IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Appellant, Respondent on Review, v. VANESSA AMADA GONZALEZ, Defendant-Respondent, Petitioner on Review.	Marion County Circuit Court Case No. 17CR78352 CA A173971 SC S070433

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 Marion County
Honorable Audrey J. Broyles, Judge

Opinion Filed: June 28, 2023
Author of Opinion: Lagesen, C.J.
Before Powers, Presiding Judge, and Lagesen, Chief Judge, and Hellman, Judge.

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STATEMENT OF THE CASE

The trial court correctly considered defendant's personal characteristics, including her mental health, to conclude that the 90-month prison sentence was unconstitutionally disproportionate as applied to her. The state argues that the trial court erred in considering defendant's mental health in its proportionality analysis of her sentence.

The state advocates for the Judicial Branch, including this court, to defer solely to the legislature both to set the societal standards that govern proportionality challenges and to define the parameters of those standards. Legislative enactments can provide some guidance when identifying societal standards. But those enactments are not the sole source for those standards, and the particulars of those enactments are not dispositive of any standard gleaned therefrom. Adopting the state's rule would reduce constitutionally required judicial review of the constitutionality of a sentence imposed on a particular individual to an audit of whether "a particular penalty [is] incompatible with 'societal standards' embodied by the legislature's own enactments." Resp BOM at 15.

Consistent with its major premise, the state asserts that the Guilty Except Insane (GEI) and diminished capacity statutes stand as the legislature's predetermination of the spectrum and degree that mental illness bears on proportional punishment. But those enactments, which pertain only when determining guilt in the first instance, are ill-equipped for a sentencing court's evaluation of whether a defendant's personal characteristics reduce, but not erase, responsibility for the person's crimes.

This court should reject the state's bare assertion that the legislature intended to prohibit courts from considering mental illness at sentencing based on the enactment of the GEI and diminished capacity statutes. Engaging in proportionality analyses of criminal punishments is a judicial, not legislative, responsibility that often requires incorporation of societal standards that contravene—not comport with—legislative enactments. Contrary to the state's contentions, the sentencing court's consideration of defendant's mental health as part of its proportionality analysis is grounded in this court's caselaw and objective societal standards. Finally, a sentencing court that deferred to the legislative enactments on GEI and diminished capacity when assessing a defendant's mental health as part of a proportionality analysis would, in effect, abandon its constitutional role and eliminate mental health as a pertinent personal characteristic.

Argument

I. The state's contention that this and other courts defer solely to the legislature's identification of current societal standards would supplant judicial review of whether sentences are constitutional with an audit for conflicting legislative pronouncements.

The state asserts that courts can find societal standards to apply in proportionality challenges "only when societal standards [are] embodied by the legislature's own enactments." Resp BOM at 15. The state calls on this court to "honor the legislature's primary authority to set punishment, respect the separation of powers, and avoid second-guessing the legislature's judgment." *Id.* The state views proportionality challenges as courts "overrid[ing] the legislature's judgment about criminal penalties." *Id.* at 1.

Finding a sentence disproportionate, as applied to a defendant, is not "second guessing the legislature's judgment" *vis-à-vis* proportionality. Specifically, here, this court has no evidence that the legislature, or voters through the initiative process, undertook that task in enacting ORS 137.700 with respect to defendant's particular offense and her particular characteristics. That is, there is no evidence that the legislature or voters considered the constitutional factors set out in *State v. Rodriguez/Buck*, 347 Or 46, 217 P3d 659 (2009), which includes the characteristics of individual defendants; this court decided *Rodriguez/Buck* after ORS 137.700 was enacted *and* as-applied challenges require consideration of individual defendants' personal

characteristics. *See State v. Carey-Martin*, 293 Or App 611, 649, 430 P3d 98 (2018) (James, J., concurring) (explaining that proportionality challenges require courts to consider "the characteristics of *this* defendant against the *hypothetical* defendant that motivated legislative action") (emphasis in original).

The intent of voters in passing Measure 11, later codified as ORS 137.700, was that courts must impose a specific sentence for convictions of specific crimes, no matter whether the conduct underlying the crime was at the "outer edge" of the prohibited conduct or whether the defendant's personal characteristics rendered the defendant less morally culpable than defendants without those characteristics. *See Rodriguez-Buck*, 347 Or at 86 (De Muniz, C.J., dissenting) (describing voters' intent in passing Measure 11). And while the legislature and voters are free "to exercise their legislative power and establish policy for the state by setting mandatory minimum sentences for certain crimes," "the Oregon Constitution represents the fundamental expression of the people regarding the limits on governmental power. And it is the obligation of the courts to ensure that those fundamental principles are followed." *Rodriguez-Buck*, 347 Or at 79 (citations omitted).

At best, in passing Measure 11, the voters considered whether certain crimes should be designated as more serious and subject to harsher penalties, but that is not "the only 'proportion' that should be considered [in] the

relationship between the crime for which the defendant was convicted and the punishment for that crime." *Id.* at 64. Thus, considering whether the sentence, as applied to a defendant, is constitutional is not "second-guessing" the legislature or disrespecting separation of the powers. It is instead performing "the obligation of this court to enforce the constitutional provision—our fundamental law—rather than the statute." *Id.* at 80.

The state's assertion that "societal standards" can be set only by the legislature is also wrong. The state relies on *Rodriguez-Buck*, *Ryan*, and *Bartol* to support its position that "[t]he throughline in this court's decisions concluding that a particular penalty shocked the moral sense of reasonable people is that the penalty was incompatible with the legislature's own handiwork." Resp BOM at 18. But those cases establish that while legislative enactments help guide this court's determination of current societal norms, it is not the only source to rely on for that decision. Indeed, legislative enactments can conflict, thus requiring this court to exercise its own judgment.

In *Rodriguez-Buck*, this court did not rely on the legislature to "glean a general societal consensus." Resp BOM at 19. The legislative enactments that applied to those defendants called for mandatory sentences under ORS 137.700, full stop: the defendants' conduct constituted the sexual abuse charges, albeit on the "outer edge" of what constitutes that crime, which subjected them to 75-month prison sentences. *Rodriguez/Buck*, 347 Or at 74. But contrary to the

legislature's judgment, this court determined that the defendants' "criminal conduct appear[ed] insufficiently grave to justify the mandatory six-year and three-month sentence, but it also [was] less severe than the conduct in the vast majority of (and probably in all) other reported first-degree abuse cases since Measure 11 passed." *Id.* at 74. This court never identified a legislative-set societal standard that it followed; instead, this court used its own judgment in determining that the defendant's sentences were unconstitutional as applied to them. *Id.* at 79-80.

Similarly, this court in *Ryan* did not rely "on a legislatively recognized societal standard *regarding intellectual disability*" to find the defendant's sentence unconstitutional. Resp BOM at 21 (emphasis added). In *Ryan*, this court was persuaded by the Court's analysis in *Atkins v. Virginia*, 536 US 304, 122 S Ct 2242, 153 L Ed 2d 335 (2002), which categorically bans the death penalty for intellectually disabled people, to conclude that "[e]vidence of an offender's intellectual disability * * * is relevant to a proportionality determination where sentencing laws require the imposition of a term of imprisonment without consideration of such evidence." *Ryan*, 361 Or at 620-21. This court endorsed that independent societal standard before any mention of the legislature's enactment of ORS 161.290, which at most provided context

that *by analogy* supported the court's view.[1] This court mentioned that statute—once—when it applied the rule to the defendant. *Id.* at 624. This court did not rely on ORS 161.290 as the authority for its holding; that statute merely demonstrated that the defendant functioned at a level "two years below the minimum age for establishing criminal responsibility of a child under Oregon law." *Id.* This court acknowledged that the statute does not "directly appl[y] to intellectually disabled adults." *Id.* at n 13. Instead, it applies to children; and the defendant was not a child. Thus, the state's assertion that the holding in *Ryan* "focus[ed] on a legislatively recognized societal standard regarding *intellectual disability*" is untrue. Resp BOM at 21 (emphasis added). That statute pertains to children, not persons with intellectual disabilities.

The state also relies on *State v. Bartol*, 368 Or 598, 496 P3d 1013 (2021), to assert that societal standards are set only by the legislature. The state claims that this court observed that the legislature's "choices reflect 'societal standards'" and are the "principal metric this court has used in assessing the constitutional proportionality of a particular penalty." Resp BOM at 17 (citing

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[1] ORS 161.290 provides:

> "(1) A person who is tried as an adult in a court of criminal jurisdiction is not criminally responsible for any conduct which occurred when the person was under 12 years of age.
>
> "(2) Incapacity due to immaturity, as defined in subsection (1) of this section, is a defense."

Bartol, 368 Or at 613). But *Bartol*—and particularly that pinpoint citation—does not identify the legislature as the "principal" voice on societal standards. Instead, this court said that while "legislative enactments are strong indicators of current societal standards, [they] are not dispositive of whether a sentence comports with those standards." *Bartol*, 368 Or at 613. Indeed, in *Bartol*, this court had to decide which legislative enactment to rely on in determining whether the defendant's death sentence was unconstitutionally disproportionate as applied to him: (1) the provision that expressly stated that the new law redefining crimes that are subject to the death penalty did *not* apply retroactively to the defendant (and others similarly situated); or (2) the conflicting view of the legislature that the crime that the defendant had committed was no longer subject to the death penalty. *Id.* at 624-25. That did not require this court to defer to the societal standard that the legislature endorsed but instead to determine the constitutionality of the sentence given societal standards held by the community. *Id.* at 625 ("[O]ur task is not to determine the application of SB 1013 to [the] defendant's sentence—instead, we must evaluate the constitutionality of his sentence under Article I, section 16, in light of current societal standards."). In fact, the societal standard that the court ultimately relied on—a person should not be executed for a conviction that no longer is subject to the death penalty—is a standard that the legislature expressly flouted when it limited the retroactivity of SB 1013.

Defendant acknowledges that the legislative enactments can inform courts on current societal standards. But this court should reject the state's assertion that that is the *only* measure of current societal standards. The United States Supreme Court relied on multiple sources to determine societal standards, including "'the American public, legislators, scholars, and judges.'" *Ryan*, 361 Or at 617-18 (quoting *Atkins*, 536 US at 307). And this court has relied on United States Supreme Court case law, scholarly articles, and the American Bar Association in determining that a defendant's intellectual disability must be considered in proportionality analyses. *Ryan*, 361 Or at 620.

Moreover, as the *Amicus Curiae* observes, "societal standards often evolve more quickly than corresponding legislation is enacted." *Amicus* BOM at 20 (explaining how); *see also id.* at 20-22 (providing examples). That point is further illustrated by the legislature's inaction after this court determined that the defendants in *Rodriguez/Buck* and *Ryan* were undeserving of the punishments as applied to them. As it stands, if a defendant in the exact same circumstances were convicted of the exact same crimes as in *Rodriguez/Buck* and *Ryan*, the only power protecting such a defendant from constitutionally disproportionate punishment would lie in the judiciary. Sentencing courts would have to rely on the standards that *this* court set to ensure that the defendants did not receive an unconstitutional sentence, not the societal standards set by legislative enactment.

II. Extending *Ryan* to require sentencing courts to consider a defendant's mental illness, when the issue is properly raised, is a workable test and grounded in caselaw.

The state proposes a categorical ban on sentencing courts considering a person's mental illness in determining whether a sentence is unconstitutional as applied to that person. But the constitution is not that rigid. The state is unable to point to any authority that forbids a sentencing court from considering a defendant's mental illness in determining whether the sentence is unconstitutional. Instead, the state accuses defendant of endorsing a "broad rule" that "any of a 'defendant's personal characteristics that influence conduct and reduce culpability,' including mental illness, weigh in favor of constitutional disproportionality." Resp BOM at 25-26. The state further alleges that defendant invented a "sweeping rule that is not supported by any case law." *Id.* at 26. The state immediately steps back from the absolute by admitting that defendant relies on *Rodriguez-Buck*, which "permits a trial court to consider the 'characteristics of the defendant.'" *Id.* But, according to the state, "*Ryan* makes clear, that the question is whether a particular characteristic meaningfully affects the constitutional inquiry, and that requires a societal standard that demonstrates both when and how a characteristic reduces culpability such that it makes an offender categorically different from other offenders." *Id.*

Defendant's proposed rule is grounded in case law. Pet BOM at 34-39. Defendant did not make it out of whole cloth; it was *this* court that articulated that an offender's characteristics can be considered when they influence a defendant's conduct:

> "To the extent that an offender's personal characters influence his or her conduct, those characteristics can affect the gravity of the offense."

Ryan, 361 Or at 616 (citing *Rodriguez/Buck*, 347 Or at 63).

To be sure, defendant is asking this court to extend *Rodriguez/Buck* and *Ryan* to apply to defendants who suffer from mental illnesses—a personal characteristic that can influence a defendant's conduct. But that does not mean that defendant's arguments are "sweeping" or "unsupported by any case law." This is a novel issue, which will require this court to draw principles from similar cases to decide the outcome.

Defendant accepts that mental illnesses vary considerably depending on the person and the diagnosis. But the same is true for people suffering from intellectual disabilities. *Ryan*, 361 Or at 621 (noting the "broad spectrum of intellectual disabilities that may reduce, but not erase a person's responsibility for her crimes"); *see also Atkins*, 536 US at 340-41 (Scalia, J., dissenting) (describing wide range of intellectual disabilities). Thus, like considering intellectual disabilities, the test for sentencing courts in considering mental illness is as follows:

> "A sentencing court's findings, among other factual considerations, as to [a mentally ill] offender's level of understanding of the nature and consequences of his or her conduct and ability to conform his or her behavior to the law, will be relevant to the ultimate legal conclusion as to the proportionality—as applied to the offender—of a mandatory minimum sentence."

Ryan, 361 Or at 621 (citation omitted).

The state insists that this court's decision in *Kinkel v. Persson*, 363 Or 1, 20-21, 417 P3d 401 (2018), shows that courts "have not extended the *Atkins* Court's assessment of relative culpability for intellectually disabled offenders, and its corresponding conclusions regarding retribution and deterrence, to those with mental illness." Resp BOM at 37, 38. *Kinkel* does not aid the state.

Kinkel was before this court in a different posture. The petitioner raised a categorical Eighth Amendment challenge to his sentence, under *Miller v. Alabama*, 567 US 460, 132 S Ct 2455, 183 L Ed 2d 407 (2012). *Kinkel*, 363 Or at 18. In *Miller*, the Court held that youth who commit a homicide are eligible for a life sentence without the possibility of parole, only when the crime "reflects irreparable corruption rather than the transience of youth." *Kinkel*, 363 Or at 14 (describing *Miller*).

The petitioner did not challenge the state-constitutional proportionality of his punishment; he argued that "running his attempted murder sentences consecutively to each other and to his concurrent murder sentences result[ed] in an aggregate sentence that is equivalent to life without the possibility of parole

and, as a result, violates the Eighth Amendment" under *Miller*. *Kinkel*, 363 Or at 18. The petitioner argued that "when a juvenile's aggregate sentence is equivalent to life without the possibility of parole, then the severity of the sentence coupled with the characteristics of juvenile offenders will always lead to the conclusion that a life sentence without possibility of parole will violate the Eighth Amendment." *Id.* at 19.

Although *Miller* was decided after the petitioner was sentenced, the sentencing court's decision showed that it had made the proper inquiry as required by that case. The sentencing court had held a six-day sentencing hearing to determine whether the defendant's convictions should be served consecutively to each other. *Id.* at 7. At the hearing, the petitioner offered expert testimony that he "suffered from a schizoaffective disorder that motivated him to commit his crimes" and "his condition could be treated but never cured." *Id.* at 27. "[T]he sentencing court agreed with [the] petitioner's expert that 'there is no cure for [the petitioner's] condition, that he should never be released without appropriate medication and—I quote—'an awful lot of structure and appropriate support services arranged for him.'" *Id.* at 27-29 (footnote omitted). Relying on the petitioner's experts, the sentencing court found that if the "petitioner's disorder were untreated or inadequately treated, [he] 'remained dangerous.'" *Id.*

This court deferred to the sentencing court's findings and concluded that they were "inconsistent with a determination that [the] petitioner's crimes 'reflect the transient immaturity of youth.'" *Id.* at 28 (quoting *Montgomery v. Louisiana*, 577 US 190, 208, 136 S Ct 718, 193 L Ed 2d 599 (2016)). "[A]s [the] petitioner's experts testified, and the sentencing court found, [the] petitioner's crimes reflect a deep-seated psychological problem that will not diminish as [the] petitioner matures." *Id.*

Kinkel—and this case—demonstrate that courts can consider a defendant's mental and psychological issues in determining whether a sentence is unconstitutional as applied to them. In *Kinkel*, the defendant's mental illness weighed against him because, according to the sentencing court and expert testimony, it made the petitioner dangerous and did not reduce his culpability. *Id.* at 29-30. In contrast, here, the trial court, relying on expert testimony, found that defendant's mental illness was treatable and had been treated. Tr 558-66. The trial court found that the mental illnesses that defendant experienced at the time of committing the arson, however, reduced her moral culpability, rendering a 90-month prison sentence unconstitutional as applied to the defendant. But defendant did not escape all liability. The court sentenced her to 60 months of probation that stood between her and the 90-month prison sentence that otherwise will be imposed. That sentence demonstrates that the court believed that the defendant's dangerousness had subsided after being

treated, but it allowed for protection of the community in case defendant's mental illness resurfaced.

Thus, *Kinkel* and this case demonstrate that litigants can adequately present the issue to trial courts and that courts can consider mental illness in determining a defendant's moral culpability at sentencing. Like *Kinkel*, this court should defer to the trial court's ruling here.

III. The GEI and diminished capacity statutes do not preclude courts from considering mental illness at sentencing for people who do not qualify for that defense.

The state argues that the GEI statute and statute on diminished capacity show that the legislature "has spoken on the issue of mental illness and culpability in determining criminal responsibility in the first instance." Resp BOM at 33. And, because not all mental illnesses qualify under those statutes, the legislature has spoken on behalf of society that a mentally ill person who does not qualify under those statutes, is ineligible for courts to consider his or her mental illness in imposing the sentence. *Id.* The state contrasts the circumstances in this case with *Ryan*, arguing that the *Ryan* court recognized that the legislature had set a societal standard by enacting ORS 161.290. *Id.* at 35. And, in contrast here, the GEI and diminished capacity statutes "*do not apply to defendant*." *Id.* (state's emphasis).

The state's italicized distinction is no distinction at all. The statute at issue in *Ryan*, ORS 161.290, also did "*not apply to [the] defendant*" because

the *Ryan* defendant was not under the age of 12. This court relied on ORS 161.290 in applying its rule to the defendant to show that evidence of the "defendant's intellectual disability, if credited, would establish that [the] defendant's age-specific intellectual capacity, including his level of adaptive functioning, fell below the minimal age level for the imposition of criminal responsibility." *Id.* at 625.

Thus, relying on ORS 161.290 was not to say that the defendant could escape criminal culpability because his mental functioning was akin to a child, and children are not criminally culpable under ORS 161.290. It was to show that—despite criminal culpability—the defendant was less morally culpable such that the sentencing court could find that his sentence unconstitutionally disproportionate—and that some lesser punishment would be proportionate.

The state's reliance on the GEI or diminished capacity statutes to establish that mental illness should not be considered in proportionality challenges is also flawed. The state provides no legislative history or other authority to show that that that was the legislature's intent in enacting those statutes. Moreover, a GEI or diminished capacity inquiry "is not synonymous with culpability in determining the constitutionality of a sentence under Article I, section 16." *State v. Ryan*, 305 Or App 750, 767, 473 P3d 90 (2020). A person who successfully raises those defenses "has a complete defense to all criminal liability." *Id.* A person whose intellectual disability or mental illness

"reduces culpability in determining the proportionality of a sentence does not escape criminal liability." *Id.* at 767. If a defendant's mental illness could be considered only via a successful GEI or diminished capacity claim, there would be no proportionality inquiry because the defendant would have escaped all criminal liability. *Id.* at 767.

A defendant's culpability in establishing criminal liability is a different inquiry than the defendant's culpability at sentencing. The point of considering personal characteristics in a proportionality analysis "is not simply to ask whether [the] defendant knows the nature of the offense or whether he [or she] can conform his conduct. It is to determine the degree of culpability of [the] defendant's conduct." *Ryan*, 305 Or App at 770. A defendant's personal characteristics—like intellectual disability or mental illness—bring "into question the goals of retribution and deterrence that may justify punishments of particular severity. An offense may be relatively less reprehensible, even if equally harmful, when committed by an intellectually disabled [or mentally ill] offender as opposed to a high-functioning one." *Id.* Thus, unlike a GEI or diminished capacity inquiry, the "proportionality analysis requires courts to consider the 'constitutional implications' of a defendant's diminished culpability, specifically the fit between the offense and penalty," and when the defendant's personal characteristics "*reduce*, but [did] *not erase*, [the

defendant's] responsibility for her crimes." *Id.* at 770-71 (quotations and citations omitted).

CONCLUSION

For the above reasons, and those contained in defendant's Brief on the Merits and the *Amicus Curie's* Brief on the Merits, this court should affirm the trial court and reverse the Court of Appeals.

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Signed
By Kali Montague at 3:55 pm, Apr 23, 2024

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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 3,889 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 April 23, 2024.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Petitioner's Reply Brief on the Merits will be eServed pursuant to ORAP 16.45 on Benjamin Gutman #160599, Solicitor General, and Jonathan N. Schildt #151674, Assistant Attorney General, attorneys for Respondent on Review, Brittney Plesser #154030, and Malori Maloney ##175899, Oregon Justice Resource Center, and Jeffrey Ellis #102990, Oregon Capital Resource Center, attorneys for *Amicus Curiae*.

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