

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff-Respondent,  
Respondent on Review

Supreme Court No. S063857

Court of Appeals No. A156146

v.

STEVEN LEVI RYAN,

Marion County Circuit Court  
Case No. 13C43883

Defendant-Appellant.  
Petitioner on Review

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**BRIEF ON THE MERITS OF *AMICI CURIAE*  
FAIR PUNISHMENT PROJECT AND OREGON JUSTICE RESOURCE  
CENTER**

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On Review of the Opinion of the Court of Appeals  
On appeal from a judgment of the Circuit Court for Marion County  
Honorable Vance D. Day, Judge

Court of Appeals affirmed without opinion: November 18, 2015

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**BRIEF ON THE MERITS OF *AMICI CURIAE* FAIR PUNISHMENT  
PROJECT AND OREGON JUSTICE RESOURCE CENTER**

**INTEREST OF AMICI CURIAE**

The Fair Punishment Project is a joint initiative of Harvard Law School’s Charles Hamilton Houston Institute for Race & Justice and its Criminal Justice Institute. In seeking to ensure that the United States justice system is fair and equitable, we contest the unconstitutional use of excessive punishment and highlight gross injustices resulting from issues like prosecutorial misconduct, ineffective defense lawyering, and racial bias.

The Oregon Justice Resource Center’s work is centered on the principle that fairness, accountability, and evidence-based practices should always be the foundation of our criminal justice system. For this reason, OJRC focuses on identifying and challenging harsh sentencing outcomes that fail to treat convicted offenders with respect for their capacity to change as well as sentencing practices that perpetuate mass incarceration.

The FPP and OJRC respectfully submit this brief as *amici curiae* because we share an interest in ensuring that sentencers recognize and give effect to mitigating circumstances—including intellectual deficits—when determining what punishment to fix. We believe that when sentencers are deprived of mitigating information or fail to give it effect, their decisions not only damage



the integrity of the proceedings at issue, but also undermine public confidence in the legal system.

### **SUMMARY OF ARGUMENT**

The trial court improperly interpreted this court's test in *State v. Rodriguez/Buck*, 347 Or 46, 217 P3d 659 (2009), to preclude it from considering certain characteristics of the defendant when deciding whether the mandatory Measure 11 punishment was unconstitutionally disproportionate. This case presents this court with an important opportunity to ensure that the Oregon Constitution's prohibition of disproportionate punishments meaningfully protects individuals with significant intellectual deficits and other vulnerabilities.

*Amici curiae*, the Fair Punishment Project ("FPP") and the Oregon Justice Resource Center ("OJRC"), submit this brief in support of defendant-appellant Steven Levi Ryan to assist the Court by making observations relevant to the questions presented that are not addressed or are not fully addressed in the parties' briefs. This Court's Article I, section 16, jurisprudence contemplates that sentencers can consider characteristics of the particular defendant, including intellectual disability and the possibility of successful treatment. And it should, for at least three reasons.

First, a review process that fails to consider intellectual disabilities in the analysis of a punishment's constitutionality will ultimately tolerate and endorse

the imposition of a number of disproportionate sentences. Intellectual impairments reduce an individual's moral culpability for criminal acts. The United States Supreme Court also has observed that individuals with intellectual disabilities experience unique challenges when facing criminal charges, and those challenges should be accounted for in disproportionality sentencing review. Moreover, individuals with intellectual disabilities are overrepresented in the criminal justice system. Therefore, an individual's intellectual disability is a critical consideration in sentencing.

Second, given that this court already requires trial courts to consider characteristics of the defendant in conducting a disproportionality analysis, the failure to account for characteristics like intellectual deficits and cognitive impairments will put all of the sentencing weight on the state's side of the scale. Courts regularly consider individual offender's criminal histories and aggravating facts of charged and uncharged offenses when deciding whether a punishment is unconstitutional as-applied. If only those aggravating characteristics matter for the constitutional analysis, the type of Article I, section 16, review this court envisioned in *Rodriguez/Buck* will be foreclosed.

Third, mandatory sentencing regimes risk creating constitutionally significant inequities. These regimes effectively foreswear the possibility that individuals will be rehabilitated or can be safely reintegrated into society on a timeline shorter than the legislatively predetermined sentence. Recent decisions

by the Supreme Court underscore the problem with making such significant judgments at the time of sentencing (or, more accurately, at the time of charging) with no input about how an individual may deal with incarceration. Moreover, when a mandatory sentence is affixed to a criminal law that prohibits a wide range of conduct, there is a heightened risk that individuals will be subjected to disproportionate sentences. Broad criminal laws with hefty mandatory sentences transfer additional power to prosecutors, and when prosecutors misuse discretion the courts see the types of outcomes that animated this Court's concerns in *Rodriguez/Buck*.

For these reasons, *amici curiae* argue that this court should rule in defendant's favor and remand the matter for a resentencing that entails consideration of defendant's particular intellectual deficits and vulnerabilities.<sup>1</sup>

## ARGUMENT

### **I. AN INDIVIDUAL'S INTELLECTUAL DISABILITY IS A CRITICAL CONSIDERATION IN SENTENCING**

#### **A. A Defendant's Intellectual Impairments Substantially Reduce Moral Culpability**

Individuals with intellectual disabilities are viewed as categorically different from typical adult offenders when it comes to moral culpability for crime. Individuals with intellectual disabilities have "deficiencies" that "do not

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<sup>1</sup> *Amici* adopt defendant's statement of the case, summary of facts, and proposed rule.

warrant an exemption from criminal sanctions, but \* \* \* diminish their personal culpability.” *Atkins v. Virginia*, 536 US 304, 318, 122 S Ct 2242, 153 L Ed 2d 335 (2002). Intellectual disability is not an excuse, but it is a powerful mitigating circumstance.

The fundamental notion “that defendants with a lesser *mens rea* are less deserving of punishment is \* \* \* a basic feature of our criminal justice system.” Timothy Cone, *Developing the Eighth Amendment for Those “Least Deserving” of Punishment: Statutory Mandatory Minimums for Non-Capital Offenses Can Be “Cruel and Unusual” When Imposed on Mentally Retarded Offenders*, 34 NM L REV 35, 51 (2004).<sup>2</sup> Intellectual disability<sup>3</sup> is defined in the medical community as significantly subaverage intellectual functioning, deficits in adaptive functioning, and onset of these deficits during an

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<sup>2</sup> Citing *Boyde v. California*, 494 US 370, 400, 110 S Ct 1190, 108 L Ed 2d 316 (1990) (Marshall, J., dissenting) (observing that several of the Court’s cases demonstrate that “a criminal defendant may be considered *less culpable* and thus less deserving of severe punishment if he encountered unusual difficulties in his background, *suffers from limited intellectual or emotional resources*, or possesses redeeming qualities”) (second emphasis added).

<sup>3</sup> Taking its cue from experts in the field and the U.S. Supreme Court, this brief uses the term “intellectual disability” to refer to the concept that was previously described as “mental retardation.” See, e.g., *Hall v. Florida*, \_\_\_ US \_\_\_, 134 S Ct 1986, 1990, 188 L Ed 2d 1007 (2014) (“Previous opinions of this Court have employed the term ‘mental retardation.’ This opinion uses the term ‘intellectual disability’ to describe the identical phenomenon. \* \* \* This change in terminology is approved and used in the latest edition of the Diagnostic and Statistical Manual of Mental Disorders, one of the basic texts used by psychiatrists and other experts \* \* \* .”).

individual's developmental period. *See Hall*, 134 S Ct at 1994. By virtue of these developmental setbacks and intellectual deficits, individuals with intellectual disability categorically possess a lower culpability.

Before the Supreme Court held that the Eighth Amendment prohibited the execution of individuals with intellectual disability, several professional associations with expertise on intellectual disability filed *amicus* briefs with the Court to explain what the condition entails. According to the American Psychological Association, the American Psychiatric Association, and the American Academy of Psychiatry and the Law:

“Although many individuals with mental retardation can achieve comparative independence when they receive appropriate training, support, and services, the fact remains that such persons are substantially less capable of both abstract reasoning and practical or adaptive functioning than non-retarded adults. These very real and serious impairments are reflected in diminished capacities to understand basic facts, foresee the moral consequences of actions, learn from one's mistakes, and grasp the feelings, thoughts, and reactions of other people.”

Brief for *Amici Curiae* Supporting Petitioner, *McCarver v. North Carolina*, 122 S Ct 22 (2001) (No. 00-8728), 2001 WL 648606, \*2. In the capital punishment context, the Supreme Court made explicit the professional understanding that intellectual disability undercuts moral culpability. In its words, “[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the *lesser culpability of the mentally retarded*

*offender* surely does not merit that form of retribution.” *Atkins*, 536 US at 319 (emphasis added).<sup>4</sup>

The Supreme Court’s recognition that intellectual disability reduces moral culpability arose in the context of a particular punishment, but the fact remains true across the sentencing spectrum. Recent developments in the jurisprudence of juvenile sentencing reflect this reality. To start, there are clear parallels between the limitations that individuals with intellectual disability experience and those that affect juveniles. Both groups are characterized by a “lack of maturity” that affects judgment and impulsiveness. *Roper v. Simmons*, 543 US 551, 569, 125 S Ct 1183, 161 L Ed 2d 1 (2005) (describing juveniles); *see Atkins*, 536 US at 306 (describing how individuals with intellectual impairments have “disabilities in areas of reasoning, judgment, and control of their impulses”). And, both groups “are more vulnerable \* \* \* to negative influences and outside pressures \* \* \* .” *Simmons*, 543 US at 569 (describing juveniles); *see Atkins*, 536 US at 318 (explaining that individuals with intellectual disabilities are typically “followers rather than leaders”). These similarities between characteristics of juveniles and characteristics of people with intellectual disabilities suggest that the sentencing ramifications of

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<sup>4</sup> *See also* Paul Marcus, *Does Atkins Make A Difference in Non-Capital Cases? Should It?*, 23 WM & MARY BILL RTS J 431, 458-59 (2014) (noting that the Supreme Court has held that “impaired intellectual functioning is inherently mitigating”).

intellectual disability should be considered beyond the realm of the death penalty.<sup>5</sup> *See, e.g., Montgomery v. Louisiana*, \_\_\_ US \_\_\_, 136 S Ct 718, 733, 193 L Ed 2d 599 (2016) (discussing the Supreme Court’s prohibition of mandatory life-without-parole sentences for juvenile offenders); *cf. Eddings v. Oklahoma*, 455 US 104, 116, 102 S Ct 869, 71 L Ed 2d 1 (1982) (“just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing”).

Beyond the special status both youthfulness and intellectual disability have garnered under the Eighth Amendment, the critical underlying fact here is that individuals with intellectual disabilities have a substantially reduced level of culpability.<sup>6</sup> Because culpability is a primary consideration in sentencing, evidence of intellectual disability is critical.

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<sup>5</sup> *See also* Cone, 34 NM L REV at 43-44 (“The relevance of the mental retardation mitigator to the proportionality of a non-capital case sentence cannot be ignored \* \* \*.”).

<sup>6</sup> *See, e.g.,* Elizabeth Nevins-Saunders, *Not Guilty As Charged: The Myth of Mens Rea for Defendants with Mental Retardation*, 45 UC DAVIS L REV 1419, 1437 (2012) (“[W]hile a presumption of culpability may be valid for defendants of average intelligence, a deeper examination of the capacities and tendencies of people with mental retardation demonstrates the gulf between this assumption and reality for defendants with mental retardation. Two forces work to undermine the overall culpability of defendants with mental retardation: cognitive capacity and psychosocial capacity.”).

**B. The Adversarial Criminal Justice System Poses Unique Challenges for Defendants with Intellectual Disabilities and Compromises Their Ability to Advocate Effectively With Respect to Sentencing**

The Supreme Court's historic decision in *Atkins* not only made visible the everyday plight of individuals with intellectual disabilities, but also underscored unique challenges these people confront when they end up in the criminal justice system. The challenges demonstrate that as criminal defendants, individuals with intellectual disabilities often cannot advocate effectively for themselves, particularly with respect to sentencing. For that reason, a failure to account meaningfully for the impact of these challenges will result in more disproportionate sentencing outcomes.

In *Atkins*, the Supreme Court identified the following challenges faced by individuals with intellectual disabilities: a heightened "possibility of false confessions," *Atkins* 536 US at 320; a lesser ability "to give meaningful assistance to their counsel," *Id.* at 321; a likelihood of being "poor witnesses," *Id.*; and, "demeanor [that] may create an unwarranted impression of lack of remorse for their crimes." *Id.* While a false confession can obviously lead to a wrongful conviction in the case of a factually innocent defendant, it may also mean that a defendant guilty of some wrongdoing confessed to more aggravated crimes or provided a more aggravating (but false) narrative that may implicate his sentencing exposure. The other challenges more obviously demonstrate that



a defendant's intellectual disability may compromise sentencing advocacy by preventing the formation of a strong attorney-client relationship<sup>7</sup> and misleading sentencers about a defendant's level of culpability.

**C. Evidence Indicates that with Appropriate Treatment Individuals with Intellectual Disabilities Can Learn to Behave in Sexually Appropriate Ways**

Although intellectual disability definitively reduces moral culpability, it may seem to cut against reduced sentencing in certain circumstances. The Supreme Court recognized that intellectual disability often operates as a “two-edged sword” that improperly generates harsher sentencing outcomes. *Atkins*, 536 US at 321. These results typically occur when sentencers fixate on the immutability of intellectual disability. Even though the condition is permanent, individuals with intellectual disabilities can learn and change their behaviors.

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<sup>7</sup> “‘Representing a client with mental retardation, however, presents unique problems even for highly skilled and experienced lawyers.’ See generally Richard J. Bonnie, *The Competence of Criminal Defendants with Mental Retardation To Participate In Their Own Defense*, [81 J CRIM L & CRIMINOLOGY 419 (1990)]. Among other things, a defendant with mental retardation may seek to mask significant cognitive deficiencies by appearing to understand what is in fact not understood in the hope of pleasing those around him. See James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, [53 GEO WASH L REV 414 (1985).]”

In the sensitive context of sex offenses,<sup>8</sup> evidence indicates that appropriate treatments can help individuals with intellectual disabilities behave in sexually appropriate ways and avoid reoffending.

Critically, “[e]xperts in mental retardation and sexuality emphasize that people with mental retardation can be educated to understand what is and is not appropriate sexual conduct.” Elizabeth Nevins-Saunders, *Incomprehensible Crimes: Defendants with Mental Retardation Charged with Statutory Rape*, 85 NYU L REV 1067, 1096 (2010). Indeed, sex education has been an effective tool.<sup>9</sup> And, research has shown that individuals with intellectual disabilities convicted of sex offenses can be effectively treated with cognitive-behavioral therapy. See, e.g., Sabyasachi Bhaumik et al., *Psychological Treatments in Intellectual Disability: The Challenges of Building a Good Evidence Base*, 198

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<sup>8</sup> Resistance to fairly evaluating evidence that intellectually disabled individuals can change their behavior is likely especially acute in the sex offense context. Individuals who have committed sex offenses, regardless of their culpability and personal characteristics, are widely defined by their crime and presumed to have an uncontrollable propensity to reoffend. “Perhaps this is because the general consensus—regardless of whether it is correct—is that sex offenders’ natures are immutable \* \* \*.” Note, *Incest and Sex Offender Registration: Who Is Registration Helping and Who Is It Hurting?*, 14 CARDOZO J L & GENDER 429, 441-42 (2008).

<sup>9</sup> See, e.g., Paul R. Abramson et al., *Sexual Expression of Mentally Retarded People: Educational and Legal Implications*, 93 AM J MENTAL RETARDATION 328, 331 (1988) (“Research has indicated that sex education greatly increases contraceptive, reproductive, and hygienic knowledge; improves social skills; and reduces inappropriate behavior of mentally retarded people.”).

BRIT J PSYCHIATRY 428 (2011); Christine Maguth Nezu et al., *Problem Solving Treatment for Intellectually Disabled Sex Offenders*, 2 INT J BEHAV CONSULTATION & THER 266 (2006).

While learning is often more difficult for individuals with intellectual disabilities, it is not impossible. Self-help and detention, however, is unlikely to solve the problem; these offenders need professional treatment and education. As Professor Nevins-Saunders explains, “while adults with mental retardation can sometimes be educated to understand, appreciate, and appropriately express their sexuality within the bounds of the law, what often distinguishes them from their peers of average intelligence is their dependence on others to receive this education and training.” Nevins-Saunders, 85 NYUL

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REV at 1075. If an intellectually disabled individual is never provided access to sex education or appropriate treatment, it is unfair to punish him to the fullest extent, especially because his condition is not one he chose.<sup>10</sup>

**D. Failing to Consider an Individual’s Intellectual Disability and the Prospects for Effective Treatment Will Lead to Many Disproportionate Sentences**

The system-wide impact of refusing to consider an individual’s intellectual disability in a disproportionality analysis would be considerable. Estimates on the percentage of convicted offenders that possess intellectual disabilities vary, in part because it is difficult to make accurate assessments when the condition is so often masked by those afflicted and rarely identified by

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<sup>10</sup> A more general observation about individuals with intellectual disabilities who have committed sex crimes may also bear on prospects for behavioral course correction. Research indicates that many intellectually disabled offenders commit sex crimes when they are young—typically in their mid-twenties or younger. See Peter R. Johnson, *Sexual Offences of Men with Intellectual Disabilities: A View from Private Practice*, 14 J DEVEL DISABILITIES 79, 84 (2008). “This suggests that the inappropriate sexual behaviour, for the vast majority, was related to a time of life when rapid sexual development occurs and when the male sex drive is very strong.” *Id.* Further research should be done to determine whether intellectually disabled offenders—like other offenders—tend to “age out” of criminal activity. See, e.g., Jamie Fellner, *Graying Prisoners*, NY TIMES (Aug 18, 2013), <http://www.nytimes.com/2013/08/19/opinion/graying-prisoners.html> (“Recidivism studies consistently show declining rates of crime with age.”).

other actors in the criminal justice system.<sup>11</sup> The Arc, a national organization that advocates for individuals with intellectual disabilities, sets out that “[w]hile those with intellectual disability comprise 2% to 3% of the general population, they represent 4% to 10% of the prison population.” Leigh Ann Davis, *People With Intellectual Disability in the Criminal Justice System: Victims & Suspects*, THE ARC (Aug. 2009), <http://www.thearc.org/what-we-do/resources/fact-sheets/criminal-justice>. Acknowledging the absence of reliable data, others estimate the percentage of individuals with intellectual disabilities in the prison population as 3% to as high as 40%. Despite the wide variance in these estimates, there is a consensus that people with intellectual disabilities are over-represented in the criminal justice system. *See, e.g.*, Nevins-Saunders, 45 UC DAVIS L REV at 1422; Shereen Hassan and Robert M. Gordon, *Developmental Disability, Crime, and Criminal Justice: A Literature Review*, CRIMINOLOGY RESEARCH CENTER (2003), <http://www.sfu.ca/crc/fulltext/hassangordon.pdf>. If this Court does not clarify that Article I, section 16, of the Oregon Constitution requires trial courts to consider evidence of a defendant’s intellectual deficits when deciding whether a punishment is disproportionate as-applied, many intellectually disabled offenders will be sentenced to unduly long

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<sup>11</sup> Richard J. Bonnie, *The Competence of Criminal Defendants with Mental Retardation to Participate in Their Own Defense*, 81 J CRIM L & CRIMINOLOGY 419, 423 (1990) (noting “the well-documented tendency of persons with mental retardation to conceal their disability”).

sentences. Taking intellectual disability into account upon disproportionality review has been recognized as an important “stopgap measure[] designed to prevent injustices from occurring.” Nevins-Saunders, 45 UC DAVIS L REV at 1424. This Court should ensure that the measure is fully incorporated into the *Rodriguez/Buck* analysis.

## II. THIS COURT HAS CORRECTLY HELD THAT THE OREGON CONSTITUTION’S PROHIBITION OF DISPROPORTIONATE SENTENCES REQUIRES COURTS TO CONSIDER CHARACTERISTICS OF THE DEFENDANT

### A. *Rodriguez/Buck* Held that Judges Should Consider Characteristics of the Defendant When Determining Whether a Sentence is Disproportionate

In deciding *Rodriguez/Buck*, this court correctly determined that trial courts should consider characteristics of the defendant when facing an as-applied challenge to a mandatory Measure 11 sentence. The court’s holding was clear:

“We therefore conclude that a defendant’s ‘offense,’ for purposes of Article I, section 16, is the specific defendant’s particular conduct toward the victim that constituted the crime, as well as the general definition of the crime in the statute. In considering a defendant’s claim that a penalty is constitutionally disproportionate as applied to that defendant, then, a court may consider, among other things, the specific circumstances and facts of the defendant’s conduct that come within the statutory definition of the offense, as well as other case-specific factors, such as **characteristics of the defendant** and the victim, the harm to the victim, and the relationship between the defendant and the victim.”

347 Or at 62 (emphasis added). One of the cases upon which this court relied in *Rodriguez/Buck*, *People v. Leonard*, 40 Cal 4th 1370 (2007), also based its disproportionality analysis in part on characteristics of the defendant. *See Rodriguez*, 347 Or at 59 n 6. In *Leonard*, the Supreme Court of California explained that these characteristics included factors like “age, prior criminality, and mental capabilities.” 40 Cal 4th at 1426-27. Even though the state in this case apparently conceded below that intellectual deficits are pertinent to the *Rodriguez/Buck* analysis, *see* Respondent’s Answering Brief at 6, the trial court nonetheless failed to consider these characteristics.

**B. Oregon’s Courts Must Not Limit Consideration to Negative Characteristics or They Will Only Validate Harsh Sentences**

Although the trial court in this case determined it did not have the power to account for defendant’s intellectual deficits in deciding whether the punishment shocked the conscience, courts in Oregon have uniformly understood that they can consider characteristics like the defendant’s criminal history and even uncharged negative conduct. If a one-sided assessment of personal characteristics—that is, a mere assessment of negative characteristics—prevails, trial courts will only validate sentencing outcomes. The judiciary’s constitutional power to review punishments to ensure they are proportionate will dissolve.

Courts have relied on a defendant's criminal history to uphold Measure 11 sentences. *See, e.g., State v. Sills*, 260 Or App 384, 399-400, 317 P3d 307 (2013); *State v. Alwinger*, 236 Or App 240, 247, 236 P3d 755 (2010) ("The court in *Rodriguez/Buck* did not state that a court's consideration of a defendant's criminal history is limited to the same or similar offenses."). Moreover, even where a defendant has established that he has no prior criminal history, courts have framed the conduct at issue in a way that negates any positive inference from that lack of history. *See State v. Camacho-Garcia*, 268 Or App 75, 83-84, 341 P3d 888 (2014), *review denied*, 357 Or. 164 (2015) (where the state dropped a second count, the court nevertheless held that "while it is true that defendant has no previous criminal history, he admitted to two, escalating incidents that constitute sexual abuse"). Indeed, courts have analyzed a defendant's "uncharged conduct" when deciding a disproportionality claim. *See e.g., State v. Padilla*, 277 Or App 440, \_\_ P3d \_\_ (2016); *State v. Sokell*, 273 Or App 654, 658, 362 P3d 251, *rev allowed*, 366 P3d 719 (2015) ("defendant's criminal history includes not only prior convictions, but also arrests, unadjudicated charges, and other uncharged misconduct").

Oregon courts have taken into consideration the "characteristics of the defendant" that support the imposition of a mandatory sentence. If this court approves of a trial court ruling that ignores the role mitigating characteristics play in the disproportionality analysis, then the result may be the promulgation



of a one-sided assessment that uniformly affirms punishments rather than analyzes them on a case-by-case basis.

**C. Courts of Appeal Have Held that Characteristics Such as a Defendant’s Mental Capacity Should be Considered**

Although Oregon courts have considered a wide range of defendants’ negative characteristics in performing *Rodriguez/Buck* sentencing reviews, some have also appropriately held that offenders’ mitigating characteristics must also be incorporated in the analysis. These courts have properly interpreted *Rodriguez/Buck* and faithfully fulfilled their constitutional duties under Article I, section 16.

In *Wilson*, the parties agreed—as they do in defendant’s case—that mental capacity is a relevant consideration under *Rodriguez/Buck*. There, the court of appeals also agreed: “We agree with the parties that the trial court can take into account a defendant’s mental capacity when determining whether a Measure 11 sentence violates Article I, section 16.” *State v. Wilson*, 243 Or App 464, 468, 259 P3d 1004 (2011); *see also id.* at 468-69 (“Among the characteristics of a defendant that the court should consider is a defendant’s diminished capacity.”). And, in *Sanderlin*, the court of appeals ordered re-sentencing where the trial court erroneously concluded that “in determining the constitutionality of the mandatory sentence \* \* \* it was not permitted to consider defendant’s asserted ‘mental problems’ as a result of the strokes he

had suffered \* \* \* .” *State v. Sanderlin*, 276 Or App 574, 576-77, 368 P3d 74 (2016).

In the *Wilson* and *Sanderlin* cases, the appellate courts fundamentally comprehended this court’s precedent. That understanding eluded the trial court here (as it did the trial court in *Sanderlin*). Defendant’s case now presents this court with the opportunity to clarify the confusion that courts evidently confront in performing *Rodriguez/Buck* analyses. Evidence pertaining to a defendant’s intellectual deficits and mental capacity is relevant when a defendant challenges the constitutionality of a mandatory Measure 11 sentence as-applied.

### **III. MANDATORY SENTENCES FOR EXPANSIVE CRIMINAL LAWS CREATE A CONSTITUTIONAL RISK OF DISPROPORTIONALITY**

#### **A. When Attached to a Law that Prohibits a Wide Range of Conduct, Mandatory Sentencing Schemes Consolidate Prosecutorial Power and Contribute to Disproportionate Outcomes**

Mandatory sentencing schemes shift a significant degree of responsibility for ultimate sentencing outcomes from the traditional sentencer—the trial court—to the charging authority. The Dean of the House of Representatives, long-time Congressman John Conyers, has explained this phenomenon:

“A minimum sentence depends solely on which statute a person is found to have violated, rather than a holistic analysis of the facts and circumstances of the crime. Further, mandatory minimums place the primary sentencing discretion in the hands of one side of an

adversarial process—the prosecution—rather than in the hands of a dispassionate judge.”

Congressman John Conyers, Jr., *The Incarceration Explosion*, 31 YALE L & POL’Y REV 377, 385 (2013). Prosecutors enjoy wide discretion in deciding which charges to file, meaning they can often invoke crimes with mandatory sentences where those sentences are available.<sup>12</sup> When a statute criminalizes a broad range of conduct and carries a mandatory sentence, prosecutorial power is at its apex. See Michael M. O’Hear, *Plea Bargaining and Procedural Justice*, 42 GA L REV 407, 425 (2008) (“when prosecutorial lenience is the only reliable means to avoid a draconian sentence, the prosecutor can effectively dictate the terms of the ‘deal’”).

Problems arise when prosecutors, imbued with great power, overreach. This court recognized in *Rodriguez/Buck* that the constitutional prohibition of disproportionate punishment provides a critical check on abuses of prosecutorial discretion. In the prosecution of one of the defendants in *Rodriguez/Buck*, the trial court stated on the record, “And it’s \* \* \* as [the deputy district attorney] certainly knows, because he’s prosecuted many cases in this courtroom, \* \* \* the contact was probably the least of any I’ve ever

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<sup>12</sup> See, e.g., Mark Osler and Judge Mark W. Bennett, *A “Holocaust in Slow Motion?” America’s Mass Incarceration and the Role of Discretion*, 7 DEPAUL J FOR SOC JUST 117, 147 (2014) (“whether or not a mandatory minimum will apply depends on an action of the prosecutor—specifically the choice of a charge”).

had.” *Rodriguez/Buck*, 347 Or at 53. Faced with the prospect of sentencing her to a 75-month sentence, the judge refused, stating “this case just cries out for [a finding of] shocking [the conscience].” *Id.* Something very similar happened in Darryl Buck’s trial where the trial court said: “‘I don’t think this should have been charged as a Measure 11 [crime].’ The 75–month mandatory sentence, given the particular conduct, was ‘grossly unfair.’” *Id.* In both *Rodriguez* and *Buck*, the prosecutors filed Measure 11 charges against defendants whose conduct represented the least offensive manifestations of first-degree sexual abuse.

This court observed that the particular problem in sexual abuse cases is that “few [other] statutes criminalize such a broad range of conduct.” *Id.* at 69. The statute thus inherently subjects a wide range of activities to the same mandatory 75-month sentence even though those activities may reflect disparate levels of gravity. In other words, “Rodriguez and Buck would have received the same sentences if they had engaged in sexual intercourse with the children that they briefly touched.” *Id.* at 75. In this way, mandatory sentences consolidate prosecutorial power and, when attached to laws that criminal a wide range of conduct, contribute to disproportionate outcomes.

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**B. Mandatory Sentences Inappropriately Disavow the Possibility that an Individual May Change**

Mandatory sentencing schemes disregard the possibility that an individual may change. While a legislature is generally free to adopt a punitive approach to sentencing, a total disavowal of potential rehabilitation does not comport with this court’s disproportionality analysis. The possibility that an individual’s mental illness or intellectual deficits can be treated, for example, should not be ignored outright by the sentencer. The flaw in mandatory sentencing is that the constitutionally relevant indicators of potential rehabilitation may never be considered by the sentencing court.

The Supreme Court has recently addressed a similar issue under the Eighth Amendment. In the context of mandatory life-without-parole sentences imposed on juvenile offenders, the Court found in *Miller v. Alabama* that these automatic and punitive judgments made at the time of sentencing are unconstitutional. 132 S Ct 2455 (2012).

The Court’s decision rested upon two core insights. First, “the mandatory penalty schemes at issue here prevent the sentencer from taking account of [] central considerations. By \* \* \* subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law’s harshest term of imprisonment proportionately punishes a juvenile offender.” *Miller*, 132 S Ct

at 2466. This reinforces the point made above, that mandatory sentences contribute to disproportionate outcomes.<sup>13</sup>

Second, the Supreme Court noted that the “mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.” *Id.* at 2468. Although the punishment in question in *Miller*, life-without-parole, altogether prevents any opportunity for release, a mandatory Measure 11 sentence without appropriate *Rodriguez/Buck* review similarly passes judgment upon a defendant irrespective of his capacity for treatment or change. Practically every individual convicted of first-degree sexual abuse—regardless of potential intellectual deficits, issues with mental capacity, and prospects for successful treatment—will receive a 75-month sentence. Unless, of course, this court clarifies that the *Rodriguez/Buck* disproportionality analysis enables courts to properly consider those characteristics of the defendant.

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<sup>13</sup> See also *Miller*, 132 S Ct at 2468 (“Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences.”).

**CONCLUSION**

For the foregoing reasons, *amici* urge this court to rule in defendant's favor and make clear that the *Rodriguez/Buck* test requires trial courts to consider a defendant's intellectual deficits and prospects for treatment when deciding whether a Measure 11 mandatory punishment is disproportionate.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH  
BRIEF LENGTH AND TYPE SIZE REQUIREMENTS**

**Brief Length**

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count on this brief (as described in ORAP 5.05(2)(a)) is 5,130 words.

**Type Size**

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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**CERTIFICATE OF FILING AND SERVICE**

I certify that on June 10, 2016, I filed the original of this BRIEF ON THE MERITS OF *AMICUS CURIAE* OREGON JUSTICE RESOURCE CENTER with the State Court Administrator by the eFiling system.

I further certify that on June 10, 2016, I served a copy of the BRIEF ON THE MERITS OF *AMICUS CURIAE* OREGON JUSTICE RESOURCE CENTER on the following parties by electronic service via the eFiling system:

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