IN THE SUPREME COURT OF THE STATE OF OREGON

ALISHA DAWN MYERS, Petitioner-Appellant, Petitioner on Review v. ROB PERSSON, Superintendent, Coffee Creek Correctional Institution, Defendant-Respondent, Respondent on Review.	Washington County Circuit Court Case No. 16CV38560 CA A166884 SC S068096

BRIEF ON THE MERITS OF *AMICUS CURIAE* OREGON JUSTICE RESOURCE CENTER IN SUPPORT OF PETITIONER ON REVIEW

Review of the Decision of the Court of Appeals
on Appeal from the Judgment of the Circuit Court for Washington County
Honorable Andrew Erwin, Judge

Court of Appeals Decision Filed: July 1, 2020
Before: DeVore, Presiding Judge, and DeHoog, Judge, and Mooney, Judge
Affirmed Without Opinion

(Counsel listed on following page) June 2021

JASON WEBER #054109
O'Connor Weber LLC
1500 SW First Avenue, Suite 1090
Portland, Oregon 97201
jason@oconnorweber.com
(503) 226-0923

Attorney for Petitioner on Review
Alisha Dawn Myers

ELLEN F. ROSENBLUM #753239
Attorney General
BENJAMIN GUTMAN #160599
Solicitor General
RYAN KAHN #002919
Department of Justice
1162 Court Street NE
Salem, Oregon 97301
ryan.kahn@doj.state.or.us
(503) 378-4402

Attorneys for Respondent on Review
Rob Persson

SARA F. WERBOFF #105388
ZACHARY R. DUFFLY #143109
c/o Oregon Justice Resource Center
PO Box 5248
Portland, Oregon 97208
(503) 944-2270
amicus@ojrc.info

Attorneys for Amicus Curiae
Oregon Justice Resource Center

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Oregon Justice Resource Center
PO Box 5248 • Portland, Oregon 97208
(503) 944-2270
amicus@ojrc.info

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Oregon Justice Resource Center
PO Box 5248 • Portland, Oregon 97208
(503) 944-2270
amicus@ojrc.info

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Oregon Justice Resource Center
PO Box 5248 • Portland, Oregon 97208
(503) 944-2270
amicus@ojrc.info

BRIEF ON THE MERITS OF *AMICUS CURIAE* OREGON JUSTICE RESOURCE CENTER

INTRODUCTION

Amicus Curiae, Oregon Justice Resource Center (OJRC), is a Portland-based non-profit organization founded in 2011. OJRC works to dismantle systemic discrimination in the administration of justice by promoting civil rights and by enhancing the quality of legal representation to traditionally underserved communities. OJRC serves this mission by focusing on the principle that our criminal-justice system should be founded on fairness, accountability, and evidence-based practices. OJRC Amicus Committee is comprised of Oregon attorneys from multiple disciplines and practice areas.

Amicus writes in support of petitioner in this case. *Amicus* urges this court to reverse the opinion of the Court of Appeals and the circuit court's grant of summary judgment, as petitioner's sentence violated the state and federal constitutions. In particular, *amicus* urges this court to evaluate this case independently under Article I, section 16, of the Oregon Constitution.

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Oregon Justice Resource Center
PO Box 5248 • Portland, Oregon 97208
(503) 944-2270
amicus@ojrc.info

SUMMARY OF ARGUMENT

Petitioner, who was 18 when she committed the underlying homicides, has the mental age of an 11-year-old. She was sentenced to life without the possibility of parole (LWOP). Petitioner brought a post-conviction relief petition, alleging, *inter alia*, that her sentence violated the state and federal prohibitions on disproportionate punishments. The state moved for summary judgment, and the post-conviction court granted that motion. Petitioner appealed, lost, and petitioned for review, which this court allowed.

Following this court's decision to allow review, the United States Supreme Court issued a decision that upended its Eighth Amendment proportionality analysis for juvenile offenders convicted of homicide. That decision, *Jones v. Mississippi*, __ US __, 141 S Ct 1307 (2021), is a distortion of the Court's Eighth Amendment jurisprudence, but, nonetheless, this court must adhere to it.

But the United States Supreme Court's Eighth Amendment jurisprudence is not the end of, nor indeed the beginning of, this court's evaluation of petitioner's claims. Instead, this court should evaluate petitioner's claims first under Article I, section 16, of the Oregon Constitution.

This court may do so even when the state constitutional claim is imperfectly preserved, as it is here. Although this court has previously declined

to consider unpreserved state constitutional claims in this context, prudential considerations warrant that consideration here. In particular, the procedural posture of this case, where the remedy would be reversal of summary judgment and a remand for a full consideration of petitioner's post-conviction claims, does not give rise to the same concerns in addressing that claim for the first instance on direct appeal.

Additionally, the significant change in the law following the *Jones* decision weighs in favor of evaluating this case under the state constitution. Parties tended to litigate these claims under the Eighth Amendment because the law had been more developed under that provision. However, now that the ground has shifted, and shifted in a manner that is inconsistent with this court's earlier Eighth Amendment rulings, petitioner and those like her should be able to find relief under the more protective state constitutional provision.

Article I, section 16, requires an individualized sentencing determination for petitioner and those like her. This court's Article I, section 16, case law recognizes that children and those with intellectual disabilities are less culpable and often should not be subject to the same sentences as adult offenders. Accordingly, the post-conviction court erred when it concluded that petitioner had no legal claims such that summary judgment was warranted.

ARGUMENT

I. This court should consider the issue in this case under Article I, section 16, and adopt an independent state analysis that is more protective of defendants' rights than the current Eighth Amendment analysis.

This case presents a unique scenario where a decision rendered after this court allowed review dramatically changed the circumstances of this appeal. The United States Supreme Court recently held juveniles convicted of homicide may be sentenced to LWOP, provided that they were afforded the procedural protection of a sentencing hearing where the sentencing court could exercise discretion and consider youth. *Jones v. Mississippi*, __ US __, 141 S Ct 1307 (2021). In reaching that holding, the majority concluded that neither *Miller v. Alabama*, 567 US 460, 132 S Ct 2455, 183 L Ed 2d 407 (2012), nor *Montgomery v. Louisiana*, 577 US 190, 136 S Ct 718, 193 L Ed 2d 599 (2016), required a sentencing court to conclude that the youth was irredeemably corrupt before imposing an LWOP sentence; instead, those decisions prohibited only a *mandatory* LWOP sentence. *Id*. at 1318. Because the sentencing court in *Jones* considered the defendant's youth and had discretion to impose a life sentence with the possibility of parole, it was permissible for that court to impose an LWOP sentence. *Id*.

The holding of *Jones* is controversial, for good reason. As discussed at length in the dissent, the majority opinion is inconsistent with the rationale of *Miller/Montgomery*. Specifically, *Miller/Montgomery* held that the Eighth Amendment provides a substantive prohibition on juvenile LWOP sentences for all but the most incorrigible youths. *See* 141 S Ct at 1328 (Sotomayor, J., dissenting) (noting that majority opinion "would come as a shock to the Courts in *Miller* and *Montgomery*" because the "essential holding is that a 'lifetime in prison is a disproportionate sentence for all but the rarest children, those whose crimes reflect "irreparable corruption"'").

The dissent systematically explained the faults in the majority's reasoning. First, the dissent notes that the majority opinion selectively quotes *Montgomery* for the proposition that a specific finding of incorrigibility in not required, while simultaneously minimizing *Montgomery*'s holding that an LWOP sentence is constitutionally disproportionate for most children:

> "The Court rests its conclusion on *Montgomery's* modest statement that '*Miller* did not impose a formal factfinding requirement,' and so 'a finding of fact regarding a child's incorrigibility ... is not required." * * * This statement is the linchpin of the Court's opinion. * * *. As the Court quietly admits in a footnote, however, *Montgomery* went on to clarify that the fact '[t]hat *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects transient immaturity to life without parole. To the contrary, *Miller* established that this punishment is disproportionate under the Eighth Amendment.'"

Id. at 1330–31 (Sotomayor, J., dissenting) (internal citations omitted). It is therefore "necessary," the dissent explains, that a sentencing court determine whether the juvenile offender's crimes "reflect transient immaturity" or whether the offender is "one of those rare children whose crimes reflect irreparable corruption." *Id*.

The dissent further notes that even discretionary sentencing schemes can produce disproportionate sentences. *Id*. at 1332 (Sotomayor, J., dissenting) ("No set of discretionary sentencing procedures can render a sentence of LWOP constitutional for a juvenile whose crime reflects 'unfortunate yet transient immaturity.'"). Disputing the majority's conclusion that *Miller* offered only a prediction that juvenile LWOP sentences would be rare with the requisite procedural protection of a discretionary determination, the dissent explains that those sentences are rare because *Miller* held, substantively, that juvenile LWOP sentences are constitutionally disproportionate for the majority of juvenile offenders:

> "Simply put, there are very few juveniles for whom the 'signature qualities' of youth do not undermine the penological justifications for LWOP. Youth is 'a time of immaturity, irresponsibility, impetuousness, and recklessness, and, almost invariably, those 'qualities are all transient.'"

Id. at 1333 (Sotomayor, J., dissenting).

In sum, after petitioner litigated the summary judgment motion below, appealed that decision, and petitioned for review to this court, the majority in *Jones* dramatically refashioned a body of Eighth Amendment case law concerning LWOP sentences for juvenile offenders. While it had been understood since *Miller/Montgomery* that there were substantive limitations on juvenile LWOP sentences, that understanding is no longer the law of the land.[1] Moreover, the jurisprudential underpinning of this sea change is suspect.

[1] Notably, *Jones* also is inconsistent with this court's interpretation of *Miller/Montgomery*, which hewed closely to the interpretation discussed in the *Jones* dissent. For example, in *White v. Premo*, 365 Or 1, 9–10, 433 P3d 597 (2019), this court explained:

> "In *Miller*, the court considered whether juvenile offenders could be sentenced to life in prison without the possibility of parole for the crime of homicide. The court knit together two strands of precedent. * * * [I]t took the principle that the Constitution categorically bans mismatches between the culpability of a class of offenders—juveniles—and the severity of a penalty [and it] took the principle that the sentencing authority must consider the individual characteristics of the defendant and the details of the offense before imposing that penalty. * * * Likening life without parole for juveniles to the death penalty, the Court then held that 'the confluence of these two lines of precedent leads to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment.' * * * What is required, the Court explained, is individualized decision-making and a determination whether the juvenile offender who is being sentenced is typical of those juvenile offenders whose crime " 'reflects unfortunate yet transient immaturity,' " or whether the offender, instead, is " 'the rare juvenile offender whose crime reflects irreparable corruption.' " * * * Although the Court did not foreclose a sentencer's ability to make that judgment in homicide cases, it required the sentencer 'to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.'"
>
> "*Miller* did not impose only a procedural rule, however. * * * *Miller* 'did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of "the distinctive attributes of youth." ' * * * Thus, the Court amplified, '[e]ven if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects "unfortunate yet transient immaturity." ' * * * *Miller* created a substantive rule that sentencing a child who has committed homicide to life without parole is excessive for all but the 'rare' offender whose crime reflects irreparable corruption."

(Internal citations omitted.)

In reaching the issues presented in this case, this court is, of course, bound by the United States Supreme Court's Eighth Amendment jurisprudence, including the majority opinion in *Jones*, no matter how dubious that decision may be. And petitioner here argues that she is entitled to the Eighth Amendment procedural protection discussed in *Jones*, namely, a hearing in which the sentencing court has discretion to consider the facts that render her less culpable and an LWOP sentence disproportionate. But this court can and should go further, as even the *Jones* majority recognized. *See* 141 S Ct at 1323 ("Importantly, * * * our holding today does not preclude the States from imposing additional sentencing limits in cases involving defendants under 18 convicted of murder."). As discussed further below, it is appropriate for this court to decide this case first under Article I, section 16, and, in so doing, develop a robust state constitutional rule that would apply to petitioner.

A. Under this court's practice of deciding "first things first" under the state constitution, this court should develop a robust Article I, section 16, jurisprudence.

Oregon has traditionally evaluated issues by first turning to its own constitution. In 1980, Justice Hans Linde promoted the notion that litigants and courts should *first* consider all issues under state law and, only if the state law failed to resolve the issue, then consider federal law. He wrote:

> "In my view, a state court should always consider its state constitution before the Federal Constitution. It owes its state the respect to consider the state constitutional question even when counsel does not raise it, which is most of the time. The same court probably would not let itself be pushed into striking down a state law before considering that law's proper interpretation. The principle is the same."

Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U Balt L Rev 379, 383 (1980).

Justice Linde was particularly aware that a state's constitution is better positioned to protect the individual rights of its citizens than the federal constitution. He explained that requiring courts to apply the state's own bill of rights "can make people aware of their responsibility for the law of their state" and encourage possible amendments to better serve the residents of those states. *Id*. at 394–95. He noted that states were not necessarily served best by the decisions of judges unconnected with their particular communities, and careful scrutiny of a state's constitution may encourage those citizens "to face closer to home some fundamental values that the public has become accustomed to have decided for them by the faraway oracles in the marble temple." *Id*.

Justice Linde anticipated that states would choose to provide greater protections for their citizens than the federal government required, while not depriving those citizens of those federal protections:

> "The irreducible national standards, as declared from time to time by the United States Supreme Court, bind us in any event. No state can choose to reject them. But neither are the people of any state bound to be satisfied with the minimum standard allowed to all."

Id.

Justice Linde's vision has been repeatedly implemented by this court. This court has stated its preference to consider whether a government action or statute violates the state constitution before embarking on similar, but potentially unnecessary, analysis under the federal constitution. *See State v. Kennedy*, 295 Or 260, 266–67, 666 P2d 1316 (1983) ("[A]n Oregon court should not readily let parties, simply by their choice of issues, force the court into a position to decide that the state's government has fallen below a nationwide constitutional standard, when in fact the state's law, when properly invoked, meets or exceeds that standard."). As discussed in Part II, Article I, section 16, provides independent grounds for relief in this case. For the following reasons, this court should adhere to its practice of reaching the state constitutional remedy first.

B. Prudential considerations favor reaching the state constitutional analysis in this case.

This court may reach the proper interpretation and application of Article I, section 16, even if that was not defendant's primary argument below.

Preservation is a prudential doctrine and there are several factors that weigh in favor of this court considering the state constitutional issue first.

Preservation rules are "pragmatic" and "prudential." *Peeples v. Lampert*, 345 Or 209, 219, 191 P3d 637 (2008). The touchstone is procedural fairness to courts and litigants. *Id*. In some circumstances, preservation is not required, such as when a party has no practical ability to raise an issue, or when the record demonstrates that preservation would have been futile. *Id*. at 220. In this case, petitioner requests that this court reach a state constitutional argument when that argument was not fully presented below.

In *State v. Link*, 367 Or 625, 482 P3d 28 (2021), this court addressed a similar request and concluded it was not appropriate to reach the merits of the state constitutional argument. In *Link*, this court reiterated that preservation is a pragmatic and prudential doctrine, and that this court has eschewed "a 'hard-and-fast rule' that a litigant always must articulate distinct arguments under the state and federal constitutions, explaining instead that the 'appropriate focus' is 'whether a party has given opponents and the trial court enough information to be able to understand the contention and to fairly respond to it." *Id*. at 638.

> "In other words, when parallel constitutional provisions are at issue, a party is not necessarily required to develop separate and distinct arguments under both constitutions in the trial court to preserve both issues for review on appeal. However, a party still must frame its argument in a way that gives notice to the trial court

> and opponents that it is advancing its claim under both constitutional sources."

Id. at 639.

This court then addressed a tension in its case law between the preference for resolving claims under the state constitution, and the prudential considerations of the preservation doctrine. Noting that there is support for the notion that this court should reach unpreserved state constitutional claims, this court explained that the current practice was to decline consideration of unpreserved claims.

> "The interplay between the 'first things first' doctrine and jurisprudential principles such as preservation is a difficult and important issue that has not received systematic treatment by this court. Nevertheless, * * * the trend in this court's case law in recent decades has been decidedly against reaching unpreserved arguments under state law."

Id. at 640–41. Even so, this court did not categorically prohibit consideration of an unpreserved state constitutional argument in a future case, where prudential considerations might favor it. *Id*. at 641 ("We do not rule out the possibility that, in a future case, this court may find prudential reasons to address an unpreserved question of state law in addition to, or in lieu of, a federal question.").

The court then explained that the defendant expressly abandoned any Article I, section 16, argument on appeal. *See id*. at 641–42 ("Defendant raised

a state constitutional claim at the trial court and then, for unknown reasons, did not do so at the Court of Appeals. The state specifically noted in its response brief and during oral argument at that court that defendant was not raising a state constitutional claim. Defendant had repeated opportunities to refute the state's position if he believed it was incorrect, and he declined to do so."). Accordingly, the defendant's "invocation of the 'first things first' doctrine was not alone sufficient for this court to consider his unpreserved state constitutional claims.

Although this case and *Link* both raised challenges to the constitutionality of a sentence, this case does warrant consideration of a state constitutional claim. First, petitioner did assert that her sentence violated Article I, section 16, in the trial court. Below, the state contended that petitioner did not develop an argument under that provision, however, doing so was not necessarily required to preserve her claim under the state constitution. Raising an issue (the unconstitutionality of her sentence) and citing a source (Article I, section 16) is more important than developing a particular argument. *See State v. Hitz*, 307 Or 183, 188, 766 P2d 373 (1988) ("We have previously drawn attention to the distinctions between raising an issue at trial, identifying a source for a claimed position, and making a particular argument. The first ordinarily is essential, the second less so, the third least."); *State v. Weaver*, 367 Or 1, 17, 472 P3d 717

(2020) (relying on *Hitz* to conclude that the defendant sufficiently raised constitutional claim).

Second, petitioner did not abandon that argument in the Court of Appeals to the same extent as did the defendant in *Link*. Notably, this case arises in a different procedural posture than *Link*. The defendant in *Link* directly appealed his sentence. Here, petitioner raised a collateral post-conviction challenge to her sentence and argued that it violated Article I, section 16, and the Eighth Amendment. The post-conviction court granted the state's motion for summary judgment, and, in appealing that ruling, petitioner focused on the then-operative Eighth Amendment case law that cleanly fit the statute of limitations escape clause criteria. If petitioner were to prevail, this case would be remanded for factual determinations relevant to the proportionality analysis under the state and federal constitutions.

Thus, the question for this court to resolve, among others, is whether petitioner has a legal claim that her sentence violated Article I, section 16, and whether the post-conviction court erred in concluding she did not. Unlike the defendant in *Link*, who litigated the propriety of his sentence under both provisions in the trial court, abandoned the state constitutional argument on appeal, and then reasserted the state constitutional argument on review, here, petitioner asserted that her sentence violated both the state and federal

constitutions on collateral review and challenges the post-conviction court's conclusion that she raised no viable claim. Petitioner anticipated that the post-conviction court would ultimately address her state constitutional arguments and that the state would be able to fully respond. In that sense, she did not abandon those claims.

Finally, in light of the *Jones* decision, and its significant alteration of the Eighth Amendment framework for juvenile LWOP sentences, there are additional prudential considerations, not present in *Link*, that warrant this court's evaluation of Article I, section 16.

As noted above, in outlining the contours of state constitutionalism, Justice Linde anticipated that parties might overly rely upon federal doctrine in their arguments. The over-reliance on the Eighth Amendment, in the context of sentencing, is understandable in this instance. That is because the United States Supreme Court had issued a number of landmark decisions addressing the Eighth Amendment limitations on sentencing for juvenile offenders. The United States Supreme Court had developed a jurisprudence surrounding the fact that children are less culpable due to their transient immaturity. This court also has addressed the limitations on sentencing youth offenders but primarily has been called upon to apply the well-developed Eighth Amendment jurisprudence. *See White*, 365 Or at 9–10 (applying *Miller/Montgomery* to

aggregate life sentence); *Kinkel v. Persson*, 363 Or 1, 15–16, 417 P3d 401 (2018) (applying *Miller/Montgomery*).

The decision in *Jones*, which issued after the parties had litigated their case in the post-conviction court and the Court of Appeals (indeed, after this court allowed review), was unanticipated. For the reasons given above, it is inconsistent with *Miller* and *Montgomery*, and this court's prior interpretations of those cases. The parties were not on notice of the extent to which the jurisprudential ground beneath them would shift, and how the answer to the questions presented now would lie in the state constitution. Those circumstances were not present in *Link*, and they heighten the need for flexibility here.

Additionally, this court has an independent obligation to reach the correct result in this case, and to do so despite what the parties argued below. *See e.g.*, *Stull v. Hoke*, 326 Or 72, 77, 948 P2d 722 (1997) (this court has independent obligation to determine correct interpretation of statute, whether or not asserted by the parties); *State v. Blair*, 361 Or 527, 534, 396 P3d 908 (2017) (this court has independent obligation to determine correct constitutional standard, even when not asserted by the parties). This court historically has been willing to decide cases on other grounds when the proper resolution of the case depends upon it. *See e.g.*, *State v. Clark*, 291 Or 231, 233 n 1, 630 P2d 810 (1981)

(considering state constitutional argument even when that argument was not directly asserted on appeal). Linde anticipated that state constitutionalism would, on occasion, require it. *See* Linde, *First Things First*, 9 U Balt L Rev at 383 (noting that proper consideration of the legal issue requires considering state rule first, even when not asserted by a party).

Amicus emphasizes the stakes that are at issue here. The *Jones* decision has diluted this court's Eighth Amendment case law. The state constitution provides a more robust protection, and it should be applied to prevent manifestly unjust outcomes. *See Jones*, 141 S Ct at 1337 (Sotomayor, J., dissenting) (noting with approval that many states have developed their own "robust procedures" to give effect to *Miller/Montgomery*).

More to the point, petitioner, who has the mental age of an 11-year-old child, is serving an LWOP sentence. She is categorically less culpable than an adult offender with adult cognitive abilities, and the state constitution required an individualized sentencing determination that considered her reduced capability.

II. Under Article I, section 16, it is disproportionate to sentence a person with the mental age of a child to a life sentence without the possibility of parole.

Under both the Eighth Amendment and Article I, Section 16, "proportionality jurisprudence has denoted two individual qualities that warrant

special proportionality concerns: youth, and intellectual disability." *State v. Cook*, 297 Or App 862, 868, 445 P3d 343 (2019). Although "the proportionality inquiry under the state constitution, Article I, section 16, 'closely parallels the Eighth Amendment,'" there are significant distinctions. *Id.* (quoting *Billings v. Gates*, 323 Or 167, 173, 916 P2d 291 (1996)). As relevant here, Article I, Section 16, requires a trial court to consider a defendant's intellectual disability as part of its proportionality analysis in capital cases and—in contrast to the Eighth Amendment—also in cases "where sentencing laws require imposition of a term of imprisonment without consideration of such evidence." *State v. Ryan*, 361 Or 602, 620–21, 396 P3d 867 (2017).

Article I, Section 16, of the Oregon Constitution[2] prohibits cruel and unusual punishments, and it requires that all penalties be proportioned to the offense. The proportionality of a sentence ordinarily turns on "whether the length of the sentence would shock the moral sense of reasonable people." *Ryan*, 361 Or at 612 (citing *State v. Althouse*, 359 Or 668, 683, 375 P3d 475

[2] That provision provides, in relevant part "Excessive bail shall not be required, nor excessive fines imposed. Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense."

(2016)).[3] The Oregon Supreme Court has identified three nonexclusive factors that bear on the proportionality inquiry: "(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." *Ryan*, 361 Or at 613 (citing *State v. Rodriguez/Buck*, 347 Or 46, 58, 217 P3d 659 (2009)).

The first factor requires a court to compare the penalty's severity with the crime's gravity. *Id.* A "greater or more severe penalty should be imposed for a greater or more severe offense," and "a less severe penalty should be imposed for a less severe offense." *State v. Wheeler*, 343 Or 652, 656, 175 P3d 438 (2007). In an as-applied challenge, a court may consider case-specific factors in making that assessment. *Id.* The gravity of an offense encompasses both the statutorily defined crime itself and "the gravity of the defendant's particular conduct[.]" *Ryan*, 361 Or at 616. "To the extent that an offender's personal

[3] The Court of Appeals has signaled that other factors in addition to the duration of a sentence may be relevant in assessing a sentence's "severity." *See Cook*, 297 Or App at 864 (declining to resolve whether a court considering intellectual disability in the context of the "severity" of a sentence is "limited to merely the quantitative severity of a sentence, *i.e.*, the length of incarceration, or is * * * permitted to consider the qualitative nature of a sentence's severity as applied to an intellectually disabled defendant").

characteristics influence his or her conduct, those characteristics can affect the gravity of the offense." *Id.*

In *Ryan*, this court held for the first time that intellectual disability is one such personal characteristic. 361 Or at 620–21. "Evidence of an offender's intellectual disability therefore is relevant to a proportionality determination where sentencing laws require imposition of a term of imprisonment without consideration of such evidence." *Id.* *Ryan* emphasized the extent to which a defendant's level of intellectual disability could diminish the penological aims of deterrence and retribution. *Id.* at 618. The court reasoned that, because intellectually disabled defendants have reduced abilities "to understand and process information, to learn from experience, to engage in logical reasoning, and to control impulses," they "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." *Id.* (internal quotation marks omitted). The court advised that analysis of a defendant's intellectual disability would necessarily be individualized, "[b]ecause there exists a broad spectrum of intellectual disabilities that may reduce, but not erase, a person's responsibility for her crimes[.]" *Id.* at 621. "[A] one-size-fits-all approach is not appropriate"; rather, the analysis must be case-specific. *Id.* To guide lower courts in conducting this analysis, the court articulated that the relevant factors to consider include: (1) the defendant's "level of understanding

of the nature and consequences of his or her conduct" and (2) the defendant's "ability to conform his or her behavior to the law[.]" *Id*.[4]

The court in *Ryan* was unequivocal that, "where the issue is presented, a sentencing court *must* consider an offender's intellectual disability in comparing the gravity of the offense and the severity of a mandatory prison sentence on such an offender in a proportionality analysis under *Rodriguez/Buck*." *Id.* at 621 (emphasis added). Regarding the extent to which a trial court must consider a defendant's intellectual disability on the record, the court held that it was insufficient to "generally note" the fact of a defendant's intellectual disability, because reviewing courts "would have to speculate to conclude that the [trial] court properly considered that factor and made any related factual findings with respect to it." *Id.* at 62425. Appellate courts therefore "cannot presume in the absence of express findings that a trial court properly considered a defendant's intellectual disability in comparing the gravity of the offense with

[4] On remand, the Court of Appeals subsequently elaborated that "[t]he lessened culpability of intellectually disabled offenders brings into question the goals of retribution and deterrence that may justify punishments of particular severity." *State v. Ryan*, 305 Or App 750, 770, 473 P3d 90 (2020). "An offense may be relatively less reprehensible, even if equally harmful, when committed by an intellectually disabled offender as opposed to a high-functioning one." *Id*. "All things considered, such impairments may make a defendant 'less morally culpable.'" *Id.* at 765 (quoting *Ryan*, 361 Or at 619).

the severity of the sentence." *State v. Fudge*, 297 Or App 750, 758, 443 P3d 1176 (2019); *see also Ryan*, 361 Or at 624–25 (explaining that the normal presumption under *Ball v Gladden*, 250 Or 485, 443 P2d 621 (1968)—that a trial court resolved factual disputes consistently with its ultimate conclusion—does not apply when the trial court fails to address on the record a defendant's intellectual disability in comparison to the gravity of the offense). Thus, a trial court commits legal error when its factual findings do not demonstrate that it considered, or sufficiently considered, the constitutional implications of the defendant's limited cognitive abilities. Following *Ryan*, the Court of Appeals has consistently remanded cases for resentencing where the record did not establish that the trial court in fact adequately considered the defendant's intellectual disability when addressing an as-applied challenge. *See, e.g.*, *Ryan*, 305 Or App at 772; *Fudge*, 297 Or App at 758; *State v. Allen*, 294 Or App 301, 314, 432 P3d 250 (2018).

The foregoing demonstrates that petitioner's sentence in this case violated Article I, section 16, and that the post-conviction court erred when it granted summary judgment.

CONCLUSION

For the foregoing reasons, and those provided in Petitioner's Brief on the Merits, *amicus* respectfully requests that this court reverse the decision of the Court of Appeals and the decision of the circuit court and remand for further proceedings.

Respectfully submitted,

/s/ Anna Belais
FOR: SARA F. WERBOFF OSB #105388
ZACHARY R. DUFFLY OSB #143109

Attorneys for *Amicus Curiae*
Oregon Justice Resource Center

NOTICE OF FILING AND PROOF OF SERVICE

I certify that, on June 3, 2021, I electronically filed the foregoing Brief of *Amicus Curiae*, Oregon Justice Resource Center, with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Jason Weber, attorney for Petitioner on Review, and Ryan Kahn, attorney for Respondent on Review, by using the appellate electronic filing system.

CERTIFICATE OF COMPLIANCE

I certify that (1) this brief complies with the word count limitation in ORAP 5.05(1)(b) and (2) the word count of this brief, as described in ORAP 5.05(1)(a), is 5,760 words.

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

/s/ Anna Belais
FOR: SARA F. WERBOFF OSB #105388
ZACHARY R. DUFFLY OSB #143109

Attorneys for *Amicus Curiae*
Oregon Justice Resource Center