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 RESPONDENT 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*)

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
JENNIFER S. LLOYD #943724
Attorney-in-Charge Criminal Appeals
1162 Court Street NE
Salem, OR 97301-4096
Email: Jennifer.lloyd@doj.state.or.us
Phone: (503) 378-4402

Attorneys for Plaintiff-Petitioner

KENDRA M. MATTHEWS #965672
Ransom Blackman LLP
1001 SW Fifth Avenue, Suite 1400
Portland, OR 97204
Phone: (503) 228-0487
Email: kendra@ransomblackman.com

Attorney for Defendant-Respondent

ERIN K. OLSON #934776
Law Office of Erin Olson, P.C.
2014 N.E. Broadway Street
Portland, OR 97232
Phone: (503) 546-3150
E-mail: eolson@erinolsonlaw.com

Attorney for Amicus Curiae the National Center for Victims of Crime

MARGARET GARVIN #044650
AMY C. LIU #101232
National Crime Victim Law Institute
at Lewis & Clark Law School*
1130 SW Morrison St., Suite 200
Portland, OR 97205
Phone: (503) 768-6819
Emails: garvin@lclark.edu
aliu@lclark.edu
*Law School is not *amicus* and is listed for location purposes only

Attorneys for Amicus Curiae the National Crime Victim Law Institute

ROSEMARY W. BREWER #110093
Oregon Crime Victims Law Center
7412 S.W. Beaverton-Hillsdale Hwy,
Suite 209
Portland, OR 97225
Phone: (503) 208-8160
E-mail: Rosemary@ocvlc.org

Attorney for Amici Curiae Crime Victim J.B. and the Oregon Crime Victims Law Center

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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 Google search history 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 the prosecutor to obtain a victim's internet search activity over the victim's objection.

STATEMENT OF THE CASE

Amici curiae reference and incorporate the procedural history submitted by the defendant in his brief on the merits, but reject the defendant's framing of

the questions presented and the presentation of facts material to the determination of the review.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

Amici curiae submit that the legal questions presented, and proposed rules of law, are as follows:

A. "Control" Under ORS 135.815.

Question Presented: Is information that a prosecutor can obtain only by search warrant within the prosecutor's "control" within the meaning of ORS 135.815?

Answer and Proposed Rule of Law: No. Information is within a prosecutor's control within the meaning of ORS 135.815 when the prosecutor may obtain it upon demand, without issuing process or obtaining a warrant.

B. Trial Court's Authority to Order the Prosecution to Obtain a Search Warrant.

Question Presented: Does a trial court have the constitutional authority to compel a prosecutor to obtain a search warrant in order to obtain information protected by the Electronic Communications Privacy Act ("ECPA")?

Answer and Proposed Rule of Law: No. The separation of powers provision of the Oregon Constitution forbids a judicial officer from ordering a prosecutor to exercise her discretion to apply for a search warrant.

C. Dismissal Due to Prosecutorial Misconduct.

Question Presented: Is dismissal of a criminal prosecution an appropriate sanction when the prosecutor resists an unconstitutional court order?

Answer and Proposed Rule of Law. No. A prosecutor is sworn to uphold the constitution, and dismissal of a prosecution is not a lawful or appropriate sanction when the prosecutor resists an unconstitutional court order.

STATEMENT OF MATERIAL FACTS

Except where references to the trial transcript appear below, *amici curiae* adopt the facts and procedural history set forth by the Court of Appeals. *State v. Bray*, 281 Or App 584, 586-592, 383 P3d 883 (2016).

ARGUMENT

I. Introduction

The defendant challenges his conviction based on the state's refusal to apply for a search warrant to obtain the victim, J.B.'s, Google search history so he could see if it contained anything useful with which to impeach her. It is

axiomatic that J.B.'s Google search history is private information,[1] protected by federal law.[2] *See, e.g.*, 18 USC § 2701 *et seq.* (Stored Communications Act, enacted as part of the Electronic Communications Privacy Act[3]).

Assuming arguendo a good faith belief that probable cause existed, the prosecutor's refusal to exercise her discretion to apply for a search warrant was consistent with her obligations to protect J.B.'s constitutional right to privacy, to advance her rights as a crime victim under Or Const, Art I, § 42, and to avoid further harm to her through complicity in the defendant's efforts to unearth information he could use to attempt to discredit her.

Moreover, the prosecutor's resistance to obtaining J.B.'s Google search information for the defendant's benefit was consistent with the purposes of the Electronic Communications Privacy Act, a federal law enacted more than 30

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[1] *See Gonzales v. Google, Inc.*, 234 FRD 674, 687-88 (N D Cal 2006) (addressing *sua sponte* the privacy implications for Google's users of the government's subpoena for the text of search queries, and providing examples).

[2] *See also Riley v. California*, — US —, 134 S Ct 2473, 2491, 189 L Ed 2d 430 (2014) (search of a cell phone requires a search warrant under the Fourth Amendment).

[3] Pub L 99-508, 100 Stat 1848 (1986), codified as amended at 18 USC §§ 2701–10 (2012). For consistency with the Court of Appeals and with the briefs of the parties, references to 18 USC § 2701 *et seq.* are hereinafter referred to as the ECPA.

years ago to protect information entrusted by the populace to internet service providers.[4]

Rather than challenge the constitutionality of the ECPA as applied to him, the defendant instead seeks a judicial decree that a prosecutor *must* exercise her discretion to obtain protected information from internet service providers when a criminal defendant merely asserts the information is material and exculpatory.

There is no precedent for the obligation the defendant seeks to impose on the prosecutor, and this Court should not create any. To do so would change the balance of the criminal justice system, turning prosecutors into investigators

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[4] *See In re Google Inc. Cookie Placement Consumer Privacy Litig*., 806 F3d 125, 145 (3d Cir 2015), *cert den*, 137 S Ct 36, 196 L Ed 26 (2016) (internal quotation omitted) (ECPA "was born from congressional recognition that neither existing federal statutes nor the Fourth Amendment protected against potential intrusions on individual privacy arising from illicit access to stored communications in remote computing operations and large data banks that stored e-mails."); S Rep No 99-541, at 3 (1986) (ECPA was "modeled after the Right to Financial Privacy Act, 12 U.S.C. § 3401 *et seq.*, to protect privacy interests in personal and proprietary information, while protecting the Government's legitimate law enforcement needs.").

By creating a statutory framework that criminalized an internet service provider's disclosure of a subscriber's protected communications except to the government under explicit circumstances, Congress in effect created a "Fourth Amendment Lite by statute," leaving criminal defendants unable to access information protected by the ECPA unless produced to them by the government. Marc J. Zwillinger, Christian S. Genetski, *Criminal Discovery of Internet Communications under the Stored Communications Act: It's Not a Level Playing Field*, 97 J Crim L & Criminology 569, 576 (2006-2007).

for the defense, and engendering mistrust in the victims whose cooperation is essential to holding offenders accountable and advancing public safety.

For victims of sexual assault, who have already suffered an invasion of their person, the invasion of their privacy by the government official they are entrusting with their safety and hope for justice would be devastating. It would lead to an even lower rate of reporting than the already-abysmal rate shown by leading statistics,[5] leaving dangerous criminals free to prey on others.

II. Information the Prosecutor May Only Obtain by Search Warrant is Not Within the Prosecutor's "Control" Under ORS 135.815.

Defendant argues that J.B.'s Google search history was within the "control" of the prosecution within the meaning of ORS 135.815, and should have been produced to him.

Information available only by search warrant or court order is not within the prosecutor's "control" as that word is used in ORS 135.815. The Court of Appeals reached that conclusion by finding that "for purposes of ORS 135.815, the prosecution controls Google information only if (1) Google is 'required' by the ECPA to divulge J.B.'s information to the state, or (2) the prosecution can obtain the information 'directly.'" *State v. Bray*, 281 Or App at 597-98

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[5] The U.S. Department of Justice's 2015 statistical report shows that only 32 percent of rapes or sexual assaults were reported to police. Jennifer L. Truman & Rachel E. Morgan, Bureau of Justice Statistics, *Criminal Victimization, 2015*, at 5 (Oct 2016), https://www.bjs.gov/content/pub/pdf/cv15.pdf.

(quoting *State v. Wixom*, 275 Or App 824, 831-32, 366 P3d 353 (2015)). The Court of Appeals said that since the ECPA provision uses the word "may" and not "shall," Google is not "required" by the ECPA to disclose J.B.'s information, and that the prosecution cannot "directly obtain" the information because it would require the cooperation of Google. *Bray*, 281 Or App at 597-98.

Defendant challenges the Court of Appeals' conclusion, arguing that because the ECPA requires Google to disclose content information to governmental entities upon receipt of a search warrant or court order, the information is within the prosecutor's "control." (Def Br 37-40) As the defendant candidly concedes, there is no precedent or authority for his proposed interpretation of the word "control" in ORS 135.815. He points to *State v. Warren*, 304 Or 428, 746 P2d 711 (1987), and argues that if the prosecutor in that case was obligated to produce the records of the Children's Services Division because the records were available to the prosecutor (but not the defense) under Oregon law and thus within the prosecutor's "control," then the prosecutor in this case is obligated to produce the victim's Google search history because it is available to the prosecutor (but not the defense) under federal law. Defendant's proposed definition of "control" goes too far, and it

would significantly alter the balance of obligations within the criminal justice system.

Information is within the "control" of a party if it is can be obtained upon the demand of that party. *See, e.g., Intern. Union of Petro. & Indus. Wkrs.*, 870 F2d 1450, 1452 (9th Cir 1989) (defining "control" for purposes of FRCrP 34 as "the legal right to obtain documents on demand"). Information a prosecutor can only obtain from a third party by use of a search warrant[6] is simply not within

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[6] While defendant asserts that J.B.'s Google search history was available to the prosecutor under the ECPA by either a court order or a search warrant (Def Br 34), in fact, the prosecutor would only have been able to obtain the information using a search warrant, because Google will only release content information pursuant to a search warrant. Google states on its website under "Legal process for user data requests FAQs":

> "On its face, ECPA seems to allow a government agency to compel a communications provider to disclose the content of certain types of emails and other content with a subpoena or an ECPA court order (described below). But Google requires an ECPA search warrant for contents of Gmail and other services based on the Fourth Amendment to the U.S. Constitution, which prohibits unreasonable search and seizure."

Google Transparency Report Help Center, https://support.google.com/transparencyreport/answer/7381738/ (last accessed September 17, 2017) (answering the question, "What's the difference between a subpoena, a search warrant and a court order under ECPA? What information can a government agency get from Google with each?"). *See also United States v. Warshak*, 631 F3d 266, 288 (6th Cir 2010) (finding the ECPA is unconstitutional to the extent it purports to permit the government to obtain contents of subscriber's emails without first obtaining a warrant based on

the prosecutor's "control" for purposes of ORS 135.815. *See, e.g.*, *United States v. Sarras*, 575 F3d 1191, 1214-15 (11th Cir 2009) (concluding victim's and/or victim's mother's computers, camera, and medical records were not in government's possession or control and therefore not discoverable from government); *cf. United States v. Bailleaux*, 685 F2d 1105, 1112-14 (9th Cir 1982) (concluding evidence in possession of FBI was in "government" control within meaning of Rule 16). To hold otherwise would impose upon prosecutors the affirmative obligation to procure information the defendant asserts is material and exculpatory in all circumstances. Nothing in this Court's holding in *State v. Warren* suggests such a radical expansion of prosecutors' obligations.

"The state initiates criminal prosecutions in order to punish for misconduct." *State ex rel Upham v. Bonebrake*, 303 Or 361, 367, 736 P2d 1020 (1987). While the state cannot deny criminal defendants their constitutionally-guaranteed procedural rights, *id.*, the state need not collect information that may only be obtained by search warrant for the possible benefit of the defense. No

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probable cause); *see generally* Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 Geo Wash L Rev 1208, 1212–14, 1218–23 (2004) (explaining the various warrant, subpoena, and notice requirements for e-mails, content files, records, and logs stored by internet service providers).

court has found such information to be within the prosecutor's "control" for discovery purposes. *See, e.g., United States v. Gatto*, 763 F2d 1040, 1047-49 (9th Cir 1985) (rejecting defendant's argument that documents in the possession of a cooperating state agency were within the federal prosecutor's "control" within the meaning of FRCrP 16; and concluding that "the triggering requirement under rule 16(a)(1)(C) is that the papers, documents, and tangible objects be in the actual possession, custody or control of the government"). For this Court to find otherwise would fundamentally alter the criminal justice system—turning the prosecutor into an agent of the defense, diluting constitutional protections including the freedom from unreasonable searches and the right to privacy, and abruptly shifting the balance that voters enshrined in the Oregon Constitution nearly two decades ago. Or Const, Art I, § 42(1) (adding constitutional rights for crime victims in part to "ensure that a fair balance is struck between the rights of crime victims and the rights of criminal defendants").

III. The Trial Court Had No Authority to Compel the Prosecutor to Apply for a Search Warrant in Order to Obtain Information Protected by the Electronic Communications Privacy Act.

The trial court ultimately concluded that it had no authority to compel the prosecutor to apply for a search warrant for J.B.'s Google search history.

While the court did not identify the authority for its conclusion, its ruling must be affirmed on both constitutional and factual grounds.

A. A judicial order directing the prosecutor to exercise her discretion to apply for a search warrant would violate the separation of powers provision of the Oregon Constitution.

The trial court was correct when it ultimately concluded that it was without authority to order the prosecutor to obtain a search warrant for J.B.'s Google search history. That is because the prosecutor and police are within the executive department of government, and a member of the judicial department may not exercise a function of the executive department without express constitutional authority:

> "The powers of the Government shall be divided into three seperate [sic] departments, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided."

Or Const, Art. III, § 1.

Article III, section 1, prevents an officer in one branch of government from exercising power constitutionally assigned to a different branch. *State ex rel Frohnmayer v. Oregon State Bar,* 307 Or 304 310, 767 P2d 893 (1989); *see also Marbury v. Madison*, 5 US 137 (1 Cranch 137), 170, 2 L Ed 60 (1803) ("The province of the court is, solely, to decide on the rights of individuals, not

to enquire how the executive, or executive officers, perform duties in which they have a discretion."). The power to apply for a search warrant has been assigned exclusively to officers in the executive branch of government – only a prosecutor or police officer may apply for a search warrant under Oregon law. ORS 133.545(5). Therefore, a violation of Article III, section 1, would have occurred if the trial court – a member of the judicial department – ordered the prosecutor – a member of the executive department –to apply for a search warrant. *See Eacret et ux v. Holmes*, 215 Or 121, 125-126, 333 P2d 741 (1958) ("[I]t is not within judicial competency to control, interfere with, or even [] advise the Governor when exercising his power to grant reprieves, commutations, and pardons. The principle of the separation of powers written into the constitution by Article III, § 1 forbids it.").

While the court may review the prosecutor's exercise of discretion to apply for a search warrant under limited circumstances,[7] there is no precedent for a court's review of a prosecutor's discretion to decline to apply for a search warrant. Moreover, this Court has repeatedly rejected efforts to compel the

[7] For example, a prosecutor's application for search warrants only for members of a protected class might be challenged on equal protection grounds. *See, e.g., State v. Savastano*, 354 Or 64, 309 P3d 1083 (2013) (discussing constitutional authority and limitations of prosecutors).

government to obtain evidence or to gather information for a criminal defendant.

In *State ex rel Roach v. Roth*, 293 Or 636, 652 P2d 779 (1982), this Court held that the trial judge in a pending criminal case lacked authority to order Children's Services Division to make child victims available for pretrial interview by defense investigator, finding no statutory source of authority for the judge to issue an order requiring the victim be made available to defendant. "The pretrial discovery rules of ORS 135.805 to 135.873 do not extend to the present order to CPS. Without a source of authority there is no general power, merely by virtue of conducting a trial, to order persons how to conduct themselves outside the courtroom." *Id.* at 639.

In a mandamus action in a separate case, but on indistinguishable facts, the Court was presented with, and rejected, ORS 1.010(5)[8] as a potential source of statutory authority for the order rejected in *State ex rel Roach v. Roth*. *State ex rel Roach v. Olsen*, 295 Or 107, 663 P2d 767 (1983).

Defendant acknowledges that his proposed rule of law is unprecedented. But it is more than just unprecedented – it is contrary to decades of

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[8] ORS 1.010(5) states: "Every court of justice has power * * * [t]o control, in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto."

jurisprudence limiting the prosecutor's obligation to obtain or produce evidence for the defendant. This Court found no constitutional requirement that the prosecutor "affirmatively assist the defense by ordering the witness to be present for a pretrial interview" in *State ex rel Upham v. Bonebrake*, 303 Or 361, 366, 736 P2d 1020 (1987), and found a trial court order directing the prosecutor to produce 53 children for interviews by defendant's agents to be without basis in statutory, constitutional, or decisional law in *State ex rel O'Leary v. Lowe*, 307 Or 395, 769 P2d 188 (1989). This Court should not chart new territory that invades prosecutorial discretion.

B. Even if the trial court had the authority to direct the prosecutor to obtain information for the defense, such authority exists only for evidence that is material to the defense, and the victim's Google search history was not.

Due process imposes upon the government an obligation to disclose material evidence favorable to an accused. *Brady v. Maryland*, 373 US 83, 87, 83 S Ct 1194, 10 L Ed 2d 215 (1963).[9] Evidence is material if it has a

[9] This obligation exists only for evidence within the government's possession, custody, or control. *Brady* does not require prosecutors to help defendants investigate and secure evidence outside of their control. *See, e.g., United States v. Tadros*, 310 F3d 999, 1005 (7th Cir 2002) ("*Brady* prohibits suppression of evidence, it does not require the government to act as a private investigator and valet for the defendant, gathering evidence and delivering it to opposing counsel."); *Bellinger v. United States*, 127 A3d 505, 521 (DC 2015) ("'If the government does not possess the requested information, there can be no *Brady* violation.'[] *Brady* 'does not imply the government's duty to investigate – and

"reasonable probability" of affecting the outcome of the proceeding. *United States v. Bagley*, 473 US 667, 682, 105 S Ct 3375, 87 L Ed 2d 481 (1985). The evidence at issue in this case is the victim's actual Google search history, which the prosecutor did not have, and which was not within the prosecutor's "control" for the reasons set forth above.

Even if this Court were to find the victim's Google search history to be within the prosecutor's "control" for *Brady* purposes, reversal is required only if the court determines that there is a reasonable probability that the result of the trial would have been different had the information been available to the defense. *Bagley*, 473 US at 684. The Court of Appeals expressed its inclination to find 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*." *State v. Bray*, 281 Or App at 600 (italics in original). Because the Court of Appeals concluded that it did not need to rely on its inclination due to its conclusion that the prosecutor's *Brady* obligation does not extend to evidence in the possession of a private entity, the Court of Appeals did not review the Google search evidence for materiality. *See id.* Should this Court reach the issue of materiality, a review of the Google search

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come to know – information which the defendant would like to have but the government does not possess.'").

evidence in the trial court record will lead to the conclusion that the Court of Appeals' inclination was correct.

During the state's case-in-chief, J.B. testified that she had done research about rape before she reported the defendant's assault on her to police:

> Q. Now, did you do any research about rape, about the Defendant before you reported it?
>
> A. Yes.
>
> Q. Can you tell us about that.
>
> A. I was under the impression that the Defendant was an anesthesiologist, and I was also under the impression that there was one hospital in Bend. I didn't realize that BMC and St. Charles were different at the time. I was afraid that I would be walking into a hospital with co-workers and friends of the man who just raped me. I wanted -- I tried to find out if he was, in fact, Thomas Bray and that he was, in fact, an anesthesiologist, and I didn't find much of anything.
>
> Q. How did you try to find that out?
>
> A. I just searched it on the internet.
>
> Q. His name?
>
> A. Correct.
>
> Q. Okay. What else did you look into?
>
> A. I -- what I looked at, I was trying to decide what – what you do when you are raped, what do you

need to do, what happens to you, and I looked that up.

Q. So how did you look that up?

A. I searched for like rape in Oregon, just key words I thought would get -- give me the information of what happens to you when you report.

Q. And did you find out anything?

A. I felt largely unsuccessful. There is nothing that I found on the internet that says step-by-step this is what happens to you. I just knew that -- I concluded that I needed to go to the police.

Q. And did you conclude that based on something you found on the internet?

A. No. I just -- I was -- I feared that the police might not believe me. Mr. Bray told me it was my fault when he was raping me, and I was frightened to go -- I -- I don't get in trouble. I don't go to the police, and so I made the decision - -

Q. To call the police?

A. Yes, because I knew that I would never forgive myself if I didn't tell the police what happened and let the Defendant do this to somebody else.

(Tr 1142-1144)

The defendant's attorneys did not ask J.B. a single question about the content of her Google searches. (Tr 1149-1192, 1196-1257, 1263-1267) Instead, they undertook an impeachment-by-innuendo strategy that sought to

paint J.B. as a gold-digger who falsely accused the defendant of raping her after she engaged in consensual "rough sex" with him in order to capitalize on his perceived wealth. The defendant was given wide latitude at trial to present this defense, through extensive cross-examination of J.B. and the other State's witnesses. His chosen factfinder rejected his defense after considering all the testimony and physical evidence presented, including photographs depicting the significant physical injuries sustained by J.B. in the attack, and medical evidence describing her injuries.

The defendant has offered nothing but speculation to support his assertion that J.B.'s actual search history might have changed the outcome of his trial. While the trial court made findings that the Google search records were *exculpatory*, it made no finding as to *materiality*, and both are required before due process imposes an obligation on a court to fashion a remedy for nonproduction. Should this Court reach the question of whether J.B.'s Google search history was material evidence to which the defendant was constitutionally entitled, a review of the trial court record will demonstrate that it was not.

IV. Dismissal of a Criminal Prosecution for a Prosecutor's "Protracted Resistance" to an Unconstitutional Order is Not Warranted.

The prosecutor in this case resisted an unconstitutional order to apply for a search warrant for information protected by J.B.'s constitutional right to refuse a defense discovery request. *See State v. Bray*, 352 Or 34, 37, 279 P3d 216 (2012) (observing that the prosecutor and J.B. challenged the trial court orders directing J.B. to produce information concerning internet service provider and Google records as violating J.B.'s constitutional right to refuse defense discovery requests under Or Const, Art I, § 42(1)(c)); *State v. Bray*, 352 Or 809, 291 P3d 727 (2012) (observing that prosecutor and J.B. challenged trial court's post-trial order directing J.B. to place a clone of her hard drive under seal in the trial court record). A prosecutor's entitlement to assert a crime victim's constitutional rights, at her request, was enshrined in the Oregon Constitution by 75% of Oregon voters in 2008.[10] Or Const, Art I, § 42(4); Ballot Measure 51 (2008). A prosecutor's effort to protect a crime victim's constitutional rights is not a choice, it is a legal duty, and as such is not prosecutorial misconduct, nor grounds for reversal.

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[10] May 20, 2008 Primary Election results, found at http://sos.oregon.gov/elections/Documents/results/results-5-2008.pdf (last accessed September 19, 2017).

Properly, neither the trial court nor the Court of Appeals found grounds for dismissal due to the prosecutor's failure to procure the Google search history for the defendant. *See State v. Bray*, 281 Or App at 593-95. While critical of the prosecutor's chosen mechanisms for resisting the trial court's orders, the Court of Appeals did not err in rejecting the defendant's argument; a prosecutor's defiance of an unconstitutional order should not be grounds for reversal of a conviction. *See In re Providence Journal Co*., 820 F2d 1342 (1st Cir 1986) (reversing a newspaper's criminal contempt conviction because the temporary restraining order violated was unconstitutional under the First Amendment); *Bobb v. Mun. Court*, 143 Cal App 3d 860, 192 Cal Rptr 270 (1983) (reversing contempt conviction of prospective juror held in contempt for refusing to respond to discriminatory question by the trial judge); *Johnson v. Virginia*, 373 US 61, 83 S Ct 1053, 10 L Ed 2d 195 (1963) (reversing contempt conviction for refusal to comply with a segregated seating requirement in a courtroom); *see also State v. Bray*, 31 Or App 47, 569 P2d 688 (1977) (reversing trial court order suppressing the testimony of a police officer because of prosecutor's alleged noncompliance with discovery obligations where no noncompliance occurred).

CONCLUSION

The trial court correctly rejected defendant's attempt to compel the prosecutor to apply for a search warrant to obtain information desired by the defense both because information that can be obtained only by warrant is not within the prosecutor's control and because such an order would violate the separation of powers provision of the Oregon Constitution.

The trial court was also correct in rejecting the defendant's motion to dismiss on grounds of prosecutorial misconduct because a prosecutor's resistance of unconstitutional orders and constitutionally-mandated advocacy for crime victims is not misconduct.

For these reasons and those set forth by the State in its brief, the Court of Appeals' rulings on the issues appealed by the defendant must be affirmed.

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Respectfully submitted,

s/ Erin K. Olson
Erin K. Olson, OSB 934776
Law Office of Erin Olson, P.C.
2014 N.E. Broadway Street
Portland, OR 97232
Tel: (503) 546-3150 / Fax: (503) 548-4435
E-mail: eolson@erinolsonlaw.com

Attorney for Amicus Curiae the National Center for Victims of Crime

s/ Margaret Garvin
Margaret Garvin, OSB 044650
Amy C. Liu, OSB 101232
National Crime Victim Law Institute at
Lewis & Clark Law School*
1130 S.W. Morrison St., Suite 200
Portland, OR 97205
Tel: (503) 768-6953
E-mail: garvin@lclark.edu, aliu@lclark.edu

*Law School is not *amicus* and is listed for location purposes only

Attorneys for Amicus Curiae National Crime Victim Law Institute

s/ Rosemary W. Brewer
Rosemary W. Brewer, OSB 110093
Oregon Crime Victims Law Center
7412 S.W. Beaverton-Hillsdale Hwy #209
Portland, OR 97225
Tel: (503) 208) 8160
E-mail: Rosemary@ocvlc.org

Attorney for Amici Curiae Crime Victim J.B. and the Oregon Crime Victims Law Center

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 4,910 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 October 3, 2017, I 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 RESPONDENT 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 October 3, 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:

Jennifer S. Lloyd, OSB 943724
Attorney for Petitioner on Review State of Oregon

Kendra M. Matthews, OSB 965672
Attorney for Respondent on Review

s/ Erin K. Olson
Erin K. Olson, OSB 934776
Attorney for Amicus Curiae National Center for Victims of Crime