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 REPLY BRIEF ON THE MERITS

Review of 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: July 6, 2021
Author of Opinion: Aoyagi, Judge
Before: Armstrong, Presiding Judge, and Tookey, Judge, and Aoyagi, Judge

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PETITIONER'S REPLY BRIEF

The issues on review include whether the trial court had to terminate defendant's diversion when she attended the victim impact panel after the diversion period ended, whether ORS 138.105(5) precludes appellate review of the trial court's ruling, and whether denying review in this case violates the Fourteenth Amendment to the United States Constitution. In this reply brief, defendant addresses some of the state's arguments on those three issues.

Summary of Argument

1. ORS 813.235 gives a trial court discretion to require a victim impact panel as a condition of diversion. The statute neither expressly requires the defendant to attend the panel at a particular time, nor expressly limits when the court may exercise its discretion to require or waive the panel. And the state does not appear to dispute that statutory construction.

Rather, the state points to three different statutes that it contends require termination of diversion if the defendant attends the panel after the diversion period ends. But those statutes do not assist the state. ORS 813.230(3) merely specifies the length of the diversion period, not what must occur during the period. ORS 813.255(3)(b) requires a court to terminate diversion if it finds at a show cause hearing that the defendant has not fulfilled all diversion conditions, but it does not say when the defendant must complete the conditions—if

anything, it suggests that the defendant may complete them up until the date of the hearing. And ORS 813.225(8)(b) has little bearing on this case, because it applies only to diversion periods that have been extended (which did not happen here), and it was enacted years after the statutes that apply to this case.

2. ORS 138.105(5) precludes appellate review of a "conviction" based on a plea of guilty or no contest. The statute does not define conviction, but well-established legal principles suggest the legislature meant the narrower of two potential meanings. The state does not seem to dispute those conclusions. Rather, it relies on the Court of Appeals' presumption that the legislature likely intended a broader meaning of conviction—but that presumption is contrary to a plain reading of the statute.

The legislative history that the state recounts also fails to support the state's position. Contrary to the state's characterization of that history, it says that ORS 138.105(5) carries forward *one* of the principles of the prior statute, not *all* the prior limits on review. And the state's theory that the legislature adopted the holdings of two Court of Appeals opinions is unsupported by legislative history, which does not discuss those opinions except to criticize them or suggest that they would be abrogated by the bill.

3. The state's argument that denial of appellate review comports with the Fourteenth Amendment relies on its claim that the denial is part of a scheme of benefits and burdens split between the defendant and the state. But the actual

history of the statutes belies that claim. Appellate review was available for the first 20 years of the diversion program, and when the legislature removed appellate review it did so both unwittingly and in a manner that benefitted only the state. That imposed an arbitrary and unfair burden on defendants—who can fully comply with a diversion agreement but still lose their promised benefits via trial court mistakes that are unreviewable. The state's argument also ignores the costs that the lopsided arrangement imposes on the public and the courts, which benefit from a well-functioning and accurate diversion program. Because a nonreciprocal denial of appellate review for the defendant has no rational justification, it violates the Fourteenth Amendment.

Argument

I. The state does not dispute that ORS 813.235 gives a court discretion to waive the victim impact panel, and it has not identified any statute that removes that discretion when the diversion period ends.

The issue in this case is whether the trial court had to terminate diversion when defendant attended the victim impact panel after her diversion period had ended. The state does not appear to dispute that ORS 813.235 gives a court discretion to impose or waive the victim impact panel, and the state points to nothing in the text of that statute that precludes a court from exercising its discretion after the diversion period ends. Rather, the state argues that three other statutes required the court to terminate diversion: ORS 813.230(3), ORS

813.255(3)(b), and ORS 813.225(8)(b). Respondent's Brief on the Merits (RBOM) at 54-55. But none of those statutes support the state's position.

ORS 813.230(3) merely specifies that the "diversion agreement shall be for a period of one year after the date the court allows the petition." It provides no authority—let alone a requirement—for the court to terminate diversion. And it does not specify what must be done during the diversion period. As defendant noted in her brief on the merits, *some* diversion statutes impose time limits for *some* diversion conditions. For example, ORS 813.200(4) lists several conditions that apply "during the diversion period."[1] But the victim impact panel is not one of them. The state's argument that this court should read those time limits to apply to *all* diversion conditions is contrary to basic principles of

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[1] The state claims that ORS 813.200(4)(d) "does not describe a condition of a diversion agreement." RBOM at 58-59. The state's position is contrary to the plan text of the statutes. ORS 813.200(4)(d) requires that the "petition" include "an agreement by the defendant to not use intoxicants during the diversion period." And "[t]he petition when signed and dated becomes the diversion agreement." ORS 813.230(2). Indeed, the state has previously taken the position (in a brief written by the same attorney who represents the state in this proceeding) that ORS 813.200(4)(d) does describe a diversion condition. Appellant's Opening Brief at 13-14, 26-29, *State v. Zook*, 307 Or App 49, 476 P3d 508 (2020), *rev den,* 367 Or 709 (2021) (CA A169897). And the Court of Appeals accepted that premise. *Zook*, 307 Or App at 60-61.

Other provisions of ORS 813.200(4) also apply "during the diversion period," like keeping the court informed of the defendant's mailing address. In defendant's view, those are all diversion conditions—consuming alcohol or moving without telling the court would both violate the diversion agreement. But the state's current position appears to be that a defendant could, *e.g.*, use drugs during the diversion period and still successfully complete diversion.

both statutory construction and contract law. *See* ORS 174.010 ("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"); *cf. Wright-Blodgett Co. v. Astoria Co.*, 45 Or 224, 228-29, 77 P 599 (1904) ("In equity the time of payment is not of the essence of a contract for the sale of real estate unless made so by express agreement of the parties, by the nature of the contract itself, or by the circumstances under which the contract was executed.").

Likewise, ORS 813.255(3)(b) does not specify when any diversion conditions must be completed. It provides only that the court must terminate diversion "if, at the hearing on the order to show cause, the court finds by a preponderance of the evidence that * * * [t]he defendant failed to fulfill all of the terms of the diversion agreement." At most, any timing requirement imposed by that statute is the one in its text—the defendant must have completed all conditions *by the time of the hearing*. And there is no dispute that defendant did so. Again, the state's position would require this court to add words to the statute, such as "the defendant failed to fulfill all of the terms of the diversion agreement *during the diversion period*." That this court cannot do.

Finally, ORS 813.225(8)(b), which governs termination of diversion after an extension of the diversion period, does not assist the state for two reasons. First, the state cannot plausibly argue that it required or even authorized the court to terminate diversion, because it applies only "[i]f the court grants [a]

petition for an extension under this section," ORS 813.225(8), and that did not happen here. Second, it was enacted years after the victim impact panel statute and original diversion statutes were enacted, so it does not provide context for interpreting them. *Stull v. Hoke*, 326 Or 72, 79-80, 948 P2d 722 (1997).

Similarly, the state errs in citing ORS 813.252 and ORS 813.255(5) as context. RBOM at 55-56. Those statutes permit dismissal of the DUII charge if the defendant completes every diversion condition but still owes $500 or less in fees, provided the defendant pays the remaining fees the day of the hearing. But those statutes were enacted in 2013, long after the other diversion statutes were enacted, so they are not context for the issue on review.

In any event, ORS 813.252 and ORS 813.255(5) appear to be a response to Court of Appeals case law that had interpreted the diversion statutes in a draconian manner. *E.g.*, *State v. Reed*, 241 Or App 47, 54-58, 249 P3d 557, *rev den,* 350 Or 574 (2011) (requiring diversion termination when the defendant failed to pay $3 in fees before her diversion period had ended). The legislature's decision to abrogate that case law does not establish whether the Court of Appeals got it right or wrong, but it does suggest the legislature disagreed with the outcome. And the legislature's failure to enact a similar exception for the victim impact panel says little, given that the Court of Appeals did not announce a timing requirement for the victim impact panel until several years later. *See also SAIF v. DeLeon*, 352 Or 130, 141, 282 P3d 800 (2012)

("Legislative inaction in response to a judicial interpretation of a statute does not amount to an endorsement of the court's interpretation.").

Finally, with respect to the diversion agreement in this case, the state does not appear to dispute that *if* the diversion statutes permitted the trial court to waive or excuse the victim impact panel condition after the diversion period ended, then the agreement itself did not preclude the court from exercising that authority. RBOM at 64. Consequently, any disputes about the terms of the agreement and the factual record need not be resolved at this stage of the proceeding—they can be addressed by the trial court on remand when it has the chance to exercise its discretion under a correct interpretation of the statutes.[2]

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[2] Defendant does disagree with the state's characterization of the record at the show cause hearing. RBOM at 60 n 16. It is true that defendant pointed to reasons why she was confused about the diversion requirements—including the fact that she was "shuffled through the criminal justice system" and that her attorneys "did not go through the conditions of diversion with her line-by-line and explain it to her." Tr 35-36. But she identified other concerns as well, including facts related to her financial circumstances:

> "[DEFENDANT:] I did not do the victim's panel—I thought I had enough time. I'm a single mom, I work, and I—so I just kind of thought that the treatment was more important probably, I guess. I just—you know, they were more flexible with my schedule—work schedule."

Tr 31. Defendant elaborated that she had five sons all under age 10, that she worked at Shearer's and Labor Plus, and that she had also been attending school. Tr 31-32. Those facts all relate to her finances—a higher-income job with more generous paid time off, a partner who provided a second income or the ability to split childcare duties, or the ability to hire a caregiver all would have made it easier for defendant to fit the panel into her schedule. But, again, those are appropriate considerations for the trial court on remand.

II. The state does not dispute that well-established legal principles point to the narrower meaning of "conviction" in ORS 138.105(5), and its arguments for the broader meaning rely on Court of Appeals case law that the legislature never expressed an intent to adopt.

The state does not appear to dispute that the key issue in this case is the meaning of "conviction" in ORS 138.105(5); that there are two well-established meanings of that word; that well-established principles govern which meaning applies in a particular statute; or that those principles suggest that the narrower meaning of "conviction" is employed in ORS 138.105(5) because that statute governs a stage of a criminal proceeding and not a collateral proceeding or civil penalty. Nor does the state dispute that the rest of the bill that enacted ORS 138.105(5) expressly refers to the "judgment of conviction" when it means the broader meaning of conviction, or that the bill consistently uses the word "conviction" in contexts that suggest the narrower meaning.

The state's failure to refute those premises largely resolves the reviewability question. "[T]here is no more persuasive evidence of the intent of the legislature than 'the words by which the legislature undertook to give expression to its wishes.'" *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009) (quoting *State ex rel Cox v. Wilson,* 277 Or 747, 750, 562 P2d 172 (1977)). Here, the legislature chose to use a word with well-established meanings and used that word in a context that pointed exclusively to one of those meanings. This court should assume that the legislature—and the lawyers

and judges who originally drafted the statute—were aware of those facts. And this court should respect the legislature's decision to use that word in that context and not provide its own definition or otherwise specify that a court should use any definition other than what existing law provided.

To support its argument that the legislature did not intend the narrower meaning of "conviction," the state relies on the Court of Appeals' presumption that "if the legislature had intended to preclude review in such a limited way, it would have said so explicitly." *State v. Merrill*, 311 Or App 487, 492, 492 P3d 722, *adh'd to as modified on recons,* 314 Or App 460, ___ P3d ___ (2021).

But that presumption begs the question—it assumes that "conviction" naturally takes the broader meaning in ORS 138.105(5) and that defendant is proposing an unnatural reading of the statute. To the contrary, ORS 138.105(5) naturally takes the narrower meaning of "conviction," and the Court of Appeals adopted an unnatural reading of the statute without justification. Moreover, this court has suggested that the opposite presumption is the correct one:

> "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."

State v. Clevenger, 297 Or 234, 246, 683 P2d 1360 (1984) (Linde, J., concurring); *see also State v. Loyer*, 303 Or 612, 614 n 2, 740 P2d 177 (1987)

(noting that the entire court shared the "caution expressed in greater depth by the concurring justices" in *Clevenger*).

The state's reliance on legislative history also fails because the state assumes that the history says more than it does. The state repeatedly asserts that legislative history provides that ORS 138.105(5) is intended to restate multiple "limits" on review, plural. RBOM at 13-19. The state bases that claim on a single sentence in the Oregon Law Commission work group's report. But the report actually says that ORS 138.105(5) restates only one "principle," singular:

> "[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, Senate Judiciary Committee, SB 896, April 6, 2017, at 21 (emphasis added).

That statement does not support the state's claim that ORS 138.105(5) is intended to retain multiple limits on appellate review, let alone all the case law interpreting *former* ORS 138.050. Indeed, given that the statement describes the principle of ORS 138.105(5) using the language of ORS 138.105(5) without elaborating on the meaning of that language, it tells us little about the meaning of the statute that cannot be discerned from the statute's plain text—*viz.*, the

same principles that point to the narrower meaning in the text also point to the narrower meaning in the legislative history.

Finally, the state suggests that the similarity between that passage in the legislative history and language in two Court of Appeals opinions shows that the legislature intended to codify those decisions. RBOM at 15-17. But the state exaggerates the similarity—it amounts to the shared use of the words "validity" and "conviction," which are commonly found in any discussion of criminal appeals. And the state acknowledges that little legislative history supports its theory. RBOM at 15 n 2. The only discussion of the Court of Appeals opinions in question are reports that *criticize* those opinions or suggest that they would be abrogated by the bill—the same reports that the state faults defendant for citing. RBOM at 18. The state's theory that the legislature meant to adopt the holdings of Court of Appeals opinions without saying that it was doing so—or even discussing those opinions except to criticize them—is untenable. *See State v. Guzman/Heckler*, 366 Or 18, 31, 455 P3d 485 (2019) ("it makes less sense to assume—absent a specific indication—that the legislature is aware of every recent Court of Appeals decision and that it immediately treats all such decisions as fully determinative of the meaning of an interpreted statute").

III. The denial of appellate review is not part of a rational scheme that satisfies the Fourteenth Amendment but the result of piecemeal legislation that started with a balanced system and became more and more tilted in the state's favor.

The state argues that denying a defendant appellate review of a diversion termination, but allowing the state to appeal a diversion completion, does not violate the Fourteenth Amendment because the overall "legislative scheme provides certain benefits and trade-offs to defendants and to the state" that satisfy equal protection and due process. RBOM at 42. But the state overstates those benefits and trade-offs, as well as the extent to which the legislature intended them as a comprehensive scheme.

The state asserts that one benefit to the defendant is that "[i]f the defendant pleads guilty but successfully completes diversion, she obtains dismissal of the DUII charge with prejudice under ORS 813.255(5)." RBOM at 41. The state also claims that "[t]he statutory scheme provides a mandatory process that requires judicial adjudication and is designed to prevent erroneous or extra-judicial deprivations of liberty." RBOM at 47.

But that is not necessarily so. Under the state's construction of ORS 138.105(5), a defendant could fully satisfy the diversion agreement but still end up with an unreviewable judgment of conviction if a single trial judge made a factual or legal mistake. That judge might not even be the same one who accepted the defendant's plea but a different judge assigned to the case months

or years later. And the defendant would have no remedy for that judge's error. Even the judge might be left to flounder—denying the defendant the right to appellate review means trial judges must navigate hard legal issues again and again without appellate guidance. Or, worse, judges will be incentivized to rule against defendants in close cases, because the state alone has the right to appeal, meaning—as the judge in this case noted—that ruling in the defendant's favor will likely prompt an appeal but ruling in the state's favor will not.

Nor does the existing scheme enable the defendant to make a knowing and voluntary decision to accept that trade-off. To the contrary, the diversion forms prepared by this court list many rights that the defendant must give up, but the right to appellate review is not one of them. Petitioner's Brief on the Merits (PBOM) at ER-1. Indeed, the forms suggest that the defendant *will* have the right to appellate review if diversion is terminated:

> "I understand that if I fail to comply with the terms of the diversion agreement 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."

PBOM at ER-3.

There is also no evidence that the legislature ever considered the denial of appellate review to be part of the trade-offs of the diversion program or even knew that was a possibility. As defendant explained in her brief on the merits, the diversion program existed for over 20 years without requiring a guilty plea,

meaning defendants had the ability to appeal the termination of diversion. Appellate review was part of the scheme from the start. And the legislature's 2003 decision to require guilty pleas was not motivated by a desire to remove appellate review—it appears the legislature did not even know that would be a consequence of the change. Moreover, the 2003 change was entirely one-sided. It required defendants to give up their right to a trial *and* their right to appeal *and* did not give them any benefit in exchange.

Finally, the state is incorrect to suggest that the diversion program exists only for the defendant's benefit and to the detriment of the state. DUII diversion benefits *both* "the offender" *and* "the community." *State ex rel Schrunk v. Bearden*, 66 Or App 209, 212, 673 P2d 585 (1983). It does so by giving "the criminal justice system an alternative means" of dealing with "potentially reformable first-time offenders" that does not require the time and expense of a trial. *State v. Dendurent*, 64 Or App 575, 579, 669 P2d 361, *rev den,* 296 Or 56 (1983). Indeed, a significant impetus for the diversion program was this court's decision in *Brown v. Multnomah County*, 280 Or 95, 570 P2d 52 (1977), which held that the legislature's attempt to decriminalize first-time DUIIs had failed and that defendants remained entitled to jury trials—which threatened to overwhelm trial courts until the legislature created an alternative to trial in the form of diversion.

The state gains a significant advantage from the defendant's guilty plea, and the state benefits when a defendant successfully completes diversion and is rehabilitated. Consequently, permitting the state to appeal a successful diversion but denying that right to the defendant is not only unfair but also irrational. It undermines the accuracy of the system and provides an arbitrary disincentive for defendants to accept diversion. If that is truly the scheme that the legislature enacted—in a piecemeal fashion over several decades—then it violates the Fourteenth Amendment.

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,

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Signed
By Kyle Krohn at 1:47 pm, Oct 12, 2021

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05 and (2) the word-count of this brief is 3,849 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes.

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Reply Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on October 12, 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,

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