IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Adverse Party, v. DEAN RAMIZ MACBALE, Defendant-Relator.	Clackamas County Circuit Court No. CRll 00933 Supreme Court No. S060079

BRIEF OF AMICUS CURIAE THE NATIONAL CRIME VICTIM LAW INSTITUTE IN SUPPORT OF STATE OF OREGON

The Honorable Eve L. Miller

Clackamas County Circuit Court Judge

JOHN HENRY HINGSON III
710821
409 Center Street
P .O. Box 1448
Oregon City, OR 97045
Phone: (503) 656-0355
Attorney for Defendant-Relator

MARGARET GARVIN, J.D. #044650
Executive Director
Amy Liu, J.D. #101232
Staff Attorney
National Crime Victim Law Institute at
Lewis & Clark Law School*
310 SW 4th Ave, Suite 540
Portland, Oregon 97204
Phone: (503) 768-6819
Counsel for Amicus Curiae
*Law School is not *amicus* and is listed for location purposes only

JOHN KROGER # 077207
Attorney General
ANNA MARIE JOYCE #0131 12
Solicitor General
MICHAEL A. CASPER # 062000

Continued…

Assistant Attorney General
1162 Court Street NE
Salem, OR 97301-4096
Phone: (503) 378-4402
Attorneys for Plaintiff-Adverse Party

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STATEMENT OF AMICUS CURIAE

Amicus curiae 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; researching and analyzing developments in crime victim law; and assisting crime victims by providing information on 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.

This case involves issues that are fundamental to the rights and interests of Oregon crime victims, including victims' rights to justice, privacy, and protection; to be accorded due dignity and respect; and to fair and impartial treatment in the criminal justice system. This Court's ruling on the constitutionality of the *in camera* hearing provision of OEC 412, Oregon's Rape Shield Law, will have far-reaching impact on all victims of sexual assault. NCVLI submits this brief in aid of the Court's task of analyzing and determining the correct rule of law in this matter.

QUESTION PRESENTED ON APPEAL

Whether OEC 412's *in camera* procedure is an administration of justice within the meaning of Article I, section 10, of the Oregon Constitution?[1]

INTRODUCTION

This Court has repeatedly recognized that the open administration of justice requirement of Article I, section 10 of the Oregon Constitution was never intended to "guarantee[] the right of public access to all judicial proceedings." *State ex rel. Oregonian Pub. Co. v. Diez*, 289 Or 277, 284, 613 P2d 23 (1980); *accord Oregonian Pub. Co. v. O'Leary*, 303 Or 297, 303, 736 P2d 173 (1987) (concluding that "not every proceeding involving the administration of justice, in the general sense of that term, need be open to the public" under section 10).[2] Such a construction is buttressed by common law tradition of closed court proceedings that existed at the time that section 10 was

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[1] Defendant-Relator also argues that OEC 412's *in camera* provision violates Article I, section 11, of the Oregon Constitution, and the First and Sixth Amendments of the U.S. Constitution. While amicus curiae does not address those issues in this brief, amicus curiae agrees with the arguments raised by the state that *in camera* proceedings under OEC 412 do not violate any constitutional guarantees.

[2] Construing section 10's open administration of justice provision broadly has historical support. *See, e.g.*, Jonathan M. Hoffman, *By the Court of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 Or L Rev 1279, 1289, 1308-16 (1995) (concluding that historical research strongly indicates that the open courts provision was meant to promote and protect the judiciary as an independent branch of the government and that there is no historical basis for the assumption that drafters of Article I, section 10 of the Oregon Constitution intended for section 10 to be divided into "two distinct subparts: an "'open courts' clause and a 'remedies' clause").

adopted. *See, e.g., Diez*, 289 Or at 284 (concluding that closed jury deliberations and collegial court conferences "should be read into the section" as historical exceptions to the open administration requirement because those proceedings were closed to the public in 1859).[3]

The Court has also suggested that the administration of justice may require a closed proceeding in certain situations where the proceedings at issue involve rights or interests that rise to "a constitutional dimension." *O'Leary*, 303 Or at 305 (observing that the prosecution witness's interest in secrecy to protect against public disclosure of incriminating information "is not of a constitutional dimension" given that the government could alleviate the witness's difficulty by providing immunity).

In the twenty-five years since *O'Leary*, the crime victims' rights landscape in Oregon and across the country has changed dramatically, giving rise to rights and interests that rise to constitutional dimension.[4] Between 1987

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[3] *Cf. Gannett Co., Inc. v. DePasquale*, 443 US 368, 387, 99 S Ct 2898, 61 L Ed 2d 608 (1979) (finding that "there is substantial evidence" that indicates pretrial proceedings were closed to the public at common law); *id at* 395 (Chief J. Burger, concurring) (discussing the practice of recording testimony before trial in the Eighteenth Century and observing that "until trial it could not be known whether and to what extent the pretrial evidence would be offered or received" yet "no one ever suggested that there was any 'right' of the public to be present at such pretrial proceedings").

[4] Today, more than 30 states have amended their constitutions to afford victims' rights. *See* Paul G. Cassell, *Treating Crime Victims Fairly: Integrating Victims into the Federal Rules of Criminal Procedure*, 2007 Utah L Rev 861, 866 & n 17 (2007).

and 2011, the Oregon legislature enacted a number of statutory protections for crime victims, *see, e.g.*, ORS 147.410 - 147.438; and the people of this state adopted constitutional victims' rights amendments that "preserve and protect," *inter alia*, crime victims' rights to "justice" and to be treated with "due dignity[,] *** respect *** and *** fair[ness]," Or Const, Art 1, §§ 42, 43. And last year, this Court issued a landmark decision confirming that a crime victim was entitled to a remedy for violations of her victims' rights. *State v. Barrett,* 350 Or 390, 255 P3d 472 (2011). In sum, Oregon law mandates that the criminal justice system accommodate crime victims' rights; and the administration of justice requires courts to strike the proper balance of crime victims' rights, defendants' rights, and state interests.

Given this framework, the only way to administer justice within the meaning of Article I, section 10 of the Oregon Constitution is to uphold the validity of the *in camera* procedure in OEC 412, Oregon's rape shield statute. If this Court were to invalidate the *in camera* provision and compel Oregon sexual assault victims to have every aspect of their sexual pasts examined in open court, the Court will eviscerate a key protection that has been afforded under Oregon's rape shield law for more than 35 years — namely, protection against unwarranted public disclosure of inadmissible evidence concerning the victims' sexual histories. *See State v. Blake,* 53 Or App 906, 916-19, 633 P2d 831 (1981), *rev dismissed,* 292 Or 486 (1982) (discussing the legislative history

of Oregon's rape shield law). Further, invalidating the *in camera* procedure would result in the loss of sexual assault victims' federal constitutional right to privacy and state constitutional rights to justice and protection; to be accorded due dignity and respect; and to fair and impartial treatment in the criminal justice system. Article I, section 10 of the Oregon Constitution "'does not demand, and no proper policy counsels, *** sacrifice[s] of such dimensions.'" *Id.* at 919 (quoting Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 Colum L Rev 1, 95-96 (1977)).

STANDARD OF REVIEW

This Court reviews a lower court's interpretation of the constitutionality of a statute for legal error. *State v. Rangel*, 328 Or 294, 298, 977 P2d 379 (1999). "Every statute is presumed to be constitutional, and all doubt must be resolved in favor of its validity." *Milwaukie Co. of Jehovah's Witnesses v. Mullen*, 214 Or 281, 293, 330 P2d 5 (1958).

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ARGUMENT

I. AN *IN CAMERA* HEARING UNDER OEC 412 IS A PROPER ADMINISTRATION OF JUSTICE WITHIN THE MEANING OF ARTICLE I, SECTION 10 OF THE OREGON CONSTITUTION.[5]

A. Crime Victims Have Constitutional Rights to Justice, Protection and Privacy; and to be Treated with Due Dignity, Respect and Fairness; and an *In Camera* Procedure is Required to Ensure that Oregon's Criminal Justice System Accommodates Both Crime Victims' Rights and Defendants' Rights.

The Oregon Constitution guarantees that crime victims have a right to "justice." Or Const, Art I, § 10 (mandating that "justice shall be administered *** completely"); Or Const, Art I, § 42(1) (reaffirming that crime victims have "the right *** to justice"). Under section 10, the term "justice" refers to "'giving to *everyone* what is his [or her] due.'" *State v. Vasquez*, 336 Or 598,

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[5] Defendant-Relator asserts that the "no court shall be secret" phrase should "stand apart from all the words that follow," including the "administration of justice" phrase in section 10. (Rel Br at 13). Defendant cites no historical support for this proposition and little support apparently exists. *See, e.g.*, Hoffman, Or L Rev at 1289, 1308-16. One commentator, Professor David Schuman (currently the Honorable David Schuman on the Oregon Court of Appeals), has opined that the drafters of section 10 took the "justice shall be open" language found "in the earliest American Bills of Rights" and changed it to the "'[n]o court shall be secret'" language found in section 10 because "Oregon evidently took 'open' to mean 'non-secret' or 'accessible to scrutiny' instead of 'nonexclusive' or 'accessible to all regardless of ability to pay.'" David Schuman, *Oregon's Remedy Guarantee: Article I, Section 10 of the Oregon Constitution*, 65 Or L Rev 35, 38 (1986). However, the cited authority for this proposition does *not* support Professor Schuman's opinion. *Compare id.* & n 17 (citing William McKechnie, Magna Carta: A Commentary on the Great Charter of King John 27-47 (2d ed 1914) ("McKechnie on the Magna Carta")) *with* McKechnie on the Magna Carta 27-47, *available at* http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=338 (discussing the years 1213-1216 and events leading up to the Magna Carta).

604, 88 P3d 271 (2004) (discussing Article I, section 10, and the meaning of "justice" at the time the Oregon Constitution was adopted) (emphasis added). That administering justice requires courts to accommodate both crime victims' rights and defendants' rights comports with the constitutional mandate "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), 43(1).

Oregon crime victims also have the constitutional rights to protection; to be treated with due dignity and respect; and to fair and impartial treatment in the criminal justice system. Or Const, Art I, § 42(1) (providing a crime victim with the right to be accorded "due dignity and respect"' and to be assured 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, § 43(1)(a) (guaranteeing a crime victim "[t]he right to be reasonably protected"). Additionally, Oregon crime victims have a federal constitutional right to privacy that encompasses an "individual interest in avoiding disclosure of personal matters." *Whalen v. Roe*, 429 US 589, 599, 97 S Ct 869, 51 L Ed 2d 64 (1977); *see Roe v. Wade*, 410 US 113, 152, 93 S Ct 705, 35 L Ed 2d 147 (1973) ("[A] right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.").

When evaluating whether OEC 412's *in camera* procedure is an administration of justice within the meaning of Article I, section 10 of the Oregon Constitution, this Court must accommodate crime victims' constitutional rights to justice, protection and privacy; to be accorded due dignity and respect; and to be treated with fairness. *See* Or Const, Art I, §§ 42(1), 43(1). *Cf. Brown v. Bd. of Educ. of Topeka, Shawnee County, Kan.*, 347 US 483, 492-93, 74 S Ct 686, 98 L Ed 873 (1954) ("In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted ***.We must consider [the legal and social landscape] in the light of [their] full development and [their] present place in American life[.]"). Such accommodation may properly require *in camera* proceedings. *Cf. Press-Enter. Co. v. Superior Court*, 464 US 501, 510-12, 104 S Ct 819, 78 L Ed 2d 629 (1984) (recognizing that in some cases, the presumption of openness of criminal trials may be overcome by the possible impairment of prospective jurors' "legitimate privacy interests" and thereby justify the use of an *in camera* procedure during *voir dire*).

As described more fully below, in sexual assault cases, OEC 412's *in camera* procedure strikes a proper balance of crime victims' rights, defendants' rights, and state interests. Invalidating the procedure would render Oregon crime victims' rights meaningless and offend the mandate that "justice shall be administered *** completely." Or Const, Art 1, § 10.

B. OEC 412's *In Camera* Provision Supports the Administration of Justice.

Rape is a "seriously underreported crime";[6] and it remains a "significant social and health problem" in this country.[7] It is well documented that the underreporting can be attributed to the victims' fear of (1) the unfair treatment that they may receive from the criminal justice system (where the victims' moral character, as opposed to defendant's conduct, is on trial) and (2) the public disclosure of not only their victimization but also intimate details of their sexual histories. *See, e.g.*, Marah DeMeule, Note, *Privacy Protections for the Rape Complainant: Half a Fig Leaf*, 80 ND L Rev 145, 148-49 (2004); Paul S. Grobman, Note, *The Constitutionality of Statutorily Restricting Public Access to Judicial Proceedings: The Case of the Rape Shield Mandatory Closure Provision*, 66 BU L Rev 271, 276, 298-99 (1986).

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[6] Patricia Tjaden and Nancy Thoennes, U.S. Dep't of Justice, Office of Justice Programs, Nat'l Inst. of Justice, *Extent, Nature, and Consequences of Rape Victimization: Findings From the National Violence Against Women Survey* ("*Extent, Nature, and Consequences of Rape Victimization*") 1, 33 (Jan. 2006), *available at* http://www.ncjrs.gov/pdffiles1/nij/210346.pdf (finding "only 19.1 percent of the women and 12.9 percent of the men who were raped since their 18th birthday said their rape was reported to the police"); *accord Rape in the United States: The Chronic Failure to Report and Investigate Rape Cases: Hearing before the S. Comm. on the Judiciary Subcomm. on Crime and Drugs*, 11 (Sept. 14, 2010), *available at* http://judiciary.senate.gov/pdf/10-09-14KilpatrickTestimony.pdf (statement of Dean G. Kilpatrick) (observing that "[m]ost rape cases (over 80%) are still not reported to police, indicating that this remains a chronic problem that we must address").

[7] Tjaden & Thoennes, *Extent, Nature, and Consequences of Rape Victimization* at 1 (documenting "an epidemic of rape" in this country).

Until the recent decades, a rape victim could expect to have every aspect of her sexual past thoroughly examined in open court. *See, e.g.,* Clifford S. Fishman, *Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior*, 44 Cath U L Rev 711, 714-16 (1995) (describing the state of the law pre-rape shield reform in the 1970s). The theory behind this practice was that if the victim had engaged in sexual activity before, she might be predisposed to submit to similar activity on another occasion, thus making it less likely that the victim was raped as opposed to having engaged in consensual sex. *See id.*; DeMeule, 80 ND L Rev at 148. Often, the crux of such an examination was no more than a character assassination. *See* Harriet R. Galvin, *Shield Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 Minn L Rev 763, 794 (1986). Defense attorneys would insinuate that because of the victim's sexual past, she must have enjoyed the act, or she must have "asked for it" or "wanted it" and was now lying about having been raped because she was embarrassed or because she had ulterior motives. *See id.* This practice turned the usual course of legal proceedings on its head, diverting its proper attention on defendant's conduct to the victim's conduct. Victims, afraid of being re-traumatized by the legal system, stopped reporting rapes. *See, e.g., id.* at 795-96; Grobman, 66 BU L Rev at 275. The result was that rape – although on the rise – was one of the most underreported and underprosecuted of crimes. *See id*.

In the 1960s and 1970s, a legal reform movement began to address the unnecessary public disclosure and use of victims' past sexual history in rape trials, and this movement resulted in the passage of rape shield legislation across the country.[8] In 1975, the Oregon legislature joined the reform movement and enacted a rape shield law to protect sexual assault victims and encourage the victims' cooperation in the prosecution of sexual assault crimes. *See Blake,* 53 Or App at 916-18 (exploring the legislative history of the 1977 amendment of ORS 163.475, the predecessor to OEC 412, and the *in camera* hearing requirement).

OEC 412 has two principal purposes. *State v. Lajoie,* 316 Or 63, 69, 849 P2d 479 (1993) (upholding the constitutionality of a preclusion of evidence sanction for defendant's failure to comply with OEC 412's notice requirement). First, the statute is designed "to protect victims of sexual crimes from degrading and embarrassing disclosure of intimate details about their private lives," *id.* (internal quotations omitted); and it does so by "'balanc[ing] the interests involved: the interest of the victim of a sexual crime in protecting a private life from unwarranted public exposure[] and the defendant's interest in being able to present adequately a defense by offering relevant and probative evidence'" at

[8] The federal government, all states, and the District of Columbia have adopted rule-based or statutory rape-shield protections. *See, e.g.*, FRE 412; Ark. Code Ann. § 16-42-101; Colo Rev Stat § 18-3-407; NJ Stat Ann § 2C:14-7; NM Stat Ann § 30-9-16; 18 Pa Cons Stat Ann § 3104; Tex R Evid 412; Wash Rev Code Ann § 9A.44.020.

trial, *id.* at 80 (quoting the Legislative Commentary to OEC 412). Second, the statute is designed "to encourage victims of sexual misconduct to report and assist in the prosecution of the crime *** by preventing highly prejudicial evidence from reaching the jury and thus helping to protect jury impartiality." *Id.* (internal quotations omitted) (ellipses in the original).

Protecting the victim by preventing unwarranted public dissemination of otherwise inadmissible evidence lies at the heart of the rape shield law. Once a victim's possibly damaging sexual history is disclosed in an open court, the information is exposed to potential jurors who may form unfair assumptions about the victim's culpability before trial, even if the trial court were to rule that such information is inadmissible at trial. *See, e.g.*, Megan Reidy, Comment, *The Impact of Media Coverage on Rape Shield Laws in High-Profile Cases: Is the Victim Receiving a "Fair Trial,"* 54 Cath U L Rev 297, 300-01, 319 (2004). Such damaging and unfair disclosure could reach the potential jury pool in an amazingly short amount of time during this modern era of rapid transmission of information by way of the media and the Internet (including the use of online social network platforms such as Facebook and Twitter). And knowledge of the possibility of such public disclosure can be "a major cause of the reluctance of women to report rapes or to participate in the prosecution." *Blake*, 53 Or App at 917 (quoting then-Senator Biden's testimony in support of the passage of Rule 412 of the Federal Rules of Evidence, the federal rape shield law) (internal

quotations omitted). In short, closing the OEC 412 evidentiary hearing to the public is the *only* effective method of achieving the legitimate purposes behind Oregon's rape shield law and ensuring the proper administration of justice. [9]

Contrary to this, Defendant-Relator asserts that *O'Leary* dictates opening such proceedings. (Rel Br at 17). Relator's assertion appears to rest on the fact that *O'Leary* rejected the notion that the witness's "secrecy interest" rises to the level of "a constitutional dimension" so as to warrant the closed hearing. (*Id.* at 19 (emphasizing the decision's "secrecy interest" discussion)). This argument is flawed because *O'Leary* is distinguishable.

In *O'Leary*, the prosecution witness refused to testify at trial on the ground that his testimony would incriminate him. 303 Or at 299-300. The state moved to compel the witness to testify, and the trial court held the hearing

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[9] Sexual assault victims, like the general public, also have a constitutional right to access the courts. *See Chappell v. Rich*, 340 F3d 1279, 1282 (11th Cir 2003) ("Access to the courts is clearly a constitutional right, grounded in the [right to petition clause of the] First Amendment, the Article IV Privileges and Immunities Clause, the Fifth Amendment, and/or the Fourteenth Amendment"); *Ryland v. Shapiro*, 708 F2d 967, 971 (5th Cir 1983) (noting access to courts is a fundamental right). To the extent that requiring the OEC 412 hearings to be held in public would cause a chilling effect on the victims' willingness to report and prosecute sexual assault crimes, the requirement would also impair victims' right to access the courts. *See* Cari Fais, Note, *Denying Access to Justice: The Cost of Applying Chronic Nuisance Laws to Domestic Violence*, 108 Colum L Rev 1181, 1220-21 (2008) (discussing cases that support construing the First Amendment right to petition to "protect[] individuals seeking access to the court and access to the aid of law enforcement" and courts that have expressed "concern[] that exposing people to [certain damaging consequences] based solely on reporting activities to law enforcement would have a 'chilling effect' on other people's willingness to report criminal activity to the police").

outside the presence of the public and the jury as required by ORS 136.617. *Id.* at 300. In the face of a constitutional challenge under Article I, section 10 of the Oregon Constitution, the Court disagreed with the trial court's conclusion that the witness's "'secrecy' interest" justified the courtroom closure. *Id.* at 304-05. The Court observed that "[a]ny secrecy interest the witness may have in not disclosing incriminating information is not of a constitutional dimension." *Id.* at 305. The Court explained that the right at issue "has nothing to do with secrecy" for secrecy is unnecessary "so long as immunity or some other acceptable substitute is provided" by the state. *Id.* In other words, the state created the "need" for secrecy by not offering the witness immunity from prosecution. *See id.*

In contrast, in a rape shield situation an *in camera* hearing is the *only* means by which to obviate the harm that an open evidentiary hearing would cause to both the victim and the public.[10] Unlike *O'Leary*, where a "remedy" for the situation existed (in the form of immunity from prosecution), once private, damaging and inadmissible information about a victim's sexual history is "let out of the bottle," there is no plausible way for a court to fashion a remedy for the crime victim. Such a result would also violate the constitutional mandate that "[e]very victim *** shall have remedy by due course of law for violation of a right established in this section." Or Const, Art I, §§ 42(3)(a),

[10] The public harm would be the diminished administration of justice.

43(5)(a); *accord Barrett*, 350 Or at 407 (concluding that "[t]he victim was entitled to a remedy by due course of law under Article I, section 42(3)(a)" for a violation of her rights).

The interests that the Court must weigh in rape shield cases include the crime victims' constitutional rights to justice, privacy, protection; to be accorded due dignity and respect, and to be treated with fairness. The only way to effectuate the constitutional rights to which sexual assault victims are entitled is to conclude that OEC 412's *in camera* proceeding *is* an administration of justice within the meaning of Article I, section 10 of the Oregon Constitution.

CONCLUSION

As Justice Cardozo once cautioned:

> "[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.

Snyder v. Massachusetts, 291 US 97, 122, 54 S Ct 330, 338, 78 L Ed 647 (1934), *reaffirmed by Payne v. Tennessee*, 501 US 808, 827, 111 S Ct 2597, 2609, 115 L Ed 2d 720 (1991); *accord Morris v. Slappy*, 461 US 1, 14, 103 S Ct 1610, 1618, 75 L Ed 2d 610 (1983) ("[I]n the administration of criminal justice, courts may not ignore the concerns of victims."). Oregonians amended the Oregon Constitution to reaffirm the fundamental principle that administration of justice requires striking a "fair balance" between crime victims' rights and defendants' rights. Or Const Art 1, §§ 42(1), 43(1). And

OEC 412's *in camera* procedure was designed to strike that fair balance. *Cf. Lajoie*, 316 Or at 80 (concluding that OEC 412 is "an elaborate and comprehensive scheme" created to protect sexual assault victims and the legislature achieved its purpose with a process that carefully "'balances the [victims' and defendants'] interests'"). Invalidating OEC 412's *in camera* procedure would offend every notion of justice, fairness, due dignity and respect afforded victims by the laws and policies of this state. Therefore, the Court must conclude that the *in camera* hearing *is* an administration of justice within the meaning of Article I, section 10 of the Oregon Constitution. For the foregoing reasons, the Court should affirm the trial court's order denying defendant's motion to permit the public to attend the OEC 412 hearing.

Respectfully submitted,

_____

Margaret Garvin, J.D. #044650
Amy C. Liu, J.D. #101232
National Crime Victim Law Institute at
Lewis & Clark Law School*
310 SW 4th Ave, Suite 540
Portland, Oregon 97204
Phone: (503) 768-6819

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

CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

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Margaret Garvin

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on May 16, 2012, I sent the original plus 15 copies of the foregoing BRIEF OF AMICUS CURIAE THE NATIONAL CRIME VICTIM LAW INSTITUTE IN SUPPORT OF THE STATE OF OREGON via FedEx 2-day delivery to:

APPELLATE COURT ADMINISTRATOR
Appellate Court Records Section
Supreme Court Building
1163 State Street
Salem, OR 97301-2563
Phone: (503) 986-5555

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Dean Ramiz MacBale
Attorney:
JOHN HENRY HINGSON III
409 Center Street
P .O. Box 1448
Oregon City, OR 97045
Phone: (503) 656-0355

State of Oregon, Plaintiff-Adverse Party
Attorneys:
JOHN KROGER
Attorney General
ANNA MARIE JOYCE
Solicitor General
MICHAEL A. CASPER
Assistant Attorney General
1162 Court Street NE
Salem, OR 97301-4096
Phone: (503) 378-4402

Jeff Hanson
Paralegal for *Amicus Curiae*
National Crime Victim Law Institute