IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. RHONDA COLGROVE, Defendant-Appellant, Petitioner on Review.	Umatilla County Circuit Court Case No. 17CR57106 CA A169952 S068372

PETITIONER'S BRIEF ON THE MERITS

Review the decision of the Court of Appeals
On an appeal from a judgment of the Circuit Court for Umatilla County
Honorable Daniel J. Hill, Judge

Opinion Filed: January 6, 2021
Author of Opinion: Aoyagi, Judge
Before: Armstrong, Presiding Judge, and Tookey, Judge, and Aoyagi, Judge.

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PETITIONER'S BRIEF ON THE MERITS

Introduction

Defendant pleaded guilty to driving under the influence of intoxicants (DUII) and entered diversion for a one-year period. Among other things, the diversion agreement required her to attend a victim impact panel.

Defendant attended a victim impact panel around three weeks after the diversion period ended. She testified that she was unable to attend during the diversion period because she was a working single mother and argued that the court had authority to dismiss the DUII charge in the interest of justice.

The state argued that the diversion statutes, as interpreted by the Court of Appeals, required the court to terminate diversion. The trial court agreed with the state, terminated diversion, and entered a judgment of conviction for DUII.

Defendant appealed and challenged the termination of diversion. She also argued that the issue was reviewable despite her guilty plea. The Court of Appeals assumed that the issue was reviewable and affirmed on the merits, though it did reverse various fees and remand for resentencing. *State v. Colgrove*, 308 Or App 441, 480 P3d 1026, *rev allowed,* 367 Or 347 (2021). The Court of Appeals later rejected defendant's reviewability arguments in other cases. *State v. Redick*, 312 Or App 260, ___ P3d ___ (2021); *State v. Merrill*, 311 Or App 487, ___ P3d ___ (2021).

Questions Presented and Proposed Rules of Law

First Question Presented

Does a trial court have discretion to not terminate DUII diversion when the defendant attends the victim impact panel after the diversion period ends?

Proposed Rule of Law

A trial court may excuse a defendant's failure to attend the victim impact panel during the diversion period.

Second Question Presented

Does ORS 138.105(5) bar appellate review of a trial court's decision to terminate DUII diversion?

Proposed Rule of Law

In a criminal defendant's appeal, ORS 138.105(5) precludes review of a guilty or no-contest plea or a "conviction" based on such a plea. In the context of that statute, "conviction" means "finding of guilt." Thus, defendants who plead guilty may not appeal and challenge their factual guilt but may raise legal challenges to the entry of a judgment of conviction, including the trial court's error in terminating diversion.

Third Question Presented

If ORS 138.105(5) bars review of a court's decision to terminate DUII diversion, does that statute violate Article VII (Amended), sections 1 and 3, of the Oregon Constitution?

Proposed Rule of Law

Article VII (Amended), section 3, gives appellate courts the power and duty to review the lawfulness of trial court judgments whenever the legislature has authorized a party to appeal the judgment. Article VII (Amended), section 1, precludes the legislature from interfering with a court's ability to adjudicate cases. If ORS 138.105(5) precludes review of the lawfulness of a judgment of conviction, it infringes the appellate court's constitutional powers and duties.

Fourth Question Presented

If ORS 138.105(5) bars review of a decision to terminate DUII diversion, does it violate the Fourteenth Amendment to the United States Constitution?

Proposed Rule of Law

The Fourteenth Amendment generally requires that the right to appeal be reciprocal between two parties to a proceeding. Because the state has the right to appellate review of a court's decision *not* to terminate diversion, the Equal Protection Clause and Due Process Clause require that defendants be able to obtain review of a court's decision to terminate diversion.

The Due Process Clause also precludes states from removing traditional protections against erroneous deprivations of liberty without providing adequate substitutes for those protections. One such protection is the ability of defendants who plead guilty to raise purely legal challenges to their conviction on appeal. Removing that protection without providing any substitute violates due process.

Summary of Facts

On August 26, 2017, defendant drove while her blood-alcohol content was 0.22 percent. Tr 4. She pleaded guilty to DUII, and the trial court accepted her plea and allowed her to enter diversion. *Id.*

Defendant's plea petition said the charge would be dismissed if she "fully compl[ied] with the conditions of the diversion agreement within the period authorized by law and by the court." ER-2. Her diversion petition required her to "[a]ttend a victim impact panel as ordered by the court." ER-5. And the court's order allowing her petition required her to attend a victim impact panel, but the line specifying the date she had to attend was left blank. ER-12.

Defendant's diversion period expired on October 18, 2018. On October 24, 2018, the court ordered her to show cause why her diversion should not be terminated because she had failed to pay $335 in fees or attend the victim impact panel. On November 13, 2018, defendant attended a victim impact panel. On December 3, 2018, she paid the remaining fees. Tr 20.

On January 4, 2019, defendant—who had been found indigent—appeared for a show cause hearing. She testified that she did not attend the victim impact panel during the diversion period because she was a working single mother of five young children, she had prioritized her treatment program, and she could not fit the panel into her schedule. Tr 31.

Defendant argued that the court could dismiss the DUII charge "in the interest of justice," that it would not be "equitable" to terminate diversion based solely on her late attendance of the panel, and that the legislature did not intend the statute to be as "inflexible" as the Court of Appeals had held. Tr 20, 36, 40.

The state argued, based on Court of Appeals case law interpreting the diversion statutes, that the trial court had "no authority to do anything other than revoke the diversion agreement, enter the conviction for DUII, and proceed to sentencing." Tr 38-39.

The court reluctantly agreed that it had to terminate diversion:

> "THE COURT: So, these are bad cases, and the case law is replete with judges trying to do the right thing and getting reversed. And what happens in a case like this, for someone like our defendant here today, is a judge bites off on a defense argument and 18 months later you're back in front of the court after the Court of Appeals reverses the judge. Because we have no authority, we have no discretion.
>
> "During the course of time, the legislature has removed judicial discretion on a regular basis. The Court of Appeals properly reviews statutes strictly. And the court—the legislature has not allowed us any discretion.
>
> "From *Vargas-Garcia* in 2007[1] through *State v. Reed*, 241 Or App 47 in 2011,[2] and *Wilson* in 247 Or App 761 in 2012,[3]

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1 *State v. Vargas-Garcia*, 217 Or App 70, 174 P3d 1046 (2007).

2 *State v. Reed*, 241 Or App 47, 249 P3d 557, *rev den,* 350 Or 574 (2011).

3 *State v. Wilson*, 247 Or App 761, 270 P3d 411 (2012), *rev dismissed,* 353 Or 787 (2013).

> and any other cases out there, judges have tried to do this, granted dismissals, and the court—and the state just files its appeal and then it's reversed and you're back to sentencing on the case. So all we do is delay the inevitable on these.
>
> "The state can agree to extend diversion periods. They can agree to do exceptions to the program. But otherwise, time is of the essence of these cases. That means you've got to file the extension within the year and prior to it expiring, unless the state otherwise agrees to extend it. The state can grant additional time or leeway for compliance, but the court does not have that discretion.
>
> "In many cases, the District Attorney runs the show. This is one of those cases where the DA runs the show for these matters. And reversal is, as far as I can tell, simply plain error based on the Court of Appeals results that apply.
>
> "So, there is a violation of the diversion, and therefore diversion gets revoked."

Tr 41-42.

The court proceeded to sentencing. The state agreed that defendant had "presented excellent mitigation evidence," Tr 42-43, and the court imposed what it believed was "pretty much the lowest end of the sentence that can be really provided," Tr 46. The court entered a judgment of conviction for DUII.

Summary of Argument

1. ORS 813.235 allows trial courts to require a victim impact panel as a condition of diversion, but it does not require the panel. Rather, a court has discretion to require the panel or not. And the text and context of the statute show that it does not impose a timing requirement—it does not require the

defendant to attend the panel during the diversion period or preclude the court from waiving the panel after the diversion period has ended.

Here, the trial court required a victim impact panel but did not specify when defendant had to attend it. Defendant attended the panel shortly after the diversion period ended. Under those circumstances, defendant fulfilled the conditions of her diversion. The fact that she attended the victim impact panel after the diversion period did not violate ORS 813.235 or the diversion agreement. Alternatively, if the diversion agreement required defendant to attend the panel within the diversion period, both the statute and contract law principles permitted the court to excuse her belated attendance. The court's failure to recognize its discretion caused it to err in terminating diversion.

2. In a criminal defendant's appeal, ORS 138.105(5) precludes review of a guilty or no-contest plea or a "conviction" based on the plea. "Conviction" has two legal meanings: a finding of guilt based on a plea or verdict, or a judgment of conviction that states the finding and sentence. In the context of ORS 138.105(5), "conviction" means "finding of guilt." Conviction usually has that meaning in statutes governing criminal procedures—such as appeals—whereas it means judgment of conviction in statutes governing collateral consequences or collateral review. Other parts of ORS chapter 138 are consistent with interpreting conviction as a finding of guilt and inconsistent with interpreting it as a judgment of conviction.

Legislative history supports that conclusion. The evolution of Oregon's criminal appeal statutes contains little evidence that the legislature intended to preclude appellate review of diversion terminations. And the legislature's 2017 revision of the appeal statutes shows that it intended to relax the strict limits on review after a guilty plea that had previously applied. Under ORS 138.105(5), defendants who plead guilty may not challenge their factual guilt, but they may raise other legal challenges to the entry of a judgment of conviction—including the erroneous termination of diversion.

3. Article VII (Amended), section 3, gives appellate courts the power to review trial court judgments. Article VII (Amended), section 1, precludes the legislature from interfering with that power. Under those provisions, the legislature has ample power to decide *appealability*—who may appeal and when. But the legislature has little power to decide *reviewability*—the court's authority to adjudicate a case that is properly before it. Indeed, this court recently held that it may disregard legislative directives about appellate review. If ORS 138.105(5) precludes review of a judgment of conviction, then it unlawfully infringes the appellate court's constitutional power.

4. The Equal Protection Clause and Due Process Clause both include a basic principle of fairness that states cannot arbitrarily let one party appeal but not the other party. If the state can appeal an adverse ruling, then the defendant must have a reciprocal right to appeal. And the state has the right to appellate

review of a trial court's decision *not* to terminate diversion, because ORS 138.105(5) does not limit state's appeals. No rational basis supports denying the defendant a reciprocal right, so the Fourteenth Amendment requires that defendants be able to obtain review of a court's decision to terminate diversion.

The Due Process Clause also precludes states from removing traditional protections against erroneous deprivations of liberty without providing adequate substitutes. One protection is the ability of defendants who plead guilty to raise legal challenges to the judgment on appeal (if state law allows them to appeal). That includes a due process right to appellate review of a diversion termination. Removing that protection without providing any substitute violates due process, so ORS 138.105(5) cannot preclude review of the judgment in this case.

Argument

"Diversion in one form or another has always been practiced informally." *State ex rel Harmon v. Blanding*, 292 Or 752, 760, 644 P2d 1082 (1982). The first statutory diversion program was specifically for DUII. In 1975, the legislature enacted *former* ORS 484.385, *repealed by* Or Laws 1983, ch 338, § 978, which allowed courts to order first-time DUII defendants to undergo rehabilitation upon conviction. If the defendant complied, the court would dismiss the charge; if the defendant failed, the court would enter a judgment of conviction. *State v. Anderson*, 66 Or App 855, 858-59, 677 P2d 39 (1984).

In 1981, the legislature repealed the rehabilitation program and replaced it with diversion, which it initially codified at *former* ORS 484.445 to 484.480, *repealed by* Or Laws 1983, ch 338, § 978, and later placed in ORS chapter 813. Diversion remains in effect today with the following relevant changes:

- In 1987, the legislature enacted ORS 813.235, which authorizes the court to require attendance of a victim impact panel as a condition of diversion.
- Although the initial diversion statutes did not permit any extension of the one-year diversion period, in 1997 the legislature allowed for a single six-month extension. ORS 813.225.
- Although defendants initially could enter diversion without a plea or trial, in 2003 the legislature required defendants to plead guilty or no contest to enter diversion. Or Laws 2003, ch 816, § 1.
- In 2013, the legislature authorized dismissal of the DUII charge if the defendant completed all other diversion conditions within the diversion period but owed less than $500 in fees and paid the fees before the show cause hearing. Or Laws 2013, ch 78, § 1.

DUII diversion is an "agreement between the defendant and the court." ORS 813.230(2). This court establishes statewide requirements for diversion forms, while trial courts make the forms available and inform defendants about diversion during arraignment. ORS 813.200(1) – (3). If the defendant files a diversion petition, the trial court determines whether she is eligible and whether to allow diversion based on factors such as the benefit to the defendant and the community. *See generally* ORS 813.220. Although the prosecutor may object to diversion and request a hearing, ORS 813.210(6), the trial court alone determines whether to allow the petition. If the court allows diversion, it

"[a]ccepts the guilty plea" but "withhold[s] entry of a judgment of conviction." ORS 813.230(1)(a).

If the diversion period ends and the defendant has "fully complied with and performed the conditions of the diversion agreement," the court must dismiss the DUII charge with prejudice. ORS 813.250(3). However, if the court finds by a preponderance of the evidence that "[t]he defendant failed to fulfill all of the terms of the diversion agreement" then "the court shall terminate the diversion agreement and enter the guilty or no contest plea that was filed as part of the petition." ORS 813.255(3)(b).

Here, there is no dispute that defendant qualified for dismissal in all regards except one: she attended the victim impact panel three weeks after the diversion period ended. The first issue on appeal is whether the trial court erred when it concluded that it had to terminate diversion based on that fact. The second issue is whether that ruling is reviewable.

I. The trial court may require a victim impact panel, but it need not require the defendant to attend the panel during the diversion period and may excuse a defendant's failure to do so.

The victim impact panel is a session wherein victims of DUII crashes tell their stories to help offenders understand the consequences of DUII. *See, e.g.*, Exhibit A, Senate Judiciary Committee, SB 887, May 13, 1987 (statement of Washington County DUII Coordinator Linda Todd). As part of the diversion agreement, the trial court may require a defendant to attend the panel:

> "In a county that has a victim impact program *a court may require as a condition of a driving while under the influence of intoxicants diversion agreement that the defendant attend a victim impact treatment session*. If the court requires attendance under this section, the court may require the defendant, as part of the diversion agreement, to pay a reasonable fee to the victim impact program to offset the cost of the defendant's participation. The fee shall be established for each county by the victim impact panel coordinator and steering committee of that county and shall be not less than $5 or more than $50."

ORS 813.235 (emphasis added).

The question is whether a defendant's failure to attend the victim impact panel during the diversion period requires the court to terminate diversion. The answer requires an examination of the diversion statutes, the diversion agreement in this case, and the principles underlying diversion.

A. ORS 813.235 does not require a defendant to attend the victim impact panel during the diversion period or prelude the court from exercising its discretion to excuse late attendance.

The text, context, and legislative history of ORS 813.235 show that the defendant need not attend the victim impact panel within the diversion period for the court to find that the defendant has successfully completed diversion. The text contains two significant features. First, it says the court "may" require a victim impact panel. That shows that the court has discretion to require the panel or not. *E.g.*, *Elkhorn Baptist Church v. Brown*, 366 Or 506, 528, 466 P3d 30 (2020) ("may" confers "discretionary" authority).

Second, the statute contains no timeframe for when the defendant must attend the panel *or* when the court must exercise its discretion. In other words, a defendant who attends the panel after the diversion period has not violated the plain text of ORS 813.235, because the statute does not expressly require attendance within the diversion period. And if the court imposes the panel, nothing in the statute precludes it from later exercising its discretion to waive the panel or excuse the defendant's belated attendance.

Context supports that interpretation. Other diversion statutes do contain timing requirements. *E.g.*, ORS 813.200(4)(d) – (f) (requiring defendant to keep the court informed of their mailing address, not use intoxicants, and not commit DUII "during the diversion period"); ORS 813.210(2), (3) (requiring defendant to pay filing and treatment fees "at the time" they enter diversion); ORS 813.210(4) (requiring defendant to pay attorney fees "prior to the end of the diversion period"). The legislature's decision to require that some conditions be completed "during the diversion period" but *not* impose such a requirement for the victim impact panel suggests that the legislature did not intend to require that defendants attend the panel within a certain time. *See State v. Bailey*, 346 Or 551, 562, 213 P3d 1240 (2009) ("Generally, when the legislature includes an express provision in one statute and omits the provision from another related statute, we assume that the omission was deliberate.").

Legislative history confirms that the legislature did not intend to require a court to terminate diversion based on a defendant's failure to strictly comply with a victim impact panel requirement. The victim impact panel was added to the diversion statutes by Senate Bill (SB) 887 (1987). The bill was introduced on behalf of the Washington County courts, which had been requiring the panel as a probation condition and wanted to require it for diversion and expand the program throughout the state.

Most of the legislature's discussion focused on the accompanying fee, and it shows that the legislature intended to give judges discretion over the victim impact panel requirement. Oregon Judicial Department (OJD) raised concerns about how the fee would be collected and the burden the fee would place on indigent defendants, and it proposed an amendment—which the legislature adopted—that made clear the program and fee were discretionary. Exhibit B, Senate Judiciary Committee, SB 887, May 13, 1987 (testimony of Brad Swank on behalf of OJD); Staff Measure Analysis, House Judiciary Committee, SB 887, June 11, 1987.

Legislative counsel Mark Kramer also noted the constitutional requirement that an indigent defendant's financial circumstances be considered, citing *Fitch v. Belshaw*, 581 F Supp 273 (D Or 1984), which had invalidated an Oregon statute that did not adequately require consideration of the defendant's ability to pay attorney fees. Tape Recording, Senate Committee on Judiciary,

SB 887, May 13, 1987, Tape 139, Side A. Both the OJD spokesperson and the main witness supporting the bill, Washington County District Judge Michael J. McElligott, agreed that the bill's use of the word "may" would give judges sufficient discretion to consider a defendant's financial circumstances. *Id.*

Further discussion established that judges could exercise that discretion at any time. Counsel Kramer asked what would happen if a defendant arrived at the victim impact panel without the fee. Judge McElligott replied that the defendant would be permitted to attend without paying and that their failure to pay, unless accompanied by other violations, would pass without consequence:

> "He'd get in. * * * If it's only $5 and he does everything else that he's supposed to do, he's never going to pay the $5, to be real blunt, because it costs $50 to collect the $5. But if he also doesn't pay some other monies or he also doesn't do some other things that he's supposed to do and therefore he's back in front of me, then I'll collect the $5."

Id.

Although the legislature did not address the question here—what would happen if a defendant attended the panel after the diversion period ended—Judge McElligott's answer reflects that a judge would be able to consider all the circumstances in deciding whether to terminate diversion based on belated compliance with a victim impact panel condition. And the legislature's concern about indigency supports interpreting ORS 813.235 to give courts discretion to excuse late attendance when it results from indigency—as is the case here.

Finally, the legislature's concern about constitutionality supports the interpretation that failure to complete a diversion requirement due to indigency does not require termination. In fact, the Court of Appeals had held exactly that in two opinions shortly before the legislature passed SB 887. In *Anderson*, 66 Or App at 857, the defendant entered the DUII rehabilitation program but was unable to complete it because he could not afford a $150 fee for treatment. The trial court terminated him from the program, but the Court of Appeals reversed. It held that penalizing the defendant for failing to complete rehabilitation due to inability to pay violated the Fourteenth Amendment, so he was entitled to have the DUII charge dismissed. *Id.* at 860-61. The court applied that holding to DUII diversion in *State v. Hunt*, 83 Or App 684, 732 P2d 956 (1987), where it held that a defendant who failed to pay diversion fees was entitled to have the court consider his indigency in deciding whether to terminate diversion.

Anderson and *Hunt* provide further context for ORS 813.235 and confirm that, at least when a defendant is indigent, the court may excuse noncompliance or partial compliance with the victim impact panel. Although legislative history does not reference those opinions, the legislature was concerned with the application of the statute to indigent defendants and discussed a recent federal court opinion on the issue. *Cf. State v. Guzman/Heckler*, 366 Or 18, 30-31, 455 P3d 485 (2019) (explaining that Court of Appeals opinions can provide context even without legislative history discussing them).

The text, context, and history of ORS 813.235 show that it does not impose a time limit and that the court has discretion to excuse a defendant's belated attendance. The next question, then, is whether the diversion agreement in this case imposed some additional timing requirement.[4]

B. The diversion agreement in this case did not require defendant to attend the victim impact panel during the diversion period.

ORS 813.255(3)(b) requires the court to terminate diversion if, at the show cause hearing, "the court finds by a preponderance of the evidence" that the defendant "failed to fulfill all of the terms of the diversion agreement." Applying that provision to defendant's case requires an examination of what the "terms of the diversion agreement" were—and whether the trial court was *compelled* to find that defendant failed to fulfill them.

Again, diversion is an "agreement between the defendant and the court." ORS 813.230(2). It is essentially a contract. As with a plea agreement, a court should interpret the diversion agreement based on both contract law and the defendant's statutory and constitutional rights, which "at times may override contractual principles." *State v. Heisser*, 350 Or 12, 23, 249 P3d 113 (2011). In interpreting such an agreement, the most important consideration is its text. *Id.*

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[4] ORS 813.225 authorizes a six-month extension of the diversion period if the defendant requests an extension during the initial one-year period. But that statute was enacted in 1997 and does not provide context for ORS 813.235 or the 1981 diversion statutes. In any event, ORS 813.225 addresses only *extensions* of the defendant's time to complete diversion conditions, not the court's authority to *waive* or *excuse* conditions.

at 25. In this case, the text of the agreement shows that it did not require defendant to attend the victim impact panel at any particular time.

Most importantly, the diversion agreement includes a space for the court to indicate a date on which the defendant must attend the panel. Here, that space was left blank. ER-12. That signals the court's intent to let defendant attend the panel on a date of her choosing. Indeed, other portions of the agreement did include express timing requirements, which confirms that the victim impact panel was not subject to such a requirement. *See id.* (requiring defendant to make payments every month starting November 1, 2017); ER-6 (requiring defendant to install ignition interlock device and not use intoxicants "during the term of the diversion agreement"). To hold that defendant was required to attend the panel by a particular date would improperly fill in the space the court left blank. *See* ORS 42.230 ("[i]n the construction of an instrument, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted").

Although the diversion agreement says the diversion period runs for one year and ends on a specific date, nothing in the agreement states that defendant had to attend the victim impact panel during that year. To the contrary, the agreement requires her to "[a]ttend a victim impact panel as ordered by the court," which is significant considering the court could have ordered a specific date but did not. ER-5. Moreover, the agreement says that defendant needed to

complete "the conditions of the diversion agreement within the period authorized by law *and* by the court." ER-2 (emphasis added). Because the law allowed defendant to attend the panel after the one-year period ended, and because the court had authority to excuse late attendance, the agreement did not mandate that defendant attend the panel within one year or be terminated.

It is true that the trial court orally said that defendant had to complete all the requirements within one year:

> "Your diversion starts today and will end in one year. You must complete the evaluation, treatment, victim's impact panel, all requirements within one year's time. And so it's important that you get started right away, because you'll have to make sure that you've both completed the classes and paid for them or they won't give you your certificate of completion."

Tr 5.

That oral statement cannot supplant the written terms of the agreement. *See Heisser*, 350 Or at 25-26 (emphasizing priority of written agreement over oral statements); ORS 41.740 (parole evidence rule limits use of oral statements to interpret written agreements). In fact, the court gave defendant a separate paper with a date to attend the panel but said it was "just information" and not mandatory. Tr 7. And the court emphasized that the date was flexible:

> "And if it's like last year, and there's horrible weather and they cancel it, then you can get the new date from the court. You can always go to one in Tri-Cities or Walla Walla earlier, if you wish."

Tr 7.

ORS 813.235 did not require defendant to attend the victim impact panel during the diversion period. The court could have imposed such a requirement but did not. Defendant did not violate the diversion agreement when she attended the panel on November 13, 2018, less than a month after the diversion period ended and nearly two months before the court concluded that it had to terminate diversion.

If there is any ambiguity in the diversion agreement, constitutional principles—including the requirement that defendant's guilty plea must be knowing and voluntary and the prohibition against penalizing her for her indigence—weigh in favor of resolving those ambiguities in defendant's favor. *Cf. State v. King*, 361 Or 646, 659, 398 P3d 336 (2017) (when plea agreement and relevant statutes did not address an unforeseen situation, this court adopted "default rule" in favor of the defendant; noting prior case "when a contract was silent as to the time of performance, this court applied a default rule that performance must be completed within reasonable time"). At minimum, if this court concludes that additional findings are necessary, it should remand to the trial court to make those findings under a correct understanding of the law.[5]

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[5] The trial court's ruling was based solely on Court of Appeals case law interpreting the diversion statutes to require termination. It never had the chance to consider the diversion agreement independently of its erroneous understanding of the statutes. *Cf. Outdoor Media Dimensions Inc. v. State*, 331 Or 634, 659-60, 20 P3d 180 (2001) (explaining that an appellate court may not affirm on basis not raised below if the record could have developed differently).

C. Even if the diversion agreement required defendant to attend the panel during the diversion period, contract principles permitted the court to accept her incomplete performance because the condition was not mandated by statute.

The fact that a DUII diversion agreement is a contract between the defendant and the court is important because, unlike a typical plea bargain where the defendant negotiates with the prosecutor, the parties to the diversion agreement are the defendant and *the court*. As discussed above, the diversion forms are drafted by this court and given to the defendant by the trial court. And the trial court makes the discretionary decision whether to allow diversion and can even do so over the prosecutor's objection.

Most importantly, the trial court decides—to the extent permitted by statute—which conditions to impose. And contract law allows the court, as a party to the agreement, to excuse the defendant's incomplete performance of any condition that is not mandated by statute. *See, e.g.*, *Cross v. Campbell*, 173 Or 477, 493, 146 P2d 83 (1944) ("It is axiomatic that a party to a contract may waive performance of any of its provisions if he so chooses."); *cf. Stein v. Gable Park, Inc.*, 223 Or 17, 26, 353 P2d 1034 (1960) ("Unless prohibited by positive law, a written agreement may be modified, changed or annulled by a subsequent valid agreement of the parties.").

Here, ORS 813.235 did not require the court to impose the victim impact panel in the first place, let alone require the court to impose a time limit on

defendant's attendance. Consequently, the court had authority to excuse defendant for attending the panel a few weeks after the diversion period ended. And nothing in the diversion statutes deprived the court of that discretion just because the diversion period ended.[6]

Like any party to a contract, the trial court was free to conclude that defendant had kept her end of the bargain—that she had done the best she could under the circumstances and that the purposes of diversion had been served. If the court made such a finding, it could have entered a judgment of dismissal instead of a judgment of conviction. Because the trial court failed to recognize that it had that power, this court should remand for it to reconsider its decision. *E.g.*, *State v. Baughman*, 361 Or 386, 409-11, 393 P3d 1132 (2017).

II. ORS 138.105(5) allows review of defendant's challenge to the termination of her diversion, because she does not challenge the validity of her guilty plea or the trial court's factual finding of guilt.

The scope of an appeal involves two questions: appealability and reviewability. "'Appealability' generally concerns whether an appeal may be taken at all. 'Reviewability' concerns what type of decisions and rulings the appellate court may consider in a case that is appealable." *State v. Nix*, 356 Or 768, 772, 345 P3d 416 (2015) (citations omitted).

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[6] In contrast, a court likely could not excuse a defendant's failure to complete diversion requirements that are mandated by statute in all cases, such as a treatment program. ORS 813.200(4)(c). *But see Anderson*, 66 Or App at 860-61 (excusing failure to complete treatment due to indigence).

ORS 138.035 governs appealability in criminal cases when the defendant seeks to appeal. It provides, in relevant part:

> "(1)(a) A defendant may take an appeal from the circuit court * * * to the Court of Appeals from a judgment:
>
> "(A) Conclusively disposing of all counts in the accusatory instrument or conclusively disposing of all counts severed from other counts;
>
> "(B) Convicting the defendant of at least one count; and
>
> "(C) Imposing sentence on all counts of which the defendant was convicted."

ORS 138.035(1)(a).

Here, there is no dispute that defendant has the right to appeal the judgment of conviction under ORS 138.035(1)(a).

ORS 138.105 governs reviewability in a defendant's appeal. It provides, in relevant part:

> "(1) On appeal by a defendant, the appellate court has authority to review the judgment or order being appealed, subject to the provisions of this section.
>
> "(2) The appellate court has authority to review only questions of law appearing on the record.
>
> "(3) Except as otherwise provided in this section, the appellate court has authority to review any intermediate decision of the trial court.
>
> "* * * * *
>
> "(5) *The appellate court has no authority to review* the validity of the defendant's plea of guilty or no contest, or *a conviction based on the defendant's plea of guilty* or no contest, except that:

> "(a) The appellate court has authority to review the trial court's adverse determination of a pretrial motion reserved in a conditional plea of guilty or no contest under ORS 135.335.
>
> "(b) The appellate court has authority to review whether the trial court erred by not merging determinations of guilt of two or more offenses, unless the entry of separate convictions results from an agreement between the state and the defendant."

ORS 138.105 (emphasis added).

Because defendant pleaded guilty, the question is whether ORS 138.105(5) precludes review of her challenge to the termination of diversion. The text, context, and history of ORS 138.105(5) show that it precludes review only of the guilty plea and factual finding of guilt. The legislature did not intend to preclude review of legal errors unrelated to the guilty plea or finding.

A. The text of ORS 138.105(5) shows that it precludes review only of challenges to the guilty plea and factual finding of guilt.

The Court of Appeals has held that ORS 138.105(5) bars appellate review of a trial court's termination of diversion, because it is "clear" that the appellate court has "no authority to review on appeal challenges seeking to invalidate convictions based on pleas." *Merrill*, 311 Or App at 491.

But that analysis overlooks the key question: what is a "conviction"? The statute does not define that term. Because ORS 138.105 governs legal proceedings, the legislature likely intended the term to align with its legal meaning. *See Ogle v. Nooth*, 355 Or 570, 578, 330 P3d 572 (2014) ("when words are used in the context of a legal proceeding * * * we give precedence to

their legal meanings"). And "conviction" has two distinct legal meanings, only one of which supports a conclusion that ORS 138.105(5) precludes review of a trial court's decision to terminate diversion.

> This court has stated the two meanings of "conviction" as follows:
>
> "The first refers to a finding of guilt by a plea or verdict. The second, more technical meaning refers to the final judgment entered on a plea or verdict of guilt. In the latter case conviction has not been accomplished until the judgment is made by the court."

Vasquez v. Courtney, 272 Or 477, 479-80, 537 P2d 536 (1975); *see also Black's Law Dictionary* 408 (10th ed 2014) (defining conviction as "**1.** The act or process of judicially finding someone guilty of a crime; the state of having been proved guilty. **2.** The judgment (as by a jury verdict) that a person is guilty of a crime."); *cf. State v. McDonnell*, 306 Or 579, 582, 761 P2d 921 (1988) ("A 'judgment of conviction' represents the *combined* factual *and* legal determinations that the defendant committed acts constituting a crime and that there is no legal impediment to so declaring[.]" (Emphasis added.)).[7]

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[7] Regular dictionary definitions are not as precise but do distinguish between the two meanings. *See, e.g.*, *Webster's Third New Int'l Dictionary* 499 (unabridged ed 2002) ("the act of proving, finding, or adjudging a person guilty of an offense or crime <[conviction] of the prisoner for burglary>; *specif* **:** the proceeding of record by which a person is legally found guilty of any crime esp. by a jury and on which the judgment is based"); *The American Heritage Dictionary of the English Language* 402 (5th ed 2016) ("**a.** The judgment of a jury or judge that a person is guilty of a crime as charged. **b.** The state of being found or proved guilty: *evidence that led to the suspect's conviction*.").

"Conviction" in ORS 138.105(5) means finding of guilt, not judgment of conviction. This court has consistently applied the first meaning to laws that involve stages of the criminal process and the second meaning only to laws that involve collateral use or consequences of a conviction. For example, this court adopted the "majority view" that conviction means a judgment of conviction when a statute involves "civil penalties and disabilities," but it means a finding of guilt when the statute "'involves either the imposition of a punitive sanction or a criminal procedure.'" *Vasquez*, 272 Or at 480-81 & n 2 (quoting Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 Vand L Rev 929, 953-54 (1970)); *see also Ex Parte Tanner*, 49 Or 31, 35-36, 88 P 301 (1907) (stating general rule that "'conviction,' when used in a statute, means the judicial ascertainment of guilt by plea or verdict," but it means a judgment "when a conviction is made the ground of some disability or special penalty").

Similarly, this court has applied the "general rule" that conviction usually means a guilty finding "'where the context of the statute refers to the successive steps in a criminal case, or any particular stage of such a prosecution as distinguished from the others,'" and it means judgment of conviction "'where the reference is to the ascertainment of guilt in another proceeding, in its bearing upon the status or rights of the individual in a subsequent case.'" *State v. Cartwright*, 246 Or 120, 141, 418 P2d 822 (1966) (quoting *People v. Fabian*, 192 NY 443, 452, 85 NE 672, 675 (1908)); *see also State v. Hoffman*, 236 Or

98, 104, 385 P2d 741 (1963) (holding that "conviction" in sentencing statute meant "the finding of guilt either by plea in open court or the verdict of the jury in a matter then pending," because it was used "to designate a particular stage in a criminal prosecution where the guilt of the defendant has been established").

Here, both of those principles show that conviction means finding of guilt, not judgment of conviction. ORS 138.105 governs criminal procedure, not civil penalties or disabilities. Likewise, a criminal appeal is one stage of a criminal case, not a collateral consequence or proceeding. Both factors establish that conviction means finding of guilt.

Other aspects of ORS 138.105(5) support that construction. The fact that ORS 138.105(5) proscribes review of challenges to *both* the plea *and* the conviction suggests that those words encompass different things. The plea is the defendant's acknowledgement of guilt, whereas the conviction is the court's finding of guilt based on the plea. But a challenge to the plea is necessarily a challenge to the *judgment*, because an invalid plea would make the judgment erroneous.[8] Thus, if "conviction" meant "judgment of conviction," a challenge to the plea would be precluded as a challenge to the conviction. There would be

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[8] "Validity" in ORS 138.105(5) likely means legal sufficiency. *See Black's* at 1784 ("valid" can mean "[l]egally sufficient; binding <a valid contract>"); *Webster's* at 2529 ("valid" can mean "having legal strength or force"). Accordingly, the validity of a plea likely refers to its legal sufficiency, including the requirement that it be knowing and voluntary.

no need to separately preclude review of the plea. Interpreting conviction to mean judgment of conviction would make the word plea redundant. *See, e.g.*, *State v. Cloutier*, 351 Or 68, 104, 261 P3d 1234 (2011) (rejecting construction of statute that "would introduce unnecessary redundancy").

In contrast, interpreting "conviction" to mean "finding of guilt" avoids redundancy by allowing conviction and plea to mean different things. By precluding review of the plea, the statute bars defendants from arguing that their decision to plead guilty was not knowing or voluntary. By precluding review of the conviction, the statute bars defendants from disputing the court's finding of guilt based on the plea. But the statute does not bar defendants from arguing that, notwithstanding their factual guilt, some other legal impediment precludes the entry of a judgment of conviction. Defendant's interpretation avoids redundancy and gives full effect to each word in the statute.

ORS 138.105(5) contains two exceptions to its limit on review that further support the interpretation that conviction means finding of guilt. ORS 138.105(5)(a) allows appellate courts to review "pretrial" rulings "reserved in a conditional plea of guilty or no contest." Conditional pleas commonly involve rulings on motions to suppress. *E.g.*, *State v. Pichardo*, 360 Or 754, 388 P3d 320 (2017) (reviewing denial of motion to suppress statements after defendant entered conditional guilty plea). And appeals from adverse suppression rulings often constitute a challenge to the conviction—*i.e.*, the factual finding of

guilt—because they seek to exclude the facts that support guilt. Thus, under defendant's interpretation of subsection (5), subsection (5)(a) is necessary to preserve a defendant's ability to appeal suppression rulings through a conditional plea. *Cf. Class v. United States*, 583 US ___, 138 S Ct 798, 805, 200 L Ed 2d 37 (2018) ("A valid guilty plea also renders irrelevant—and thereby prevents the defendant from appealing—the constitutionality of case-related government conduct that takes place before the plea is entered.").

But conditional plea appeals cannot challenge rulings that occur *after* the plea, because they are not "pretrial" rulings. No defendant could reserve the right to appeal a post-plea ruling under subsection (5)(a), so a defendant could appeal such a ruling only if it were permitted under subsection (5). Moreover, pretrial rulings often implicate factual guilt, but post-plea rulings—such as termination of diversion—rarely if ever concern the validity of the plea or guilty finding. Thus, the legislature likely intended to allow defendants to appeal post-plea rulings under subsection (5), rather than impose an arbitrary, insurmountable bar to review of such rulings.

ORS 138.105(5)(b) allows the court to review "whether the trial court erred by not merging determinations of guilt of two or more offenses, unless the entry of separate convictions results from an agreement between the state and the defendant." That provision treats "not merging determinations of guilt" as equivalent to "the entry of separate convictions," which equates "convictions"

with "determinations of guilt" and suggests that the legislature understood the terms to be synonymous. *See State v. Carlton*, 361 Or 29, 41, 388 P3d 1093 (2017) (explaining that legislature's use of a "variety of words" to describe out-of-state convictions reflected that the legislature understood the words to be "synonym[s]"). And using the plural "convictions" is inconsistent with the definition "judgment of conviction" because a trial court's non-merger decision does not allow it to enter multiple *judgments*, only separate findings of guilt within a single judgment. *See also* ORS 138.257(4)(a)(A) (addressing appellate court's authority "in a case involving multiple convictions").

Similarly, ORS 138.035(1)(a) allows a defendant to appeal "a judgment" if the judgment "[c]onvict[s] the defendant of at least one count" and imposes sentence "on all counts of which the defendant was convicted." Because "convict" in ORS 138.035 refers to matters *contained in* "a judgment," it likely means the finding of guilt—a judgment can contain multiple guilty findings but cannot contain another judgment. And the legislature enacted both ORS 138.035 and ORS 138.257 as part of the same bill, so it likely intended the same meaning to apply to ORS 138.105(5). Or Laws 2017, ch 529, § 2, 13, 15; *see Tharp v. PSRB*, 338 Or 413, 422, 110 P3d 103 (2005) (explaining that when the legislature uses a term in related sections of the same bill, the term likely means the same thing in each section).

The text and context of ORS 138.105 establish that its limit on review of the conviction means only that the defendant may not challenge the trial court's *finding of guilt*—its determination that the guilty or no-contest plea provides a sufficient factual basis for guilt. An appeal that does not challenge that finding but identifies some other legal impediment to the judgment of conviction is reviewable under ORS 138.105. Here, the record and applicable statutes show that defendant has raised a reviewable challenge to the judgment of conviction, not an unreviewable challenge to the finding of guilt.

B. The "conviction" in a diversion case is the trial court's acceptance of the guilty plea when the defendant enters diversion, not the court's later termination of diversion.

Again, conviction can mean a finding of guilt or the entry of a judgment of conviction. This case includes convictions in both senses. When the trial court terminated diversion, the court entered a judgment of conviction that was a "conviction" in the second sense of the word. That is the conviction that defendant challenges on appeal.

But the other conviction occurred over one year earlier when defendant entered diversion. At that time, the court accepted her guilty plea and admission to the elements of DUII and elicited the prosecutor's representation about her BAC. Tr 4. That is the only time the court ever made findings about defendant's guilt. *Cf.* Tr 42 (court terminated diversion and proceeded to sentencing without addressing guilt). Defendant does not challenge those findings on appeal.

Moreover, the statutes that govern diversion and guilty pleas confirm that the finding of guilt occurs when a defendant enters diversion, not when the court terminates diversion. That is because entry into diversion requires the court to "[a]ccept" the guilty plea. ORS 813.230(1)(a). In contrast, when the court terminates diversion, it merely "enter[s]" the plea. ORS 813.255(3). And acceptance of a plea, not entry of a plea, results in a finding of guilt.

The acceptance of a guilty plea is a judicial function that requires the judge to determine "that the defendant understands the nature of the charge," ORS 135.385(1), and "that the plea is voluntary and intelligently made," ORS 135.390(1). In contrast, entry of the plea is a clerical act performed by a clerk. *See Blackledge v. Harrington*, 289 Or 139, 143, 611 P2d 292 (1980) ("'entry' is an act performed by the clerk" that is "required by statute"); ORS 135.355(1) ("[e]very plea shall be oral and shall be entered in the register of the court in substantially one of the following forms").

It is true that acceptance of the plea does not completely overlap with the finding of guilt. Rather, "[a]fter accepting a plea of guilty or no contest, the court shall not enter a judgment without making such inquiry as may satisfy the court that there is a factual basis for the plea." ORS 135.395; *see also McDonnell*, 306 Or at 582 (identifying "four distinct events: (1) defendant's act of pleading guilty or a jury's act in reporting a verdict of guilty; (2) acceptance

by the trial judge of the guilty plea or verdict; (3) conviction of the defendant on the plea or verdict; and (4) pronouncement and entry of defendant's sentence").

But the finding of guilt results from acceptance of the plea, not entry of the plea. ORS 135.395 requires the judge to make the finding—not the clerk—so it necessarily accompanies the judicial act of accepting the plea rather than the clerical act of entering it. Indeed, this court has cited ORS 135.395 as one of the statutes that governs "receiving" or "accept[ing]" a guilty plea. *McDonnell*, 306 Or at 582; *State v. Evans*, 290 Or 707, 716 n 3, 625 P2d 1300 (1981).

Legislative history confirms that ORS 135.395 "requires a determination by the judge accepting a plea into the accuracy of the plea." Commentary to Criminal Law Revision Commission Proposed Oregon Criminal Procedure Code, Final Draft and Report § 262, 157 (Nov 1972). In other words, the judge who accepts the plea must also make the finding of guilt—which suggests a contemporaneous finding, not one months or years later at a show cause hearing that may occur before a different judge.[9] And the statute was intended to improve the process for accepting pleas, which further supports making the finding at the same time as the plea. *See id.* (explaining that the finding of guilt "provide[s] a more adequate record of the conviction process," "minimize[s] the chances of a defendant successfully challenging his conviction later," and

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[9] Here, the show cause hearing did occur before a different judge.

"allows the court to better evaluate his competency, his willingness to plead guilty, and his understanding of the charges against him").

Indeed, establishing guilt before the defendant enters diversion is the reason the legislature required a guilty plea to enter diversion. The legislature added the guilty plea requirement via SB 302 (2003), which was intended to establish guilt before defendants entered diversion to prevent defendants from failing diversion and then demanding trials. *E.g.*, Staff Measure Summary, Joint Committee on Ways and Means, SB 302, July 11, 2003. That purpose makes clear that the court should make the guilty finding when the defendant enters diversion. Postponing the finding until the court terminates diversion would frustrate the legislature's purpose—for example, it would let a defendant plead no contest, enter diversion, fail diversion, and then months or years later object that the facts recited at the plea hearing did not establish all the elements of DUII and that the court could not find her guilty. *Cf. State v. Gray*, 275 Or 75, 78, 549 P2d 1112 (1976) (noting that a court "could err by entering a plea of guilty which was not substantiated by the record").

Finally, the state's right to appeal in a diversion case confirms that the conviction occurs when the trial court accepts the plea. The state has the right to appeal "[a]n order made *prior to trial* dismissing or setting aside one or more counts in the accusatory instrument" or "[a]n order made *after a guilty finding* dismissing or setting aside one or more counts in the accusatory instrument."

ORS 138.045(1)(a), (i) (emphasis added). The state cannot appeal a diversion case under the first provision because the trial court has already accepted a guilty plea. *See State v. Summers*, 151 Or App 301, 305-06, 948 P2d 754 (1997) (holding that dismissal after court accepts guilty plea is not "prior to trial" under predecessor to ORS 138.045(1)(a)). Consequently, the state's right to appeal in diversion cases—a right it has exercised at least six times in the last fifteen years—depends on the "guilty finding" under subsection (1)(i) occurring when the trial court accepts the defendant's plea. If the acceptance of the plea was not a conviction, then the state could not appeal a subsequent dismissal.

Here, defendant does not challenge the "conviction" addressed by ORS 138.105(5), which is the finding of guilt. None of her arguments in the trial or appellate courts cast any doubt on the fact that she validly pleaded guilty to DUII and is factually guilty of DUII. Defendant challenges only the second kind of conviction—the trial court's entry of a judgment of conviction after it terminated diversion. ORS 138.105(5) does not preclude review of that ruling.[10]

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[10] If the trial court finds that a defendant successfully completed diversion, it enters a judgment of dismissal with prejudice. ORS 813.250. That judgment undoes some—but not all—of the consequences of the prior finding of guilt. For example, the dismissed charge does not count under ORS 813.011, a recidivist statute that makes a person's third DUII in 10 years a felony. On the other hand, the defendant is barred from entering DUII diversion again for 15 years, ORS 813.215(1)(e), and may not have the DUII charge set aside even if it otherwise qualifies for expungement, ORS 137.225(8)(b). And the plea will still be considered a conviction for federal immigration law purposes even after dismissal. *See, e.g.*, *Zazueta v. Barr*, 916 F3d 708, 711 (8th Cir 2019).

C. Legislative history contains little evidence that the legislature intended to preclude review of DUII terminations, whereas the legislature would have known that the 2017 revision to the criminal appeal statutes repealed the provision that had previously barred review.

Before the legislature enacted ORS 138.035 and 138.105 in 2017, several different statutes governed criminal appeals. The history of Oregon's criminal appeal statutes until 2017 provides context for the current statutes, and that history contains little evidence that the legislature ever intended to preclude review of diversion terminations.

1. Appeal statutes and case law from 1864 to 2017 involved many disputes over reviewability after a guilty plea, which the legislature never clearly expressed an intent to limit and this court frequently struggled with.

The legislature authorized criminal appeals in 1864. The statute, which ultimately became *former* ORS 138.040, *repealed by* Or Laws 2017, ch 529, § 26, allowed appellate review of "any actual decision of the [circuit] court, in an intermediate order or proceeding forming a part of the judgment roll." *Cloutier*, 351 Or at 76-77. A defendant who pleaded guilty could not dispute the facts but could "advanc[e] purely legal challenges to the lawfulness of the conviction or the sentence that resulted." *Cloutier*, 351 Or at 77 (citing *State v. Lewis*, 113 Or 359, 361-62, 230 P 543, *on reh'g*, 113 Or 359, 232 P 1013 (1925)).

In 1945, the legislature enacted the statute that became *former* ORS 138.050, *repealed by* Or Laws 2017, ch 529, § 26. It originally limited review after a guilty plea to "'whether an excessive fine has been imposed, or

excessive, cruel or unusual punishment has been inflicted which is not proportionate to the offense.'" *Cloutier*, 351 Or at 78 (quoting Or Laws 1945, ch 62, § 1, compiled at OCLA 26-1304a (1944-1947 Secondary Pocket Part)).

For nearly 70 years, this court struggled with the meaning and application of *former* ORS 138.050, particularly with whether it limited review to the lawfulness of the sentence only. *See generally Cloutier*, 351 Or at 79-104. In particular, in *State v. Jairl*, 229 Or 533, 541-42, 368 P2d 323 (1962), this court *sua sponte* held that the statute "overrule[d]" *Lewis* and limited review after a guilty plea to the lawfulness of the sentence.

Although this court adhered to *Jairl*, it did so "with caution." *State v. Loyer*, 303 Or 612, 614 n 3, 740 P2d 177 (1987). In fact, this court declined to revisit *Jairl* primarily for one reason: the principle that "[w]hen this court interprets a statute, that interpretation becomes 'a part of the statute as if written into it at the time of its enactment.'" *State v. Clevenger*, 297 Or 234, 244, 683 P2d 1360 (1984) (quoting *State of Oregon v. Elliott,* 204 Or 460, 465, 277 P2d 754, *cert den* 349 US 929 (1955)). And this court has since disavowed that principle. *Farmers Ins. Co. v. Mowry*, 350 Or 686, 697, 261 P3d 1 (2011).

In *Clevenger*, this court noted that there was no legislative history explaining *former* ORS 138.050 and that the legislature "might have not intended at all to overrule *Lewis;* it might have intended only to limit the grounds for sentence review, leaving to a defendant the right to raise any

question he could have raised on appeal pursuant to ORS 138.040." 297 Or at 243-44. Two justices concurred, cautioning that *Jairl* "may well have been wrongly decided" but agreeing that *stare decisis* compelled adherence to it. *Id.* at 247 (Linde, J., concurring). The concurrence expressed doubt that the legislature had intended to limit review:

> "The notion that, once a trial court enters a plea of guilty, the validity of the court's action cannot thereafter be reviewed is so improbable that I would expect the legislature to make such a change only explicitly."

Id. at 246 (Linde, J., concurring). And this court later pointed to the *Clevenger* concurrence as expressing the entire court's doubts. *Loyer*, 303 Or at 614 n 3.

In 1989, the legislature enacted *former* ORS 138.222, *repealed by* Or Laws 2017, ch 529, § 26, to govern review of felony sentences. From then on, *former* ORS 138.040 and *former* ORS 138.050 "appl[ied] only to appeal and review of sentences for misdemeanor offenses." *Cloutier*, 351 Or at 91. That included DUII diversion cases, which are misdemeanors.

But defendants could still obtain review of diversion terminations until 2003. That is because the diversion statutes did not require guilty pleas to enter diversion until 2003, so *former* ORS 138.050 did not apply to their appeals. Accordingly, the Court of Appeals routinely reviewed diversion terminations. *E.g.*, *State v. Cardew*, 168 Or App 610, 7 P3d 631 (2000).

Moreover, the legislature likely did not intend—or even know—that the 2003 change would eliminate appellate review of diversion terminations. Rather, the change was aimed at reducing *trial* litigation. *E.g.*, Staff Measure Summary, Joint Committee on Ways and Means, SB 302, July 11, 2003. Proponents and opponents of the bill disputed whether it would decrease costs at the trial level. *E.g.*, Fiscal Analysis of Proposed Legislation, SB 302, June 17, 2003. But no one ever mentioned that it could affect appellate review. In other words, the legislature never expressed an intent to eliminate the existing appellate review of diversion terminations.

The final version of *former* ORS 138.050 provided that a defendant who pleaded guilty had to show that the "disposition [e]xceeds the maximum allowable by law." *Cloutier*, 351 Or at 75. The Court of Appeals held that challenges to termination of diversion were not reviewable under the statute because they did not involve the "disposition." *State v. Landahl*, 254 Or App 46, 59, 292 P3d 646 (2012), *rev den,* 353 Or 788 (2013). The court reached the same conclusion for termination of a conditional discharge, which is essentially diversion for drug offenses. *State v. Herrera*, 280 Or App 830, 841, 383 P3d 301 (2016), *rev den*, 360 Or 852 (2017).

2. In 2017, the legislature rewrote many of Oregon's criminal appeal statutes, including the reviewability provision for guilty pleas, and the history of that decision supports defendant's construction of ORS 138.105(5).

ORS 138.105(5) was part of SB 896 (2017), an overhaul of Oregon's criminal appeal statutes. The bill repealed *former* ORS 138.050 and enacted ORS 138.105, which contains no comparable phrasing. Whereas *former* ORS 138.050 allowed review only of specified challenges to the sentence, ORS 138.105(5) precludes review only of challenges to the plea or conviction. And ORS 138.105(3) otherwise provides "authority to review any intermediate decision of the trial court." The new statute is more like the 1864 law that precluded review of the guilty finding but permitted review of other rulings.

If the legislature intended to keep all the limits of *former* ORS 138.050, it would have been easy to do so. Although the legislature rewrote much of ORS chapter 138, it retained some statutes and incorporated others into the new framework. *See, e.g.*, ORS 138.071 (largely unchanged by the bill); ORS 137.172 (restating provisions of *former* ORS 138.083). The legislature could have retained the language of *former* ORS 138.050. Or, if the legislature wanted to permit sentencing challenges beyond the scope of *former* ORS 138.050 but preclude review of other issues, it could have specified that the appellate court could review "only the lawfulness of the sentence." But the legislature did not retain the limits of *former* ORS 138.050 or anything like them. *Cf. Jones v.*

Gen. Motors Corp., 325 Or 404, 414-15 & n 6, 939 P2d 608 (1997) (noting that when the legislature changes wording it usually intends a different meaning).

Legislative history supports that reading. Most of the discussion focused on the fact that the bill would expand appellate review in misdemeanor cases—the result of repealing *former* ORS 138.050. *See, e.g.*, Audio Recording, Senate Floor Debate, SB 896, June 14, 2017, at 35:16 (statement of Sen Floyd Prozanski), https://olis.oregonlegislature.gov (accessed August 12, 2021) ("The measure provides more opportunity for the appeal of misdemeanor cases, but at this point we're not sure exactly what impact it may have or not have. The number of appeals will increase."). It should come as no surprise that the bill would allow review in misdemeanor cases that were not reviewable before, such as DUII diversion cases.

Other legislative history confirms that legislators would have known that the bill would allow review of termination decisions and that they had sound policy reasons for that result. The bill was originally drafted by an Oregon Law Commission work group, which submitted a report written by Appellate Commissioner James Nass. Exhibit 37, Senate Judiciary Committee, SB 896, April 6, 2017. The report does not discuss the meaning of "conviction" or the reviewability of diversion terminations. Its only explanation of ORS 138.105(5) simply mirrors the text of the provision and says that it "restates" a principle from *former* ORS 138.050:

> "[ORS 138.105(5)] is intended to *restate the principle* currently found in ORS 138.050(1)(a) that where the defendant pleaded guilty or no contest to the offense of which the defendant was convicted, on appeal, *the appellate court may not review the validity of the plea or the conviction*, except when the defendant, under ORS 135.335, has reserved in writing an adverse pre-trial trial court ruling for appeal."

Exhibit 37 at 21 (emphasis added).

That statement does not explain the difference between the text of ORS 138.105(5) and the text of *former* ORS 138.050. Indeed, Nass described the principle in the language of ORS 138.105(5), not *former* ORS 138.050. That fact, combined with the fact that the new law was intended to eliminate some of the restrictions of *former* ORS 138.050, suggests that ORS 138.105(5) carries forward what the work group saw as the core principle of *former* ORS 138.050 but not every application of the statute. That principle is the one defendant has identified: a defendant who pleads guilty cannot challenge their decision to plead guilty or their factual guilt. In contrast, nothing in the work group's report reflects an intent to bar review of rulings unrelated to guilt or innocence.

Moreover, the work group included many experienced criminal practitioners and judges at the trial and appellate levels. Ex 37 at 3-4. Those members presumably would have known the dual meanings of "conviction" and which meaning a court would apply to a statute that governed criminal appeals. The fact that they chose that word to identify what could not be reviewed further supports defendant's construction of the statute.

Indeed, the rest of the work group's submission to the legislature suggests that it intended to make diversion terminations reviewable. In the exhibit containing its report, the work group attached several memoranda written by its individual members. Three of those memoranda showed that repealing *former* ORS 138.050 would likely make diversion terminations reviewable and that the work group likely intended that outcome.

In the most relevant memorandum, Chief Defender Ernest Lannet proposed a change in the reviewability of misdemeanor sentences. Exhibit 37 at 63. He described the limitations of *former* ORS 138.050 that applied to misdemeanor but not felony appeals and listed many cases where review had been unjustly precluded under that statute—including *Herrera*, a diversion termination case. *Id.* at 63-65. Lannet argued that the bill should be amended to remove the distinction between misdemeanor and felony appeals, and he proposed that the work group accomplish that result by removing the restrictive language of *former* ORS 138.050. *Id.* at 64-66. Not only did the work group adopt that proposal, it cited Lannet's memorandum in its report as the explanation for the change. Exhibit 37 at 22.

In another memorandum, law clerk Matt Shoop discussed *Landahl* in detailing the history of the word "disposition" in *former* ORS 138.050. He explained that *former* ORS 138.050 permitted review only of "dispositions" and that *Landahl* had interpreted the word "disposition" to exclude a conviction.

Exhibit 37 at 41-42. Although the discussion of *Landahl* ends there, the rest of the story is telling—the final bill deleted the word "disposition" along with the other restrictions of *former* ORS 138.050. Thus, the legislature would have known that the bill would undermine or abrogate the analysis in *Landahl*.

Finally, Nass expressly called on the work group to abrogate *Herrera* and make conditional discharge revocations reviewable. He "[a]ssum[ed] that the Work Group agrees" that conditional discharge revocations "and other comparable issues * * * should be reviewable regardless of whether the defendant pleaded guilty or no contest." Exhibit 37 at 72. Nass explained that he wanted "to make sure the draft bill implements that policy decision." *Id.* He also noted that while the defendant in *Herrera* had not been permitted to appeal a conditional discharge revocation, the state did have the right to appeal an adverse decision in the same proceeding. *Id.* at 73.

Nass suggested that ORS 138.105(3) could be interpreted to permit review of the revocation, but "it might be preferable to avoid any potential ambiguity." *Id.* at 74. To remove that ambiguity, Nass proposed adding the following language to the bill: "On appeal under [ORS 138.035], the appellate court may review whether the trial court erred in extending a period of probation, imposing a new or modified condition of probation or of sentence suspension, or imposition or executing a sentence upon revocation of probation or sentence suspension." *Id.* Although the final bill did not include that exact

text, it did include a similar provision: "A defendant may appeal a judgment or order extending a period of probation, imposing a new or modified condition of probation or of sentence suspension, or imposing or executing a sentence upon revocation of probation or sentence suspension." ORS 138.035(3). And nothing suggests that the work group intended to let defendants *appeal* those rulings but prohibit the appellate court from *reviewing* them.

In light of Lannet's, Shoop's, and Nass's memoranda, the legislature likely would have understood that the new statutes would abrogate *Landahl* and *Herrera* and that fairness supported such a result. Moreover, nothing in the legislative history contained any positive reference to *Landahl* or *Herrera* or any suggestion that ORS 138.105(5) would preclude review of diversion terminations. The text, context, and history of ORS 138.105(5) show that it bars only challenges to the guilty plea or finding. Because defendant does not challenge her plea or factual guilt, her challenge is reviewable.

D. This court should adopt defendant's construction of ORS 138.105(5) to ensure its constitutionality.

If a statute is ambiguous, the court may resort to maxims of statutory construction. One maxim is that "when one plausible construction of a statute is constitutional and another plausible construction of a statute is unconstitutional, courts will assume that the legislature intended the constitutional meaning." *State v. Kitzman*, 323 Or 589, 602, 920 P2d 134 (1996).

As discussed below, interpreting ORS 138.105(5) to preclude review in this case would render the statute unconstitutional, so this court should adopt defendant's interpretation to avoid constitutional problems. In particular, the fact that the statute as construed by the Court of Appeals gives the state a right to appellate review of diversion rulings but denies that right to the defendant is an inequity that the legislature likely never intended. Thus, if any ambiguity remains as to which of meaning of "conviction" the legislature meant, this court can and should limit the statute to the finding of guilt.

III. Article VII (Amended), sections 1 and 3, gives appellate courts the power and duty to determine the lawfulness of a judgment on appeal, and when an appellate court has jurisdiction the legislature cannot prevent it from performing its constitutional task.

The Court of Appeals has held—citing this court's case law—that the legislature may constitutionally limit an appellate court's authority to review certain errors. *See Merrill*, 311 Or App at 495 (upholding ORS 138.105(5) based on principle that "[t]he legislature * * * has the power to define in what cases, and under what circumstances, and in what manner, an appeal may be taken to this court" (quoting *State v. Endsley*, 214 Or 537, 546, 331 P2d 338 (1958); alterations in *Merrill*)).

On the other hand, the Court of Appeals has also held—again citing this court's case law—that an appellate court has inherent constitutional authority to decide how to adjudicate an appeal notwithstanding the legislature's contrary

directives. *See State v. Beebe*, 300 Or App 31, 34, 452 P3d 1063 (2019), *rev den*, 366 Or 205 (2020) ("[a]lthough the legislature may provide for, and limit, a statutory right of appeal, the appellate courts retain the inherent authority to determine how to adjudicate and dispose of those appeals" (citing *Circuit Court v. AFSCME*, 295 Or 542, 550, 669 P2d 314 (1983)).

The latter rule finds better support in this court's case law, as well as the text of the Oregon Constitution. The distinction between appealability and reviewability is key. When the legislature makes decisions about appealability, its power over the appellate process is at is greatest—it alone decides whether to authorize a party to appeal. A dispute about whether a particular judgment or order should be appealable is a dispute between the legislature and the party who wishes to appeal, not the judiciary.

But when the legislature makes decisions about reviewability, its power is at its weakest—it is limiting the power of *the court* to adjudicate a case that is properly before the court. A dispute over whether an appellate court should affirm or reverse a judgment is a dispute between the parties and the court, in which the legislature should have little or no role. And the disposition of the case is squarely within the court's constitutional powers and duties. Those powers and duties are protected from legislative interference by Article VII (Amended), sections 1 and 3. Defendant addresses section 3 before turning to section 1, this court's case law, and how those provisions apply to this case.

A. Article VII (Amended), section 3, gives an appellate court the power and duty to determine the lawfulness of a judgment on appeal.

Article VII (Amended), section 3, grants Oregon appellate courts the power and duty to review trial court judgments. It provides:

> "[1] In actions at law, where the value in controversy shall exceed $750, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict.
>
> "[2] Until otherwise provided by law, upon appeal of any case to the supreme court, either party may have attached to the bill of exceptions the whole testimony, the instructions of the court to the jury, and any other matter material to the decision of the appeal.
>
> "[3] If the supreme court shall be of opinion, after consideration of all the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed, notwithstanding any error committed during the trial; or if, in any respect, the judgment appealed from should be changed, and the supreme court shall be of opinion that it can determine what judgment should have been entered in the court below, it shall direct such judgment to be entered in the same manner and with like effect as decrees are now entered in equity cases on appeal to the supreme court.
>
> "[4] Provided, that nothing in this section shall be construed to authorize the supreme court to find the defendant in a criminal case guilty of an offense for which a greater penalty is provided than that of which the accused was convicted in the lower court."

(Line breaks and sentence numbers added for clarity.)

Several aspects of section 3's text bear emphasis, particularly the second and third sentences. The second sentence governs how a party may take an appeal. *See* Hall S. Lusk, *Forty-Five Years of Article VII, Section 3,*

Constitution of Oregon, 35 Or L Rev 1, 9-11 (1955) (discussing how section 3 relaxed prior procedures for initiating appeals).[11] But it authorizes the legislature to alter that process. *See, e.g.*, *Ekwall v. Stadelman*, 146 Or 439, 441, 30 P2d 1037 (1934) (explaining that "until otherwise provided by law" language in constitution authorizes legislature to make changes). And the legislature has done just that. *See* ORS 19.390 ("A bill of exceptions is not required. For the purposes of section 3, Article VII (Amended) of the Oregon Constitution, the transcript * * * is the bill of exceptions.").

In contrast, the third sentence governs the appellate court's powers and duties—to "direct such judgment to be entered" if the judgment is erroneous and the court can "determine what judgment should have been entered," or to affirm the judgment if it "was such as should have been rendered" despite any error in the proceedings. That sentence does *not* include the phrase "until otherwise provided by law," which indicates that the reviewability provisions of section 3 are not subject to legislative modification. In other words, the legislature can control how a party initiates an appeal, but it cannot limit the court's powers and duties on appeal. *See Knight v. Beyers*, 70 Or 413, 418-19, 134 P 787 (1913) (explaining that right to appeal is a "statutory privilege" of

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[11] The first sentence of Article VII (Amended), section 3, limits judicial review of jury verdicts; it applies both at trial and on appeal. *See generally* Lusk, 35 Or L Rev at 3-9, 20.

the appellant but the appellate court has the constitutional "'power * * * to retry [the] case and render any judgment it sees fit'").[12]

The supporting argument in the voters' pamphlet confirms that the second and third sentences of section 3 were intended to give the appellate court new powers and duties. It said that they would serve

> "to simplify procedure on appeals to the Supreme Court and remove the pretext for new trials in those cases in which substantial justice is done by the verdict and judgment, but in which the trial court may have made a technical mistake; or *if the verdict is just and the judgment is not, to make it the duty of the Supreme Court to enter the proper judgment*, if that can be done, instead of sending the case back for a new trial * * *."

Official Voters' Pamphlet, General Election, Nov 8, 1910, 177 (emphasis added).

The appellate court's power to review and correct the judgment is further confirmed by the fourth sentence of Article VII (Amended), section 3, which states that section 3 does not permit this court to find a criminal defendant guilty of a greater offense than he was convicted of below. That limitation on this court's authority shows that the preceding sentence authorizes the court to modify a judgment of conviction. *See Knight*, 70 Or at 419 ("This exception proves the rule and indicates the intent of the lawmaking power * * * to invest this court with power, if in its judgment such course seems proper, to retry

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[12] *Knight* was written by Chief Justice McBride, who has been credited as the original author of Article VII (Amended), section 3. Lusk, 35 Or L Rev at 2.

cases erroneously tried in the court below."); Lusk, 35 Or L Rev at 20 ("The clear implication of this language is that the Supreme Court is authorized to find the accused guilty of a lesser offense than that of which he was convicted by the verdict of a jury.").

Indeed, this court has held that Article VII (Amended), section 3, gives it the "inherent power" to modify a judgment of conviction if it concludes that the defendant was "improperly convicted of the offense charged." *State v. Braley*, 224 Or 1, 13, 355 P2d 467 (1960). In *Braley*, a jury convicted the defendant of first-degree murder. On appeal, he challenged the trial court's failure to properly instruct the jury on voluntary intoxication. This court noted that the error was not preserved and that the evidence of intoxication was weak. *Id.* at 11-12. But the fact that the defendant had been sentenced to death, combined with "the possibility, although slight, that he might have been benefited by the instruction," led this court "to seek some solution which takes account of that possible benefit." *Id.* at 12. Given "the expense and inconvenience of another long trial," this court decided to modify the judgment of conviction to second-degree murder based on its conclusion that the facts would have supported that conviction with the correct instruction. *Id.* at 13-14. And this court held that Article VII (Amended), section 3, "empower[ed]" it to do so, because the defendant was not harmed by the modification and the state agreed to it in lieu of a new trial. *Id.* at 14-15; *cf. State v. Rader*, 62 Or 37, 41, 124 P 195 (1912)

("[i]f the evidence were clear and without contradiction, we would ourselves try out the case here, as we have a right to do under our amended Constitution").[13]

B. Article VII (Amended), section 1, protects the judicial power from legislative interference and authorizes courts to disregard legislative barriers to adjudication.

Article VII (Amended), section 1, protects the judicial power via the principle of separation of powers. It provides, in part, "The judicial power of the state shall be vested in one supreme court and in such other courts as may from time to time be created by law." Under that provision, the judiciary is "a branch of the state government of equal dignity" that is not "subservient to the legislature." *State ex rel Bushman v. Vandenberg*, 203 Or 326, 339-40, 280 P2d 344 (1955).[14] A court "cannot be directed, controlled, or impeded in its functions by any of the other departments of the government." *Id.* at 334 (quoting *State ex rel Kostas v. Johnson*, 224 Ind 540, 69 NE2d 592 (1946)). A statute violates Article VII (Amended), section 1, if it "interferes with the judiciary in a manner which prevents or obstructs the performance of its irreducible constitutional task, adjudication." *AFSCME*, 295 Or at 550.

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[13] *Rader* was also written by then-Justice McBride.

[14] In *Bushman*, the court cited Article III, section 1. 203 Or at 333-40. However, this court later clarified that the rule in *Bushman* actually applied under Article VII (Amended), section 1. *AFSCME*, 295 Or at 551. Although both provisions involve separation of powers, Article III is violated only when a "member of one department is exercising a function of another department," whereas Article VII (Amended) is violated when the executive or legislature "prevents or obstructs the courts' exercise of its judicial power." *Id.* at 547.

City of Damascus v. State of Oregon, 367 Or 41, 472 P3d 741 (2020), provides a recent example of a case where this court refused to be bound by a legislative restriction on reviewability. It involved judicial review of SB 226 (2019), which contained two alternative provisions that each caused the disincorporation of Damascus. *Id.* at 46-47. The bill provided for judicial review of its validity in this court, and it expressly required this court to address the first provision first. *Id.* at 48. "[O]nly if" this court invalidated the first provision could it address the validity of the second:

> "(5) Judicial review under this section *shall proceed as follows*:
>
> "(a)(A) *First*, the court *shall* determine whether section 1 of this 2019 Act is valid.
>
> "* * * * *
>
> "(b)(A) *Second*, *only if* the court determines that section 1 of this 2019 Act is invalid under paragraph (a) of this subsection, the court shall determine whether sections 2 and 3 of this 2019 Act are valid."

SB 226, § 4 (emphasis added).

However, this court "respectfully decline[d]" to follow the legislature's directive. *City of Damascus*, 367 Or at 66. Instead, it ruled that the second provision was valid without reaching the validity of the first provision. In doing so, this court expressed its concern that "the legislature's instruction itself violates the separation of powers provision of the Oregon Constitution, Article III, section 1, because it unduly interferes with or burdens our exercise of the

judicial function." *Id.* at 68.[15] This court said that a law that "simply confer[s] original jurisdiction on this court to decide a particular, justiciable case" comports with separation of powers, but a law that "tell[s] us what result we should reach in deciding the case" would likely constitute "a clear interference with the judicial function." *Id.* at 68. SB 226 "directs us to decide the issues in a specific case in a particular order" and thus fell "somewhere between" those two extremes and posed a "potentially close constitutional question[]." *Id.* This court's concern that the directive might be unconstitutional, along with other prudential concerns, led it to decide not to follow the directive and to determine only the validity of the second provision. *Id.*

Although *City of Damascus* did not decide the constitutionality of the reviewability provisions in SB 226, it stands for the proposition that the judicial power gives a court discretion to disregard legislative limits on judicial review. SB 226 expressly forbade this court from deciding the validity of the second provision without deciding the validity of the first. Because this court did not decide the validity of the first provision, SB 226 did not permit review of the second. And SB 226 provided the only statutory authority for this court to review *either* provision. Consequently, when this court chose to disregard the

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[15] Although this court cited Article III, section 1, the concern it expressed is more consistent with Article VII (Amended), section 1. *See AFSCME*, 295 Or at 547, discussed above in footnote 14.

legislature's directive and review only the second provision, it necessarily relied on the premise that its inherent judicial power authorized it to review the merits of the case despite a statutory bar to review. *Cf. McFadden v. Dryvit Systems, Inc.*, 338 Or 528, 535, 112 P3d 1191 (2005) (holding that statute reviving dismissed claims did not violate Article VII (Amended), section 1, "because a court's ability to decide the merits of the issues before it is unaffected").

C. This court has not previously addressed a challenge under Article VII (Amended) to statutory limits on review.

This court has often made statements like, "The statute authorizing an appeal may include limitations on the issues that may be reviewed in an appeal." *Nix*, 356 Or at 772 (citing *Logsdon v. State and Dell,* 234 Or 66, 70, 380 P2d 111 (1963)); *cf. Endsley*, 214 Or at 546 (quoting *City of Portland v. Gaston*, 38 Or 533, 535, 63 P 1051 (1901) ("The legislature * * * has the power to define in what cases, and under what circumstances, and in what manner, an appeal may be taken to this court.").

But those cases all involved appealability, not reviewability:

- *Nix*, 356 Or at 782, held that the state had no right to appeal a judgment of conviction for a misdemeanor.
- *Logsdon*, 234 Or at 70, held that parties had no right to appeal non-final orders in a child custody case.
- *Endsley*, 214 Or at 547, held that a defendant had no right to appeal an order denying a petition for a writ of *coram nobis*.
- *Gaston*, 38 Or at 536-37, held that a party had no right to appeal a circuit court's award of damages for street construction.

None of those cases addressed limits on the court's power to review a case where a party *did* have the right to appeal. Although they may have stated their holdings more broadly, this court can and should take the opportunity to clarify that those opinions address only appealability, not reviewability. *Cf. State ex rel Huddleston v. Sawyer*, 324 Or 597, 638, 932 P2d 1145 (1997) (Durham, J., concurring in part and dissenting in part) ("[A]ppellate courts on occasion present verbal formulas as 'rules' without examining the assumptions that underlie them. Through repetition over time without genuine legal analysis, such formulas can become unsound law.").

Similarly, this court has interpreted and applied statutory limits on review. *E.g.*, *Huddleston*, 324 Or 597; *Loyer*, 303 Or 612. But it has never addressed a challenge to such limits under Article VII (Amended).

Defendant has located one case in which this court upheld a limit on appellate review against a challenge under Article VII (Original). *Kadderly v. City of Portland*, 44 Or 118, 74 P 710 (1903). *Kadderly* involved a property owner's right to appeal to the circuit court from a property assessment by the city council. The city charter limited the issues that could be reviewed on appeal to "a determination of the amount of special benefits equitably to be assessed against the property." *Id.* at 155-56.

This court adopted the circuit court's ruling that the limitation on review did not violate Article VII (Original), section 9, which gave circuit courts

"appellate jurisdiction" over all "inferior courts, officers, and tribunals." The court explained that the legislature could regulate appellate proceedings:

> "While this section confers upon the circuit courts appellate jurisdiction, it leaves the regulation of the mode of proceedings on an appeal and the limitation of the cases wherein an appeal may be taken to be provided by statute. Whenever the Legislature determines this question, and fixes the rule in any particular case, the question is thereby settled, whether or not the right to prosecute an appeal exists."

Id. at 156-57.

But the court did not hold that the legislature could eliminate review altogether. The court distinguished a Wisconsin case involving a provision that had a similar limit on review but also made the appeal the only remedy for an aggrieved property owner. *Id.* In contrast, the provision in *Kadderly* limited the appeal but did not preclude other remedies. And this court warned that if a law did preclude all remedies, "we would have no hesitancy in saying that it would be unconstitutional in that respect." *Id.* at 156.

Kadderly's holding is therefore limited and does not apply to a statute—like ORS 138.105(5)—that eliminates review of a particular ruling.[16] Beyond that, *Kadderly* fits the above analysis of Article VII (Amended), sections 1 and 3, for two reasons.

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[16] The legislature has not provided any other means for review of a trial court's decision to terminate diversion. For example, post-conviction relief is not available for subconstitutional errors. *Strasser v. State of Oregon*, 368 Or 238, 269-70, ___ P3d ___ (2021). The only possible relief would be this court's discretionary power of mandamus under Article VII.

First, Article VII (Amended), section 3, governs an appellate court's review of circuit court judgments, but it has no application to a circuit court's review of decisions by a lower tribunal. And section 3 was enacted after *Kadderly* for the express purpose of giving appellate courts new powers and duties. Thus, a statute that limits the power of this court or the Court of Appeals to review lower court judgments is subject to constitutional restrictions that do not apply to laws governing circuit courts.

Second, separation of powers considerations are different in a direct appeal from a circuit court judgment than they are in a circuit court's review of a city council action. A direct appeal heavily implicates judicial interests—it involves multiple layers of the judiciary, including the ability of this court or the Court of Appeals to supervise other state courts. And it does not directly involve the legislature or executive, except perhaps as a party. Regardless of whether the trial or appellate court renders the final judgment, the judicial branch makes the decision. Because the scope of a direct appeal is of great importance to the judicial branch and less importance to other branches, separation of powers weighs in favor of the judiciary having the most say in the process.

In contrast, a circuit court's review of a city council action involves more complicated balancing of governmental interests. It directly involves multiple branches of government, not just judicial and legislative but also state and local.

Cf. City of Enterprise v. State of Oregon, 156 Or 623, 635, 69 P2d 953 (1937) (noting that municipalities exercise both "legislative and executive functions"). The city is not just a party to the proceeding but the lower tribunal itself, whose decision the circuit court can reverse or modify. Thus, the scope of appellate review determines which branch of government has the final say. And the superior knowledge and interest of city governments in property assessments means that separation of powers concerns weigh *against* broad judicial review of such decisions. *See Western Amusement Co. v. City of Springfield*, 274 Or 37, 41-43, 545 P2d 592 (1976) (discussing separation of powers basis for limiting judicial review of assessments); *cf. La Grande/Astoria v. PERB*, 281 Or 137, 147-49, 576 P2d 1204, *aff'd on reh'g,* 284 Or 173, 586 P2d 765 (1978) (discussing constitutional "home rule" concerns involved in judicial review of municipal laws).

Differing separation of powers concerns also show how *Kadderly* is consistent with *City of Damascus*. The legislature and judiciary are on a more even footing than a state court and a municipality. The legislature controls the number and size of courts, judicial budgets and staff, and many of the laws that govern court procedures. There is room for give-and-take between the two branches if one does something that offends the other. When the legislature provides for judicial review, it makes sense that the court should have discretion to decline the legislature's commands about how to adjudicate the case.

In contrast, a municipality has little if any power over state courts. When a municipality subjects itself to review by a circuit court, separation of powers and home rule concerns weigh in favor of the judiciary exercising restraint and not exceeding the scope of review that the municipality requested. Otherwise, if a state court decides to review any municipal decision it pleases, the city will be at the mercy of state government. But those concerns are not present in appellate review of a circuit court decision.[17]

D. ORS 138.105(5) violates Article VII (Amended), sections 1 and 3, because it precludes the appellate court from exercising its constitutional powers and duties.

It is axiomatic that a statute cannot trump the constitution. Again, ORS 138.105(5) provides that "[t]he appellate court has no authority to review * * * a conviction based on the defendant's plea of guilty or no contest." In other words, it requires the court to affirm a judgment just as though the court had determined the judgment was correct. *See State v. Edison*, 300 Or App 382, 384, 450 P3d 1040 (2019) ("If the decisions are not reviewable, the correct result is to affirm. If the decisions are reviewable but defendant's arguments fail on the merits, the correct result is still to affirm.").

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[17] Separation of powers concerns are also different in judicial review of administrative agency decisions, which involves all three departments: the judiciary performs review, the legislature makes review available, and the executive is the tribunal whose decision is scrutinized. If a court disregards legislative limits on its review, then it encroaches not just on the legislature but also the executive—without the executive having any say in the matter.

That command violates Article VII (Amended), section 3, because it infringes the court's power and duty to determine whether the judgment was what "should have been entered in the court below." It also violates separation of powers principles because it "tell[s] us what result we should reach in deciding the case." *City of Damascus,* 367 Or at 68. It therefore cannot be applied to defendant's appeal.

At minimum, as *City of Damascus* illustrates, an appellate court has discretion to disregard the limits in ORS 138.105(5) if it concludes that they may be unconstitutional and that prudential concerns weigh in favor of deciding the appeal on the merits. In fact, here the Court of Appeals did just that—it made a discretionary decision to reach the merits of defendant's appeal regardless of whether it had statutory authority to do so. *Colgrove*, 308 Or App at 444. This court can and should do the same.

IV. The Fourteenth Amendment precludes states from arbitrarily barring only one party from obtaining appellate review or eliminating traditional protections against erroneous deprivations of liberty, and ORS 138.105(5) violates both of those principles.

The Fourteenth Amendment to the United States Constitution provides, in part, "No State shall * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Neither due process nor equal protection requires a state to allow criminal appeals. But if a state chooses to allow them, "the

procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution." *Evitts v. Lucey*, 469 US 387, 393, 105 S Ct 830, 83 L Ed 2d 821 (1985).

The Fourteenth Amendment makes two demands that are relevant here. First, it includes a well-established principle that any right of appeal must be reciprocal between two parties to a proceeding. Second, some procedural protections can become part of our legal tradition that a state may not abrogate without good cause. ORS 138.105(5) violates both principles.

A. Equal protection and due process both include a basic principle of fairness that the right to appeal should be reciprocal between two parties to a proceeding, and ORS 138.105(5) violates that principle by limiting review only in a defendant's appeal and not a state's appeal.

A basic principle of fairness provides that "[t]he right of appeal must be reciprocal," and the law may not "give to one party an advantage over the other party, under the same circumstances." *The Sydney*, 139 US 331, 336, 11 S Ct 620, 35 L Ed 177 (1891). That principle finds support under equal protection and due process principles.

A statutory right to appeal "cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." *Lindsey v. Normet*, 405 US 56, 77, 92 S Ct 862, 31 L Ed 2d 36 (1972). In *Lindsey*, the Court considered an Oregon statute that required tenants to pay both an undertaking and a bond of double the rental value of the

premises to appeal a forcible entry and detainer (FED) judgment. *Id.* at 74-75. No other party had to pay a double bond to appeal. *Id.*

The Court held that the double-bond requirement violated equal protection. The requirement "heavily burden[ed] the statutory right of an FED defendant to appeal" and was not necessary to protect the landlord because the tenant already had to pay an undertaking. *Id.* at 77. And the state's argument that the requirement deterred frivolous appeals was "unpersuasive, for it not only bars nonfrivolous appeals by those who are unable to post the bond but also allows meritless appeals by others who can afford the bond." *Id.* at 78. Even nonindigent defendants were "confronted by a substantial barrier to appeal faced by no other civil litigant in Oregon." *Id.* at 79. Because the statutory discrimination against FED defendants was "arbitrary and irrational," it was unconstitutional. *Id.*

If the state has the right to appeal a ruling in the defendant's favor, then equal protection requires that the defendant have a reciprocal right to appeal a ruling in the state's favor on the same issue. *Shortridge v. State*, 478 NW2d 613, 614-15 (Iowa 1991). In *Shortridge*, an inmate sought judicial review of a prison discipline decision. The trial court denied relief, and the inmate appealed. The state moved to dismiss the appeal under a statute that gave the state the right to appeal but provided that an inmate could pursue only discretionary relief via a writ of *certiorari*. *Id.* at 614.

The Iowa Supreme Court held that the statute violated the Equal Protection Clause. Although the legislature had valid reasons to limit an inmate's ability to appeal, the legislature could not impose limits on inmates that did not apply to the state. "[W]hatever avenue of appellate review is deemed appropriate by the legislature, that right of appeal must be reciprocal." *Id.* at 615 (collecting cases). Because the state had the right to appeal an adverse ruling, "that right must extend to prisoners as well." *Id.*; *see also In re City of Rochester*, 224 NY 386, 397, 121 NE 102, 105 (1918) (holding that law giving city the right to appeal land use decision, but denying appeal by landowners, violated equal protection).

A nonreciprocal arrangement between the state and a criminal defendant can also violate due process. In *Wardius v. Oregon*, 412 US 470, 93 S Ct 2208, 37 L Ed 2d 82 (1973), the Court held that Oregon's alibi discovery rule violated due process because it was nonreciprocal—the defendant had to notify the state about their alibi and the witnesses who supported it, but the state did not have to give the defendant reciprocal discovery. The Court explained that the Due Process Clause "speak[s] to the balance of forces between the accused and his accuser." *Id.* at 474. Although Oregon was not constitutionally required to have discovery laws, "in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street." *Id.* at 475.

ORS 138.105(5) violates the basic principle that "[t]he right of appeal must be reciprocal." *The Sydney*, 139 US at 336. It limits reviewability only in a defendant's appeal—no statute places a similar limit on a state's appeal. Here, for example, the trial court ruled in the state's favor and entered a judgment of conviction. If instead the court had ruled in defendant's favor, it would have entered a judgment of dismissal. And the state would have had the right to appeal the dismissal under ORS 138.045(1)(i). But the reviewability statute for state's appeals, ORS 138.115, contains no counterpart to ORS 138.105(5). Accordingly, defendant's plea would not have prevented the state from obtaining review—even though it prevents her from obtaining review of the same ruling. *Compare Landahl*, 254 Or App at 59 (holding that defendant could not obtain review of diversion termination due to guilty plea), *with State v. Wilson*, 247 Or App 761, 270 P3d 411 (2012), *rev dismissed,* 353 Or 787 (2013) (reviewing state's challenge to trial court decision not to terminate diversion of defendant who pleaded guilty).

There is no rational basis for that distinction. If the risk that a court will err in a diversion proceeding justifies a state's appeal, then the same risk justifies a defendant's appeal from the same proceeding—with the same scope of review. Alternatively, if the finality of a guilty plea justifies limiting the defendant's appeal, then finality should also limit the state's appeal. Because ORS 138.105(5) arbitrarily denies defendants the right to appellate review when

the state has that right under equivalent circumstances, it violates the Fourteenth Amendment.

The Court of Appeals rejected a similar challenge to ORS 138.105(5) under the Equal Protection Clause because "the Equal Protection Clause concerns the differential treatment of individuals, not the relationship between individuals and the government or power imbalances in that relationship." *Merrill*, 311 Or App at 496. But the court acknowledged that "inequities in the relationship between the state and the individual and, in particular, power imbalances in criminal prosecutions, fall within the territory of the Due Process Clause." *Id.* at 496 n 3. This court need not resolve whether equal protection or due process is the better vehicle for addressing nonreciprocal limits on reviewability, because defendant has raised both clauses. *Cf. Evitts*, 469 US at 402 (noting "seeming ambiguity" in the Court's case law applying equal protection and due process to criminal appeals). In any event, defendant respectfully disagrees with the Court of Appeals' analysis—equal protection *should* apply when the state gives itself advantages *as a litigant* that it denies the opposing litigant in the same proceeding. In doing so, the state denies that "person * * * the equal protection of the laws." US Const, Amend XIV.

B. Due process precludes states from eliminating traditional protections against erroneous deprivations of liberty, and appellate review of diversion terminations has become the kind of protection that cannot be abolished without justification.

Due process can also preclude states from abolishing protections of liberty that—although not inherently required by due process—have become a part of our legal traditions that cannot be removed without good cause. In *Honda Motor Co. v. Oberg*, 512 US 415, 114 S Ct 2331, 129 L Ed 2d 336 (1994), the Court examined an Oregon law[18] that precluded judicial review of the amount of punitive damages awards. The Court explained that "traditional practice" provided the "touchstone" for due-process analysis. *Id.* at 430. However, the unquestioned nature of some practices could yield "very few cases * * * in which a party has complained of their denial," meaning a court might have only a "handful" of cases to rely upon in determining whether the protection was a traditional one. *Id.*

The Court's review of its case law showed that "[w]hen the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process." *Id.* Only when the state supplied an alternative practice with "nearly the same protection" as the traditional practice, or when social change required modification of older practices, had the Court upheld the abrogation of

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[18] Specifically, the first sentence of Article VII (Amended), section 3.

traditional procedural protections. *Id.* at 431. Because judicial review of the amount of punitive damages had become a traditional practice, and Oregon had not provided any substitute or shown any relevant social change, Oregon's bar on review violated the Due Process Clause. *Id.* at 432.

If ORS 138.105(5) precludes appellate review of the termination of diversion—a legal ruling that occurs long after the plea and has no relationship to the facts admitted by the plea—then it violates due process. It is true, as the Court of Appeals has noted, that *Honda Motor Co.* involved a complete bar to judicial review, not just appellate review. *Redick*, 312 Or App at 261. *But see Honda Motor Co.*, 512 US at 420-21 (noting that the Court's prior opinions had emphasized the availability of trial *and* appellate review of punitive damages). This case is obviously different, but the underlying principle still applies.

Just like judicial review of punitive damages awards has become a traditional protection against deprivations of property, appellate review of legal challenges to a conviction after a guilty plea has become a traditional protection against deprivations of liberty. "Decisions of state and federal courts throughout the 19th and 20th centuries" reflect that a defendant's guilty plea has generally not barred appellate review of many legal issues, including "a claim that 'the State may not convict' him 'no matter how validly his factual guilt is established.'" *Class*, 138 S Ct at 803-04 (quoting *Menna v. New York*, 423 US 61, 63 n 2, 96 S Ct 241, 46 L Ed 2d 195 (1975)). A defendant who pleads guilty

may not challenge their factual guilt, the indictment, or the plea agreement, but has traditionally been allowed to raise other challenges, like an argument that the statute defining the offense is unconstitutional. *Id.* at 804-05.

Of course, *Class* did not hold that appellate review was required by due process. Nor did it provide a "clear answer" to what claims "a defendant can raise on appeal after entering an unconditional guilty plea." *Id.* at 807 (Alito, J., dissenting). Defendant relies on *Class* not because it definitively resolves the issue in this case but because its discussion of historical case law shows that appellate review after a guilty plea is a traditional protection of liberty, which can become part of due process as described in *Honda Motor Co*. Moreover, *Menna* was based on a due process right to appellate review. *Class*, 138 S Ct at 809 (Alito, J., dissenting).

Another issue that a guilty plea traditionally does not waive is a court's decision to terminate diversion. Most jurisdictions that have considered the issue have held that a defendant who pleads guilty and enters a diversion program "has a liberty interest in remaining in that program (and is therefore entitled to procedural due process before he may be terminated from that program)." *State v. Rogers*, 144 Idaho 738, 741-42, 170 P3d 881, 884-85 (2007) (collecting cases). And "the promise of due process protections" in a diversion program "may be of little comfort without the availability of an appellate process to review whether that promise is kept." *State v. Brookman*, 460 Md

291, 321-22, 190 A3d 282, 300 (2018). Thus, the very constitutionality of the program depends "on the availability of the usual mechanisms of appellate review." *Id.* at 313, 190 A3d at 295 (internal quotation marks omitted).

Until 1945, Oregon also allowed defendants who pleaded guilty to obtain review of legal errors related to the conviction so long as they did not challenge the facts underlying their plea. *Cloutier*, 351 Or at 77. And until 2003, defendants regularly obtained review of diversion terminations, because Oregon law did not require defendants to plead guilty to enter diversion until then.

When the 1945 legislature enacted *former* ORS 138.050 and precluded all appellate review except for the sentence, it abrogated a "traditional practice" that had "provided protection against arbitrary and inaccurate adjudication." *Honda Motor Co.*, 512 Or at 430. Similarly, when the 2003 legislature required a guilty plea to enter diversion and eliminated a defendant's ability to obtain appellate review of their termination, it removed a procedural protection that had been available for decades. The legislature did not supply any alternative or identify any social change to justify those limits on review—it likely did not even realize it was imposing such limits. Because ORS 138.105(5) removes a protection against erroneous deprivations of liberty without justification, it violates due process and cannot be applied to defendant's appeal.

CONCLUSION

Defendant respectfully requests that this court reverse the decision of the Court of Appeals in part, reverse the judgment and supplemental judgment of the circuit court, and remand to the circuit court for further proceedings.

Respectfully submitted,

ERNEST G. LANNET
CHIEF DEFENDER
CRIMINAL APPELLATE SECTION
OFFICE OF PUBLIC DEFENSE SERVICES

Signed
By Kyle Krohn at 9:03 am, Aug 19, 2021

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Petitioner on Review
Rhonda Colgrove

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IN THE Circuit **COURT, THE STATE OF OREGON**

Umatilla **COUNTY, CITY OF** Hermiston

State of Oregon

Case No: 17CR57106

v.

PETITION TO PLEAD GUILTY OR NO CONTEST

Rhonda Colgrove
Defendant

1. My true name is *(first, middle, last)* Rhonda Colgrove

   I also am known as _____

2. I am 38 years old. The highest grade level of school I have completed is finishing high school

3. My physical and mental health are satisfactory. I am not under the influence of any drugs or intoxicants, except

4. The following statement best describes me:

   ☐ I am able to read, write, and understand English, and I have read this petition completely
   ☒ I am able to understand English, and this petition has been read aloud to me completely
   ☐ I am unable to read English, and this petition has been read aloud to me completely in English
   ☐ I am unable to read, write, or understand English, and this petition has been read aloud to me in the _____ language by _____, who is qualified to translate English into the _____ language

5. I ☑ am ☐ am not represented by a lawyer. I understand that I have the right to hire a lawyer or have the court appoint a lawyer to represent me if the court finds that I cannot afford to hire a lawyer.

   ☐ I choose to give up my right to a lawyer. I will represent myself. (_____) [*initial here*]

6. If represented by a lawyer, I have told my lawyer all the facts I know about the charge against me. My lawyer has advised me of the nature of the charge and the defenses, if any, that I have in this case. I am satisfied with the advice and help my lawyer has given me.

7. I understand that I have the following rights: a) the right to jury trial; b) the right to confront and question all witnesses who testify against me at trial; c) the right to remain silent about all facts of the case; d) the right to subpoena witnesses and evidence in my favor; e) the right to have my lawyer assist me at trial; f) the right to testify at trial; g) the right to have the jury told, if I decided not to testify at trial, that they cannot hold that decision against me; and h) the right to require the prosecutor to prove my guilt beyond a reasonable doubt.

8. I understand that I give up all of the rights listed in paragraph 7 when I plead guilty or no contest. I understand I give up: a) any defenses I may have to the charge; b) objections to evidence; and c) challenges to the accusatory instrument.

9. By this petition, I am pleading ☑ guilty ☐ no contest to the crime of driving under the influence of intoxicants (DUII) which is a Class A misdemeanor under Oregon law. The maximum penalties, applicable if I do not enter diversion or if I fail to comply with the conditions of diversion are one year in jail and a fine of $6,250 or $10,000 if the offense was committed in a motor vehicle and there was a passenger younger than 18 and at least three years younger than me. The minimum penalties are 48 hours of imprisonment or 80 hours of community service and a fine of:

   - $1,000 if this is my first conviction

RC

- $1,500 if this is my second conviction
- $2,000 if this is my third conviction and I am not sentenced to a term of imprisonment
- $2,000 if my blood alcohol level (BAC) was 0.15 percent or greater

If I do not enter diversion or if I fail to comply with the conditions of diversion, there will be a mandatory suspension of my driving privileges for:

- 1 year if this is my first conviction
- 3 years if this is my second conviction within 5 years
- my lifetime if this is my third or subsequent conviction

10. I understand that I will be required to pay all of the fees listed in the *Summary of DUII Diversion Fees*, unless the court finds me unable to pay and waives all or part of these fees. These fees include an alcohol or drug abuse assessment and any recommended treatment. The court may order me to attend a victim impact panel and pay a participation fee. I may be required to reimburse the state for the cost, if any, of a court-appointed attorney.

11. I am submitting this plea along with a petition to enter the diversion program under ORS 813.200 to 813.270. I understand that if the court grants the petition, the court will accept this plea but will not enter a judgment of conviction at this time.

12. I understand that:

    a. If I fully comply with the conditions of the diversion agreement within the period authorized by law and by the court, the court will dismiss the charge with prejudice under ORS 813.250. If the court does not have a policy of automatically dismissing the DUII charge at the end of one year, I will have to file a motion at the end of the diversion period requesting that the charge be dismissed.

    b. If I fail to comply with the diversion agreement within the diversion period, the court will enter a judgment of conviction on the charge and will sentence me

13. I understand that if the court enters judgment on this plea for failing to comply with the diversion agreement, it is the same as a conviction. This court can find me guilty of the crime of DUII based on this plea alone, without receiving any evidence.

14. I understand that if the court denies the diversion petition and I go to trial, nothing in this petition will be used against me

15. I understand that if I am not a U.S. citizen and the court enters judgment on this plea for failing to comply with the diversion agreement, it may result in my removal from this country, exclusion from admission to the United States, or denial of naturalization

16. This plea is based only on what is written on this petition. No promises have been made to me by my lawyer or any officer or agent of any branch of government (federal, state, or local) that I will receive a particular sentence or form of treatment from this or any other court, on these or any other charges, other than what is set forth in this petition.

17. ☐ I plead no contest *or*

    ☑ I plead guilty because in Umatilla County, Oregon, I did the following:

on or about August 26, 2017, did unlawfully drive a vehicle upon a highway or premises open to the public while under the influence of intoxicants, to wit: alcohol.

18. I ☐ am ☑ am not currently on probation, parole, or post-prison supervision. I know that if I am and the court enters judgment on this plea, my failure to comply with the conditions of the diversion agreement may cause my probation, parole, or post-prison supervision to be revoked and I may be required to serve jail or prison time in that case in addition to any sentence imposed in this case.
19. I understand the charge against me and the information in this petition. I am signing this petition and entering this plea voluntarily, intelligently, and knowingly.
20. I understand that if I fail to comply with the terms of the diversion and the court enters a judgment of conviction, I have the right to appeal the conviction. My right to an appeal will be explained to me when the court enters the judgment of conviction.

Certificate of Document Preparation. Check all that apply:
☐ I chose this form for myself and completed it without paid help
☑ A legal help organization helped me choose or complete this form, but I did not pay money to anyone
☐ I paid (or will pay)_____ for help choosing, completing, or reviewing this form

Rhonda Colgrove — Rhonda Colgrove — 10/19/2017
Defendant's Signature — Defendant's Name (printed) — Date

CERTIFICATE OF COUNSEL

I am the attorney for the defendant in this proceeding and I certify that:

1. I have fully explained to my client the charge and possible defenses that may apply in this case
2. I have personally examined this plea petition, explained all of its provisions to my client, and discussed fully with my client all matters described and referred to in the petition
3. I have explained to my client the maximum penalty and other consequences of entering a guilty or no contest plea, including possible immigration consequences
4. To the best of my knowledge and belief, my client's decision to enter this plea is made voluntarily, intelligently, and knowingly
5. I have told my client that if he or she is eligible for court-appointed counsel and wishes to pursue an appeal, I will transmit the information necessary to perfect the appeal to the Office of Public Defense Services

Signed by me in the presence of the above-named defendant/petitioner and after full discussion of the contents of the certificate with the defendant on *(date)* 10/7/17

Defendant's Attorney's Signature

Jacek Berka
Attorney Name (typed or printed)

160733
Bar Number

CERTIFICATE OF INTERPRETER

I, the undersigned interpreter, certify that I have read aloud the petition to the above defendant in the _____ language

Signed by me in the presence of the above-named defendant on *(date)*_____

Interpreter's Signature

Interpreter Name (printed)

IN THE Circuit **COURT, THE STATE OF OREGON**
Umatilla **COUNTY, CITY OF** Hermiston

State of Oregon **Case No:** 17CR57106

v.

PETITION AND AGREEMENT

Rhonda Colgrove
Defendant

DUII Diversion

Date of DUII Offense: August 26, 2017

Defendant's Residence:			
30520 Joy Ln	Hermiston	OR	97838
Street	City	State	ZIP
Mailing Address (if different)			

Date of Birth:	Phone #:	Driver License:	SID# (if known):
4 / 29 / 1979		WA	17098373
Month Day Year		Number State	

DEFENDANT'S AGREEMENT AND WAIVER

I am the Defendant. I ask the court to grant a diversion under ORS 813.200 to 813.270 for the charge of driving under the influence of intoxicants (DUII). If the court allows this petition:

(1) I have read and understand all of the information in the attached *Explanation of Rights and DUII Diversion Agreement* and I agree to:
   a) Pay the required diversion fees and any restitution ordered
   b) Complete an alcohol and drug abuse assessment and any recommended treatment
   c) Attend a victim impact panel as ordered by the court
   d) Not use alcohol or other intoxicants except as allowed in the attached *Explanation of Rights and DUII Diversion Agreement*
   e) Install and use an approved Ignition Interlock Device (IID) if ordered by the court
   f) Keep the court advised of my current mailing address

2) I plead guilty or no contest to the DUII charge as shown in the *Petition to Plead Guilty or No Contest* submitted with this diversion petition

3) I waive (give up) the rights listed in the *Petition to Plead Guilty or No Contest*

4) I waive my former jeopardy rights under the federal or state constitutions and ORS 131.505 to 131.525 in any future action on the charge or any other offenses based on the same criminal incident

Certificate of Document Preparation. Check all that apply:
- ☐ I chose this form for myself and completed it without paid help
- ☑ A legal help organization helped me choose or complete this form, but I did not pay money to anyone
- ☐ I paid (or will pay) _____ for help choosing, completing, or reviewing this form

Rhonda L. Colgrove — Rhonda Colgrove — 10/19/2017
Defendant's Signature — Defendant's Name (typed or printed) — Date

NOTE: the *Defendant's Declaration of Eligibility*, and *Petition to Plead Guilty or No Contest* must be filed with this form and served on the district attorney or city attorney who filed the charge

RC

EXPLANATION OF RIGHTS AND DUII DIVERSION AGREEMENT

Read this entire form carefully. You are charged with driving under the influence of intoxicants (DUII). You can apply for the DUII Diversion Program, but you can enter the program only if you meet all eligibility requirements. The court will appoint a lawyer to help you if you ask for one and you are financially eligible.

ELIGIBILITY FOR DIVERSION PROGRAM

You are eligible to participate in the diversion program only if:

- you meet all requirements described in the attached *Defendant's Declaration of Eligibility* **and**
- you appeared in court on the date scheduled for your first appearance on the charge (unless the court finds good reason to excuse your failure to appear) **and**
- you file the *Petition and Agreement* with the court within thirty (30) days of your first appearance in court (unless the court finds there is good cause to allow a later date)

AGREEMENT WITH THE COURT

The *DUII Diversion Petition and Agreement* is your agreement with the court. To have the DUII charge dismissed, you must do all the following (if ordered by the court):

a. **Pay the required diversion fees** to the court. Fees are listed in Section 1 of the *Summary of DUII Diversion Fees*. If you cannot afford to pay these fees, tell the judge. The court may waive some of the fees or allow you to make payments over time, depending on your financial situation.

b. **Pay restitution** (See Section 1 of the *Summary of DUII Diversion Fees*)

c. **Complete an alcohol and drug abuse assessment**. The court will assign you to an agency for assessment. You must give the agency accurate and truthful information about your use of drugs and alcohol. You must pay fees to the agency. The agency will recommend a treatment program if they find that you need treatment.

d. **Complete the recommended treatment program.** You must pay the treatment provider directly. If you cannot pay the cost of treatment, tell the treatment provider. They may be able to waive certain costs or let you make payments over time.

e. **Attend a victim impact panel** and pay the participation fee

f. **Do not use <u>any</u> alcohol or other intoxicant** (includes marijuana) during the term of the diversion agreement. Comply with state laws that prohibit the use of intoxicants. You **can** use:
   - sacramental wine given or provided as part of a religious rite or service
   - alcohol or a controlled substance taken *as directed* with a valid prescription
   - a non-prescription drug that contains alcohol **if** you follow the directions for use that are printed on the label

h. **Keep the court advised of your current mailing address**

i. **Install and use an approved ignition interlock device (IID)** in all the vehicles you operate during the term of the diversion agreement when you have driving privileges, if ordered by the court

REQUIRED BOOKING

If the court grants your petition, you will have to be booked and fingerprinted on the DUII charge, if you have not already been book and fingerprinted.

INFORMATION ON IGNITION INTERLOCK DEVICES (IIDs)

j. You must install and use an approved ignition interlock device (IID) in all vehicles you operate during the term of the diversion period when you have driving privileges if:
- Your Blood Alcohol Content (BAC) was 0.08 or above
- You refused a breath/blood test when requested by the arresting officer
- Your BAC was greater than 0.00 and less than 0.08 and your blood test showed the presence of cannabis, a controlled substance, or an inhalant, or
- The court orders you to do so, if your BAC was less than 0.08

k. The IID requirement applies in all cases and to all vehicles you operate during the term of the diversion agreement when you have driving privileges, except:
- If the court finds that you meet requirements for a medical exemption under the rules of the Oregon Department of Transportation
- While operating an employer's vehicle in the course and scope of your employment (contact DMV for more information), or
- If you submitted to a test of your blood, breath, or urine, and your BAC was less than 0.08, and the court does not order the installation and use of the IID

l. The IID requirements continue until you submit a certificate to the DMV from the IID provider. The certificate must state that the device did not record a negative report for the last 90 consecutive days of the required installation period.

m. After 6 months, you can apply for an order vacating (ending) the IID requirement as a condition of diversion if:
- You provide the court with a certificate from the IID service provider stating that the device has not recorded a negative report for at least 6 consecutive months, ***and***
- You have been in compliance with any treatment program you were ordered to participate in as a condition of your diversion agreement

ADDITIONAL INFORMATION AND WAIVER OF RIGHTS

n. The diversion agreement applies only to the DUII charge. If you are charged with other offenses arising from the same incident, the other charges will be prosecuted separately. By entering into a diversion agreement, you give up the right to have the DUII charge decided at the same time as your other charges (former jeopardy - which means the right not to be prosecuted twice for the same offense).

o. If you have a prior DUII conviction, the Interstate Compact for Adult Offender Supervision rules may prohibit you from leaving the state without permission during the diversion period

p. Prosecution of the DUII charge will be delayed during the diversion period

q. If you successfully complete the diversion agreement, the court may automatically dismiss the DUII charge at the end of one year. If you do not receive notice of dismissal, you must file a motion at the end of the diversion period asking the court to dismiss the DUII charge.

r. If the court finds that you violated the terms of the diversion agreement or that you were not eligible for diversion, the court will terminate the diversion agreement. The court may hold a hearing where you can "show cause" why the court should not terminate your diversion agreement. **The court will send notice of such hearings by regular mail. If you fail to appear in court, the court can terminate the diversion agreement and may issue a warrant for your arrest.**

s. The court will terminate the diversion agreement if at any time during the diversion period the court finds that you failed to fulfill all of the terms of the agreement. Among other things, a new DUII or breaking open container laws will violate the agreement.

t. If the court terminates your diversion agreement or you fail to fulfill the terms of the agreement by the end of the diversion period, the court will sentence you without a trial

u. You may file a motion asking the court to extend the diversion period, **but you must file the motion within the last 30 days of your scheduled diversion period.** The court may grant an extension if the court finds that you have made a good faith effort to complete the diversion program and that you can complete all remaining conditions within the extension period. The court may grant an extension **only once** and for **not more than 180 days.**

v. If the court denies the diversion petition, the state cannot use your guilty or no contest plea (in the *Petition to Plead Guilty or No Contest*) when the state continues the prosecution

ADDITIONAL INFORMATION FOR ACTIVE MILITARY PERSONNEL
The following may apply if you are engaged in active military service:

w. The court may not deny your petition for a DUII diversion agreement solely because military service will impair your ability to complete the diversion program **if:**
   - You are a member of the Armed Forces of the United States, the reserve components of the Armed Forces of the United States, or the National Guard **and**
   - You have been called to active duty

x. You may ask the court to allow you to participate in a comparable treatment program conducted by or authorized by a government entity in another jurisdiction

y. You may file a motion asking the court to extend the diversion period. The court may grant an extension if the court finds you have made a good faith effort to complete the diversion program and that you can complete all remaining conditions within the extension period. **If you are serving on active duty, you must file the motion by the end of your scheduled diversion period.** The court may extend the diversion period as necessary to allow you complete the conditions of the diversion agreement.

IN THE Circuit **COURT, THE STATE OF OREGON**

Umatilla **COUNTY, CITY OF** Hermiston

State of Oregon

Case No: 17CR57106

v.

DEFENDANT'S DECLARATION OF ELIGIBILITY

DUII Diversion

Rhonda Colgrove
Defendant

I am eligible to participate in a driving under the influence of intoxicants (DUII) diversion program because:

1. I have never been convicted of a felony DUII offense in Oregon or any other place

2. On the date I sign the attached petition for a DUII diversion agreement:
   a. Except for the DUII charge in this case, there is no charge pending against me in Oregon or any other place for an offense involving operation of a vehicle while:
      - under the influence of alcohol, cannabis, a controlled substance, an inhalant, or any combination of the four, or
      - having a blood alcohol content above the allowable blood alcohol content

   b. I am not participating in a DUII diversion program or any similar alcohol or drug rehabilitation program in Oregon or any other place except:
      - a program I may have entered as a result of the DUII charge in this case, or
      - a charge for minor in possession of alcohol under ORS 471.430

   c. There is no charge of an offense pending against me in Oregon or any other place for any degree of aggravated vehicular homicide, murder, manslaughter, criminally negligent homicide, or assault that resulted from the operation of a motor vehicle

3. During the fifteen (15) years before the date of the alleged DUII offense in this case and from the time between the alleged DUII offense and the date I sign the attached petition:
   a. I have not been convicted in Oregon or any other place for an offense involving the operation of a vehicle while:
      - under the influence of alcohol, cannabis, a controlled substance, an inhalant, or any combination of the four, or
      - having a blood alcohol content above the allowable blood alcohol content

   b. I have not participated in a DUII diversion program or any similar alcohol or drug rehabilitation program in Oregon or any other place except a program I may have entered as a result of a charge for minor in possession of alcohol under ORS 471.430

   c. I have not been convicted, in Oregon or any other place, on any charge of an offense in any degree for aggravated vehicular homicide, murder, manslaughter, criminally negligent homicide, or assault that resulted from the operation of a motor vehicle, ***and***

d. If this is my second or subsequent diversion, I have not been convicted of any criminal offenses involving a motor vehicle

4. The DUII offense described in the attached petition did not involve any deaths or any physical injury to any other person *("physical injury" means impairment of physical condition or substantial pain)*

5. At the time of the alleged offense, I did not have commercial driving privileges

6. At the time of the alleged offense, I was not operating a commercial motor vehicle

Certificate of Document Preparation. Check all that apply:
☐ I chose this form for myself and completed it without paid help
☑ A legal help organization helped me choose or complete this form, but I did not pay money to anyone
☐ I paid (or will pay)_____for help choosing, completing, or reviewing this form

I hereby declare that the above statement is true to the best of my knowledge and belief. I understand it is made for use as evidence in court and I am subject to penalty for perjury.

Rhonda Colgrove
Defendant's Signature

Rhonda Colgrove
Defendant's Name (printed)

10/19/2017
Date

NOTE: this declaration must be completed by Defendant and filed with DUII diversion *Petition and Agreement (with attached Explanation of Rights and DUII Diversion Agreement), Order re: DUII Diversion, Petition to Plead Guilty or No Contest,* and *Order on Petition to Plead Guilty or No Contest*

RC

IN THE Circuit **COURT, THE STATE OF OREGON**
Umatilla **COUNTY, CITY OF** Hermiston

State of Oregon

Case No: 17CR57106

v.

Rhonda Colgrove
Defendant

ORDER ON PETITION TO PLEAD GUILTY OR NO CONTEST

(DUII Diversion)

Regarding Count 1

The court finds:

That the defendant's plea of ☐ **no contest** ☒ **guilty** is knowingly, intelligently, and voluntarily made

ORDER:

The court ☒ **accepts** ☐ **denies** the plea petition for purposes of ORS 813.200 to 813.270

Judge Signature:

10/19/2017

IN THE Circuit **COURT, THE STATE OF OREGON**

Umatilla **COUNTY, CITY OF** Hermiston

State of Oregon

Case No: 17CR57106

v.

ORDER RE: DUII DIVERSION

Rhonda Colgrove
Defendant

ODL: _____ DOB: 4/29/1979

The alleged DUII occurred on *(date)* August 26, 2017

Based on Defendant's *DUII Diversion Petition and Agreement*, **THE COURT ORDERS:**

The petition for diversion is

☐ **Denied**

☒ **Allowed.** The court withholds entry of a judgment of conviction pending completion or termination of the diversion agreement and orders that:

1) Defendant is ordered to comply with all terms in the *Petition and Agreement*
Assessment Evaluator information: Rosa Rivera

2) The diversion period is 1 year beginning *(date)* 10/19/2017 and ending *(date)* 10/18/2018
☐ Defendant must file a motion to dismiss after the diversion period ends in order for the court to dismiss the charge *(if this option is not checked the defendant does not need to file a motion to dismiss)*

3) Defendant must pay a fee of **$490.00** to the court for the diversion as required by statute unless waived or deferred. Payment is due ☐ **immediately** or ☒ **per payment schedule:**
$ 41 / month due by the 1 day of each month beginning Nov 1, 2017
☐ other: _____

4) ☒ Defendant must attend a victim impact panel approved by this court ☒ ***and*** must pay a participation fee to that program **Victim Impact Panel Date:** _____

5) ☐ Defendant must pay court-appointed attorney fees
☐ in an amount of $_____ on a schedule determined by the court. The court finds that the defendant has the ability to pay court-appointed attorney fees.
☐ as ordered in a separate limited judgment or order

6) ☒ Defendant must install and use an **ignition interlock device (IID)** in any vehicle operated by the Defendant during the period of the agreement when the Defendant has driving privileges *
☐ Defendant need not install an IID because Defendant:
☐ meets the requirements for medical exemption under Oregon Department of Transportation rules and is exempt from the IID requirement
☐ submitted to a blood, breath, or urine test that showed no cannabis, controlled substances, or inhalants and a BAC below 0.08%

7) ☐ Defendant must be booked and fingerprinted

8) Other: _____

Judge Signature:

10/19/2017 _____

**if Defendant is required to operate an employer-owned motor vehicle, an IID need not be installed if Defendant notifies employer of the IID requirement and has written proof of the notification*

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05

Brief length

I certify that (1) the word-count of this brief is 17,948 words. A motion to file extended brief in this case was filed on August 12, 2021. The motion has not been ruled on yet.

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.

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on August 19, 2021.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Petitioner's Brief on the Merits will be eServed pursuant to ORAP 16.45 on Benjamin Gutman #160599, Solicitor General, attorney for Plaintiff-Respondent.

Respectfully submitted,

ERNEST G. LANNET
CHIEF DEFENDER
CRIMINAL APPELLATE SECTION
OFFICE OF PUBLIC DEFENSE SERVICES

Signed
By Kyle Krohn at 9:03 am, Aug 19, 2021

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Attorneys for Petitioner on Review
Rhonda Colgrove