[s] * * * on the scope of questioning' at * * * trial." (Quoting *Ritchie*, 480 US at 53-54.)).

In this case, defendant had ample opportunity to cross-examine the victim at trial about her post-rape Google searches, journal entries and related data stored in her personal computer (collectively, the "computer information"). The record reveals that defendant chose not to ask the victim about the computer information. (State's Pet. for Review at 5 [citing Tr 1149-92, 1197, 1196-1266-67].) Because the Confrontation Clause only guarantees defendant an opportunity for cross-examination, and defendant "was not prohibited from pursuing any line of inquiry, but strategically chose not to" ask certain questions, the trial court's denial of his motion to compel did not violate defendant's confrontation right. *Dorsey v. Chapman*, 262 F3d 1181, 1190 (11th Cir 2001) (declining to find a Confrontation Clause violation).

B. The Trial Court's Denial of Defendant's Motion to Compel Did Not Violate Defendant's Constitutional Right to Compulsory Process.

As a threshold matter, the Court of Appeals prematurely addressed defendant's right to compulsory process. Without a search warrant (or the application of a known exception to the warrant requirement), there is no legal

authority for the requested "process" to trigger a compulsory process analysis. Assuming *arguendo* that defendant's right to compulsory process is implicated, the trial court's denial of his motion did not violate this right.

"[T]he Sixth Amendment [right to compulsory process] does not by its terms grant to a criminal defendant the right to secure the attendance and testimony of any and all witnesses: it guarantees him 'compulsory process for obtaining *witnesses in his favor*.'" *United States v. Valenzuela-Bernal*, 458 US 858, 867, 102 S Ct 3440, 73 L Ed 2d 1193 (1982) (quoting the Sixth Amendment) (emphasis in original). Similarly, the Compulsory Process Clause under Article I, section 11, only guarantees defendant the right "to have compulsory process for obtaining witnesses in his favor." Or Const Art I, § 11.

A criminal defendant's right to compulsory process "is not unlimited, but rather is subject to reasonable restrictions." *United States v. Scheffer*, 523 US 303, 308, 118 S Ct 1261, 140 L Ed 2d 413 (1998); *accord State v. Mai*, 294 Or 269, 274-77, 656 P2d 315 (1982) (concluding that defendant's right of compulsory process under Article I, section 11 may be subject to reasonable restrictions, and upholding the trial court's refusal to permit defendant's witness

from testifying as a preclusion sanction under ORS 135.865).[9] Defendant's interest may "bow to accommodate other legitimate interests in the criminal trial process." *Scheffer,* 523 US at 308 (internal quotations omitted).

To show a violation of the right to compulsory process, a defendant must show that the evidence lost was both material and favorable, similar to the showing required for a due process violation. *See Valenzuela-Bernal,* 458 US at 867-72. In *Valenzuela-Bernal,* the Supreme Court concluded that defendant failed to make the requisite showing and "[t]he mere fact that the Government deport[ed] such witnesses [thereby causing defendant to lose access to the witnesses] is not sufficient to establish a violation of the Compulsory Process Clause of the Sixth Amendment[.]" *Id.* at 872-73.

Rather than recognizing the victim's constitutional rights as legitimate interests and analyzing what restrictions were necessary on defendant's right to compulsory process, the Court of Appeals assumed an absolutist position, ignoring long standing tenets of legal analysis. When properly analyzed, it becomes clear that defendant has not explained what material, favorable evidence the victim's personal computer would provide for his defense. He merely speculates that the computer might show the victim lied about

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[9] This court "construe[s] the state compulsory process clause in the same way as the Supreme Court construed the virtually identical federal counterpart." *Mai,* 294 Or at 272.

something, which purportedly would undermine her credibility. *See Bray*, 281 Or App at 607 (recounting defendant's speculation in "an accompanying memorandum and in oral argument before the court" that "the computer could reveal whether J had, as she testified, erased its contents. If not, * * * that would undermine her credibility and also reveal potentially exculpatory evidence; if so, that fact would itself be relevant evidence that she had something to hide"). Indeed, in the portion of the Court of Appeals' decision where it upholds the trial court's denial of defendant's motion to compel the state to obtain the victim's Internet search information, the Court of Appeals concluded that "although there is a *possibility* that the Google information could have resulted in an acquittal, that possibility was a far cry from a *reasonable probability*[] [i]n light of the inculpatory evidence and the trial court's finding that J.[B.] was a credible witness[.]" *Id.* at 600 (emphasis in original). On this record, defendant simply cannot establish even a facial compulsory process violation.

CONCLUSION

The Court of Appeals' ruling effectively creates tiered constitutional rights, allowing defendants to use the subpoena *duces tecum* process to search and seize the victims' electronically stored information—whether stored in the victims' home computers or cell phones—without probable cause and without

proper consideration of all of the victims' state and federal constitutional rights. This Court must reverse the Court of Appeals' decision with respect to the motion to compel production of the victim's computer.

Date: August 17, 2017

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

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 4961 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).

CERTIFICATE OF SERVICE AND FILING

I hereby certify that on August 17, 2017, directed the foregoing BRIEF OF AMICI CURIAE CRIME VICTIM J.B., NATIONAL CRIME VICTIM LAW INSTITUTE, NATIONAL CENTER FOR VICTIMS OF CRIME, AND OREGON CRIME VICTIMS LAW CENTER IN SUPPORT OF PETITIONER STATE OF OREGON to be electronically filed with the Appellate Court Administrator, Appellate Records Section, by using the appellate court's eFiling system.

I further certify that on August 17, 2017, I directed the foregoing brief, including this certificate, to be electronically served upon the following persons by using the electronic mail function of the eFiling system:

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