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IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF WASHINGTON

STATE OF OREGON,  
Plaintiff,

v.

ROBERT ANDREW BROWNING,  
Defendant.

Case No. C122076CR

STATE’S MEMORANDUM IN SUPPORT OF  
MOTION *IN LIMINE*

The State of Oregon, by and through Matthew R. McCauley, Senior Assistant Attorney General for the State of Oregon and Special Deputy District Attorney for Washington County, provides this Court with the following points and authorities and argument for the Court's consideration in the above-entitled matter.

**A. Summary of Facts**

Defendant is charged with 14 counts of Criminal Mistreatment in the First Degree (ORS 163.205). The state alleged that defendant, acting with a durable power of attorney over all the financial aspects of Laura Sullivan and Alice Browning’s lives, accessed their accounts and took money from their accounts for his personal use. The facts at trial will show that both Laura Sullivan and Alice Browning were over the age of 65 during the time period alleged and that starting in 2006, Laura Sullivan and Alice Browning were diagnosed with dementia and could not make financial decisions. The state’s evidence will also show that while taking and using the victim’s money, the defendant violated a duty of care inherent in the power of attorney and did so in violation of a bar ethics rule. The state’s evidence would further show that defendant’s use

1 of the money was for his personal benefit and that the use of the funds was not for a purpose  
2 outlined in the power of attorney or to the benefit of the victims.

3 **B. The Elements of Criminal Mistreatment in the First Degree**

4 In its motion *in limine*, the state seeks a ruling finding that the elements of Criminal  
5 Mistreatment in the First Degree (ORS 163.205(1)(b)(D)), as alleged in this matter, **do not**  
6 include an element of theft and that the state is not required to prove that the defendant  
7 committed theft of the victims property (pursuant to the statutory definitions under ORS 164.005  
8 to 164.015 or their associated jury instructions).

9 The State anticipates that the defense will argue to the court and jury that unless the state  
10 proves that the defendant stole money or property or permanently deprived the victim of money  
11 or property then the state has not met its burden of proof. Such a defense is based on the legal  
12 argument that Oregon's Criminal Mistreatment in the First Degree statute, ORS  
13 163.205(1)(b)(D), includes the element of permanent loss or theft. The state rejects this  
14 argument.

15 According to the Uniform Criminal Jury Instructions, Criminal Mistreatment in the First  
16 Degree has the following five elements:

- 17 1. The act occurred in an Oregon county;
- 18 2. The act occurred on or about (dates alleged in the indictment);
- 19 3. (The named victim) is/was an elderly person;
- 20 4. The Defendant owed a legal duty to provide care for and having assumed the permanent  
21 or temporary care, custody, and responsibility of the victim elderly person;
- 22 5. The Defendant violated that legal duty to provide care for the victim elderly person by  
23 knowingly taking and appropriating the victim elderly person's money or property for  
24 any use or purpose not in the due and lawful execution of the person's responsibility.  
25 [emphasis added].

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1           At issue is the meaning of the words “taking” and “appropriating” contained in the fifth  
2 element of the offense and whether the statute as a whole requires a “theft” of property or  
3 whether any taking of money/property (however temporary) not for a use or purpose in the due  
4 and lawful execution of the defendant’s responsibility completes the crime. The state argues that  
5 any possession, use or taking of an elderly person’s money or property that is not in conformance  
6 with a lawful duty to care, constitutes the offense.

7           On first glance, the terms “take” and “appropriate” appear to be repetitive of the language  
8 used in Oregon’s theft statute at ORS 164.005 to 164.015.<sup>1</sup> Used in the context of theft, only the  
9 term “appropriate” is defined. “Taking” is not defined by statute. According to Oregon  
10 Uniform Criminal Jury Instructions the term “Appropriate” property of another to oneself or a  
11 third person, or appropriate means “to exercise control over property of another, or to aid a third  
12 person to exercise control over property of another, permanently or for so extended a period or  
13 under such circumstances as to acquire the major portion of the economic value or benefit of  
14 such property....”

15           Interestingly, “taking” has been defined by the courts but *not* in the context of theft – but  
16 in an elder abuse context. In *Church v. Woods*, 190 Or. App. 112 (2003), the court defined the  
17 term “taking” as used in Oregon’s protection of endangered persons statute (ORS 124.110(1)(a))  
18 and specifically in a case involving a civil action relating to elder fraud. The court found that the  
19 term was not defined anywhere in statute and so turned to the plain meaning of the term. The  
20 court stated: “ORS chapter 124 does not define ‘takes’ or ‘taking.’ The ordinary meaning of  
21 ‘take’ is ‘to transfer into one’s own keeping or to enter into or arrange for possession, ownership,  
22 or use of.” *Woods* at 118. This definition would include temporary “use” or “possession” of  
23 money without a permanent deprivation.

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26 <sup>1</sup> Theft is committed when a person, with the intent to deprive another of property or to appropriate property to the  
person or to a third person, takes , appropriates, obtains or withholds such property from an owner thereof. ORS  
164.015.

1           However, the above analysis of “appropriate” is unsatisfactory because if the drafters of  
2 Oregon’s Criminal Mistreatment statute had wanted to require the equivalent of theft they could  
3 have simply used the word “theft.” Theft of money or property was a statute already in the code  
4 when this section was drafted in 1973 and amended in 1993. The Criminal Mistreatment statute  
5 must therefore be something more than simply theft from an elderly person. Why did the  
6 legislature create a special statute for abuses of elderly and dependent persons and what was their  
7 intent in using the words “take” and “appropriate” as an act outside a caretaker’s duty?

8           **C. Legislative History of Oregon Criminal Mistreatment Statute**

9           Oregon’s Criminal Mistreatment in the first degree statute began life in 1973 with a  
10 rather limited scope addressing only violations of legal duty to provide care by those  
11 “intentionally withholding necessary and adequate food, physical care or medical attention.”  
12 *Senate Amendments to Senate Bill 780, Joint Special Committee on Aging, June 26, 1973.* (See  
13 Exhibit 1 – collected legislative history documents for Criminal Mistreatment in 1973 and 1993).  
14 Twenty years later the legislature re-addressed the Criminal Mistreatment in the First Degree  
15 statute, resulting in the creation of the law in use today. The 1993 Oregon Legislature  
16 commenced work on House Bill 2318 in February of 1993. The stated intent was to expand the  
17 crime of criminal mistreatment in the first degree to include “taking charge of dependent or  
18 elderly person for purpose of fraud, abandonment or financial exploitation of elderly person.”  
19 *Summary of House Measures, January 1993.* The original 1993 proposed bill was originally  
20 entitled as a bill addressing “elder abuse.” Early into the legislative process proponents of the  
21 bill testified about the need to make criminal the financial exploitation of the elderly. Clackamas  
22 County Department of Human Services testified that their main concerns were with 1)  
23 abandonment of elderly persons, 2) embezzling from elderly persons and 3) financial  
24 exploitation of elderly persons. *Testimony to the Subcommittee on Crime, February 22, 1993,*  
25 Exhibit A. The term “financial exploitation” became the operative term throughout the  
26 legislative development of the bill into law. It is helpful to understand that no legislator and no

1 one testifying before the legislature ever used the word “theft” or “appropriate” referring to  
2 Oregon’s theft statute. There simply is no evidence that any member of the committee hearing  
3 the bill or any witness before the committee used or linked Oregon’s theft statute or terms to  
4 Criminal Mistreatment in the First Degree. Oregon’s theft law and terms were never used in  
5 relation to the language of Criminal Mistreatment in the First Degree.

6         Instead, the discussion focused on broader terms and concepts such as the “financial  
7 exploitation” of the elderly. Oregon’s Alzheimer’s Association testified that their constituency  
8 was one of the most vulnerable to financial exploitation. They strongly recommended creating  
9 language that would criminalize “personal financial profiting from a person with cognitive  
10 disorders.” *Testimony before the House Subcommittee on Crime*, February 22, 1993, Exhibit B.  
11 By March of 1993 the committee chair person ordered that “language regarding financial  
12 exploitation be added to the Criminal Mistreatment in the First Degree bill. The first version of  
13 the financial exploitation language made it a crime for a person, in violation of a legal duty to  
14 provide care for an elderly person, to...(D) Spend or use the property or assets of an...elderly  
15 person without the express, voluntary consent of the person or consent of a legally authorized  
16 representative of the person.” *Proposed Amendments to HB 2318*, March 25, 1993, page 2. This  
17 proposed amendment had a flaw however. It would allow people who had obtained power of  
18 attorney authorization to commit financial exploitation without any liability under the proposed  
19 statute because an “authorized representative” could approve the “spending or use” of the  
20 victim’s property. This flaw was pointed out by testimony in relation to the amendment. A man  
21 named Bertrand Copp, representing an association of senior citizens, testified urging different  
22 language. He told the committee that he was concerned the amendment did not address the  
23 fraudulent manipulation of an elder to gain access to their property. He testified that financial  
24 exploitation commonly occurred through the malicious use of a power of attorney “to sell  
25 someone’s property right out from under them.” *Testimony of Bertran Copp, Subcommittee on*  
26 *Crime*, March 31, 1993, Exhibit G.

1 By April, the Subcommittee working on the bill made important changes which appear to  
2 have incorporated Mr. Copp’s concerns. Their work product states that the bill: “expands  
3 Criminal Mistreatment I; Expands Criminal Mistreatment I to elderly persons; Expands Criminal  
4 Mistreatment I to include persons in violation of legal duty who intentionally or knowingly  
5 commit a number of acts; and expand Criminal Mistreatment I to include ‘financial  
6 exploitation’.” *Legislative Committee Services Office Legislative Counsel Memo to*  
7 *Representative Bob Tiernan, Chair of the Subcommittee on Crime, April 21, 1993.* It is in this  
8 report to the Chairman of the committee that the language used today was first introduced.  
9 Legislative Counsel suggested that the committee adopt the following language from  
10 California’s protective services law. The recommendation to use this wording was in direct  
11 response to testimony about the shortcomings, as discussed above, of the last set of amendments.  
12 Legislative counsel wrote: “California protective services law defines financial abuse as: ‘A  
13 person who has the care and custody of, or who stands in a position of trust to an elder or  
14 dependent adult, takes, hides, or appropriates the person’s money or property to any use or  
15 purpose not in the due and lawful execution of his or her responsibility’.” *Id.* This is the first  
16 use of the phrase “takes, hides, or appropriates the person’s money or property to any use or  
17 purpose not in the due and lawful execution of his or her responsibility.” It was adopted to  
18 replace the language with the flaw pointed out by Mr. Copp. Most importantly, the language is  
19 from an elder abuse statute in California – not from Oregon’s theft statute. The key language  
20 was adopted in the final version of the bill presented to the full legislature and passed in June of  
21 1993.

22 The legislative history therefore makes clear that the legislative intent is to have a broad  
23 application of the statute addressing financial exploitation and financial abuse of the elderly.  
24 The legislature structured the law in direct response to concerns about the abuse of powers of  
25 attorney used to gain access to elderly person’s money and property. The legislature adopted  
26 language from California’s protective service law and not from Oregon’s theft statute. Taken as

1 a whole, the history of the law indicates that “financial abuse” and “financial exploitation” do not  
2 require theft as an element of the offense. As noted above, there is not a single reference to  
3 Oregon’s theft statute or the definitions around “theft” in relation to the Criminal Mistreatment I  
4 law. The history shows that the drafters had in mind a plethora of acts which could constitute a  
5 violation of a duty of care that may result in a defendant taking a victims money for a use that  
6 was not for the benefit of the victim elderly person. They conceived of a statute that included  
7 unauthorized use of money as well as hiding of assets. Neither of these scenarios would require  
8 theft – as a permanent deprivation of property. On the contrary, Oregon’s Criminal Mistreatment  
9 in the First Degree statute could be violated by temporary use or hiding of money or property if  
10 such use was shown to be a violation of a duty of care and not in the due and lawful execution of  
11 the defendant’s responsibility to the victim. To exploit an elderly person financially is the crux  
12 of the offense. Hence, the acumen of the offense occurs when a person violates a duty of care  
13 AND **uses** the money or property of an elderly person for a purpose not in the due and lawful  
14 execution of the person’s responsibility.

15 Having this legislative history and intent in mind, it appears best to apply that intent to  
16 statutory interpretation in this matter. Coupling the legislative intent with the definition of  
17 “taking”, as outlined above in *Woods*<sup>2</sup>, results in finding that no “theft” is required to be proved  
18 by the state in order to prove all elements of Criminal Mistreatment in the First Degree.

19 **D. Evidence of Repayment of Money is Irrelevant and Inadmissible**

20 “Relevant evidence” means evidence having any tendency to make the existence of any  
21 fact that is of consequence to the determination of the action more probable or less probable than  
22 it would be without the evidence. ORS 40.150 (ORE § 401.01). As noted above, the elements  
23 of the offense charged in this matter are:

- 24 1. The act occurred in an Oregon county;

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26 <sup>2</sup> The court stated, the ordinary meaning of ‘take’ is ‘to transfer into one’s own keeping or to enter into or arrange for possession, ownership, or use of.’ *Woods* at 118.

- 1        2. The act occurred on or about (dates alleged in the indictment);
- 2        3. (The named victim) is/was an elderly person;
- 3        4. The Defendant owed a legal duty to provide care for and having assumed the permanent
- 4            or temporary care, custody, and responsibility of the victim elderly person;
- 5        5. The Defendant violated that legal duty to provide care for the victim elderly person by
- 6            knowingly taking and appropriating the victim elderly person’s money or property for
- 7            any use or purpose not in the due and lawful execution of the person’s responsibility.
- 8            [emphasis added].

9        The State anticipates that the defendant will argue at hearing and at trial that he either repaid  
10 money taken or would have repaid money taken because he treated the taken money as a loan.  
11 The court should note that there is no evidence that either victim knew that defendant was taking  
12 their money for personal purposes. Furthermore, there is no evidence that either victim  
13 consented, agreed or was even capable of consenting to a loan to the defendant. Nevertheless,  
14 the defendant contends that money taken for his personal use from the victims in this case does  
15 not amount to a criminal act because he borrowed it and intended to repay.

16        Evidence of the defendant’s motive in this case, why he took the money or his intent to  
17 repay, is irrelevant and inadmissible. As the Court of Appeals described in a burglary case,  
18 “Defendant’s motive, that is, why he did what he did, is immaterial to the allegations that he  
19 acted with a conscious objective to commit burglary or with an awareness that his conduct  
20 constituted burglary or theft...The issue was whether defendant acted with a particular state of  
21 mind, not why he had that mental state.” *State v. Troen*, 100 Or App 442, 447 (1990) *rev den*  
22 310 Or 791 (1991). Specifically in matters where a Defendant is claiming a defense based on the  
23 motive to repay taken money the Oregon Court of Appeals disagrees with the Defendant’s theory  
24 of innocence. In *State v. Kelley*, 29 Or. App. 321 (1977) the Court stated that the fact that  
25 defendant assumed an obligation to repay in the future does not preclude a finding of the  
26 requisite intent to permanently appropriate or deprive. *Id.*, at 328. “A defendant’s restitution,

1 repayment or promise to repay is totally irrelevant.” *Id.* Speaking in the context of theft, but  
2 applicable in this case, the court stated, “Theft involves the taking of a specific thing and not the  
3 taking of an abstraction such as value....Thus, the intent to restore value to the owner while  
4 keeping the specific property taken does not preclude a theft conviction<sup>3</sup>.” *Id.*

5 In order to be relevant and admissible defendant’s evidence of his motive to repay must  
6 have a tendency to make a fact of consequence more or less probable. In this case, defendant’s  
7 intent to repay is irrelevant as it has no tendency to make any fact in the alleged crime more or  
8 less probable. Evidence of the taking of money, evidence of the purpose for the taking, the age  
9 and condition of the victim and the nature of relationship between defendant and victim are all  
10 relevant. But the intent to repay does not make any of those facts more or less probable.  
11 Evidence showing the Defendant’s intent or motive to repay taken money is irrelevant and  
12 should be inadmissible at trial.

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DATED this \_\_\_\_\_ day of October, 2012.

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Matthew R. McCauley, OSB #953513  
[matthew.mccauley@doj.state.or.us](mailto:matthew.mccauley@doj.state.or.us)  
Sr. Assistant Attorney General and  
Special Deputy District Attorney  
for Washington County

O. Scott Jackson, OSB #840552  
[o.scott.jackson@doj.state.or.us](mailto:o.scott.jackson@doj.state.or.us)  
Sr. Assistant Attorney General and  
Special Deputy District Attorney  
for Washington County

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26 <sup>3</sup> The court further noted, “A theft is no less a theft and the thief is no less a thief because he gives his unknowing  
victim a mortgage.”