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 No. 17CR78352 CA A173971 SC S070433 **REDACTED BRIEF UNDER ORS 192.355(2)(A) AND ORAP 5.95**

REDACTED BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals
on 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, Chief Judge
Before: Powers, Presiding Judge, and Lagesen, Chief Judge, and Hellman, Judge.

Continued...

ERNEST LANNET #013248
Chief Defender
Office of Public Defense Services
KALI MONTAGUE #094482
Deputy Public Defender
1175 Court St. NE
Salem, OR 97301
Telephone: (503) 378-3349
Email:
kali.montague@opds.state.or.us

Attorneys for Petitioner on Review

BRITTNEY PLESSER #154030
Attorney at Law
Oregon Justice Resource Center
P.O. Box 5248
Portland, OR 97208
Telephone: (503) 944-2270
Email: bplesser@ojrc.info

Attorney for *Amici Curiae* OJRC & OCRC

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
JONATHAN N. SCHILDT #151674
Assistant Attorney General
1162 Court St. NE
Salem, OR 97301-4096
Telephone: (503) 378-4402
Email:
jonathan.n.schildt@doj.state.or.us

Attorneys for Respondent on Review

TABLE OF CONTENTS

INTRODUCTION 1

QUESTIONS PRESENTED AND PROPOSED RULE OF LAW 2

Question Presented 2

Proposed Rule of Law 3

BACKGROUND 3

A. Defendant committed arson that recklessly put five others at risk of serious physical injury and caused serious physical injury 3

B. The trial court concluded that, although defendant's conduct was "egregious," the mandatory sentence for arson was unconstitutionally disproportionate based on a "convergence of stressors" in defendant's life. 8

C. The Court of Appeals reversed, concluding that defendant's personal characteristics and circumstances did not render her sentence unconstitutional 11

SUMMARY OF ARGUMENT 14

ARGUMENT 16

A. A sentence violates Article I, section 16, only when it is so disproportionate when compared to an offense that it shocks the moral sense of reasonable people. 16

1. This court has found constitutional disproportionality when a penalty is irreconcilable with societal standards that the legislature's own enactments embody. 18

2. A defendant's intellectual disability may weigh in favor of disproportionality based on a legislatively recognized societal standard as to how and when it reduces culpability 21

B. The mandatory sentence for defendant's commission of first-degree arson did not violate Article I, section 16, and evidence concerning her "personal characteristics" did not change that. 25

1. The fact that personal characteristics could influence conduct does not make those characteristics

significant to constitutional proportionality. 27

2. Evidence of mental illness does not meaningfully inform the proportionality inquiry, because there is no societal consensus establishing when, or how, a mental illness lessens culpability. 29

a. Defendant fails to identify any objective evidence of a societal standard as to when, or how, mental illness renders a person less culpable than others. 29

b. Oregon's guilt-except-for-insanity statute does not reflect a societal consensus as to the culpability of an offender who does not meet its criteria. 33

c. The Eighth Amendment rule barring capital punishment for intellectually disabled offenders provides no basis to conclude that mental illness is a meaningful factor in an as-applied Article I, section 16, challenge. 36

3. Even assuming that evidence of mental illness could render a sentence constitutionally disproportionate, the evidence in this case would not do so. 44

a. Any consideration of mental illness as a measure of culpability would have to align with the standards embodied in Oregon's guilt-except-for-insanity standard. 44

b. Because defendant did not have a qualifying disorder that impaired her capacities in pertinent ways, her mental illness could not affect the constitutionality of her sentence. 48

4. The trial court erred in concluding that the legislatively mandated sentence was disproportionate to defendant's offense under Article I, section 16. 53

C. The mandatory sentence for defendant's commission of first-degree arson did not violate the Eighth Amendment. 56

CONCLUSION 57

TABLE OF AUTHORITIES

Cases Cited

Atkins v. Virginia,
536 US 304, 122 S Ct 2242, 153 L Ed 2d 335 (2002) 21, 22, 29, 31, 32, 36, 37, 38, 40

Cannon v. Gladden,
203 Or 629, 281 P2d 233 (1955) 20

Kahler v. Kansas,
140 S Ct 1021, 206 L Ed 2d 312 (2020) 30, 40, 43

Kinkel v. Persson,
363 Or 1, 417 P3d 401 (2018),
cert den, 139 S Ct 789 (2019) 38, 40, 47

McKoy v. North Carolina,
494 US 433, 110 S Ct 1227, 108 L Ed 2d 369 (1990) 27

Moore v. Texas,
581 US 1, 137 S Ct 1039, L Ed 2d 416 (2017) 32

Penry v. Lynaugh,
492 US 302, 109 S Ct 2934, 106 L Ed 2d 256 (1989) 30

People v. Coty,
178 NE 3d 1071 (Ill 2020) 47

Solem v. Helm,
463 US 277, 103 S Ct 3001, 77 L Ed 2d 637 (1983) 19

State ex rel Huddleston v. Sawyer,
324 Or 597, 932 P2d 1145 (1997) 46

State of Oregon v. Zorn,
22 Or 591, 30 P 317 (1892) 30

State v. Althouse,
359 Or 668, 375 P3d 475 (2016) 16, 56

State v. Bartol,
368 Or 598, 496 P3d 1013 (2021) 17, 18, 20, 43

State v. Cook,
297 Or App 862, 445 P3d 343,
rev den, 365 Or 721 (2019) 52

State v. Davidson,
360 Or 370, 380 P3d 963 (2016) 20

State v. Folks,
290 Or App 94, 414 P3d 468,
rev den, 363 Or 283 (2018) 49

State v. Gonzalez,
326 Or App 587, 534 P3d 289 (2023) 5, 9, 11, 12, 34, 54, 55, 56

State v. J. C. N.-V.,
359 Or 559, 380 P3d 248 (2016) 24

State v. Jesse,
360 Or 584, 385 P3d 1063 (2016) 46

State v. Kleypas,
305 Kan 224, 382 P3d 373 (2016) 32, 38

State v. Rodriguez/Buck,
347 Or 46, 217 P3d 659 (2009) 8, 9, 17, 18, 19, 20, 25, 26, 53

State v. Ryan,
361 Or 602, 396 P3d 867 (2017) .....
9, 12, 13, 15, 17, 21, 22, 23, 24, 25, 26, 28, 30, 31, 35, 36, 37, 38, 43, 45, 49, 54, 55

State v. Shumway,
291 Or 153, 630 P2d 796 (1981) 20

State v. Wheeler,
343 Or 652, 175 P3d 438 (2007) 16, 18, 53, 55

Tharp v. PSRB,
338 Or 413, 110 P3d 103 (2005) 48

Tuel v. Gladden,
234 Or 1, 379 P3d 553 (1963) 46

Wells v. State,
364 So 3d 1005 (Fla 2023) 38

Constitutional and Statutory Provisions

Ken Rev Stat § 532.130 42

Ohio Rev Code § 2929.025 42

Or Const, Art I, § 15 46

Or Const, Art I, § 16 .... 1, 8, 13, 14, 16, 18, 20, 22, 23, 25, 26, 27, 28, 30, 31, 36, 37, 38, 43, 44, 45, 46, 47, 48, 52, 53, 55, 56

ORS 137.700 11

ORS 137.700(2)(b)(A) 8

ORS 161.125 5

ORS 161.290 ..... 21, 24, 35

ORS 161.290(1) 23, 36

ORS 161.295 ..... 6, 30, 35

ORS 161.295(1) 33, 34, 45, 49

ORS 161.295(2) 34, 42, 48

ORS 161.300 ..... 5, 6, 33, 34, 35

ORS 161.327(1) 47

ORS 163.165(1)(b) 7

ORS 164.325(1) 5

US Const, Amend VIII 8, 22, 29, 36, 37, 38, 39, 56

Administrative Rules

OAR 213-008-0002(1)(b)(I) 12

Other Authorities

ABA Task Force on Mental Disability and the Death Penalty, *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 Mental & Physical Disability L Rep 668 (2006) 32, 41

Bruce J. Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B C Law Rev 785 (2009) ... 32, 38

REDACTED BRIEF ON THE MERITS OF RESPONDENT ON REVIEW, STATE OF OREGON

INTRODUCTION

This case concerns the scope of a trial court's role in determining whether a sentence set by the legislature is unconstitutionally disproportionate to a criminal offense under Article I, section 16, of the Oregon Constitution. The trial court and the Court of Appeals offered two very different conceptions of that role. The trial court, after conducting a wide-ranging review of defendant's personal characteristics and life circumstances that the court viewed as mitigating, concluded that defendant's 90-month mandatory sentence for first-degree arson was unconstitutional and placed defendant on probation instead. Reviewing for legal error, the Court of Appeals explained that Article I, section 16, did not permit that kind of roving inquiry and instead required a narrower review of objective factors, which did not establish constitutional disproportionality when applied to this case.

Only that latter approach comports with the trial court's limited role under Article I, section 16, as this court has described it. Courts may override the legislature's judgments about criminal penalties, this court has cautioned, only when a penalty is so disproportionate that it shocks the moral sense of reasonable people. In the few, rare instances where this court has found that test met, the penalty at issue was fundamentally out of step with the

legislature's own enactments, which demonstrated that the penalty did not align with societal standards concerning appropriate punishment.

Although a court may consider personal characteristics in assessing proportionality, the degree to which a personal characteristic is significant to the analysis hinges on the existence of objective legislative standards: A personal characteristic is a meaningful consideration only where the legislature has recognized a societal standard, demonstrated by objective criteria, that shows when and how a personal characteristic makes an offender less culpable than other offenders. Without reliance on that kind of societal standard, a court is not free to second-guess the legislature's choices by bringing its own views of culpability to bear. The trial court erred in doing so here.

QUESTIONS PRESENTED AND PROPOSED RULE OF LAW

Question Presented

First-degree arson that threatens serious physical injury carries a mandatory minimum sentence of 90 months' imprisonment. Defendant was convicted of first-degree arson for starting a fire that created a risk of injury to five others and in fact caused serious physical injury. Did defendant's personal circumstances, including a troubled upbringing and mental illness, render the mandatory 90-month sentence unconstitutionally disproportionate as applied to her offense?

Proposed Rule of Law

No. The objective factors that guide the constitutional inquiry show that defendant's sentence would not shock the moral sense of reasonable people. Consideration of defendant's personal circumstances such as a troubled upbringing or mental illness yields no different conclusion, where defendant cannot identify objective evidence of a societal standard establishing when and how those characteristics reduce an offender's culpability in a way that makes the offender categorically different from other offenders. In all events, defendant's mental illness would not render her sentence unconstitutional, given the significant harm that defendant's conduct threatened and, in fact, caused.

BACKGROUND

A. Defendant committed arson that recklessly put five others at risk of serious physical injury and caused serious physical injury.

At a bench trial, the trial court heard evidence that defendant started a fire outside her apartment, on a landing shared with other apartments, after pushing a dresser in front of her doorway and piling clothing and papers on top of it. (Tr 129–30, 172–73). Among those flammable items, defendant had placed numerous votive candles, Sterno cans, and charcoal briquettes stamped with lighter fluid, to accelerate the fire. (Tr 256, 304). Because defendant had kept her door shut after starting the fire, her apartment was damaged only where some burning along the inside of the door caused it to fail. (Tr 225–26, 310–

11). The other apartment on the shared landing was severely damaged. (Tr 225–26).

A family living below defendant's apartment that was alerted to the fire was able to escape and make their way to the parking lot. (Tr 130, 140–41, 153). They saw defendant sitting in the window of her apartment, calling them obscene names and telling them, over several minutes' time, to go back inside the building to "burn with her" and to "die" with her. (Tr 133–34, 145, 161–62). After she was removed from the building, defendant told the mother of the family downstairs, "I wanted you to die, * * * go back." (Tr 149, 163).

Another neighbor in a separate apartment, FM, suffered significant injuries when trying to escape. Not realizing the extent of the fire, he opened the door to try to escape after seeing smoke, but the fire "flashed" and entered the apartment. (Tr 225). FM's roommate had managed to jump from the second-story window, but FM's attempt to escape through the window was much more difficult once the fire and smoke filled the apartment. (Tr 97, 116, 119–20). He finally was able to jump after someone got to a neighboring roof and broke a window to let him out. (Tr 97, 120–21). FM was severely burned. (Tr 101–05). He was hospitalized for three months due to his injuries, he spent the following two months in a physical-therapy facility, and he had lasting scars on his arm, neck, and shoulder. (Tr 103–06).

For that conduct, defendant was charged with five counts of attempted first-degree murder, five counts of first-degree arson, two counts of second-degree assault, and two counts of first-degree criminal mischief. *State v. Gonzalez*, 326 Or App 587, 594, 534 P3d 289 (2023); (App Br ER 1–4).[1]

[redacted]

[1] As pertinent here, a person commits the crime of arson in the first degree if:

> (a) By starting a fire or causing an explosion, the person intentionally damages:
>
> * * * * *
>
> (B) Any property, whether the property of the person or the property of another person, such act recklessly placed another person in danger of physical injury or protected property of another in danger of damage[.]

ORS 164.325(1).

[redacted]

2 [redacted]

[redacted]

The trial court found defendant guilty on the arson charges and merged those guilt findings. (Tr 529). The court found that defendant "intentionally set that fire [and] * * * intentionally damaged property either hers or another person's and thereby recklessly placed others in danger of physical injury." (Tr 528). The court rejected defendant's contention that she lacked the requisite mental state for that crime, finding that, "despite [her] mental health considerations," defendant took "volitional steps" in starting the fire. (Tr 529; *see also* Tr 528, this "is not a guilty-except-for-insane"). The court found that defendant had originally planned "to take pills that day," but decided to start the fire to prevent others from intervening. (Tr 526).

The court acquitted defendant on the charges of attempted murder, finding that defendant did not have the specific intent to kill another. (Tr 527). Although the court declined to convict defendant of second-degree assault, which required an intentional metal state, the court found defendant guilty of the lesser-included offense of third-degree assault for recklessly having caused serious physical injury to FM under circumstances manifesting extreme indifference to the value of human life. (Tr 529; *see* Tr 481, ruling that Count 12, charged as second-degree assault, would proceed as third-degree assault); *see* ORS 163.165(1)(b) (third-degree assault includes "[r]ecklessly caus[ing]

serious physical injury to another under circumstances manifesting extreme indifference to the value of human life").

The court also found that the arson "threatened serious physical injury," which both increased the crime seriousness of the offense on the guidelines and made the offense subject to the mandatory minimum 90-month sentence under ORS 137.700(2)(b)(A). (Tr 528).

B. The trial court concluded that, although defendant's conduct was "egregious," the mandatory sentence for arson was unconstitutionally disproportionate based on a "convergence of stressors" in defendant's life.

At sentencing, defendant asserted that the 90-month sentence for arson was unconstitutionally disproportionate under Article I, section 16, of the Oregon Constitution and the Eighth Amendment to the United States Constitution. Defendant recited the factors in *State v. Rodriguez/Buck*, 347 Or 46, 217 P3d 659 (2009)—the gravity of the crime compared to the severity of the penalty, the penalties for related crimes, and criminal history—but argued that those factors were not "exclusive." (App Br ER 12–15; Tr 549–554).

[redacted] Defendant also urged the court to rely on "post-incident factors"—including [redacted]

[redacted] and her acceptance of responsibility—to conclude that the sentence was disproportionate. (App Br ER 18–20).

The state responded that none of the *Rodriguez/Buck* factors supported a conclusion that defendant's sentence was disproportionate. (App Br ER 6–8). The state argued that, although intellectual disability can reduce culpability for an offense, as recognized in *State v. Ryan*, 361 Or 602, 396 P3d 867 (2017), that consideration did not "apply in this case." (App Br ER 7). Instead, [redacted] (App Br ER 7–8; *see also* Tr 546–49).

The trial court agreed with defendant. It acknowledged that defendant's specific conduct was "egregious," in that it involved a "volitional setting of a fire with other residents present," that FM's injuries were "significant and substantial," and that all of the residents sustained "emotional injury" as a result of defendant's conduct. (Tr 558–59). The trial court also "agreed with the state that the sentence was not disproportionate in relation to the elements and resulting sentences of similar crimes," and it noted that, although "defendant had no prior criminal history," that factor was "not sufficient to determine proportionality." *Gonzalez*, 326 Or App at 596–97; (Tr 559).

But, in the trial court's view, those considerations were "not exclusive." (Tr 559). The court reasoned that it could consider "mitigating facts in assessing moral culpability," such as the "psychological paradigm of [defendant], all factors internal and external as a factor in the determination of proportionality." (Tr 560).

Those factors, in the court's view, rendered defendant's sentence unconstitutionally disproportionate. [redacted] The court recounted that, at that time, there were reports of domestic violence, and defendant attempted suicide three times. (Tr 563). Despite past "challenges and obstacles," the court stated, defendant "went through her life without any criminal justice interaction," until a "convergence of stressors"—"suicide attempts, an eviction notice, lost children, her husband's continued attempts to control her and harass her." (Tr 564). Those stressors "caused her to snap" in a way that "endanger[ed] those

around her." (Tr 564).

The court otherwise noted that, since her incarceration, [redacted] (Tr 564–65). Further, the court found that defendant had taken responsibility for her conduct and was remorseful. (Tr 565–66). The court did not explain how those observations affected its conclusion as to disproportionality.

Ultimately, the trial court acknowledged the mandatory 90-month sentence that ORS 137.700 required but reasoned that it could not "follow legislation in a vacuum and without context." (Tr 566). The court found the sentence "disproportionate as applied" "in view of the other facts surrounding [defendant's] life." (Tr 566). The trial court then departed from both ORS 137.700 and the guidelines range, sentencing defendant to 60 months' probation. (Tr 566).

C. The Court of Appeals reversed, concluding that defendant's personal characteristics and circumstances did not render her sentence unconstitutional.

The state appealed, and the Court of Appeals reversed. *Gonzalez*, 326 Or App at 604. Reviewing the trial court's ruling for legal error, the Court of Appeals concluded that the 90-month sentence applicable to defendant's conduct was not so disproportionate as to shock the moral conscience of reasonable people.

Addressing the gravity of defendant's conduct, the Court of Appeals explained that defendant's conduct was "within the core" of the conduct covered by the first-degree arson statute and, in fact, was more aggravated than the statute requires because defendant actually caused serious physical injury. *Id.* at 603. And "because defendant's conduct did not just threaten, but actually caused, a permanent injury to one victim, had she been sentenced under the guidelines," she potentially could have faced a sentence of 116 to 120 months, even without any criminal history. *Id.* at 604; *see* OAR ch 213, App 1 (guidelines grid); OAR 213-008-0002(1)(b)(I) (providing for departure where "defense resulted in a permanent injury to the victim").

Defendant did not argue "that the mandatory 90-month sentence for first-degree arson is disproportionate when compared to penalties for similar offenses," and the Court of Appeals found no basis to reach that conclusion. *Gonzalez*, 326 Or App at 604; (*see* State's App Br at 32–34, addressing penalties for related offenses). And "although defendant had no prior criminal history, that does not demonstrate that defendant's sentence is disproportionate on these facts." *Id.*

The trial court committed legal error, the Court of Appeals explained, in basing its constitutional assessment on its view that defendant's personal characteristics mitigated her culpability. The Court of Appeals recognized that, in *Ryan*, this court held that "intellectual disability" could render a sentence

unconstitutionally disproportionate when an offender's "'age-specific intellectual capacity [falls] below the minimum level of criminal responsibility for a child.'" *Id.* at 592 (quoting *Ryan*, 361 Or at 625–26). But that holding "flow[ed] from the fact that the legislature has recognized a societal standard that treats children as less culpable than adults," and that societal standard "warrant[ed] treating people who have the intellectual capacity of a child as less culpable than people who have the intellectual capacity of an adult for purposes of Article I, section 16." *Id.* In contrast with *Ryan*, defendant had "not identified any statutory or other basis for concluding that there is a 'societal standard that eschews' treating persons with defendant's mental health attributes the same way that other adults are treated where, as here, they are found to have acted with the requisite culpable mental state, notwithstanding the presence of mental health issues." *Id.* at 601–02.

Accordingly, "the many challenges that defendant has faced throughout her life and her post-offense recovery do not bear, in any objective way, on whether defendant should be viewed as less culpable for setting the fire, or on whether the fire, and the significant harm it caused, should be viewed as anything other than grave." *Id.* at 601. Although those challenges "would be relevant to the question of leniency in a situation where the court had sentencing discretion," they did not "speak to the issue of whether a 90-month

sentence is proportional to the crime of first-degree arson for defendant's conduct." *Id.*

SUMMARY OF ARGUMENT

The mandatory minimum sentence that applies to defendant's arson conviction is constitutionally proportionate to her offense. By intentionally setting a fire in her apartment building that blocked her neighbors' ability to exit, defendant recklessly risked serious physical injury to all involved and in fact caused serious physical injury. Given the severity of defendant's conduct and the significant harm it caused—harm that goes beyond what the offense requires and that potentially could give rise to a longer sentence under the sentencing guidelines, even for those without criminal history—the sentence for defendant's offense would not shock the moral sense of reasonable people.

The trial court reached a contrary conclusion only by relying on its wide-ranging review of defendant's personal characteristics and circumstances that, in the trial court's view, mitigated her culpability. Defendant endorses that open-ended approach in this court, arguing that any "personal characteristics" that could be thought to "influence conduct and reduce culpability" are significant to a trial court's "comparison of the gravity of the offense against the severity of the penalty."

But the trial court's approach finds no support in this court's precedents under Article I, section 16. This court has explained that a trial court's role in

reviewing constitutional proportionality is a limited one; the court must honor the legislature's primary authority to set punishments, respect the separation of powers, and avoid second-guessing the legislature's judgments. In accord with that limited role, this court has found constitutional disproportionality only when a particular penalty was incompatible with "societal standards" embodied by the legislature's own enactments.

This court's decision in *State v. Ryan*, 361 Or 602, 396 P3d 867 (2017), is illustrative. In *Ryan*, this court identified objective evidence of a societal consensus—a legislative enactment—demonstrating that, when a person's intellectual functioning falls below a certain level, that makes them categorically different, in terms of culpability, from other offenders. Accordingly, when evidence establishes that level of functioning, it may weigh in favor of constitutional disproportionality.

Contrary to defendant's arguments, *Ryan* does not support the trial court's analysis in this case, even if that analysis can be characterized as a consideration of "mental illness." That is because defendant identifies no objective evidence of a societal consensus as to when, or how, a mental illness makes an offender categorically less culpable than other offenders. In fact, the legislature has spoken on the relationship between mental illness and culpability by providing standards, like guilt-except-for-insanity, that are relevant to finding guilt in the first instance. Yet those standards do not apply to an

offender, like defendant, who is criminally responsible and acts with the requisite mental state. In any event, at a minimum, any consideration of mental illness should not conflict with those legislative standards, and here defendant did not suffer from a qualifying mental disorder that impaired her capacity to appreciate her conduct or conform it to the law. And in all events, regardless of defendant's mental illness, a 90-month sentence would not shock the moral sense of reasonable people, given the serious risk of harm that defendant's conduct created for all involved, and the extreme, lasting harm it did cause.

ARGUMENT

A. A sentence violates Article I, section 16, only when it is so disproportionate when compared to an offense that it shocks the moral sense of reasonable people.

Article I, section 16, of the Oregon Constitution provides that "all penalties shall be proportioned to the offense." But "respect for the separation of powers and the legislature's authority to set criminal penalties means that the court's role [in assessing proportionality] is a limited one." *State v. Wheeler*, 343 Or 652, 672, 175 P3d 438 (2007). The "legislature has primary authority to determine the gravity of an offense and the appropriate length of punishment." *State v. Althouse*, 359 Or 668, 684, 375 P3d 475 (2016). A court will not "second-guess the legislature's determination of penalties or range of penalties for a crime" unless a punishment "is so disproportionate, when compared to the offense," that it "shock[s] the moral sense of reasonable people." *State v.*

Rodriguez/Buck, 347 Or 46, 58, 217 P3d 659 (2009) (quotation marks omitted). The circumstances when that test is met are "rare." *Id.*

To prevent courts from substituting their judgment for that of the legislature, this court has cautioned that "proportionality review must be informed by objective factors to the maximum extent possible." *Ryan*, 361 Or at 621 (internal quotation marks omitted). Those factors include "(1) a comparison of the severity of the penalty and the gravity of the crime; (2) a comparison of the penalties imposed for other, related crimes; and (3) the criminal history of the defendant." *Rodriguez/Buck*, 347 Or at 58. Even if those factors are not "precise," reviewing courts are "competent" to make the necessary judgments in assessing those factors, "at least on a relative scale," "just as legislatures must make them in the first instance." *Ryan*, 361 Or at 621–22 (internal quotation marks omitted).

Indeed, the choices that the legislature has made in enacting legislation, because those choices reflect "societal standards," are the principal metric this court has used in assessing the constitutional proportionality of a particular penalty. *State v. Bartol*, 368 Or 598, 613, 496 P3d 1013 (2021). That is because legislative enactments provide "objective evidence of a societal standard" that can meaningfully guide a reviewing court's analysis. *Ryan*, 361 Or at 624.

1. This court has found constitutional disproportionality when a penalty is irreconcilable with societal standards that the legislature's own enactments embody.

The 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. The starting point for assessing constitutional proportionality is the "enactment of the particular penalties at issue," because those serve "as an external source of law to assist in determining whether those penalties would shock the moral sense of reasonable people." *Wheeler*, 343 Or at 671. To be sure, the legislature's enactment of a particular penalty does not itself establish constitutional proportionality; it is not "dispositive" because the courts ultimately must decide whether penalties exceed constitutional limits. *Bartol*, 368 Or at 613. But enactment of the penalty is itself important because of what it reflects about societal standards, just as other legislative enactments embody societal standards that guide the proportionality analysis.

Those enactments, this court has explained, make it possible to perform the objective comparisons that Article I, section 16, requires. A court can compare the relative "'harm caused or threatened to the victim or society, and the culpability of the offender'" by looking to the "'widely shared views as to the relative seriousness of crimes'" that "'the criminal laws make clear.'" *Rodriguez/Buck*, 347 Or at 63 (quoting *Solem v. Helm*, 463 US 277, 292, 103

S Ct 3001, 77 L Ed 2d 637 (1983)). For example, "'[s]tealing a million dollars is viewed as more serious than stealing a hundred dollars—a point recognized in statutes distinguishing petty theft from grand theft.'" *Id.* (quoting *Solem*, 463 US at 293). As for "the culpability of the offender, there are again clear distinctions that courts may recognize and apply": A court can glean a general societal consensus that "negligent conduct is less serious than intentional conduct," for example, in light of distinctions the legislature has made in ranking "seriousness" of criminal acts based on varying culpable mental states. *Solem*, 463 US at 293.

Those kinds of distinctions, reflected in legislation, are what drove this court's analysis in *Rodriguez/Buck.* This court found that two defendants' 75-month sentences for their particular conduct in committing first-degree sexual abuse were unconstitutionally disproportionate where the conduct at issue, over-the-clothes momentary touching of a child, was (1) at the "outer edge" of the legislature's definition of the crime and likely the least severe of "all reported first-degree sexual abuse cases"; (2) nothing like other conduct that could constitute the same offense and that could be subject to the same sentence; and (3) similar to, or even less serious than, conduct for which the legislature had prescribed shorter sentences. *Rodriguez/Buck*, 347 Or at 68–76. Because, in all those ways, the sentences imposed were fundamentally out of

step with the legislative design, this court concluded that they would shock the moral sense of reasonable people.

Similarly, in *Bartol*, this court concluded that the defendant's death sentence violated Article I, section 16, based on the legislature's "enactment of SB 1013." 368 Or at 623. Even though that enactment did not, by its terms, retroactively apply to the defendant's sentence, it reflected a "moral judgment" that stood "apart from the question of retroactivity"—"a judgment that conduct" like the defendant's "that was previously classified as 'aggravated murder' does not fall within the narrow category of conduct that can be punished by death." *Id.* at 625. A death sentence was disproportionate under Article I, section 16, "for conduct that the legislature has determined no longer justified that unique and ultimate punishment." *Id.* Again, the sentence at issue was unconstitutional because it was fundamentally incompatible with a legislatively recognized societal standard.[3]

---

[3] The few other decisions where this court has found unconstitutional disproportionality reflect the same concern that a particular penalty was incompatible with the legislature's enactments and what they revealed about societal views on appropriate punishment. *See State v. Davidson*, 360 Or 370, 380 P3d 963 (2016) (applying the *Rodriguez/Buck* factors to a life-without-parole sentence for public indecency); *Cannon v. Gladden*, 203 Or 629, 281 P2d 233 (1955) (finding a vertical proportionality problem where the legislature assigned a sentence to a lesser-included offense that exceeded the sentence for a greater crime); *State v. Shumway*, 291 Or 153, 630 P2d 796 (1981) (finding same vertical proportionality problem).

2. A defendant's intellectual disability may weigh in favor of disproportionality based on a legislatively recognized societal standard as to how and when it reduces culpability.

This court followed the same analytical path in *Ryan*, there focusing on a legislatively recognized societal standard regarding intellectual disability. This court recognized that, in light of objective evidence of a societal consensus regarding when and how intellectual disability reduced an offender's moral culpability, intellectual disability was a factor that could be assessed objectively and could meaningfully affect the proportionality analysis.

The defendant in *Ryan*, who "functioned at an approximate mental age of 10" because of his intellectual disability, argued that his sentence was disproportionate to his offense given that disability. 361 Or at 604–06. The trial court rejected that argument without addressing the evidence of intellectual disability. That was error, this court held, because the evidence showed "that defendant's age-specific intellectual capacity fell below the minimum age level of criminal responsibility for a child," as set by the legislature in ORS 161.290. *Id.* at 604.

Although this court based its holding on that legislatively recognized societal standard, this court began its discussion by noting that the United States Supreme Court, in *Atkins v. Virginia*, 536 US 304, 122 S Ct 2242, 153 L Ed 2d 335 (2002), had recognized a national consensus against imposing the death penalty on intellectually disabled offenders—a group that, based on measures of

IQ and adaptive functioning, had "not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18." *Atkins*, 536 US at 318. That national consensus, the Court concluded in *Atkins*, served as "powerful evidence that today our society views [intellectually disabled] offenders as categorically less culpable than the average criminal." *Id.* at 316. After finding "no reason to disagree with the judgment of the legislatures" across the country—based on the Court's assessment of "the deterrent or retributive purpose of the death penalty"—the Court held that the Eighth Amendment prohibited imposing a death sentence on intellectually disabled offenders. *Id.* at 316–17.

After crediting the national consensus that intellectually disabled offenders are categorically less culpable, this court held that courts must consider "an offender's intellectual disability" in comparing the gravity of the offense and the severity of the sentence under Article I, section 16. *Ryan*, 361 Or at 621. Yet this court "emphasize[d] that [its] holding applies only to intellectually disabled offenders, not to other categories of offenders." *Id.* at 621 n 9.

And that was only the first step in the analysis. The question that remained was "how that consideration should affect the proportionality analysis." *Id.* at 621. This court recognized that, in line with the consensus that

intellectual disability diminishes culpability, standards promulgated by the American Bar Association and the Oregon Sentencing Guidelines both recognized reduced mental capacity as a possible mitigating factor at sentencing. *Id.* at 620. But it did not follow that, under Article I, section 16, a determination that a defendant qualifies as intellectually disabled should be a free-floating mitigating factor that a sentencing court could weigh in its discretion. Nor did the court endorse "a one-size-fits-all approach" by which the mere fact of intellectual disability signaled disproportionality. *Id.* at 621. Instead, this court required an assessment of "an intellectually disabled 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." *Id.* That determination was "relevant to the ultimate legal conclusion as to proportionality" because it shed light on the "culpability of the offender." *Id.* (internal quotation marks omitted).

But one question still remained: What level of diminished capacity would "reasonable people" view as meaningfully affecting the gravity of an offense as compared to the severity of the penalty? This court found "objective evidence of a societal standard" in a "legislative pronouncement," ORS 161.290(1), which provides that those under 12 are "not criminally responsible" when tried in adult court. *Ryan*, 361 Or at 623–24. That statute, this court explained, reflected a societal consensus that "eschews treating

persons with the attributes of a preteen child as if they were normally abled adult offenders." *Id.* at 624; *see also State v. J. C. N.-V.*, 359 Or 559, 573, 380 P3d 248 (2016) (explaining that ORS 161.290 reflects a legislative "presumption" that children under 12 "lack criminal capacity").

That societal standard provided the discernible metric by which trial courts could meaningfully assess whether a defendant's intellectual disability rendered a sentence unconstitutionally disproportionate to an offense. In *Ryan*, there was evidence that the defendant had a level of "impaired adaptive functioning" such that he functions at "an approximate mental age of 10." 361 Or at 623. That evidence, "if credited, would establish that defendant's age-specific intellectual capacity, including his level of adaptive functioning, fell below the minimum age level for the imposition of criminal responsibility." *Id.* at 625. Because the trial court had not considered that evidence, this court remanded for the trial court to do so.

But, even then, this court cautioned that it did not mean to imply that "defendant's intellectual disability necessarily would lead to a different sentence," because the trial court would also have to consider "other case-specific factors" like the harm that the defendant caused. *Id.* This court held "only that" the "evidence, if credited, would establish that the sentence would be arguably unconstitutional because it shows that defendant's age-specific

intellectual capacity fell below the minimum level of criminal responsibility for a child." *Id.* at 625–26.

B. The mandatory sentence for defendant's commission of first-degree arson did not violate Article I, section 16, and evidence concerning her "personal characteristics" did not change that.

None of the objective factors that inform the Article I, section 16, inquiry provide a basis to conclude that defendant's sentence was unconstitutionally disproportionate. Unlike in *Ryan*, there is no evidence of an intellectual disability, much less of intellectual capacity at a level below the minimum level of criminal responsibility for a child. And unlike *Rodriguez/Buck*, defendant's conduct is within the very core of the conduct that the legislature made subject to the mandatory minimum sentence, and her sentence is not out of step with legislative judgments regarding conduct that requires the same sentence and sentences for related crimes. Defendant does not argue to the contrary. (*See* Pet Br at 46, "defendant's conduct surrounding the crime fell squarely within the conduct prohibited by" the first-degree arson statute; Pet Br at 49, "defendant does not attempt to argue that comparing her sentence to others for similar conduct that violates related offenses will support finding disproportionality").

Yet defendant contends that evidence concerning her "personal characteristics" makes all the difference. Defendant reads *Ryan* as 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. (Pet Br at 4). Based on that understanding, defendant argues that the trial court correctly concluded that her sentence was constitutionally disproportionate based on "mitigating facts in assessing moral culpability." (Tr 560).

The sweeping rule that defendant proposes finds no support in this court's Article I, section 16, precedents. To be sure, *Rodriguez/Buck* permits a trial court to consider the "characteristics of the defendant," a category that presumably includes mental illness, or any aspect of a defendant's life, that could be viewed to influence conduct. 347 Or at 62. But, as *Ryan* makes clear, the question is whether a particular personal 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. Defendant identifies no such societal standard regarding mental illness that would meaningfully guide the Article I, section 16 inquiry. In any event, any consideration of mental illness would be limited by the societal judgments concerning mental illness and culpability reflected by the guilt-except-for-insanity standards, and defendant did not have a qualifying mental disorder that diminished her capacities in the ways that those standards require.

1. The fact that personal characteristics could influence conduct does not make those characteristics significant to constitutional proportionality.

Defendant contends that "[t]his court's framework for analyzing proportionality requires consideration" of all "a defendant's personal characteristics" that could be thought to "influence conduct and reduce culpability." (Pet Br at 3–4). But this court has never endorsed that sweeping view, which would transform every sentencing proceeding in this state into a roving constitutional inquiry into factors that might affect a trial court's assessment of an offender's blameworthiness.

Virtually any aspect of a person's life could be thought to influence conduct and thus reduce, or mitigate, a person's culpability. "Relevant mitigating evidence," for the purpose of discretionary sentencing decisions without legislative parameters, includes any "evidence which tends logically to prove or disprove some fact or circumstance which a factfinder could reasonably deem to have mitigating value." *McKoy v. North Carolina*, 494 US 433, 440, 110 S Ct 1227, 108 L Ed 2d 369 (1990) (internal quotation marks omitted). But the fact that some aspect of an offender's life could be viewed as a mitigating consideration for purposes of a discretionary sentencing decision does not mean that it is significant to the constitutional inquiry under Article I, section 16.

This court's analysis in *Ryan* confirms as much. The incontestable observation that intellectual disability could be a characteristic that influences conduct and reduces culpability was not the beginning and end of this court's analysis in *Ryan*. This court took intellectual disability into account under Article I, section 16, because it found objective evidence of a societal consensus regarding when a person's intellectual functioning makes them categorically different, in terms of culpability, from other offenders. *Ryan*, 361 Or at 623–24. In the view of a three-Justice concurrence in *Ryan*, that was a "narrow, but principled approach to the issue presented," which correctly rejected the defendant's much broader theory that any "factors affecting judgment and conduct" will determine constitutional proportionality. *Id.* at 627, 634 (Balmer, C. J., concurring). Indeed, this court in *Ryan* emphasized that its "holding applies only to intellectually disabled offenders," and not to any personal characteristic that could be thought to make an offender less blameworthy. *Id.* at 621 n 9.

Nothing in *Ryan* or any of this court's other Article I, section 16, decisions supports defendant's expansive view that any characteristic that might be seen by a trial court as a fact that mitigates culpability, whether mental illness or anything else, could establish the constitutional disproportionality of a penalty set by the legislature.

2. Evidence of mental illness does not meaningfully inform the proportionality inquiry, because there is no societal consensus establishing when, or how, a mental illness lessens culpability.

Although defendant also defends the trial court's approach by addressing "mental illness" in particular, those arguments likewise miss the mark. That is because defendant fails to identify objective evidence of a societal standard that provides a basis to determine when an offender with a mental illness is categorically different, in terms of culpability, from other offenders. In fact, the Oregon legislature has addressed the relationship between mental illness and criminal liability through statutes describing the insanity defense and related concepts, but those statutes do not establish a societal standard to measure culpability for an offender, like defendant, who does not meet their criteria. Although defendant otherwise relies on the *Atkins* Court's Eighth Amendment rule prohibiting the death penalty for intellectually disabled offenders, along with policy proposals recommending death-penalty prohibitions based on severe mental illness, those sources likewise do not establish the necessary societal standard in Oregon.

a. Defendant fails to identify any objective evidence of a societal standard as to when, or how, mental illness renders a person less culpable than others.

Because defendant points to no objective evidence of a societal consensus as to when, or how, mental illness renders a person "less culpable" than the average offender, she offers no cognizable basis for courts to assess

mental illness as a matter of constitutional proportionality under Article I, section 16.

The initial problem with defendant's argument is that she poses the wrong question in asking whether there is societal agreement that "mental illness is a characteristic that influences conduct and reduces capability." (Pet Br at 4). *Ryan* did not simply rely on a societal consensus that intellectual disability could reduce culpability; instead, this court relied on objective evidence of a societal standard that provides a basis to determine when an intellectually disabled offender is categorically different, in terms of culpability, from other offenders.

That distinction is key. The state does not dispute that there is a general "'belief, long held by this society,'" that defendants with mental illness "'may be less culpable than defendants who have no such excuse.'" (Pet Br at 40 (quoting *Penry v. Lynaugh*, 492 US 302, 319, 109 S Ct 2934, 106 L Ed 2d 256 (1989); emphasis omitted)). The existence of the insanity defense in Oregon and elsewhere confirms that, for hundreds of years, society has understood that there is a relationship between mental illness and criminal responsibility. *See* ORS 161.295 (providing current formulation for when a person is guilty except for insanity and thus not criminally responsible); *State of Oregon v. Zorn*, 22 Or 591, 597, 30 P 317 (1892) (articulating early formulation of insanity defense); *Kahler v. Kansas*, 140 S Ct 1021, 1030, 206 L Ed 2d 312 (2020) (explaining

"that for hundreds of years jurists and judges have recognized insanity (however defined) as relieving responsibility for a crime").

But, as *Ryan* shows, the question in this case is whether—when a person is found criminally responsible—there is objective evidence of a societal standard that specifies when, and how, mental illness makes that person less culpable than the "average" offender. Only then could the existence of mental illness meaningfully inform the Article I, section 16, inquiry. Yet defendant offers no objective evidence of a societal consensus as to when, or how, mental illness renders a person "less culpable" than the average offender.

It is no answer to equate mental illness with intellectual disability, as defendant does on review. Although defendant contends that, "like persons with intellectual disabilities, persons with mental illnesses are less culpable than others," that categorical assertion is both inaccurate and unhelpful. (Pet Br at 39).

The problem with defendant's position is that it treats "mentally ill people" as a uniform group. (Pet Br at 41). To be sure, both *Ryan* and *Atkins* recognized an overwhelming national consensus that intellectually disabled offenders are "categorically," or "by definition," "less culpable." *Atkins*, 536 US at 316; *Ryan*, 361 Or at 618–20. But that is because those offenders meet an established definition of intellectual disability marked by diminished capacities. *See Moore v. Texas*, 581 US 1, 21, 137 S Ct 1039, L Ed 2d 416

(2017) (addressing standard to establish intellectual disability). And those diminished capacities, in turn, led the court in *Atkins* to conclude that *all* intellectually disabled offenders have diminished culpability, are not amenable to deterrence, and thus should not be subject to the death penalty.

No such categorical assertions could apply to "mentally ill people." (Pet Br at 41). That is because mental illness varies considerably in its effects on those who experience it, as the sources that defendant cites on review acknowledge.[4] Defendant is thus mistaken that "persons with mental illnesses are less culpable than others." (Pet Br at 39). Although "some mental illnesses may make a defendant less culpable," that depends on the particular mental illness, its severity, and when and how it affects the defendant. *State v. Kleypas*, 305 Kan 224, 336, 382 P3d 373 (2016). And although some mental illnesses could make a defendant "less likely to be deterred by [criminal punishment], often such illnesses can be treated and may not manifest in

---

[4] *See* Bruce J. Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B C Law Rev 785, 822 (2009) (reasoning that, in comparison to intellectual disability, mental illness is "more difficult to diagnose," "easier to feign," and "considerably more varied in symptomology and resulting degree of functional impairment"); ABA Task Force on Mental Disability and the Death Penalty, *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 Mental & Physical Disability L Rep 668, 671 (2006) (stating that "preclusion of a death sentence based on diagnosis [of a severe mental disorder] alone would not be sensible, because the symptoms of these disorders are much more variable than those associated" with intellectual disability).

criminal behavior." *Id.* Any constitutional inquiry based on the broad category of "mental illness" would thus present unique and difficult problems not presented by consideration of intellectual disability.

Defendant ultimately acknowledges as much, accepting that "not all mental illnesses will require a finding that a lengthy mandatory prison sentence is unconstitutional," because some mental illness will not make offenders "so impaired" that they are "less morally culpable." (Pet Br at 44). Elsewhere defendant quotes from sources that speak to "severe" mental illness that "may diminish" culpability, yet defendant does not say which mental illnesses qualify as severe or explain when they diminish culpability. (Pet Br at 42–43). In fact, defendant identifies no metric to measure when and how any particular mental illness reduces culpability, much less objective evidence of societal agreement (in Oregon or anywhere) about what that metric should be.

b. Oregon's guilt-except-for-insanity statute does not reflect a societal consensus as to the culpability of an offender who does not meet its criteria.

The Oregon legislature has addressed the relationship between mental illness and culpability by enacting statutes that, based on the existence of a qualifying mental disorder, eliminate criminal responsibility or liability. *See, e.g.*, ORS 161.295(1) (guilty-except-for-insanity (GEI)); ORS 161.300 (diminished capacity). Those statutes are significant because they show that, in fact, the legislature has spoken on the issue of mental illness and culpability: In

determining criminal responsibility in the first instance, defendants who meet certain qualifications should be treated differently from those who do not. But that is all that the legislature has said. Those statutes do not reflect a societal standard about how the law should treat a defendant with a mental illness who does not meet the legislature's standards for GEI or diminished capacity.

Under Oregon statutes, "psychological conditions—and their relationship to criminal culpability—are taken into account in the determination of guilt in the first instance." *Gonzalez*, 326 Or App at 602. In particular, when assessing guilt, "[e]vidence that the actor suffered from a qualifying mental disorder is admissible whenever it is relevant to the issue of whether the actor did or did not have the intent which is an element of the crime." ORS 161.300. And "[a] person is guilty except for insanity if, as a result of a qualifying mental disorder at the time of engaging in criminal conduct, the person lacks substantial capacity either to appreciate the criminality of the conduct or to conform the conduct to the requirements of law." ORS 161.295(1). Under either standard, not all mental illnesses qualify: "[T]he term 'qualifying mental disorder' does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, nor does the term include any abnormality constituting solely a personality disorder." ORS 161.295(2).

Those statutes, to be sure, embody a moral judgment, or societal standard, as to the culpability of those who meet their requirements. But those

statutes reveal no moral judgment as to the culpability of those like defendant who, despite diagnoses of mental illness, act with the requisite mental state and do not qualify as guilty except for insanity. In other words, those statutes do not establish that a defendant who has a mental illness is less culpable than other defendants found to have acted with the same requisite culpable mental state.

In that respect, this case is the opposite of *Ryan*. In *Ryan*, this court identified a legislatively recognized societal standard, ORS 161.290, that "eschews" treating those with the "attributes of a preteen child" as criminally responsible. *Ryan*, 361 Or at 624. And because that societal standard *applied to the defendant*, based on his attributes, it established a discernible basis to conclude that society would view the defendant as less morally culpable than others in a way that, for constitutional purposes, could reduce the gravity of his conduct. Here, by contrast, the legislatively recognized societal standards concerning mental disorders, ORS 161.295 and ORS 161.300, *do not apply to defendant*. Those societal standards thus provide no basis to treat defendant as less morally culpable based on the existence of mental illness.

And in the absence of objective evidence of a societal standard establishing when and how mental illness lessens culpability, this court could only speculate as to what that standard might be. One initial difficulty is to identify what level of reduction in a person's capacities is significant, where the

mental disorder at issue does not meet the GEI standard. *Compare Ryan*, 361 Or at 623–24 (identifying an age-based standard, ORS 161.290(1), on which to assess an intellectually disabled offender's level of functioning). At bottom, it is difficult to see how—*apart* from the minimum-age consideration under ORS 161.290(1)—the GEI standard could meaningfully inform a constitutional assessment of a sentence where the legislature already has considered how mental illness affects culpability and has drawn the line at the GEI standard.

For all those reasons, Oregon's GEI and related statutes do not provide objective evidence of a societal standard establishing that a person, like defendant, who is criminally responsible for her conduct despite mental illness is somehow less culpable than other offenders who are likewise criminally responsible.

c. The Eighth Amendment rule barring capital punishment for intellectually disabled offenders provides no basis to conclude that mental illness is a meaningful factor in an as-applied Article I, section 16, challenge.

As explained above, defendant has not identified objective evidence of a societal standard establishing when and how mental illness reduces an offender's culpability in a way that makes them categorically different from other offenders. Despite that, defendant asks this court to recognize such a standard in Oregon by extending the Eighth Amendment analysis in *Atkins*: Defendant argues that *Ryan* relied on *Atkins* to conclude that intellectual

disability must be considered under Article I, section 16; that the *Atkins* rationale "applies to equal force to defendants with mental illnesses"; and that this court should therefore extend both *Ryan* and *Atkins* to this case. (Pet Br at 37–38, 41–43). But, as explained below, that argument rests on a misunderstanding of *Ryan*, and to the extent that the Eighth Amendment rule in *Atkins* is relevant to the Article I, section 16, inquiry in this case, no court has extended the *Atkins* rule to cases involving mental illness. Although defendant does identify proposals to prohibit imposition of the death penalty based on certain severe mental illnesses, those proposals only demonstrate the complex policy judgments at play; they do not provide objective evidence of a societal standard in Oregon.

Defendant first misreads *Ryan* as adopting an Eighth Amendment rule for purposes of an as-applied Article I, section 16, challenge. In *Ryan* this court emphasized that it was "hold[ing] only that" intellectual disability is of constitutional significance under Article I, section 16, when it diminishes intellectual capacity to the point that it falls below a "societal standard" of "age-specific intellectual capacity" established by Oregon statute. 361 Or at 624–26. To be sure, in the course of its discussion, *Ryan* recognized that the Court in *Atkins* had adopted a categorical prohibition against imposing the death penalty on intellectually disabled offenders. But that Eighth Amendment rule was not the basis for this court's holding in *Ryan*. Like all of this court's decisions

considering as-applied Article I, section 16, challenges, *Ryan* looked to "objective evidence of a societal standard," as shown by the legislature's own enactments, to assess whether the defendant's punishment complied with Article I, section 16. *Ryan*, 361 Or at 624. Defendant does not even mention that core aspect of *Ryan*'s holding.

In any event, any reliance on the Eighth Amendment analysis in *Atkins* would not help defendant here. The *Atkins* Court recognized a national consensus that intellectually disabled offenders are by definition less culpable than other offenders, and it relied on that consensus in examining whether imposition of the death penalty served the goals of retribution and deterrence. In stark contrast to what the Court confronted in *Atkins*, "'[t]here simply is no comparable legislative trend toward abolishing the death penalty for those with severe mental illness.'" *Kleypas*, 305 Kan at 333 (quoting Winick, 50 B C Law Rev at 790–91). And no court to consider the issue has "extend[ed] the *Atkins* * * * rationale to the mentally ill." *Id.* (collecting cases); *see also, e.g.*, *Wells v. State*, 364 So 3d 1005, 1016 (Fla 2023) (collecting cases).

In accord with those decisions, this court rejected the view that the existence of "deep-seated psychological problems" that "diminish[] moral culpability" made a life sentence unconstitutional under the Eighth Amendment. *Kinkel v. Persson*, 363 Or 1, 29, 417 P3d 401 (2018), *cert den*, 139 S Ct 789 (2019). In *Kinkel*, this court considered a post-conviction

petitioner's argument that his sentence violated the Eighth Amendment principle that "[o]nly those juveniles whose homicide reflects irreparable corruption rather than the transience of youth are eligible for a life sentence without possibility of parole." *Id.* at 14. Rejecting that argument, this court concluded that petitioner's crimes were not the result of the "transient immaturity of youth" because they resulted from "a deep-seated psychological problem," a schizoaffective disorder, "that will not diminish as petitioner matures." *Id.* at 28–29.

But this court also rejected the dissent's view "that petitioner's psychological problems reduce his culpability for his crimes in a way that makes life imprisonment without possibility of parole unconstitutional as a matter of federal law." *Id.* at 29. This court acknowledged that, as a general matter, petitioner's psychological problems "diminish his moral culpability in the same way that any and every defendant whose crimes reflect deep-seated psychological problems can claim diminished moral culpability." *Id.* But the existence of psychological problems, even "deep-seated" ones, did not render the petitioner's sentence unconstitutional under the Eighth Amendment: "Unless the Eighth Amendment prohibits imposing a life sentence without the possibility of parole on every criminal defendant (young or old) who commits murder because of psychological issues, we cannot say that it prohibits

imposing that sentence on petitioner because he suffers from a psychological problem." *Id.* at 30.

As this court's decision in *Kinkel* reflects, courts addressing constitutional challenges to sentences 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. That would require identifying a standard to determine when mental illness reduces, but does not eliminate, culpability.

The lack of any national consensus regarding that standard likely reflects the difficult value judgments required to determine when mental illness reduces, but does not eliminate, culpability. As the United States Supreme Court has observed in canvasing states' divergent approaches to defining insanity: "Defining the precise relationship between criminal culpability and mental illness involves examining the workings of the brain, the purposes of the criminal law, the ideas of free will and responsibility. It is a project demanding hard choices among values, in a context replete with uncertainty, even at a single moment in time." *Kahler*, 140 S Ct at 1037. All the tough policy choices that legislatures must make in developing a standard for insanity likewise exist for identifying a standard to determine when mental illness diminishes culpability to the extent that it prohibits a particular sentence.

On review, defendant identifies a single policy recommendation that articulates a possible standard for prohibiting the death penalty based on "severe mental illness," but that only highlights the complex policy judgments at play. (Pet Br at 42–43). A 2006 recommendation from the American Bar Association (ABA) proposes a death penalty prohibition for offenders who, at the time of the offense, had a "severe mental disorder" that "significantly impaired their capacity" in one of three specified ways. ABA Task Force on Mental Disability and the Death Penalty, *Recommendation and Report on the Death Penalty and Persons with Mental Disabilities*, 30 Mental & Physical Disability L Rep 668 (2006). That recommendation is replete with policy judgments as to how and when a particular mental illness would diminish an offender's culpability:

- "Severe mental disorder": The recommendation applies only to "severe" disorders—those "that mental health professionals would consider the most serious 'Axis I diagnoses,'" though possibly other similar disorders.

- "Significant impairment" tests: The recommendation uses capacity standards that are similar to the Model Penal Code (MPC) test for insanity ("appreciate the nature, consequences or wrongfulness of their conduct"; "conform their conduct to the requirements of the law") but adds a third ("exercise rational judgment in relation to conduct").

- Exclusions: The recommendation excludes disorders "manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs," an exclusion that is intended to

> exclude more disorders than the MPC's insanity formulation.

Id. at 670–73.

Of course, legislatures could make different policy judgments, just as they have in defining insanity. In Oregon, as noted, a "qualifying mental disorder" for purposes of the insanity defense does not "include any abnormality constituting solely a personality disorder." ORS 161.295(2). Indeed, although two states have in the past few years enacted legislation barring the death penalty based on "serious mental illness," those states have significantly narrowed the ABA recommendation, making their own policy choices about when that kind of prohibition is appropriate.[5]

In the end, the ABA recommendation and enactments in two states reveal contrasting approaches to determine whether mental illness provides a basis to preclude imposition of a death sentence. To the extent those approaches reflect moral judgments about culpability of those with certain mental illnesses, they reflect no societal consensus. And that is no surprise. Just as there is a "diversity of [state] standards for when to absolve mentally ill defendants of

---

[5] *See* Ohio Rev Code § 2929.025 (defining "serious mental illness" as schizophrenia, schizoaffective disorder, bipolar disorder, and delusional disorder and applying a narrower capacity test than ABA recommendation); Ken Rev Stat § 532.130 (prohibiting the death penalty when, at time of offense, the defendant experienced "active symptoms" of schizophrenia, schizoaffective disorder, bipolar disorder, and delusional disorder).

criminal culpability," *Kahler*, 140 S Ct at 1025, one would expect a diversity of standards for when mental illness reduces culpability and restricts imposition of a particular punishment. In all events, the varying approaches of a few states in restricting the death penalty do not provide "objective evidence of a societal standard" in Oregon as to when, and how, mental illness reduces culpability in a way that would meaningfully inform the Article I, section 16, inquiry.

But that evidence is essential to a constitutional inquiry "based on current societal standards." *Bartol*, 368 Or at 613. If *Ryan*'s "analysis applies with equal force to defendants with mental illnesses," as defendant contends (Pet Br at 42), then she must identify objective evidence of a societal standard that provides a meaningful way to assess when and how mental illness reduces an offender's culpability and makes that offender different from others. Yet the sources she cites on review provide no objective evidence of the necessary societal standard in Oregon. If anything, those sources only muddy the waters as to where the line could be drawn.

Accordingly, as a category, "mental illness" does not meaningfully inform the comparison of the gravity of an offense and the severity of a penalty when evaluating constitutional disproportionality. The Court of Appeals correctly recognized as much in concluding that defendant's sentence was constitutionally proportionate under Article I, section 16.

3. Even assuming that evidence of mental illness could render a sentence constitutionally disproportionate, the evidence in this case would not do so.

Because there is no societal consensus establishing when, or how, a mental illness lessens culpability for a person who is criminally responsible, evidence of mental illness cannot meaningfully inform the Article I, section 16, analysis. But even assuming that mental illness could be a significant factor in that analysis, the evidence defendant presented here would not render defendant's sentence unconstitutionally disproportionate.

a. Any consideration of mental illness as a measure of culpability would have to align with the standards embodied in Oregon's guilt-except-for-insanity standard.

For a trial court to meaningfully account for mental illness as part of its Article I, section 16, analysis, a trial court must apply society's shared views as to how mental illness affects culpability. For reasons already explained, Oregon statutes addressing qualifying mental disorders and their effect on criminal responsibility do not provide a societal standard to assess the culpability of defendants who do not meet those qualifications. But, because Oregon statutes provide at least some evidence of society's views on the relationship between mental illness and culpability, "mental illness" would be constitutionally significant under Article I, section 16, only if it impairs the capacities recognized as significant by those statutes.

Accordingly, to the extent that an offender's mental disorder is a meaningful consideration under Article I, section 16, it would be strictly limited to a qualifying one that could be deemed to reduce culpability under the GEI standard. The GEI defense applies to individuals who, as a result of a "qualifying mental disorder" at the time of the offense, "lack[ed] substantial capacity either to appreciate the criminality of the conduct or to conform the conduct to the requirements of the law." ORS 161.295(1). The inquiry would have to be whether defendant could make a GEI-type showing that fell short of the GEI defense but still reduced culpability to such a degree that an offender meeting those standards categorically is less culpable, in relative terms, than offenders that do not meet those standards.

That approach would at least ensure that trial courts are not applying an analysis under Article I, section 16, that contradicts societal standards that Oregon statutes embody. This court's analysis in *Ryan* is instructive. Even though *Ryan* identified a societal standard by which a trial court could measure intellectual disability—and no similar standard would guide a trial court's assessment of mental illness—this court explained that a trial court's assessment of intellectual disability should turn on the same capacity questions that drive the GEI defense. *See Ryan*, 361 Or at 621 (directing a trial court to assess the intellectually disabled 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"). At a minimum, then, any assessment of how mental illness affects culpability must be based on those same measures—and limited to the "qualifying mental disorders" that the legislature has identified as relevant to culpability. And to make the required showing, a defendant generally would have to present expert evidence. *See generally State v. Jesse*, 360 Or 584, 385 P3d 1063 (2016) (illustrating need for expert testimony to draw causal links). A mere showing of intellectual disability, by itself, would be insufficient.

It bears emphasis that, along with any consideration of mental illness in the Article I, section 16 analysis, the trial court must consider public safety. Article I, section 15, of the Oregon Constitution confirms as much, by directing that "[l]aws for the punishment of crime shall be founded on these principles: protection of society, personal responsibility, accountability for one's actions, and reformation." In fact, this court has explained that the "'protection and safety of the people of the state'" is the "'most important consideration'" for the legislature in enacting sentencing provisions, and "the legislature is entitled to prescribe more serious penalties for crimes that present greater risks to the safety of the people of the state." *State ex rel Huddleston v. Sawyer*, 324 Or 597, 613, 932 P2d 1145 (1997) (quoting *Tuel v. Gladden*, 234 Or 1, 6, 379 P3d 553 (1963), and rejecting Article I, section 15, challenge to mandatory minimum sentence even though there was no opportunity for "individualized"

sentencing). Those public-safety considerations are built into the GEI framework. *See* ORS 161.327(1) (authorizing commitment to state hospital in felony cases if the person "is affected by a qualifying mental disorder and presents a substantial danger to others"). Similar public-safety considerations would guide the Article I, section 16, analysis when a defendant makes a GEI-type showing.

And to the extent that defendants make GEI-type showings that they have impaired abilities to understand the nature and consequence of their actions and to conform their conduct to the law, that may be, at best, a "two-edged sword." On the one hand, it may reduce moral blameworthiness, but on the other hand, it can be a compelling indication that they are dangers to the public. Courts have recognized that many of the factors that reduce culpability for intellectually disabled offenders are ones that could make them a continuing danger to reoffend, which is a significant consideration in assessing whether a term of incarceration is constitutionally disproportionate. *See People v. Coty*, 178 NE 3d 1071, 1082–83 (Ill 2020). This court has recognized the same would be true for mental disorders. *See Kinkel*, 363 Or at 29 (explaining that the petitioner's psychological problems were a "two-edged sword" in that they could be viewed to "diminish his moral culpability" but also made the petitioner "dangerous"). Any consideration of mental illness as part of the Article I, section 16, analysis requires a corresponding analysis of public safety.

b. Because defendant did not have a qualifying disorder that impaired her capacities in pertinent ways, her mental illness could not affect the constitutionality of her sentence.

Even if mental illness is a meaningful consideration in the Article I, section 16, analysis, the evidence of mental illness presented in this case would not render defendant's sentence unconstitutionally disproportionate. That is so because defendant was not, at the time of her offense, affected by a qualifying mental disorder that impaired her capacity to either appreciate or conform her conduct to the requirements of law.

[redacted] That is because "the term 'qualifying mental disorder' does not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct, nor does the term include any abnormality constituting solely a personality disorder." ORS 161.295(2). With those limitations, the legislature has excluded conduct that results from a drug-induced psychosis. *See Tharp v. PSRB*, 338 Or 413, 427, 110 P3d 103 (2005) (concluding that drug dependence was not a personality disorder and thus not a qualifying mental disorder and recounting

legislative history that "personality disorders include * * * persons suffering from a drug-induced syndrome"); *State v. Folks*, 290 Or App 94, 108, 414 P3d 468, *rev den*, 363 Or 283 (2018) (explaining that, by excluding personality disorders, "the legislature intended to exclude transitory, episodic, drug-induced psychosis from the definition" of a qualifying mental disorder). [redacted]

[redacted] the trial court's findings would not establish that defendant's culpability was reduced because of her diminished "capacity either to appreciate the criminality of the conduct or to conform the conduct to the requirements of the law." ORS 161.295(1); *see Ryan*, 361 Or at 621 (citing those capacities as "relevant" to "proportionality").

[redacted]

Instead, the trial court treated various aspects of defendant's life from childhood to the years after her crimes—including an eviction, the removal of defendant's kids from her care, and suicide attempts—as "mitigating facts." (Tr 560). [redacted]

[redacted]

In fact, the trial court's findings as to defendant's mental state at the time of the offense establish that defendant not only had the capacity to, but actually did, understand the nature and risks of her conduct. The trial court's verdicts on the arson charges establish that—regardless of any mental condition afflicting her at the time—defendant intentionally set the fire while knowing, and consciously disregarding, the fact that the fire could cause serious harm to both

the building and to people inside the building. (App Br ER 2–3; Tr 529). The guilty finding on third-degree assault establishes that she acted under circumstances manifesting an extreme indifference to the value of human life. (Tr 529, 546). The fact that defendant acted with those culpable mental states with respect to the elements of those crimes demonstrates that she understood the nature of her conduct.

Beyond that, in announcing its acquittal on the attempted-murder charge, the trial court stated that, although it did not believe that defendant *intended* to kill anyone other than herself, defendant understood what she was doing. Contrary to any finding that defendant's capacity to understand what she was doing was reduced, the court found that "the danger at the time to anyone else in her mind was collateral, that she was simply bent on taking her own life, and that was collateral to what she was experiencing and what she was intending." (Tr 527).

The court also found that defendant started the fire according to her own choices, not because a mental disorder prevented her from conforming her conduct to the law. With respect to the arson charges, the court found that, despite defendant's "mental health considerations," she took numerous "volitional steps to accomplish" setting the fire, piling items out on the landing she shared with the apartment next door, and lighting briquettes and other incendiary devices. (Tr 529). The court also found that defendant had made a

deliberate decision to set the fire after abandoning her original plan to overdose because she wanted to prevent anyone from being able to intervene. (Tr 526).

In sum, both the trial court record and the trial court's findings show that defendant did not suffer from a qualifying mental disorder that impaired her capacity to appreciate her conduct or conform it to the law. Accordingly, to the extent mental illness meaningfully informs the Article I, section 16, analysis based on societal standards about its effect on culpability, the evidence in this case provides no basis to conclude that defendant's mental illness diminished her culpability in any way that is constitutionally significant.[6]

---

[6] Defendant's *amici* call for a "case-specific assessment" of how the "particularities of the prison system" might affect a person in a variety of ways, from their mental health to their status as a parent, when a court evaluates the severity of a penalty. (*Amici* Br at 24–43). But that argument is not before this court because defendant does not present it on review and did not present it to the trial court or the Court of Appeals. No court has endorsed *amici*'s position. *See State v. Cook*, 297 Or App 862, 864, 445 P3d 343, *rev den*, 365 Or 721 (2019) (noting that whether "a court is permitted to consider the qualitative nature of a sentence's severity as applied to an intellectually disabled defendant" was an "unresolved" issue that the court did not need to resolve); *see also id.* at 875–78 (Lagesen, P. J., concurring) (explaining why "conditions of confinement" are not relevant to the Article I, section 16, analysis). And here, the record shows that defendant's mental health improved in jail, once she stopped using methamphetamine and started taking her medications, and that she was doing so well in jail after her conviction that she did not need mental health treatment, but "if sentenced to prison would likely qualify for support." (ER 23).

4. The trial court erred in concluding that the legislatively mandated sentence was disproportionate to defendant's offense under Article I, section 16.

In concluding that defendant's sentence was constitutionally disproportionate, the trial court considered the challenges that defendant has faced throughout her life, along with her post-offense recovery, and concluded that those considerations served to "mitigate" her culpability. That was error.

As explained above, this court's Article I, section 16, decisions require a limited constitutional inquiry based on an objective assessment of societal standards; that inquiry does not permit the open-ended review of personal circumstances that the trial court conducted here. Carried forward, that approach would fundamentally transform sentencing hearings into a constitutional free-for-all: Legislative requirements for "mandatory sentencing that does not consider case-specific factors" would be abandoned in favor of a trial court's "case-specific consideration of proportionality" based on any "characteristics [that] may influence a defendant's conduct"—an inquiry that would occur "at every sentencing hearing." (*Amici* Br at 9, 17, 23). Yet this court has rejected that kind of intrusive proportionality review, which would upset the "separation of powers" by permitting trial courts to "second-guess" legislative judgments. *Wheeler*, 343 Or at 672; *Rodriguez/Buck*, 347 Or at 58.

Nor can the trial court's ruling be sustained based only on a consideration of "mental illness," as defendant's arguments suggest. Defendant identifies no

objective evidence of a societal consensus as to when, and how, a particular mental illness reduces an offender's culpability in a way that makes them categorically different from other offenders. And any consideration of mental illness would have to align with the legislature's standards for guilt-except-for-insanity, yet defendant did not have a qualifying mental disorder that impaired her capacity to appreciate her conduct or conform it to the law.

Finally, even if the evidence permitted the conclusion that a qualifying disorder in some way impaired defendant's ability to appreciate her conduct or conform it to the law, that would not justify a conclusion that defendant's sentence was constitutionally disproportionate in this case. *See Ryan*, 361 Or at 625 (emphasizing that, in light of other factors at play, this court did not suggest "that the proper consideration of defendant's intellectual disability necessarily would lead to a different sentence"). There is no dispute that defendant's conduct was at the core of the first-degree arson offense: Defendant, "aware of the risk that she posed to others, disregarded that risk and set fire to her apartment building, forcing her neighbors out of their apartments to escape the fire, causing severe burns to one neighbor, and damaging the apartment building." *Gonzalez*, 326 Or App at 603–04. And defendant engaged in that conduct—which caused significant harm that goes beyond what the mandatory sentence covers—"notwithstanding her mental health condition." *Id.* at 603. Accordingly, even assuming that defendant's mental health condition reduced

her culpability in some way, that would provide no basis to conclude that her conduct in setting the fire, and the significant harm it caused, was anything other than grave.

For all those reasons, the trial court erred in concluding that defendant's sentence was constitutionally disproportionate under Article I, section 16. To be sure, as the Court of Appeals observed, "[m]any of the circumstances that the trial court identified as bearing on its decision—such as the constellation of events that led defendant to commit her crimes, defendant's post-arrest conduct, her remorse, and her efforts at recovery—are ones that weigh in favor of leniency, or so a reasonable judge could conclude." *Gonzalez*, 326 Or App at 599. Echoing views expressed by members of this court, the Court of Appeals reasoned that "a more 'just and nuanced' sentencing scheme would allow trial courts some discretion to consider at least some individual circumstances when determining an appropriate sentence for a particular offender." *Id.* (quoting *Ryan*, 361 Or at 628 (Balmer, C. J., concurring)).

But it is the legislature that has the "authority to set criminal penalties." *Wheeler*, 343 Or at 672. Out of "respect for the separation of powers," under Article I, section 16, a court's review of the legislature's choices is "limited." *Id.* Properly conducted, that review provides no basis to conclude that defendant's sentence violated Article I, section 16.

C. The mandatory sentence for defendant's commission of first-degree arson did not violate the Eighth Amendment.

On review, defendant also argues that her sentence violated the Eighth Amendment, but she does not develop any independent argument. (Pet Br at 54, "Defendant relies on the factors and reasons described above to support her Eighth Amendment challenge[.]"). As the Court of Appeals correctly observed, defendant "did not develop an argument distinct from her Article I, section 16, argument" in the trial court, and she did not present any Eighth Amendment argument to the Court of Appeals. *Gonzalez*, 326 Or App at 590 n 1; (ER 11; Res Ans Br at 4, limiting argument to Article I, section 16). For the same reasons that her Article I, section 16, challenge fails, defendant's Eighth Amendment argument likewise fails. *See, e.g.*, *State v. Althouse*, 359 Or 668, 693, 375 P3d 475 (2016) (finding that sentence did not "violate the Eighth Amendment's prohibition against cruel and unusual punishment for the same reason that it does not violate the requirement in Article I, section 16").[7]

///

///

---

[7] Without further explanation, defendant argues in the "alternative" that, "if this court disagrees with her Article I, section 16, argument," it should "reverse and remand to the trial court to consider whether the sentence violates the Eighth Amendment." (Pet Br at 54–55). But because defendant presents no distinct Eighth Amendment arguments to this court (and did not do so in the trial court or the Court of Appeals), she presents no cognizable basis for a remand.

CONCLUSION

This court should affirm the decision of the Court of Appeals and reverse and remand the judgment of the trial court.

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General
BENJAMIN GUTMAN
Solicitor General

/s/ Jonathan N. Schildt
JONATHAN N. SCHILDT #151674
Assistant Attorney General
jonathan.n.schildt@doj.state.or.us

Attorneys for Respondent on Review
State of Oregon

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on April 8, 2024, I directed the original Redacted Brief on the Merits of Respondent on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet and Kali Montague, attorneys for petitioner on review, and Brittney Plesser, attorney for a*mici curiae* Oregon Justice Resource Center & Oregon Capital Resource Center, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(1)(d)

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 13,103 words. I further 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(3)(b).

/s/ Jonathan N. Schildt

JONATHAN N. SCHILDT #151674
Assistant Attorney General
jonathan.n.schildt@doj.state.or.us

Attorney for Respondent on Review
State of Oregon

JNS:bes/960886151