FILED February 26, 2024 14:40 PM Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

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

BRIEF ON THE MERITS OF *AMICI CURIAE* OREGON JUSTICE RESOURCE CENTER AND OREGON CAPITAL RESOURCE CENTER

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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BRIEF ON THE MERITS OF *AMICI CURIAE* OREGON JUSTICE RESOURCE CENTER AND OREGON CAPITAL RESOURCE CENTER IN SUPPORT OF PETITIONER ON REVIEW

INTRODUCTION

Amicus Curiae Oregon Justice Resource Center (OJRC) is a Portland-based non-profit organization founded in 2011. OJRC works to dismantle mass incarceration and systemic discrimination in the administration of justice by promoting civil rights and by enhancing the quality of legal representation to traditionally underserved communities. OJRC serves this mission by operating several distinct legal services programs that focus on the principle that our criminal legal system should be founded on fairness, compassion, accountability, and evidence-based practices. The FA:IR Law Project, a program of OJRC, seeks to: reverse, vacate, and prevent wrongful and unjust convictions and sentences and mitigate and prevent excessive sentences. The FA:IR Law Project's work encompasses broad challenges based on, among other things, changes in science, laws, and community standards; best practices; and evidence of misconduct. This is accomplished through individual casework, mass case reviews, data analysis, policy change, and community education.

Amicus Curiae Oregon Capital Resource Center (OCRC) was created by the Oregon Public Defense Commission to assist defense teams representing individuals either under a death sentence or facing the possibility of that result. We

assist at every stage of a criminal case—pre-trial, trial, appeal, state and federal post-conviction, and in clemency. OCRC provides training, case-specific help, as well as the filing of amicus briefs. Given recent events resulting in the elimination of all previous death sentences, OCRC has expanded its focus to all homicide cases.

SUMMARY OF ARGUMENT

As safeguards against unconstitutional sentences, Oregon courts have a critical duty to conduct a robust, case-specific proportionality analysis at each sentencing hearing. This analysis requires the judiciary to look to current societal standards and consider the impact of an individual's particular circumstances on both their culpability and the appropriateness of a statutorily prescribed punishment. While the judiciary may look to legislative enactments to help shed light on current societal standards, it must not "abdicate [its] sworn constitutional role" by concluding that because the legislature, or the people acting through the initiative process, passed a law, that law must be constitutional. *State v. Thorp*, 166 Or App 564, 588, 2 P3d 903 (2000), *rev dismissed*, 332 Or 559 (2001) (en banc) (Haselton, J., dissenting). The special position of the court, presiding over unique, individual defendants and cases, underscores its essential function.

The proportionality analysis Article 1, section 16, requires must be an examination not only the impact of case-specific factors on the gravity of the

offense, *see, e.g.*, *State v. Rodriguez/Buck,* 347 Or 46, 217 P3d 659 (2009), *State v. Ryan*, 361 Or 602, 396 P3d 867 (2017), but also the impact on the severity of the penalty, which necessarily turns on the personal characteristics of the defendant and the particular conditions of confinement. A penalty is disproportionate when it is likely to have a particularly harsh impact on a specific defendant or when there is no underlying penological justification.

A court applying the required proportionality analysis to Ms. Gonzalez's case will find the statutory minimum sentence disproportionate due to the comparative gravity of the offense as well as the particularly severe impact incarceration would have on her. With a history of mental illness and trauma, Ms. Gonzalez would likely experience worsening symptoms and profound retraumatization if confined to Coffee Creek Correctional Facility (CCCF). Prisons are known to exacerbate mental illness and retraumatize survivors of abuse, and CCCF is particularly ill-equipped to provide a safe environment for someone with Ms. Gonzalez's diagnoses and history. Ms. Gonzalez's status as parent of three would also result in a qualitatively harsher term of imprisonment; parents separated from their children experience an overwhelming loss and suffer poor mental health outcomes. Finally, imprisoning Ms. Gonzalez would not support any penological goals. Incarceration would destabilize and undermine the successful rehabilitative progress she made prior to her conviction and sentencing. Moreover, it would

impede public safety, increasing her risk of recidivism as well as the risk that her children become involved in the criminal legal system themselves.

ARGUMENT

The principle of proportionality is premised on human dignity. *Atkins v. Virginia*, 536 US 304, 311, 122 S Ct 2242, 153 L Ed 2d 335 (2002) (quoting *Trop v. Dulles*, 356 US 86, 100, 78 S Ct 590, 2 L Ed 2d 630 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."). For that reason, imprisonment must always be a proportionate means of achieving a legitimate aim.

The incarceration crisis in the United States "is one of the most pressing civil rights issues of our time."[1] Oregon has an incarceration rate of 555 per 100,000 people (including prisons, jails, immigration detention, and juvenile justice facilities), meaning that it locks up a higher percentage of its people than almost any democratic country on earth.[2]

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[1] Press Release, Econ Pol'y Inst, *Mass Incarceration Is One of the Most Pressing Civil Rights Issues Today* (Jan 16, 2015), https://www.epi.org/press/mass-incarceration-is-one-of-the-most-pressing-civil-rights-issues-today (accessed Feb 13, 2024) ("The disproportionate incarceration rate of minorities in general, and blacks in particular, is one of the most pressing civil rights issues of our time.").

[2] *Oregon Profile*, Prison Pol'y Initiative, https://www.prisonpolicy.org/profiles/OR.html (accessed Feb 13, 2024).

Oregon also has a proud tradition of construing our state constitution "first."[3] After all, local language, context, and history pervades state constitutions and demands independent analysis of state constitutional provisions.[4]

Oregon's constitution does not simply prohibit cruel and unusual punishment, it goes one step further and guarantees that all "penalties shall be proportioned to the offense." Or Const, Art I, § 16. Our state's legal history has practical import to this court when determining whether a sentence meaningfully serves a legitimate purpose of punishment. *See State v. Hart*, 299 Or 128, 138, 699 P.2d 1113 (1985) ("[T]raditional goals of sentencing" include such matters as "rehabilitation of the defendant and deterrence to impress upon the defendant the seriousness and cost of his offense.").

This case presents an opportunity to use our legal history and traditions as a robust check against disproportionate punishment.

I. Article I, section 16, requires the judiciary to conduct a proportionality analysis at each sentencing hearing.

Article I, section 16, requires that all penalties be proportionate to the offense. Oregon courts have interpreted this to mean a sentence is

[3] Hon. Jack L. Landau, *"First-Things-First" and Oregon State Constitutional Analysis*, 56 Willamette L Rev 63, 71 (2020).
[4] Jeffrey S. Sutton, *51 Imperfect Solutions: States and The Making of American Constitutional Law* (2018) (discussing how state constitutions can protect individual liberty); *see also* Robert J. Smith *et al.*, *State Constitutionalism and the Crisis of Excessive Punishment*, 108 Iowa L Rev 537 (2023).

unconstitutionally disproportionate if it "shocks the moral sense of all reasonable men as to what is right and proper under the circumstances."[5] To determine whether a sentence shocks the moral sense of reasonable people, this court has considered a variety of factors, *see Rodriguez/Buck*, 347 Or 58, 58 n 6, and has interpreted them based on current societal standards, *State v. Bartol*, 368 Or 598, 613, 496 P3d 1013 (2021). To comport with the demands of Article 1, section 16, courts must conduct this analysis at every sentencing.

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[5] In *State v. Wheeler*, this court looked to the "shock the moral sense of all reasonable men" standard articulated in *Sustar v. County Ct. of Marion County*, 101 Or 657, 665, 201 P 445 (1921), stating, "we read the court's words as attempting to articulate a standard that would find a penalty to be disproportionately severe for a particular offense only in *rare circumstances*." 343 Or 652, 670, 175 P3d 438 (2007) (emphasis added). The idea that a finding of disproportionality should be "rare" is worth examination, however. The *Wheeler* court came to this conclusion because of its heavy reliance on legislative deference and because, after an examination of Oregon caselaw, it determined that such findings to date had been rare. *Id.* at 671-77. Relying on few prior findings is problematic in multiple regards. First, it is circular—it has been so it must be. Second, in relying on what the court has done in the *past*, it acted contrary to the bedrock principle on which it is meant to act—"evolving standards of decency." *See State v. Bartol*, 368 Or 598, 614, 496 P3d 1013 (2021) ("Thus, the Amendment is "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.") (quoting *Weems v. United States*, 217 US 349, 378, 30 S Ct 544, 54 L Ed 793 (1910)). We cannot know whether the reasonable people of tomorrow will be shocked more often than the reasonable people of today. What's more, the *Wheeler* court came to the conclusion that these findings should be rare without an inquiry into the origin of the *Sustar* standard. It appears the court in *Sustar* improperly inserted language into the standard articulated in *Weems*, further limiting the power of the judiciary. *Compare Weems*, 217 US at 375 ("shock the sensibilities of men") with *Sustar*, 101 Or at 665 ("shock the moral sense of all reasonable men").

a. The text and context of Article I, section 16, require the judiciary to conduct a proportionality analysis at each sentencing hearing.

Article I, section 16, reads in full:

> "Excessive bail shall not be required, nor excessive fines imposed. Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense.—In all criminal cases whatever, the jury shall have the right to determine the law, and the facts under the direction of the Court as to the law, and the right of new trial, as in civil cases."

The text is clear: "*all* penalties shall be proportioned to the offense." *Id.* (emphasis added). The word "all" suggests that the inquiry must take place in every case. This is further supported by the contrasting language in the first phrase of the sentence "[c]ruel and unusual punishments shall not be inflicted," where there is no quantitative signifier.

Moreover, as this court has noted, because the text refers to "the" offense, in the singular, it necessarily involves the consideration of a defendant's particular conduct and characteristics, rather than the mere comparison of the penalty for one type of offense against the penalty for another offense. *Rodriguez/Buck*, 217 Or at 61 (citing *State v. Wheeler*, 343 Or 652, 677-80, 175 P3d 438 (2007); *see also Ryan*, 361 Or at 622 (the "proportionality test [] asks whether a *particular sentence for a particular offender* would shock the moral sense of reasonable people." (emphasis added)). In other words, the text requires the type of analysis that only the courts are able to perform in all cases.

The context confirms that the judiciary must always determine whether the penalty is proportionate to the offense. The context of the proportionality clause, which includes the surrounding words,[6] demonstrate that it is specifically directed at the judiciary: courts set bail, impose fines,[7] impose punishment, and preside over jury trials. Courts must likewise evaluate whether a penalty is proportioned to the offense.

b. Current societal standards require the judiciary to conduct a proportionality analysis at each sentencing hearing.

Both current societal standards[8] and rational judgment support a case-specific proportionality analysis at each sentencing.

Courts have relied on "current" or "evolving" societal standards when determining whether to review claims of disproportionality and in conducting individual proportionality determinations. *See, e.g.*, *Bartol,* 368 Or at 613. To determine current societal standards, courts look to legislative enactments, *see, e.g.*, *id*. at 613, as well as other sources. In *Ryan*, for example, this court looked to the United States Supreme Court's decision in *Atkins*, a law review article, the *ABA*

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[6] Hon. Jack L. Landau, *An Introduction to Oregon Constitutional Interpretation*, 55 Willamette L Rev 261, 273 (2019); *see, e.g.*, *Oberg v. Honda Motor Co., Ltd.*, 316 Or 263, 274, 851 P2d 1084 (1993), *rev'd on other grounds Honda Motor Co., Ltd. v. Oberg*, 512 US 415, 114 S Ct 2331, 129 L Ed 2d 336 (1994).
[7] ORS 135.265; ORS 137.286; ORS 161.625-665.
[8] The United States Supreme Court has stated on numerous occasions that current societal standards need not be "wholly unanimous," rather, they must "weigh[] on the side" of the decision. *See, e.g.*, *Atkins*, 536 US at 312.

Criminal Justice Mental Health Standards, and Oregon Administrative Rules. 361 Or at 619-20. In *Atkins*, the Court relied on "[t]he consensus reflected" in the deliberations of "the American public, legislators, scholars, and judges," and clinical definitions. 536 US at 307, 318. In *Graham v. Florida*, the Court looked to developments in psychology and brain science, and its own determination of the reduced culpability of juveniles in *Roper v. Simmons*, 543 US 551, 125 S Ct 1183, 161 L Ed 2d 1 (2005), as well as developments in psychology and brain science. 560 US 48, 62, 130 S Ct 2011, 176 L Ed 2d 825 (2010).

The *Graham* Court further articulated that "[c]ommunity consensus, while entitled to great weight, is not itself determinative of whether a punishment is cruel and unusual." *Id.* at 67 (citation omitted). "In accordance with the constitutional design, the task of interpreting the Eighth Amendment remains our responsibility." *Id.* (citation omitted); *see also Atkins*, 536 US at 313 ("[I]n cases involving a consensus, our own judgment is 'brought to bear,' by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators." (citation omitted)).

Countless sources support an abandonment of strict, mandatory sentencing that does not consider case-specific factors. With origins in racially motivated drug

laws,[9] mandatory minimum sentences have a growing, bipartisan reputation as "bad policy because they reallocate power from judges to prosecutors, cement racism and classism, and fail to advance community safety."[10] For example, a 2016 poll conducted for The Pew Charitable Trusts found that 77 percent of respondents supported "giving judges the flexibility to determine sentences based on the facts of each case" in "*all* cases."[11] The American Bar Association has long expressed disapproval of mandatory minimum sentencing.[12] President Biden, Attorney General Merrick Garland, and former Attorney General Eric Holder have spoken

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[9] Alison Siegler, *Shift the Paradigm on Mandatory Minimums*, American Bar Association (Jan 12, 2022) https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2022/winter/shift-paradigm-mandatory-minimums/.

[10] *Id.*

[11] The Mellman Group & Public Opinion Strategies, *National Survey Key Findings – Federal Sentencing & Prisons* 2 (Feb 10, 2016), https://www.pewtrusts.org/-/media/assets/2016/02/nationalsurveykeyfindingsfederalsentencingprisons.pdf (accessed Feb 13, 2024).

[12] American Bar Association's *Criminal Justice Standards: Sentencing* (1994) (ABA Sentencing Standards), Standard 18-3.21(b), available at https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/sentencing.pdf ("A legislature should not prescribe a minimum term of total confinement for any offense."). The Commentary explains that this "long-standing ABA policy" grew out of research showing that "fixed legislative severity judgments are overly roughshod when applied uniformly to one class of offense, removing the ability of other actors within the [criminal justice] system to respond to case-specific factors." *Id.* 135; *see also* ABA Sentencing Standard 18-6.1(a) ("The sentence imposed in each case should be the minimum sanction that is consistent with the gravity of the offense, the culpability of the offender, the offender's criminal history, and the personal characteristics of an individual offender that may be taken into account.").

out against mandatory minimum sentencing.[13] Fair and Just Prosecution, a group of "current and former elected prosecutors and law enforcement leaders" put out a statement in 2021 to allow for second chances, stating that "[m]andatory sentences that require people to serve a set minimum number of years for a given crime, notwithstanding their unique circumstances or safety risk, have also needlessly incarcerated people past the point of any public safety benefit."[14]

In Oregon, the 2021 passage Senate Bill 819, a measure that allows for district attorneys and convicted defendants to jointly petition a court for resentencing, suggests a legislative understanding that a one-size-fits-all approach to sentencing is not always appropriate. *See* ORS 137.218. There is also a growing debate among elected prosecutors in Oregon regarding the efficacy of mandatory minimum sentencing altogether.[15]

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[13] Alison Siegler, *End Mandatory Minimums*, Brennan Center for Justice (Oct 18, 2021), https://www.brennancenter.org/our-work/analysis-opinion/end-mandatory-minimums.

[14] Fair and Just Prosecution, *Joint Statement on Sentencing Second Chances and Addressing Past Extreme Sentences* 1 (Apr 2021), https://www.fairandjustprosecution.org/staging/wp-content/uploads/2021/04/FJP-Extreme-Sentences-and-Second-Chances-Joint-Statement.pdf (accessed Feb 13, 2024).

[15] Conrad Wilson, *Oregon's District Attorneys Divided on Mandatory Minimum Jail Sentences*, Oregon Public Broadcasting (Jan 9, 2021), https://www.opb.org/article/2021/01/09/oregon-district-attorneys-association-mandatory-minimum-jail-sentences/ (accessed Feb 13, 2024).

c. The unique position of the judiciary requires that it conduct a proportionality analysis at each sentencing hearing.

The need for the court to ensure proportionality is underscored by the inability of the legislative and executive branches to conduct the required analysis.

i. The legislature is unable to conduct an individualized proportionality analysis in the first instance.

A proportionality analysis compares the "general definition of the crime in the statute" with the penalty imposed, *Rodriguez/Buck*, 347 Or at 62, and asks whether it "shock[s] the moral sense of reasonable people to impose *that* penalty, for *this* defendant, for *these* acts," *State v. Carey-Martin*, 293 Or App 611, 644, 430 P3d 98, 120 (2018) (James, J., concurring) (emphasis in original). Thus, in conducting such an analysis, "the court is considering the characteristics of *this* defendant against the *hypothetical* defendant that motivated the legislative action." *Carey-Martin*, 293 Or App at 649 (emphasis in original). An "offense" includes "the *specific defendant's particular conduct* toward the victim that constituted the crime." *Rodriguez/Buck*, 347 Or at 62 (emphasis added). In evaluating the gravity of the offense, "case-specific factors, such as the characteristics of the defendant" are relevant. *Id.*

Legislators, or the people acting through the initiative process, consider only the *theoretical* offender who will be subject to the laws they pass. They may

conscientiously create carve-outs to prevent less culpable[16] or particularly vulnerable defendants from facing unduly harsh penalties. But, despite the level of their commitment to create just laws and proportionate penalties for those who violate them, without any "specific defendant" before them, they are incapable of conducting the proportionality analysis required by Oregon's Constitution. Therefore, it is incumbent on the courts to do so.

ii. District attorneys cannot reliably ensure that sentences are proportionate.

In theory, district attorneys—acting under the executive branch—could complete the portion of the proportionality analysis that legislators cannot; they have the opportunity to consider case-specific factors, including, in many cases, the personal characteristics of each defendant they prosecute. However, the conflict of interest inherent in an adversarial criminal legal system in addition to racial biases rampant throughout law enforcement results in a scenario in which district attorneys cannot reliably ensure proportionality in plea dealing.

The criminal legal system's reliance on plea bargaining—and district attorneys' acute awareness of this reliance—fosters circumstances under which

[16] *See, e.g.*, ORS 137.712 (allowing the imposition of a sentence that is less than the mandatory minimum prescribed by ORS 137.700 for certain offenses under specified circumstances related to the harm to the victim, the relationship between the defendant and the victim, the particular conduct giving rise to the offense, and the defendant's criminal history).

prosecutors "seek sentences that exceed their own opinions of retributive fit because of their use of the 'trial penalty.'"[17] For the trial penalty to serve as an effective incentive, prosecutors must follow through with their promises to seek a greater sentence (and/or file more serious charges) if a defendant is unwilling to admit guilt and instead proceeds to trial.[18] The United State Supreme Court approved of the use of trial penalties in *Bordenkircher v. Hayes*, cementing the practice in the criminal legal system. 434 US 357, 359, 98 S Ct 663, 54 L Ed 2d 604 (1978). There, "the prosecutor himself deemed it unreasonable and not in the public interest to put this defendant in jeopardy of a sentence of life imprisonment," *id.* at 371 (Powell, J., dissenting), but threatened a charge that

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[17] Samuel Weiss, *Into the Breach: The Case for Robust Noncapital Proportionality Review Under State Constitutions*, 49 Harv CR-CL L Rev 569, 590 (2014). The trial penalty refers to the widely acknowledged practice of prosecutors seeking and/or judges imposing a post-trial sentence greater than what was contemplated by the plea offered pre-trial.

The rate at which district attorneys levy (or decline to dismiss) charges, paired with current funding levels, ensures that prosecutors, public defenders, and the judiciary would be unable to perform their functions absent the overwhelming proportion of cases that resolve via plea bargaining. *See, e.g.*, *Santobello v. New York*, 404 US 257, 260, 92 S Ct 495, 30 L Ed 2d 427 (1971) ("The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.").

[18] *See, e.g.*, Weiss, 49 Harv CR-CL L Rev at 590-91.

would require such a sentence with the intent of securing a guilty plea and then followed through when Mr. Hayes refused.

In Oregon, as in all states, while prosecutors may have opportunities to consider some case-specific facts as they negotiate pleas and argue for particular sentences, the realities of a culturally and structurally adversarial system that depends on plea bargaining, disincentivizes them from focusing on or ensuring proportionality.[19]

Not only has prosecutors' reliance on plea bargaining ensured that charges and sentences are generally inflated, their reliance has also exacerbated racially disparate outcomes in the criminal legal system because there are few checks on state bias. It is well established both nationally and in Oregon that the criminal legal system is rife with racial bias that begins with police investigations and continues through to sentencing. In Oregon, for example, Black people are arrested at a rate 4.3 times higher than white people[20] and are imprisoned at a rate almost

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[19] Moreover, prosecutors are likely to lack the "training or even the appropriate information to properly consider a defendant's mitigating circumstances at the initial charging stage of a case." Hearing on Mandatory Minimums Before the United States Sentencing Commission, 13 (May 27, 2010) (prepared statement of James E. Felman, on behalf of the American Bar Association).
[20] Jonathan Levinson, *Portland Has 5th Worst Arrest Disparities in the Nation, According to Compiled Data*, Oregon Public Broadcasting (Feb 7, 2021), https://www.opb.org/article/2021/02/07/portland-has-5th-worst-arrest-disparities-in-the-nation-according-to-data/ (accessed Feb 13, 2024); *see also* Samuel Sinyangwe, *The Police Departments With The Biggest Racial Disparities In*

four times greater.[21] In Multnomah County, racial disparities exist at each stage of the criminal process from arrest to post-conviction supervision.[22] In recent years, Oregon courts have also identified numerous *Batson v. Kentucky*[23] violations, including by an elected district attorney of a major Oregon county.[24]

Nationally, studies have found that "mandatory minimum charges resulted in Black individuals spending more time in prison than whites for the exact same crimes," and "prosecutors bring mandatory minimums 65 percent more often against Black defendants."[25] In fact, one study found that "some federal prosecutors charge Black and Latino individuals more often than white individuals

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Arrests And Killings, FiveThirtyEight (Feb 4, 2021), https://fivethirtyeight.com/features/the-biden-administration-wants-to-address-racial-bias-in-policing-what-cities-should-it-investigate/ (accessed Feb 13, 2024).

[21] Latisha Jensen, *Black Oregonians Are Imprisoned at a Rate Almost Four Times That of White People*, Willamette Week (May 5, 2021), https://www.wweek.com/news/2021/05/05/black-oregonians-are-imprisoned-at-a-rate-almost-four-times-that-of-white-people/ (accessed Feb 13, 2024); *see also* Vera Institute of Justice, *Incarceration Trends in Oregon* (2019), https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-oregon.pdf (accessed Feb 13, 2024).

[22] MacArthur Safety and Justice Challenge, *Racial and Ethnic Disparities in Multnomah County* 21-39 (2019), https://multco-web7-psh-files-usw2.s3-us-west-2.amazonaws.com/s3fs-public/Multnomah_R.E.D.%20Analysis%202019_Final%20November%2019%20 2019_0.pdf (accessed Feb 23, 2024).

[23] 476 US 79, 106 S Ct 1712, 90 L Ed 2d 69 (1986).

[24] Conrad Wilson, *Court Rules Washington County DA Wrongfully Struck Juror Based on Race*, Oregon Public Broadcasting (July 3, 2019), https://www.opb.org/news/article/washington-county-district-attorney-court-rules-juror-struck-race/ (accessed Feb 13, 2024).

[25] Siegler, Brennan Center for Justice (Oct 18, 2021).

with possession or sale of a quantity of drugs just sufficient to trigger a mandatory minimum; the disparity is highest 'in states with higher levels of racial animus.'"[26]

Although racial disparities in the criminal legal system will not be alleviated by judicial intervention alone, a case-specific consideration of proportionality at every sentencing hearing would allow the courts to act as a check against the bias that impacts charging decisions and plea bargaining.

iii. It is therefore incumbent on the judiciary to ensure proportionality.

As the only branch positioned to reliably consider the case-specific factors relevant to a proportionality analysis, the judiciary must fulfill its role as a safeguard against sentences that are disproportionate as applied. While the court may give due deference to legislative enactments that are founded upon a "rational basis," *see, e.g.*, *Wheeler*, 343 Or at 669, that deference must not be absolute. The court must "bring its own judgment to bear" in each case, *Atkins*, 536 US at 304; it cannot "abdicate [its] sworn constitutional role by stating: 'The people passed this law, so it must be constitutional,'" *Thorp*, 166 Or App at 588 (Haselton, J., dissenting).

[26] *Id.*

1. The judiciary has a special duty to ensure the penalties it imposes comply with constitutional mandates.

The judiciary has a unique role in guarding against unconstitutionally disproportionate penalties.

In *Rodriguez/Buck*, the court recognized "the authority of the people, acting through the initiative process, to exercise their legislative power and establish policy for the state by setting mandatory minimum sentences for certain crimes." 347 Or at 79. But it tempered this acknowledgement with an emphasis on the judiciary's crucial function as a check on the legislature:

> "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. * * * [T]he proportionality requirement of Article I, Section 16, is not merely aspirational, but was intended to protect Oregon's citizens against penalties that are disproportionate to their offenses."

Id. at 79-80.

Similarly, in ruling a death sentence was disproportionate, the court in *Bartol* wrote:

> "Courts play a critical role in protecting against disproportionate punishments. Generally, legislatures determine the punishments that may be imposed for crimes, and courts defer to those determinations. But the fact that a punishment is authorized by the legislature does not mean that the punishment comports with current standards of decency as required by the Eighth Amendment, and courts have an obligation to ensure that punishments do not violate that requirement."

368 Or at 615.

In *Ryan*, the court relied heavily upon *Atkins*, in which the United States Supreme court held unconstitutional the use of the death penalty on intellectually disabled defendants. Summarizing *Atkins*, the *Ryan* court wrote:

> "The Court noted that, although some states still imposed the death penalty on intellectually disabled individuals convicted of heinous crimes, the consistency of the direction of change was more important than a simple numerical tally. The Court stated that the practice of executing the intellectually disabled was 'uncommon,' but that evidence of consensus, though important, did not 'wholly determine' the matter, insofar as *the Court was required to bring its own judgment to bear by asking whether there was reason to disagree with the judgment reached by the citizenry and its legislators*."

361 Or at 618 (emphasis added) (citing *Atkins*, 536 US at 312-16).

Indeed, "the court's role is to interpret and apply the constitution, even when that requires the court to invalidate the legislature's policy choice, either as it applies in a particular case or generally."[27]

2. The judiciary must act as a safeguard to ensure legislatively prescribed sentences are constitutional.

While it is the role of the legislature to enact laws, the judiciary must act as a check to ensure that those laws are constitutional. In fulfilling this role, a court conducting a proportionality analysis must evaluate the question based on current

[27] Thomas A. Balmer & Katherine Thomas, *In the Balance: Thoughts on Balancing and Alternative Approaches in State Constitutional Interpretation*, 76 Alb L Rev 2027, 2058 (2013).

societal standards. *Bartol*, 368 Or at 621. The proportionality requirement "is not static; it evolves as societal standards change.

Legislative enactments may shed light on societal standards, but they are "not dispositive of whether a sentence comports with those standards[.]" *Id.* at 613; *see also id.* at 615 ("[A]lthough legislative measures adopted by the people's chosen representatives provide one important means of ascertaining contemporary values, it is evident that legislative judgments alone cannot be determinative of Eighth Amendment standards since that Amendment was intended to safeguard individuals from the abuse of legislative power." (quoting *Gregg v. Georgia*, 428 US 153, 174 n 19, 96 S Ct 2909, 49 L Ed 2d 859 (1976) (opinion of Stewart, Powell, and Stevens, JJ)). Indeed, societal standards often evolve more quickly than corresponding legislation is enacted. For example, while Oregon recognized marriage as a defense to the crime of rape until 1977, it can hardly be said that marital rape was consistent with societal standards before that legislative change.[28] The Oregon Constitution contained obsolete references to the state's "white population," "free Negroes," and "mullattoes" until voters approved an amendment removing the language in 2002.[29] Nationally, the Civil Rights Act and Voting

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[28] ORS 163.335 (1971) (repealed 1977).

[29] The 2002 amendment affected Article VII, sections 2, 10, and 14, and Article XVIII, sections 2, 4, and 5; among the stricken language was the following provision: "No free negro, or mulatto, not residing in this state at the time of the

Rights Act were passed nearly 100 years after the ratification of the Thirteenth Amendment.

Instances of legislative failures to enact laws and promote policies that have clear public support also demonstrate that the legislature is at times out of step with societal standards. Eighty-five percent of Americans support legalized abortion access in some form, yet there is no federal law enshrining such a right.[30] Sixty-five percent believe the federal government spends too little on public education.[31] Fifty-eight percent support stricter gun laws than currently exist.[32]

Even when lawmakers are motivated to enact legislation that is in sync with current societal standards, legislatures are too often hindered from doing so; for example, during Oregon's 2023 legislative session, ten senators engaged in a

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adoption of this constitution, shall come, reside, or be within this State, or hold any real estate, or make any contracts, or maintain any suit therein; and the Legislative Assembly shall provide by penal laws, for the removal, by public officers, of all such negroes, and mulattoes, and for their effectual exclusion from the State, and for the punishment of persons who shall bring them into the State, or employ, or harbor them." Official Voters' Pamphlet, General Election, Nov 5, 2002, 7.

[30] *Where Do Americans Stand on Abortion?* Gallup: The Short Answer (July 7, 2023), https://news.gallup.com/poll/321143/americans-stand-abortion.aspx (accessed Feb 13, 2024).

[31] *Many Dissatisfied with the Government's Spending Priorities*, Associated Press-NORC Center for Public Affairs Research (Mar 29, 2023), https://apnorc.org/projects/many-dissatisfied-with-the-governments-spending-priorities/ (accessed Feb 13, 2024).

[32] Katherine Schaeffer, *Key Facts About Americans and Guns*, Pew Research Center (Sept 13, 2023), https://www.pewresearch.org/short-reads/2023/09/13/key-facts-about-americans-and-guns/ (accessed Feb 13, 2024).

record-long walkout that stalled hundreds of bills and ultimately forced concessions "on a sweeping bill related to expanding access to abortion and transgender health care and another measure regarding the manufacture and transfer of undetectable firearms, known as ghost guns."[33] A 2019 walkout resulted in the elimination of a bill that would have required guns to be locked when not in use and increased the legal age of purchase to 21.[34]

Thus, rather than simply deferring to the legislature, courts engaged in proportionality analyses must independently determine whether a statutorily prescribed sentence reflects current societal standards.

II. The judiciary's proportionality analysis should involve case-specific considerations relevant to both the gravity of the offense *and* the severity of the penalty.

In determining whether a sentence is proportionate, courts compare the severity of the penalty with the gravity of the crime. It is well established that, in determining the gravity of the offense, the court must consider case-specific

[33] Associated Press, *Oregon High Court Says 10 GOP State Senators Who Staged Long Walkout Can't Run for Reelection*, Politico (Feb 1, 2024), https://www.politico.com/news/2024/02/01/oregon-supreme-court-gop-walkout-00139079 (accessed Feb 13, 2024).

[34] Dirk VanderHart & Lauren Drake, *Senate Democrats Appear to Give Up Gun Control, Vaccine Bills to Get GOP Back*, Oregon Public Broadcasting (May 13, 2019), https://www.opb.org/news/article/oregon-senate-democrats-give-up-gun-control-vaccine-bills-gop-walkout-return/ (accessed Feb 13, 2024).

factors, including characteristics of the defendant. *Rodriguez/Buck*, 347 Or at 62.[35] Such characteristics are relevant "to the extent that [they] influence [a defendant's] conduct." *Ryan*, 361 Or at 616. As is argued in Petitioner's Opening Brief, mental health may be one such characteristic. Because many other characteristics may influence a defendant's conduct,[36] the scope cannot be strictly circumscribed; instead, courts must conduct a case-by-case assessment.

Though the comparative proportionality analysis involves two considerations ("the offense" and "the penalty"), Oregon courts to date have conducted a "slightly more involved" inquiry when considering the offense. *See, e.g.*, *Rodriguez/Buck*, 347 Or at 60. When considering "the penalty," courts generally limit the inquiry to the length of incarceration.

A proportionality analysis that complies with the mandates of the Oregon Constitution, however, must account for case-specific factors that are relevant to

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[35] Notably, the *Rodriguez/Buck* court did not need to pronounce such a robust rule to reach its conclusion; in analyzing the first enumerated factor, the court relied only on "the specific conduct" of each defendant and on the harm to each victim. *Rodriguez/Buck*, 347 Or at 70. The court did not rely upon any characteristics of either defendant or victim, nor did it rely on the relationship between either pair. *See id.* at 67-74. Nor did the court define or limit the meaning of "characteristics of the defendant."

[36] For example, Petitioner notes a variety of factors that may inform mental health diagnoses, "including a defendant's history of trauma, abuse, drug-induced psychosis, suicidal ideation and behavior, and stressors that trigger that behavior." Petitioner's Opening Brief at 4. Petitioner therefore concludes that "trial courts must be able to consider those factors in determining whether the mental illness renders the sentence unconstitutionally disproportionate." *Id.*

the gravity of the offense *and* the severity of the penalty. A contemplated penalty may be disproportionate when the impact it is likely to have on a specific defendant is especially harsh or when there is no underlying penological justification.[37]

a. Text, context, and case law support a case-specific proportionality analysis into the severity of the penalty.

Without an equally robust analysis of the severity of the penalty, courts are making proportionality determinations based on a sanitized picture of punishment. The way a penalty impacts a particular person necessarily increases or decreases its severity. The impact on a person also affects whether the penalty achieves the various purposes of punishment.

Oregon courts have not foreclosed the possibility of a case-specific penalty analysis. *See State v. Cook*, 297 Or App 862, 864, 445 P3d 343 (2019) (declining to resolve the open question of whether a court could consider a defendant's increased vulnerability in prison due to his intellectual disability "as part of the qualitative nature of a sentence's severity."). To the contrary, case law suggests that

[37] "[A] sentence of imprisonment may work to promote not respect, but derision, of the law if the law is viewed as merely a means to dispense harsh punishment without taking into account the real conduct and circumstances involved in sentencing." *Gall v. United States*, 552 US 38, 54, 128 S Ct 586, 169 L Ed 2d 445 (2007) (quoting, with approval, district judge's conclusion in the case).

the analysis of a penalty in proportion to an offense looks beyond the length of incarceration. This court has stated on a number of occasions:

> "the *primary* determinant of the severity of a penalty is the amount of time that the wrongdoer must spend in prison or jail[.]"

Rodriguez/Buck, 347 Or at 60 (emphasis added); *see also Cook*, 297 Or App at 348 ("*Rodriguez/Buck*'s use of the phrase 'primary determinant' left the door open for secondary, or nonprimary, determinants of severity that were not simply 'the amount of time that the wrongdoer must spend in prison or jail.'"); *see also Ryan*, 361 Or at 620-21, 625 n 14 (This court went so far as to state that "evidence pertaining to defendant's intellectual disability was relevant both to the gravity of his offense *and* the severity of the penalty for it." (emphasis added)).

The United States Supreme Court has similarly recognized that the severity of a penalty may depend on the individual characteristics of a particular defendant. In considering the proportionality of life sentences for juveniles, for example, the Court not only recognized the group's reduced culpability, but also emphasized the particular severity of the punishment as applied. *Graham*, 560 US at 70-71 ("Life without parole is an especially harsh punishment for a juvenile."); *Miller v. Alabama*, 567 US 460, 475, 132 S Ct 2455, 183 L Ed 2D 407 (2012) ("The penalty [of life without parole] when imposed on a teenager, as compared with an older person, is therefore the same [] in name only." (citation omitted)). Prior to those

decisions, Justice Blackmun, concurring in *Farmer v. Brennan*, also brought attention to the possibility of a "broader view of punishment:"

> "Consider, for example, a situation in which one individual is sentenced to a period of confinement at a relatively safe, well-managed prison, complete with tennis courts and cable television, while another is sentenced to a prison characterized by rampant violence and terror. * * * [I]t is natural to say that the latter individual was subjected to a more extreme punishment. It matters little that the sentencing judge did not specify to which prison the individuals would be sent; nor is it relevant that the prison officials did not intend either individual to suffer any attack. The conditions of confinement, whatever the reason for them, resulted in differing punishment for the two convicts."

511 US 825, 855, 114 S Ct 1970, 128 L Ed 2d 811 (1994) (Blackmun, J., concurring).

The use of the word "penalty" in Article I, section 16, also suggests that courts may consider more than just the length of incarceration. Historical and current definitions define "penalty" broadly to include "suffering" caused by law or judicial decisions.[38] In other words, the text does not limit the courts to a consideration of the length of a sentence alone.

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[38] *See, e.g.*, Noah Webster, 1 *An American Dictionary of the English Language* (unpaginated) (1828) ("The suffering in person or property which is annexed by law or judicial decision to the commission of a crime, offense or trespass, as a punishment. A fine is a pecuniary penalty. The usual penalties inflicted on the person, are whipping, cropping, branding, imprisonment, hard labor, transportation or death."); *Webster's Third New Int'l Dictionary* (unabridged ed 2002) ("Penalty: the suffering in person, rights, or property which is annexed by law or judicial decision to the commission of a crime or public offense: punishment for crime or offense; the suffering or the sum to be forfeited to which a person agrees to be subjected in case of nonfulfillment of stipulations[.]").

The context of Article I, section 16, likewise supports a case-specific penalty analysis. In *Wheeler*, this court stated that the cruel and unusual punishments clause and the proportionality clause "appear to be independent constitutional commands, joined in one sentence because they both concern appropriate punishment for crimes," 343 Or at 666, but that "the interpretation of one may inform the interpretation of the other." *Id.* at 656. The inclusion of the clauses in one sentence supports the position that conditions in addition to length of confinement are relevant to a proportionality analysis, just as length of confinement is relevant to a cruel and unusual analysis. *See Rodriguez/Buck*, 347 Or at 57 (quoting *Sustar*, 101 Or at 665).

Given that the context of a provision may also include related provisions,[39] Article I, section 15, also helps illuminate the meaning of section 16. Its direction that criminal penalties must be founded on the penological principles of: "protection of society, personal responsibility, accountability for one's actions and reformation"[40] supports the position that case-specific factors should be considered in evaluating the severity of any individual penalty.[41] In other words, the question of whether a legitimate penological purpose is achieved through the imposition of

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[39] Landau, 55 Willamette L Rev at 273.
[40] Or Const, Art I, § 15.
[41] *See Graham*, 560 US at 71 ("A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense.").

a certain criminal penalty turns on the personal characteristics of a given defendant. *See State v. Kinkel*, 184 Or App 277, 287, 56 P3d 463 (2002) ("To the extent that the four criteria [set forth in Article I, section 15,] can be applied on the level of individualized sentencing, their particular significance must vary depending on the circumstances of the crime or crimes being sentenced."). For example, the lack of available and appropriate mental health treatment in prisons may obstruct rehabilitation, leading to a higher risk of recidivism and decreased public safety.

b. A case-specific proportionality analysis into the severity of the penalty considers both the particularities of the defendant and the particularities of the prison system where they will be incarcerated.

In conducting a case-specific analysis of the severity of the penalty, courts must consider both whether a particular person is at risk of additional harm (1) in a prison setting generally and (2) in the particular prison setting where the sentence is to be served.[42]

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[42] "It is well understood that some prisons have harsher conditions than others, and that it is often possible to roughly judge a prison's harshness based on its security level. Overcrowded prisons heighten the risk of violence and rates of health problems among prisoners. Living for extended periods of time in isolation, or solitary confinement, can likewise cause permanent damage and heighten the risk of suicide and self-harm. In light of the wealth of evidence regarding what makes imprisonment more or less severe, courts need not blind themselves to likely differences in carceral experiences." Julia L. Torti, *Accounting for Punishment in Proportionality Review*, 88 NYU L Rev 1908, 1947-48 (2013).

First, in evaluating the risk of additional harm to a particular person in a *general* prison setting, a court might consider, for example, the additional hardships incarceration causes to people who have: (a) immediate medical treatment needs; (b) intellectual disabilities; (c) suffered severe trauma; and (d) successfully completed drug use treatment prior to sentencing. *See, e.g.*, *Kinkel*, 184 Or App at 287 ("If, for example, a defendant were convicted of disorderly conduct * * * while intoxicated * * * and that defendant, at sentencing, offered evidence to the court that she had no criminal history and had undergone significant treatment for alcohol abuse since the crime, the court might well determine that the defendant had accepted personal responsibility for the crime, was well on her way to rehabilitation or 'reformation,' and that 'protection of society' is of relatively less concern in determining the proper sentence to impose."). A person presenting any of these case-specific factors is going to suffer a more severe sentence, straying farther from penological goals than a person without these factors, even if the length of their incarceration is the same.

Second, in evaluating the risk of additional harm to a particular person in a *particular* prison setting, a court might consider, for example the additional hardships caused to people who have: (a) immediate medical treatment needs who will be sent to a prison or prison system with a medical unit that continually falls below constitutional standards; (b) intellectual disabilities who will be sent to a

prison or prison system that sends people with such disabilities to segregation rather than appropriately responding to behavioral needs; (c) suffered severe trauma who will be sent to a prison or prison system that employs policies that routinely retraumatize people in its custody; and (d) successfully completed drug use treatment who will be sent to a prison or prison system that is known to use people in its custody to traffic drugs. A person in any of these situations is going to suffer a more severe sentence, again, straying farther from penological goals.

III. A court conducting the proportionality analysis required by Article I, section 16, would find the statutory mandatory minimum sentence disproportionate as applied to Ms. Gonzalez.

Petitioner's brief lays out in detail the impact of Ms. Gonzalez's personal history and circumstances on the gravity of the offense, which the trial court thoroughly and properly considered. Petitioner's Opening Brief at 25-29, 45-49; Tr. 556-66. In considering the gravity of the offense, Ms. Gonzalez's sentence is disproportionate.

Moreover, research demonstrates that Ms. Gonzalez's history of mental illness and trauma, as well as her status as a custodial parent, will make any term of imprisonment qualitatively harsher than it would be for someone without her history and characteristics. The conditions of confinement at Coffee Creek Correctional Facility (CCCF), which the 2023 Gender-Informed Practices Assessment (GIPA) identifies as an institution severely lacking in gender-

responsive or trauma-informed approaches,[43] would further compound the harshness of imprisonment as applied to Ms. Gonzalez. Finally, given the circumstances surrounding her offense, her lack of criminal history, and her rehabilitation prior to sentencing, no legitimate penological goal would be served by the imposition of a prison sentence. In fact, they would be undermined.

a. A penalty involving incarceration would be particularly harsh as applied to Ms. Gonzalez.

In Ms. Gonzalez's case, the severity of a prison sentence would be compounded by her personal characteristics, which include her history of mental illness, trauma, and substance use.

Ms. Gonzalez has received a wide array of mental health diagnoses over the course of many years; she was first diagnosed with depression when she was 13. ER at 7. Subsequent diagnoses include anxiety, posttraumatic stress disorder,

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[43] *See* Julia Yoshimoto, Oregon Justice Resource Center, *A Serious Response to a "Sobering" Reality: OJRC's Response to the Gender Informed Practices Assessment of Coffee Creek Correctional Facility* 4 (2023), https://static1.squarespace.com/static/524b5617e4b0b106ced5f067/t/6526f12bd8bce75211b9e4b5/1697050924186/2023+GIPA_response+v.23.10.10.2.pdf (accessed February 26, 2024) ("The report not only finds that CCCF is not gender responsive, evidence-based, nor trauma-informed; it also describes a prison that is replete with dysfunction and dominated by a para-military and punitive culture, resulting in countless harms to incarcerated women daily."); *see also* Alyssa Benedict, Deanne Benos, & Marilyn Van Dieten, Women's Justice Institute & Center for Effective Public Policy, *Gender Informed Practices Assessment (GIPA) Report of Findings & Opportunities: Coffee Creek Correctional Facility (CCCF)* (2023), https://www.oregon.gov/doc/Documents/gipa-report.pdf (accessed Feb 13, 2024), ("GIPA Report").

adjustment disorder, borderline personality disorder, opioid-use disorder, stimulant-use disorder, and stimulant-induced psychotic disorder, among others. ER 6-7, 9, 11. Her symptoms have at times been severe and have included self-injurious behaviors that began in middle school and multiple suicide attempts in the months leading up to her offense. ER at 7-8.

Ms. Gonzalez also experienced profound trauma beginning in childhood and continuing into adulthood. For example: her father was abusive; her mother experienced "untreated mental health issues" which led to at least one suicide attempt resulting in a psychiatric hospitalization; Ms. Gonzalez was temporarily placed in foster care at a young age; when she was 11, her stepfather was imprisoned before being deported to Mexico; at 13, she was sexually abused by a family friend; at 16, she had her first child; at 18, she married and became the victim of domestic violence; while pregnant with her third child, her husband was sent to prison and she was homeless. ER at 2-3, 7. *See* ER at 2-8 for a detailed description of Ms. Gonzalez's history.

i. Ms. Gonzalez's mental health diagnoses and history would make a term of imprisonment especially severe.

The deleterious effects of incarceration on mental health are well documented; incarceration exacerbates symptoms of existing mental illness[44] and increases the risk of new symptoms or illnesses both during and after the term of imprisonment.[45] Several features characteristic of the prison environment may negatively impact mental health, including "consequent disconnection from family, society, and social support, loss of autonomy, diminished meaning and purpose of life, fear of victimization, increased boredom, the unpredictability of surroundings, overcrowding and punitiveness, experiencing and witnessing violence, [and] negative staff-prisoner interaction," among others.[46] People in prison experience high rates of suicidal ideation and attempts,[47] and, "[f]or some prisoners,

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[44] *E.g.*, Katie Rose Quandt & Alexi Jones, *Research Roundup: Incarceration Can Cause Lasting Damage to Mental Health*, Prison Policy Initiative (May 13, 2021), https://www.prisonpolicy.org/blog/2021/05/13/mentalhealthimpacts/ (accessed Feb 12, 2024).
[45] Timothy G. Edgemon & Jody Clay-Warner, *Inmate Mental Health and the Pains of Imprisonment*, 9 Sage Journals 33 (2019), https://journals.sagepub.com/doi/full/10.1177/2156869318785424 (accessed Feb 12, 2024).
[46] Olga Cunha *et al.*, *The Impact of Imprisonment on Individuals' Mental Health and Society Reintegration: Study Protocol*, 11 BMC Psychol (2023), https://bmcpsychology.biomedcentral.com/articles/10.1186/s40359-023-01252-w (accessed Feb 12, 2024).
[47] *See, e.g.*, Louis Favril *et al.*, *Factors Associated with the Transition from Suicidal Ideation to Suicide Attempt in Prison*, 63 European Psychiatry (2020), https://www.cambridge.org/core/journals/european-psychiatry/article/factors-

incarceration is so stark and psychologically painful that it represents a form of traumatic stress severe enough to produce post-traumatic stress reactions once released."[48] Formerly incarcerated people commit suicide at significantly disproportionate rates,[49] with formerly incarcerated women at an especially increased risk.[50]

These effects pose an even greater threat for someone, like Ms. Gonzalez, who enters prison with a history of mental health diagnoses and symptoms.[51]

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associated-with-the-transition-from-suicidal-ideation-to-suicide-attempt-in-prison/5AC0B679442D5C4C4629C0BFA453D2E6 (accessed Feb 12, 2024) .

[48] Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment*, ASPE (2001), https://aspe.hhs.gov/reports/psychological-impact-incarceration-implications-post-prison-adjustment-0.

[49] *See, e.g.*, Erin Renee Morgan, *et al.*, *Incarceration and Subsequent Risk of Suicide: A Statewide Cohort Stud*y, 52 Suicide & Life-Threatening Behav 467 (2022), https://onlinelibrary.wiley.com/doi/10.1111/sltb.12834 (accessed Feb 12, 2024) (Suicide rates among a sample of 140,281 people released from Washington prisons were 62% higher than among the general population); Emilia Janca *et al.*, *Sex Differences In Suicide, Suicidal Ideation, And Self-harm After Release From Incarceration: A Systematic Review And Meta-Analysis*, 58, Soc Psychiatry & Psychiatric Epidemiology 355 (2022), https://link.springer.com/article/10.1007/s00127-022-02390-z (accessed Feb 12, 2024) (Data from a meta-analysis that included 29 peer-reviewed studies published over 50 years demonstrated that people released from prison are more than seven times as likely die by suicide than the general population).

[50] Janca, 58 Soc Psychiatry & Psychiatric Epidemiology at 1 (Formerly incarcerated women are about 15 times more likely to die by suicide as compared to women in the general population).

[51] Leonel C. Gonçalves *et al.*, *A Longitudinal Study of Mental Health Symptoms in Young Prisoners: Exploring the Influence of Personal Factors and the Correctional Climate*, 16 BMC Psychiatry (2016), https://doi.org/10.1186/s12888-016-0803-z (accessed Feb 13, 2024).

Research demonstrates that incarceration exacerbates mental illness.[52] Inadequate treatment is the norm for people with mental illnesses in prison:

> "The purpose of these jails and prisons is to punish, not to control mental health symptoms, and they are not funded for that task. Due to the lack of consistent mental health resources, minimal mental health treatment staff, and the stressful nature of a corrections setting, people with serious mental illness rarely receive the treatment that they need in jail and prison. Instead, they often end up getting punished for breaking the rules, which can result in longer prison stays and even solitary confinement."[53]

Moreover, people with mental illness frequently struggle to access the limited resources that are available to them in prison.[54] People experiencing mental illness are also disproportionately likely to be victimized in prison.[55]

People with mental illnesses within Oregon Department of Corrections (ODOC) facilities, specifically, are not immune to the devastating impacts of incarceration; rather, Oregon prisons are acutely ill-equipped to support the needs

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[52] *See, e.g.*, National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 160 (2014) (Jeremy Travis *et al.* eds. 2014) ("[S]cholars and mental health practitioners have suggested that the combination of adverse prison conditions and the lack of adequate and effective treatment resources may result in some prisoners with preexisting mental health conditions suffering an exacerbation of symptoms and even some otherwise healthy prisoners developing mental illness during their incarceration.").

[53] Jillian Peterson & Kevin Heinz, *Understanding Offenders with Serious Mental Illness in the Criminal Justice System*, 42 Mitchell Hamline L Rev 537, 538-39 (2016).

[54] *Id.* at 551.

[55] *See, e.g.*, Cynthia L. Blitz, Nancy Wolff, & Jing Shi, *Physical Victimization in Prison: The Role of Mental Illness*, 31 Int'l J L & Psychiatry 385, 385 (2008), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2836899/ (accessed Feb 13, 2024).

of those experiencing mental illness. The mental health treatment ODOC provides is generally inadequate.[56] ODOC's use of solitary confinement[57] is an especially devastating sanction for people experiencing mental illness.[58] Rates of suicide attempts and self-injury are particularly high at CCCF, where Ms. Gonzalez would be housed were she sentenced to serve a prison term.[59] For those whose diagnoses include a substance use disorder, access to recovery treatment can be "like getting a 'winning ticket' in the lottery," resulting in incarcerated people "banging down the door" to get into rehabilitative programming that is largely unavailable.[60] A

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[56] *See id.* at 67 (The Behavioral Health Unit staffing model at Coffee Creek Correctional Facility "does not support adequate mental health staffing and leads to reliance on restrictive responses.").

[57] While ODOC has retired the phrase "solitary confinement," it continues to employ the functional equivalents of Administrative Segregation, Cell Ins, Suicide Watch, and Special Housing Units. GIPA Report at 67, 81.

[58] *See, e.g.*, *id.* at 37 ("Residents described that they are 'getting worse' in the [Special Housing Unit] and that the sensory deprivation is unbearable, and in many cases either worsens or instigates challenging and distressing mental health symptoms.").

[59] *Id.* at 162 ("While women represent the smallest prison population in the state (7.5%), CCCF, the state's only women's prison, reported the highest number of suicide attempts (20 of a total of 70) of any facility statewide, representing 29% of the total from February 1 2022-2023. In addition, CCCF reported the second-highest number of incidents of self-harm among incarcerated individuals statewide, representing 21% of all reports statewide.").

[60] Emily Green, *Most Oregon Prisoners Can't Get Addiction Treatment; There's A Bill to Change That*, The Lund Report (2023), https://www.thelundreport.org/content/most-oregon-prisoners-cant-get-addiction-treatment-theres-bill-change (accessed Feb 13, 2024). In Ms. Gonzalez's case, access to treatment would be further impaired by her ineligibility for Alternative Incarcerations Programs. *See* OAR 291-062-0130(2)(r).

2023 bill that sought to ensure "access to mental health and substance use disorder treatment and services" for all people in ODOC custody was unsuccessful.[61]

In Ms. Gonzalez's case, a documented history of multiple mental health diagnoses and history of acute and severe symptoms along with the available treatment at CCCF weighs in favor of a finding that a sentence involving incarceration would be disproportionately harsh.

ii. Ms. Gonzalez's trauma history would make a term of imprisonment especially severe.

While prison is painful regardless of one's background and experiences,[62] it can be uniquely traumatic for someone with a history of abuse: "[t]he very nature of the authoritarian correctional setting often replicates abusive relationships and past traumatic events women have experienced and increases the risk of retraumatizing women."[63] Routine prison procedures such as "body searches,

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[61] HB 2890 (2023).

[62] Craig Haney, *From Prison to Home: The Effect of Incarceration and Reentry on Children, Families, and Communities*, ASPE (2001) https://aspe.hhs.gov/reports/psychological-impact-incarceration-implications-post-prison-adjustment-0 (accessed Feb 13, 2024) ("At the very least, prison is painful, and incarcerated persons often suffer long-term consequences from having been subjected to pain, deprivation, and extremely atypical patterns and norms of living and interacting with others.").

[63] Brenda Baker, *Mothering and Incarceration: A Conceptual Model Supporting Maternal Identity*, 27 J Correct Health Care 103, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9041391/ (accessed Feb 26, 2024); *see also* Jude Kelman *et al.*, *How Does a History of Trauma Affect the Experience of Imprisonment for Individuals in Women's Prisons: A Qualitative*

shackles, cell shakedowns, restraints, and seclusion during incarceration further compound trauma."[64] As one scholar puts it, "for women with previous stories of abuse, prison life is apt to simulate the abuse dynamics already established in these women's lives, thus perpetuating women's further revictimization and retraumatization while serving time."[65]

While some prison systems have begun to incorporate trauma-informed practices into their operations, for example, "addressing organizational policies and practices that may re-traumatize or trigger traumatic memories,"[66] the Oregon Department of Corrections has yet to implement such an approach. The GIPA

Exploration, Women & Crim Just (2022), https://www.tandfonline.com/doi/full/10.1080/08974454.2022.2071376 (accessed Feb 26, 2024) ("[T]his study was able to identify many ways in which routine aspects of daily prison life, including their lack of control and power dynamics with staff, are triggering for individuals in custody with histories of trauma. The study also found that the prison environment and procedures were experienced as traumatic, irrespective of participants' trauma histories.").

[64] Cynthia A. Golembeski *et al.*, *Improving Health Equity for Women Involved in the Criminal Legal System*, 30 Women's Health Issues 313 (2020), https://www.whijournal.com/article/S1049-3867(20)30065-7/fulltext (accessed Feb 13, 2024).

[65] Danielle Dirks, *Sexual Revictimization and Retraumatization of Women in Prison*, 32 Women's Stud Q 102, 102 (2004).

[66] Sharyn Adams *et al.*, *Trauma-Informed and Evidence-Based Practices and Programs to Address Trauma in Correctional Settings*, Illinois Criminal Justice Information Authority (2017), 8, https://icjia.illinois.gov/researchhub/articles/trauma-informed-and-evidence-based-practices-and-programs-to-address-trauma-in-correctional-settings (accessed Feb 21, 2024).

report described dire conditions at CCCF.[67] Issues identified in the report include high numbers of reports of sexual abuse and sexual harassment;[68] retaliation against women who reported sexual misconduct, including placement in segregation;[69] and staff reportedly "engaging in harmful, discriminatory and harassing behaviors;"[70] among others.[71]

For Ms. Gonzalez, who is a survivor of physical, sexual, and emotional abuse, confinement at CCCF would be extremely retraumatizing. First, she would be at risk of additional physical, sexual, and emotional abuse. The retaliatory culture within CCCF[72] makes reporting abuse committed by a correctional officer

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[67] Though the GIPA Report focused on CCCF, there is no reason to believe that the problems identified in it are limited to that institution; the patterns and culture described in the report are systemic and the same agency—the Oregon Department of Corrections—is responsible for the administration of all other prisons in the state. Moreover, based on its work with people incarcerated in facilities across the state, OJRC has good reason to believe that if the entire system was studied, the outcomes would be largely the same as those in the GIPA Report. *See* Julia Yoshimoto, Oregon Justice Resource Center (2023).
[68] GIPA Report at 60.
[69] *Id.* at 61.
[70] *Id.* at 9.
[71] *Id.* at 161.
[72] *Id.* at 61 ("Staff and residents reported that allegations of sexual misconduct ("PREAs") are leading to punitive and retaliatory responses. For example, residents reported facing various forms of retaliation in the wake of reporting staff sexual misconduct, including mistreatment from staff, being placed in segregation, transferred from minimum to medium, and taken off jobs. It was reported that when a resident makes an allegation, she is often reassigned to another unit pending the outcome of an investigation. Residents are not provided information about the reason for these moves, the investigation protocol, or anticipated

or other authority figure particularly difficult. Even if not victimized by staff, Ms. Gonzalez would be subjected to an extremely rigid, unpredictable, and controlling environment that is likely to be triggering to a survivor of domestic violence. Ms. Gonzalez's trauma history and the conditions at CCCF weigh in favor of a finding that a sentence involving incarceration would be disproportionately harsh.

iii. Ms. Gonzalez's status as the custodial parent of her three children would make a term of imprisonment especially severe.

Separation from one's children is a traumatic result of incarceration that should be considered in assessing whether a punishment is excessively harsh as applied. Incarceration may result in the loss of custody, *see, e.g.*, *State ex rel. State Office for Servs. to Children & Families v. Stillman*, 333 Or 135, 148, 36 P3d 490, 497 (2001) ("any prolonged incarceration could be a condition so 'seriously detrimental to the child' as to warrant a finding of unfitness," justifying termination of parental rights), which has devastating effects on both children and their parents.[73] In fact, mothers who lose custody of their children have worse mental

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timelines. These actions are perceived as a punishment and create a dangerous situation where residents do not feel safe to report."); *see also* Ben Botkin, *Coffee Creek Inmate Sues Corrections Agency Amid Criminal Case*, Oregon Public Broadcasting (2023), https://www.opb.org/article/2023/12/29/coffee-creek-inmate-sues-corrections-agency-amid-criminal-case/ (accessed Feb 21, 2024).

[73] *See, e.g.*, American Bar Association, *Trauma Caused by Separation of Children from Parents: A Tool to Help Lawyers* (2019), https://www.americanbar.org/content/dam/aba/publications/litigation_committees/childrights/child-separation-memo/parent-child-separation-trauma-memo.pdf

health outcomes than those who experience the death of a child.[74] Even if an incarcerated mother maintains legal rights, the psychological impacts of forced separation may be extraordinary.[75]

(accessed Feb 21, 2024). Oregon's passage of House Bill 3503 in 2015 demonstrates a recognition of the extraordinary harms suffered by children and parents affected by parental incarceration. *See, e.g.,* Oregon Department of Corrections and Oregon Department of Human Services, *Family Sentencing Alternative Pilot Program: Report to the Senate and House Committees on Judiciary* 2 (Jan 1, 2021), https://www.oregonlegislature.gov/citizen_engagement/Reports/Joint%20Family%20Sentencing%20Alternative%20Pilot%20Project%20Report%201_1_2021.pdf (Describing the prison diversion program created by the bill as "promot[ing] the unification of families, prevent[ing] children from entering the foster care system, and reduc[ing] the chances individuals and their children will become involved in the criminal justice system in the future.")

[74] Elizabeth Wall-Weiler *et al.*, *Maternal Mental Health after Custody Loss and Death of a Child: A Retrospective Cohort Study Using Linkable Administrative Data*, 63 Canadian J Psychiatry 322 (2017), https://journals.sagepub.com/doi/epub/10.1177/0706743717738494 (accessed Feb 21, 2024).

[75] *See, e.g.*, Melissa DeWitte, *Separation from Parents Removes Children's Most Important Protection and Generates a New Trauma, Stanford Scholar Says*, Stanford News (June 26, 2018), https://news.stanford.edu/2018/06/26/psychological-impact-early-life-stress-parental-separation (accessed Feb 23, 2024) (Being forcibly separated from children "can induce anguish, despair, guilt, blame and depression in [] parents – all powerful negative emotions that disrupt how they can learn life skills. This includes how to cope well with adversity, being resilient, not experiencing depression or anxiety. Unquestionably, for parents, there are few events as traumatic as being separated from their children.").

Maintaining a healthy connection with one's children may help to mitigate the devastating impacts of separation attendant to incarceration,[76] but doing so depends on the cooperation of the children's guardian (and their ability to foster communication and visits) and on correctional policies and practices. If Ms. Gonzalez were imprisoned, her two younger children may be placed with their biological father, who was physically and emotionally abusive toward Ms. Gonzalez. Such a placement would almost certainly impair Ms. Gonzalez's ability to maintain a relationship with her children. Even if all three of Ms. Gonzalez's children were placed with guardians who were willing and able to promote the parent-child relationship, Ms. Gonzalez would remain vulnerable to contact restrictions with her children, including "restricted contact times, lack of money or phone call opportunities, unpredictable prison lockdowns or reduced access for visitors during public holidays."[77]

At CCCF, specifically, "residents, former residents, and providers/stakeholders report that incarcerated mothers are invisible, stigmatized,

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[76] Brenda Baker, *Mothering and Incarceration: A Conceptual Model Supporting Maternal Identity*, 27 J Correctional Health Care 103 (2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9041391/ (accessed Feb 13, 2024).

[77] Cathrine Fowler *et al.*, *Maternal Incarceration: Impact on Parent–Child Relationships*, 26 J Child Health Care 82 (2021), https://journals.sagepub.com/doi/full/10.1177/13674935211000882 (accessed Feb 13, 2024).

subject to specific forms of discipline (e.g., contraband) and that their motherhood is 'weaponized.'"[78] Disciplinary sanctions—even for minor infractions—may also result in the loss of privileges, including phone calls and visits.[79] There are fewer activities for friends and families of women at CCCF as compared to other ODOC facilities and women are sometimes told to end visits early due to space limitations in the visiting area.[80] At times, loved ones are prevented from visiting CCCF residents despite being on the approved visitors list.[81] Only half of women surveyed as part of the GIPA stated "reported that they can connect with their children and other important people in their life while incarcerated."[82] Moreover, civil legal needs "including those that relate to parenting, custody issues, and orders of protection, are frequently misunderstood and not prioritized."[83]

Ms. Gonzalez's mental health, trauma history, and the impact forced separation would have on her each weigh in favor of a finding that a term of imprisonment would be disproportionately harsh.

[78] GIPA Report at 62.
[79] *Id.* at 118-20.
[80] *Id.* at 63.
[81] *Id.*
[82] *Id.* (An additional 18% neither agreed nor disagreed.).
[83] *Id.* at 169-70.

b. A penalty involving incarceration would be contrary to any legitimate penological goals as applied to Ms. Gonzalez.

Oregon recognizes "protection of society, personal responsibility, accountability for one's actions and reformation" as valid penological goals.[84] In Ms. Gonzalez's case, these goals would not be served by incarceration, rendering any prison sentence disproportionate as applied.

Protection of society may be achieved through deterrence, rehabilitation, or incapacitation. In Ms. Gonzalez's case, incarceration would not promote deterrence, nor would it serve any rehabilitative purpose. While she may be incapacitated for the duration of a prison term, such incapacitation would be contrary to her continued rehabilitation, potentially increasing her presently low likelihood of recidivism and causing further trauma.

While deterrence is often cited as a justification for carceral sentences, whether imprisonment is an effective deterrent remains dubious. Research suggests that incarceration has, at best, no impact on recidivism, and may actually increase it:

> "A number of recent empirical studies, literature reviews, and meta-analyses report the potentially 'criminogenic' effects of imprisonment on individuals—that is, the experience of having been incarcerated appears to increase the probability of engaging in future crime . [. . .] The psychological mechanisms involved are not difficult to understand. The changes brought about by prisonization—including dependence on institutional decision makers and contingencies, hypervigilance, and incorporation of the most

[84] Or Const, Art I, § 15.

> exploitive norms of prison culture—may be adaptive in the unique environment of prison but become maladaptive or dysfunctional if they persist in the very different world outside prison."[85]

Moreover, for someone with a history of mental illness, the prison environment can be extremely destabilizing, potentially resulting in greater mental health needs upon release.[86] In Ms. Gonzalez's case, her crime was committed during an acute psychological crisis for which she was successfully treated prior to sentencing. Tr 564-65. A prison sentence would not only interrupt and jeopardize her continued rehabilitation, it would risk recreating the psychological conditions that contributed to her offense.

Even assuming incarceration was effective at reducing recidivism, the deterrent value of a prison term would be greatly minimized in Ms. Gonzalez's case, as her risk of reoffending is presently low: she had no criminal history prior to her offense, has not committed any new crimes in the years subsequent, and her criminal conduct is unlikely to reoccur given her successful treatment. Given that

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[85] National Research Council, *The Growth of Incarceration* at 194; *see also* Damon Petrich *et al.*, *Custodial Sanctions and Reoffending: A Meta-Analytic Review*, 50 Crime & Just (2021), https://doi.org/10.1086/715100 (accessed Feb 13, 2024).

[86] Holly M. Harner & Suzanne Riley, *The Impact of Incarceration on Women's Mental Health: Responses from Women in a Maximum-Security Prison*, 23 Qualitative Health Res 26 (2012), https://journals.sagepub.com/doi/abs/10.1177/1049732312461452 (accessed Feb 13, 2024).

she is not a threat to public safety, to incapacitate her through imprisonment is also wholly unnecessary.

Incarcerating Ms. Gonzalez would also impair her continued rehabilitation, or reformation, and would serve to endanger, rather than promote, public safety. The psychologist who evaluated Ms. Gonzalez made several recommendations to support her continued rehabilitation, including individual and group therapy; stable housing and employment; and ongoing support from positive influences, including family, friends, and professionals. As discussed above, mental health care in prison, including at CCCF, is entirely inadequate to support the needs of those who reside there. Contrastingly, while awaiting trial, Ms. Gonzalez was able to access mental and substance use treatment where which she made "excellent progress." ER at 14. Incarceration would mean intense destabilization, separation from family and community supports, and the risk of relapse. Moreover, reentry services are virtually nonexistent at CCCF.[87] Thus, Ms. Gonzalez would first experience the impact of several years confined within a triggering and retraumatizing environment, then she would be released back into the community without any meaningful support; the prison term itself and the lack of necessary resources upon release would each put her at an increased risk of extremely poor outcomes

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[87] *See, e.g.*, GIPA Report at 36 ("CCCF does not have adequate programs for women, and is not preparing women for successful reentry.").

including the suicidality that led to her underlying offense. Finally, incarceration would also mean her children would live for years with their primary caregiver in prison, increasing *their* risk of mental illness, economic hardship, and involvement in the criminal legal system.[88]

Given Ms. Gonzalez's mental health and trauma history as well as her treatment success and status as a custodial parent, this court should hold that a 90-month mandatory prison sentence is disproportionate as applied.

CONCLUSION

For the above reasons, this court should reverse the Court of Appeals and affirm the judgment of the trial court.

Respectfully submitted,

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[88] *See, e.g.*, Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, Nat'l Inst Just J (2017), https://nij.ojp.gov/topics/articles/hidden-consequences-impact-incarceration-dependent-children (accessed Feb 13, 2024).

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that, on February 26, 2024, I electronically filed the foregoing Brief of Amici Curiae, Oregon Justice Resource Center and Oregon Capital Resource Center, with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Kali Montague, attorney for Petitioner on Review, and Jonathan N. Schildt, attorney for Respondent on Review, by using the appellate electronic filing system.

CERTIFICATE OF COMPLIANCE

I certify that (1) this brief complies with the word count limitation in ORAP 5.05(1)(b) and (2) the word count of this brief, as described in ORAP 5.05(1)(a), is 11,481 words. 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 as required by ORAP 5.05(1)(d).

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