IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. CARYN ALINE NASCIMENTO, aka Caryn Aline Demars, Defendant-Appellant Petitioner on Review.	Jefferson County Circuit Court Case No. 09FE0092 CA A147290 SC N005211

PETITION FOR REVIEW OF DEFENDANT-APPELLANT

Petition to review the decision of the Court of Appeals
on an appeal from a judgment of the Circuit Court
for Jefferson County
Honorable George W. Neilson, Judge

Opinion Filed: February 4, 2015
Author of Opinion: Armstrong, Presiding Judge
Before: Armstrong, Presiding Judge, and Nakamoto, Judge, and Egan, Judge

Brief on Merits will be filed if review is allowed.

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PETITION FOR REVIEW

Petitioner on review, defendant-appellant below and defendant hereafter, respectfully asks this court to review and reverse the decision of the Court of Appeals in *State of Oregon v. Caryn Aline Nascimento*, 268 Or App 718, 343 P3d 654 (2015). The Court of Appeals affirmed defendant's convictions and sentence in a written opinion on February 4, 2015. A copy of the decision of the Court of Appeals is attached at ER-1-5.

The issue on appeal is whether ORS 164.377(4), a provision of Oregon's "computer crime" statute, makes it a crime for an employee to use a work computer in a way that violates her employer's computer use policy.

STATEMENT OF HISTORICAL AND PROCEDURAL FACTS

The Court of Appeals summarized the historical facts in its opinion:

> "In October 2007, defendant was hired to work at the deli counter in a convenience store. The store had a touch-screen lottery terminal that produced draw-game tickets and was connected by phone line to the Oregon Lottery network. From the terminal, a clerk could print out a ticket for a selected game, and also could print ticket-sales reports. The store manager trained defendant on the use of the lottery terminal and authorized defendant to sell lottery tickets to, and validate tickets for customers, because deli clerks would assist at the counter when the counter employee was busy or on break, even though it was not their job. The general manager testified, however, that operating the lottery terminal and cash register was not part of defendant's job description as a deli clerk and that defendant did not have authorization to use the terminal. Store policy prohibited employees from purchasing lottery tickets or validating their own lottery tickets while on duty.

> "About a year after defendant was hired, the store manager fell a few months behind in reconciling daily lottery ticket sales with the store's cash receipts. In February 2009, she discovered shortfalls in cash receipts for lottery sales of Keno tickets between November 2008 and February 2009, which prompted the general manager to investigate his records and involve the police. The investigation uncovered that large shortfalls and high-dollar wagers on Keno occurred only during defendant's shifts. The store's surveillance video showed that, when no one was around, defendant would leave the deli counter and print out and pocket lottery tickets from the lottery terminal. One of the high-dollar winning tickets printed during defendant's shift was redeemed by her by mail, and others were redeemed by her at a local grocery store."

Nascimento, 268 Or App at 719-20.

The state charged defendant with, *inter alia*, one count of computer crime under ORS 164.377(4), which provides, "Any person who knowingly and without authorization uses, accesses or attempts to access any computer, computer system, computer network, or any computer software, program, documentation or data contained in such computer, computer system or computer network, commits computer crime."

In moving for a judgment of acquittal, defendant argued that she "did not unlawfully and knowingly without authorization use and access a computer system operated by Tiger Mart store, that being the lottery machine" because she was authorized to use that machine.The prosecutor acknowledged that defendant "did have some apparent authority to operate the machine" but argued that defendant's particular use of the machine was "unauthorized."

The trial court denied defendant's motion without explanation.

In the Court of Appeals, defendant argued that she was authorized to use the lottery computer and was, therefore, not guilty of using or accessing a computer system "without authorization." App. Br. at 12. The Court of Appeals affirmed defendant's conviction. The court quoted from the state's brief its argument that "a jury could reasonably conclude that defendant's use of the lottery machine was 'without authorization' because 'she had no authorization to use the lottery computer to purchase a lottery ticket for herself during her work shift—much less to steal a lottery ticket by printing it and not paying for it.'" *Nascimento*, 268 Or App at 721. The court characterized defendant's framing of the issue as "whether ORS 164.377(4) encompasses conduct that (1) only involves a person accessing a device itself without authorization or (2) also encompasses using a device, which the person otherwise has authorization to physically access, in a manner contrary to company policy or against the employer's interests." *Id.* at 722. The court then declined to answer that question:

> "Under the circumstances of this case, however, we need not resolve that issue. There is evidence in the record that defendant's store manager gave defendant limited authorization to physically access the lottery terminal to only sell tickets to, and validate tickets for, paying customers and only when the counter employee was not available to do so. This is not the case that defendant tries to make it out to be. This is not a case where defendant had general authorization to be on a computer to carry out her duties, but then used that computer in a manner that violated company policy—

> such as, to use defendant's example, by playing solitaire during work hours. For defendant's duties, the lottery terminal had but one function: to sell and validate lottery tickets. There was evidence from which the jury could conclude that she was authorized to access the physical device itself—the lottery terminal—only to serve paying customers."

Id.

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question Presented

Does an employee who is authorized by her employer to use a computer violate ORS 164.377(4) by using the computer for an impermissible purpose?

Proposed Rule of Law

The legislature intended ORS 164.377(4) to criminalize hacking into a computer which a person has no right to access. When an employee has permission to use an employer's computer system in the course of her employment she is authorized to use that computer. Even if she uses the computer for an impermissible purposes this does not render her use "without authorization."

REASONS FOR ALLOWING REVIEW

This case presents an important issue of first impression for this court that has the potential to impact a wide range of Oregonians: the proper construction of ORS 167.377(4). The Court of Appeals decision in this case leaves in place state's expansive interpretation of that statute – that the statute

criminalizes playing solitaire on a work computer when doing so is against the employer's rules. The state acknowledged that this was its position at oral argument in the Court of Appeals. The legislature did not intend to sweep so broadly. Enacted in an era when computers had obtained none of their current ubiquity, the purpose of ORS 167.377(4) was to bar computer *hacking*, not the misuse of a work computer.

Even if 167.377(4) was intended to bar a broad range of conduct, this court should take the opportunity to fully explicate the range of covered conduct. The Court of Appeals opinion does not do that. Instead, the Court of Appeals purported to avoid deciding the central issue in this case, holding that, because there was evidence in the record that defendant's right to physically access the computer was limited, she had no right to "access" the computer in the manner she did, and thus accessed the computer without authorization. The problem with the court's holding is that it engaged in circular reasoning to avoid the central question presented by this case – whether violating a computer-use policy renders use of a computer criminally "unauthorized." The court's decision had the effect of cementing the state's interpretation of the statute without applying a rigorous analysis of the statute.

This case is an ideal vehicle for this court to interpret 167.377(4). It is free from preservation defects or procedural obstacles. The factual record is well-established and clearly presents the issue. Although the vice president of

the corporation that owns the convenience store that employed defendant testified that defendant's work duties did not include using the lottery terminal, uncontradicted testimony from defendant's immediate supervisor established that defendant was trained on and authorized to use the lottery terminal and did not describe any limitation on her right physically access the machine. Thus, the appropriate interpretation of the statute is squarely presented here.

Finally, the Electronic Frontier Foundation has communicated an intent to file an *amicus* brief if review is allowed in this case. The Electronic Frontier Foundation "is the leading nonprofit organization defending civil liberties in the digital world." About EFF, https://www.eff.org/about (last accessed April 23, 2015).

ARGUMENT

Defendant provides a brief argument below and intends to file a brief on the merits if this court allows review.

ORS 164.377(4) provides "Any person who knowingly and without authorization uses, accesses or attempts to access any computer, computer system, computer network, or any computer software, program, documentation or data contained in such computer, computer system or computer network, commits computer crime." The question presented by this case is whether a person's use of a computer he or she permission to use is rendered "unauthorized" when he or she takes an unpermitted action on that computer.

Because the legislative history and plain text of the statute establish that it was meant to target people who hack into a computer without permission, not those who misuse a work computer, this court should hold that merely violating an employer's use policy does not render a person unauthorized to use a computer under ORS 164.377(4).

When interpreting a statute, this court employs the methodology explained in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-13, 859 P2d 1143 (1993), with the modification recognized by *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). That requires this court to discern the legislature's intent by first examining the text and context of the statute. *Id.* This court then examines any legislative history offered by the parties. *Gaines*, 346 Or at 171-72. If the legislature's intent remains ambiguous, this court turns to maxims of statutory construction. *Id.*

The legislature did not define the terms "authorization" or "without authorization" in the computer crime statute. When a term is not defined by statute, this court will assume that the legislature used the natural and ordinary meaning of the words in the statute, and will consult a dictionary to determine the meaning. *State v. Ausmus*, 336 Or 493, 504, 85 P3d 864 (2004).

"Authorization" is defined as "**1 :** the act of authorizing **:** the state of being authorized." *Webster's Third New Int'l Dictionary* 146 (unabridged ed 1993).

"Authorize" is defined as

> "**1 a :** to endorse, empower, justify, or permit as by some recognized or proper authority * * * : **2** *obs* **:** to vouch for **:** confirm the truth or reality of by alleging one's own or another's authority **3** *obs* **:** to give legality or effective force to (a power, instrument, order) **4 a :** to endow with authority or effective legal power, warrant, or right **:** appoint, empower, or warrant regularly, legally, or officially * * * ."

Webster's Third New Int'l Dictionary p. 146 (unabridged ed 1993). It is likely that the legislature intended the first definition because it did not specify that "authorization" must come from a particular source or come in a particular form. The first definition captures the ordinary use of the word.

Here, under the most appropriate meaning of "authorize," defendant was "authorized" to use the lottery computer at the convenience store because she was specifically given permission to do so by her direct supervisor, trained to do so by her supervisor, and expected to do so as a part of her work duties.

This court should also consider the persuasive authority of the Ninth Circuit's interpretation of the analogous Computer Fraud and Abuse Act (CFAA)[1] in *LVRC Holdings LLC v. Brekka*, 581 F3d 1127, 1132 (9th Cir. 2009)

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[1] That statute makes a crime when, *inter alia*, a person "(4) knowingly and with intent to defraud, accesses a protected computer *without authorization, or exceeds authorized access*, and by means of such conduct furthers the intended fraud and obtains anything of value, unless the object of the fraud and the thing obtained consists only of the use of the computer and the value of such use is not more than $5,000 in any 1-year period" (emphasis added).

and *United States v. Nosal*, 676 F3d 854, 856 (9th Cir. 2012). In *Brekka*, a company sued[2] a former employee, *Brekka*, under provisions of the CFAA which require establishing that a person "intentionally accesses a computer without authorization or exceeds authorized access" and that a person "accesses a protected computer without authorization, or exceeds authorized access[.]" In construing the text of that statute, the Ninth Circuit held that "an employer gives an employee 'authorization' to access a company computer when the employer gives the employee permission to use it. Because LVRC permitted Brekka to use the company computer, the 'ordinary, contemporary, common meaning' * * * of the statute suggests that Brekka did not act 'without authorization.'" *Brekka*, 581 F3d at 1133 (citation omitted).

Nosal involves the question of whether a person who uses a computer for a purpose not permitted by his employer in a use policy has violated the provisions of the CFAA that bar either unauthorized computer access or access that "exceeds" authorization. The majority in that *en banc* decision noted that the government agreed that accessing a computer "without authorization" under the CFAA referred only to "hacking" into a computer without any authorization to use it. 676 F3d at 858. However, the court went farther and held that even the broader provision which bar certain actions when a person "exceeds authorized

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[2] The CFAA is a criminal statute under which a party may also bring also bring a civil action. 18 USC § 1030(g).

access" on a computer *also* only applies to "hacking" and *not* to violating employer use restrictions, although the majority acknowledged that other federal circuits had reached the opposite conclusion. *Id.* at 863. In reaching its conclusion, the majority emphasized some of the dangers of "basing criminal liability on violations of private computer use policies":

> "Employees who call family members from their work phones will become criminals if they send an email instead. Employees can sneak in the sports section of the New York Times to read at work, but they'd better not visit ESPN.com. And sudoku enthusiasts should stick to the printed puzzles, because visiting www.dailysudoku.com from their work computers might give them more than enough time to hone their sudoku skills behind bars."

Id. at 860.

Thus, the Ninth Circuit easily determined that a person who has permission to use a computer does not access a computer "without authorization" even when taking some non-permitted action on the computer. This court should similarly construe Oregon's more narrow statute to avoid sweeping a vast range of conduct under the reach of ORS 164.377(4).

CONCLUSION

Defendant respectfully requests that this court allow review and reverse the decision of the Court of Appeals.

Respectfully submitted,

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EXCERPT OF RECORD INDEX

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
CARYN ALINE NASCIMENTO,
aka Caryn Aline Demars,
Defendant-Appellant.

Jefferson County Circuit Court
09FE0092; A147290

George W. Neilson, Judge.

Argued and submitted March 22, 2013.

Daniel C. Bennett, Deputy Public Defender, argued the cause for appellant. With him on the brief was Peter Gartlan, Chief Defender, Office of Public Defense Services.

Douglas F. Zier, Senior Assistant Attorney General, argued the cause for respondent. With him on the brief were John R. Kroger, Attorney General, and Anna M. Joyce, Solicitor General.

Before Armstrong, Presiding Judge, and Nakamoto, Judge, and Egan, Judge.*

ARMSTRONG, P. J.

Affirmed.

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* Egan, J., *vice* Wollheim, J.

ARMSTRONG, P. J.

Defendant, a store clerk, accessed a state lottery terminal to create Keno lottery tickets for herself without paying for them. Defendant was convicted of one count of aggravated first-degree theft and one count of computer crime. On appeal, defendant raises a single assignment of error to the trial court's denial of her motion for judgment of acquittal of the computer-crime count. Defendant argues that she did not access the lottery terminal "without authorization," as required by ORS 164.377(4), because, as part of her duties at the store, she was authorized by the store manager to access the machine to sell lottery tickets to paying customers. We conclude that, even under the construction of the statute proffered by defendant, there was sufficient evidence from which the jury could find that defendant accessed the lottery terminal without authorization. Accordingly, we affirm.

"Our standard for reviewing the denial of the motion for judgment of acquittal is whether, viewing the evidence in the light most favorable to the state, any rational trier of fact could have found that the essential elements of the crime had been proved beyond a reasonable doubt." *State v. Paragon*, 195 Or App 265, 267, 97 P3d 691 (2004). With that standard in mind, the facts are as follows. In October 2007, defendant was hired to work at the deli counter in a convenience store. The store had a touch-screen lottery terminal that produced draw-game tickets and was connected by phone line to the Oregon Lottery network. From the terminal, a clerk could print out a ticket for a selected game, and also could print ticket-sales reports. The store manager trained defendant on the use of the lottery terminal and authorized defendant to sell lottery tickets to, and validate tickets for customers, because deli clerks would assist at the counter when the counter employee was busy or on break, even though it was not their job. The general manager testified, however, that operating the lottery terminal and cash register was not part of defendant's job description as a deli clerk and that defendant did not have authorization to use the terminal. Store policy prohibited employees from purchasing lottery tickets or validating their own lottery tickets while on duty.

About a year after defendant was hired, the store manager fell a few months behind in reconciling daily lottery ticket sales with the store's cash receipts. In February 2009, she discovered shortfalls in cash receipts for lottery sales of Keno tickets between November 2008 and February 2009, which prompted the general manager to investigate his records and involve the police. The investigation uncovered that large shortfalls and high-dollar wagers on Keno occurred only during defendant's shifts. The store's surveillance video showed that, when no one was around, defendant would leave the deli counter and print out and pocket lottery tickets from the lottery terminal. One of the high-dollar winning tickets printed during defendant's shift was redeemed by her by mail, and others were redeemed by her at a local grocery store. As relevant to her appeal, defendant was charged with one count of computer crime under ORS 164.377(4),[1] which provides:

> "Any person who knowingly and without authorization uses, accesses or attempts to access any computer, computer system, computer network, or any computer software, program, documentation or data contained in such computer,

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[1] Computer crime is defined in ORS 164.377. Subsections (2) and (3) and provide:

> "(2) Any person commits computer crime who knowingly accesses, attempts to access or uses, or attempts to use, any computer, computer system, computer network or any part thereof for the purpose of:
>
> "(a) Devising or executing any scheme or artifice to defraud;
>
> "(b) Obtaining money, property or services by means of false or fraudulent pretenses, representations or promises; or
>
> "(c) Committing theft, including, but not limited to, theft of proprietary information.
>
> "(3) Any person who knowingly and without authorization alters, damages or destroys any computer, computer system, computer network, or any computer software, program, documentation or data contained in such computer, computer system or computer network, commits computer crime."

The indictment caption provided that defendant was being charged under subsection (2) of ORS 164.377. However, the charging language encompassed the elements of a crime only as provided in subsection (4), which controls. *State v. Blair*, 147 Or App 90, 92 n 1, 935 P2d 1219, *rev den*, 326 Or 58 (1997); *see also State v. Kholstinin*, 240 Or App 696, 707, 249 P3d 133 (2011) (explaining that the defendant had not been charged under the concealment prong of the money-laundering statute, which the evidence may have been sufficient to prove, and reversing the defendant's conviction under the prong of the statute under which he was charged).

> computer system or computer network, commits computer crime."

At the close of the state's case, defendant moved for a judgment of acquittal on the computer-crime count, arguing that her use of the lottery terminal was not "without authorization," because she had "implied if not direct authorization to use the machine ***. And clearly [her] use of the lottery machine itself was with authorization." The trial court denied defendant's motion.

On appeal, defendant reprises her argument that she was "authorized," as that word is used ORS 164.377(4), "to use the lottery computer at [the store] because she was specifically given permission to do so by her direct supervisor, trained to do so by her supervisor, and expected to do so as part of her work duties." Defendant argues that the statute cannot be applied to her conduct because "ORS 164.377(4) does not criminalize committing theft on a computer which a person is otherwise authorized to access"; rather, defendant asserts that that act is criminalized only under ORS 164.377(2)(c), a crime for which defendant was not charged. Defendant argues that subsection (4) is expressly directed at unauthorized *use or access* of a computer, that is, the use of the device itself is unauthorized—it is not directed at taking unauthorized actions on a computer that the person otherwise has authorization to access.

The state does not deny that defendant had limited, implicit authorization from the store manager to access the lottery terminal to sell tickets to paying customers. However, the state responds that a jury could reasonably conclude that defendant's use of the lottery machine was "without authorization" because "she had no authorization to use the lottery computer to purchase a lottery ticket for herself during her work shift—much less to steal a lottery ticket by printing it and not paying for it." The state also points to the legislative history of ORS 164.377, which it argues demonstrates that the legislature intended to "criminalize instances where someone had authorization to use part of a computer system for some legitimate purpose but instead accessed other portions of the system." Citing Tape Recording, House Committee on Judiciary, Subcommittee

1, HB 2795, May 6, 1985, Tape 576 (statement of Sterling Gibson, General Telephone Co.).

This case, as argued by defendant, boils down to whether ORS 164.377(4) encompasses conduct that (1) only involves a person accessing a device itself without authorization or (2) also encompasses using a device, which the person otherwise has authorization to physically access, in a manner contrary to company policy or against the employer's interests. Under the circumstances of this case, however, we need not resolve that issue. There is evidence in the record that defendant's store manager gave defendant limited authorization to *physically access* the lottery terminal to only sell tickets to, and validate tickets for, paying customers and only when the counter employee was not available to do so. This is not the case that defendant tries to make it out to be. This is not a case where defendant had general authorization to be on a computer to carry out her duties, but then used that computer in a manner that violated company policy—such as, to use defendant's example, by playing solitaire during work hours. For defendant's duties, the lottery terminal had but one function: to sell and validate lottery tickets. There was evidence from which the jury could conclude that she was authorized to access the physical device itself—the lottery terminal—only to serve paying customers. Thus, even taking defendant's construction of the statute, there was sufficient evidence in the record from which the jury could rationally conclude that defendant accessed the lottery terminal without authorization.

Affirmed.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Petition length

I certify that (1) this petition complies with the word-count limitation in ORAP 9.05(3)(a) and (2) the word-count of this petition (as described in ORAP 5.05(2)(a)) is 2,475 words.

Type size

I certify that the size of the type in this petition is not smaller than 14 point for both the text of the petition and footnotes as required by ORAP 5.05(4)(f).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Appellant's Petition for Review to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on April 29, 2015.

I further certify that I directed the Appellant's Petition for Review to be served upon Anna Joyce attorney for Respondent on Review, on April 29, 2015, by having the document personally delivered to:

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Respectfully submitted,

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Signed
By Daniel Bennett at 11:02 am, Apr 29, 2015

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