IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. DENNIS JAMES DAVIDSON, Defendant-Appellant, Respondent on Review.	Marion County Circuit Court No. 11C43121 CA A150292 SC S063387 **REDACTED BRIEF UNDER ORS 137.077**

REDACTED BRIEF ON THE MERITS OF PETITIONER 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 Dale Penn, Judge

Opinion filed: June 17, 2015
Author of Opinion: Judge Sercombe
Concurring Judges: Presiding Judge Hadlock, Judge Tookey

Continued...

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REDACTED BRIEF ON THE MERITS OF PETITIONER ON REVIEW, STATE OF OREGON[1]

INTRODUCTION

This case involves ORS 137.719, which identifies life imprisonment without parole as the presumptive prison term for a defendant who commits a "felony sex crime" after having been sentenced twice before for a felony sex crime. In this case, defendant committed two counts of public indecency; because he had been convicted of public indecency previously, the offenses qualified as felonies and as "sex crimes." And because defendant, twice before, had been sentenced for public indecency as a felony sex crime, the sentencing court imposed ORS 137.719's presumptive life sentence. Defendant argues that the sentence, as applied to his particular circumstances, is unconstitutionally disproportionate. But because defendant's sentence is a presumptive sentence prescribed by the sentencing guidelines, ORS 138.222—as argued by the state in *State v. Althouse* S062909 (argued September 14, 2015, and still pending in this court)—precludes review.

In any event, defendant's sentence is constitutional under Article I, § 16, of the Oregon Constitution. ORS 137.719 reflects rational legislative concerns about recidivist sex offenders, including those who repeatedly commit public

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[1] This blackened area of this brief represents confidential material that is redacted under ORS 137.077.

indecency despite previous incarceration. Moreover, the disturbing and aggressive nature of defendant's particular public-indecency offenses, and his unwavering history of harming the community each time that he is released from prison, show that his sentence does not shock the moral sense of reasonable people.

QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

First question presented

> ORS 138.222(2)(a) generally precludes direct-appeal review of "[a]ny sentence that is within the presumptive sentence prescribed by the rules of the Oregon Criminal Justice Commission." When ORS 137.719's presumptive sentence is imposed, and when a defendant challenges the sentence's constitutionality, does ORS 138.222(2)(a) preclude direct appellate review?

First proposed rule of law

> The presumptive sentence prescribed by ORS 137.719 *also* constitutes a presumptive sentence prescribed by the Oregon Criminal Justice Commission's rules. The constitutionality of such a sentence may not be reviewed on direct appeal (although other forms of appellate review would be available).

Second question presented

> To assess an as-applied proportionality challenge under Article I, § 16, of the Oregon Constitution, courts must determine whether the sentence is "so disproportionate" that it "shocks the moral sense" of reasonable people. In assessing whether a true-life sentence under ORS 137.719 is unconstitutional, what factors must a court consider?

Second proposed rule of law

When a sentence is prescribed by a "recidivist" statute, courts may consider the statute itself as at least some evidence that the sentence does not shock the moral sense of reasonable people.

Courts also must do the following: (1) consider the offender's criminal and other history that informs his or her future risk to the public, while keeping in mind that—when a recidivist sentencing statute is involved—the offender's history generally is far more pertinent than other factors; (2) compare the severity of the sentence to the gravity of "the crime," while recognizing that "the crime" encompasses the prior crimes that helped trigger the recidivist statute's application; and (3) compare the penalty imposed for the crime to the penalty for similar crimes, while again recognizing that "the crime" encompasses the prior crimes that triggered the recidivist statute. In assessing the constitutionality of a sentence imposed under a recidivist statute, factors (2) and (3) generally will have extremely limited significance.

Third question presented

As applied to defendant, did ORS 137.719's presumptive true-life sentence violate Article I, § 16?

Third proposed rule of law

Defendant's life sentence complied with Article I, § 16. Defendant's public-indecency offenses, which triggered ORS 137.719's true-life sentence, show that he has repeatedly harmed the community in a significant fashion despite repeated incarceration. The rest of his criminal history shows that he cannot be successfully supervised in the community or otherwise deterred from harming the community again. Although defendant's public indecency crimes were not accompanied by force or violence, force or violence is not required to justify a true-life sentence.

NATURE OF THE ACTION

This is a criminal case in which a jury convicted defendant of two counts of felony public indecency. (ER 10-12, Judgment).[2] The trial court imposed consecutive sentences of life imprisonment without parole. (*Id.*)

STATEMENT OF MATERIAL FACTS

The state charged defendant with two counts of felony public indecency, for "expos[ing] his genitals while in view of a public place" "with the intent of arousing the sexual desire of defendant or another person," after having previously been convicted of public indecency. (ER-1, Indictment). The state thus relied on ORS 163.465(1)(c), which provides that a person commits public indecency "if while in, or in view of, a public place the person performs * * * [a]n act of exposing the genitals of the person with the intent of arousing the sexual desire of the person or another person." Because defendant had been convicted of public indecency previously, the crimes in this case were felonies. *See* ORS 163.465(2)(b) (making public indecency a Class C felony "if the person has a prior conviction for public indecency").

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[2] "ER" refers to the excerpt of record that accompanied defendant's appellant's opening brief in the Oregon Court of Appeals. "Supp ER" refers to the supplemental excerpt of record that accompanies this brief.

At trial, the state presented evidence that, on two different occasions on April 17, 2011, others saw defendant masturbating while defendant was in view of a public place. (Tr 41-42, 55). A jury convicted defendant of both public indecency counts. (ER 10-12, Judgment).

Defendant's particular criminal history meant that ORS 137.719's presumptive true-life sentence applied to him. [redacted] as that phrase is used in ORS 137.719. *See*

ORS 137.719(4) ("[a]s used in this section, 'sex crime' has the meaning given that term in ORS 181.805"). As a result, ORS 137.719(1) identified the presumptive sentence for defendant's public indecency crimes in this case as life imprisonment without release or parole:

> The presumptive sentence for a sex crime that is a felony is life imprisonment without the possibility of release or parole if the defendant has been sentenced for sex crimes that are felonies at least two times prior to the current sentence.

At sentencing, defendant argued that the trial court should impose a downward departure sentence under ORS 137.719(2), which authorizes a "sentence other than the presumptive sentence" if the court chooses to "impose[] a departure sentence authorized by the rules of the Oregon Criminal Justice Commission based upon findings of substantial and compelling reasons." (Tr 141-42). Defendant also argued that, as applied to him in this particular case, ORS 137.719's true-life sentence violates Article I, § 16, of the Oregon Constitution, which provides that "[c]ruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense." (ER-8, Defendant's Sentencing Memorandum 7).

The trial court, however, imposed the presumptive true-life sentence on both counts, after considering defendant's most recent

crimes, his criminal and personal history (as recounted in the PSI), and defendant's statement at sentencing. (Tr 147-50).

Defendant appealed, and the Court of Appeals reversed and remanded for resentencing. *State v. Davidson*, 271 Or App 719, 745 (2015). The court first rejected the state's argument that ORS 138.222(2)(a) precludes direct appellate review. *Davidson*, 271 Or App at 722 n 5. The court then held that ORS 137.719's true-life sentence, as applied to defendant, violated Article I, § 16. *Davidson*, 271 Or App at 745. The court concluded that "five episodes of public indecency, when—as here—accompanied by no meaningful evidence of force or violence and no other forcibly violent sexually charged conduct, when compared with other recidivist penalties, do not constitute the kind of criminal history that can constitutionally justify incarcerating a person with no chance of release." *Id.*

SUMMARY OF ARGUMENTS

A. ORS 138.222 precludes review.

ORS 138.222(2)(a), which generally precludes appellate review of "[a]ny sentence that is within the presumptive sentence prescribed by the rules of the Oregon Criminal Justice Commission," precludes direct appellate review of defendant's sentence. The Oregon Criminal Justice Commission's sentencing guidelines rules expressly define "presumptive sentence" as including "a

sentence designated as a presumptive sentence by statute." Hence, because defendant's life sentence was the presumptive sentence designated by ORS 137.719, it also constitutes a presumptive sentence for sentencing guidelines purposes. The commission's rules further require that sentencing courts "shall impose the presumptive sentence provided by the [sentencing] guidelines." The commission's rules thus "prescribe" the presumptive life sentence that defendant received. ORS 138.222, it follows, precludes review.

B. ORS 137.719's true-life sentence, as applied to defendant, is constitutional.

The Court of Appeals erred by holding that ORS 137.719's presumptive true-life sentence is unconstitutionally disproportionate, under Article I, § 16, of the Oregon Constitution, as applied to defendant. The constitutional question is whether the punishment "is so disproportionate, when compared to the offense, as to 'shock the moral sense' of reasonable people." *State v. Rodriguez/Buck*, 347 Or 46, 58, 217 P3d 659 (2009). The *Rodriguez/Buck* court identified the following factors as pertinent to that question: (1) comparing the penalty's severity to the crime's gravity; (2) comparing "the penalties imposed for other, related crimes"; and (3) the defendant's criminal history. In this case, however, the Court of Appeals erred by undervaluing the significance of defendant's history and of his indisputable recidivism, and by undervaluing the significance

of its own conclusion that defendant, if released, "will reoffend." *Davidson*, 271 Or App at 734.

Because the basis for defendant's life sentence is a recidivism statute, the appropriate starting place for the analysis, and the factor that requires the most emphasis, is defendant's criminal history, and his unbroken pattern of harming the community each time that he is released from confinement. Although the sentences that apply to other crimes or combinations of crimes are pertinent to the overall analysis, their significance diminishes dramatically whenever—as in this case—the sentence at issue is based on a defendant's demonstrated history as a recidivist.

Here, defendant's overall criminal history—his felony public indecency crimes in this case, his prior public indecency crimes that helped trigger ORS 137.719's life sentence, and his long history of other transgressions—shows that his true-life sentence does not shock the moral sense of reasonable people. Although defendant has painted himself as nothing more than an "incorrigible masturbator" (App Br 2), that description ignores the harm that his particular public-indecency crimes have caused, and ignores the aggressiveness with which he committed his crimes. [redacted]

[redacted]

Further, the record shows that imprisonment has utterly failed to deter defendant from future public indecency crimes. [redacted] Any new release into the community inevitably will result in additional harm to the community, in use of local and state resources to prosecute him, and in the need to imprison him yet again. In short, defendant is precisely the type of "incorrigible criminal"—a person who has shown an unbreakable pattern of harming his community on the many instances when he has been released from confinement—that this court has previously referred to when deeming ORS 137.719's true-life sentence constitutional as applied.

ARGUMENT

ORS 137.719 (1), enacted in 2001, identifies a "true life" sentence as the presumptive sentence when a person, having been sentenced twice before for a felony sex crime, commits another felony sex crime:

> The presumptive sentence for a sex crime that is a felony is life imprisonment without the possibility of release or parole if the defendant has been sentenced for sex crimes that are felonies at least two times prior to the current sentence.

The trial court imposed that sentence in this case, in which defendant committed two counts of felony public indecency, because defendant had been sentenced for the felony "sex crime" of public indecency twice before. (ER 10-12, Judgment).

The Court of Appeals held that, as applied to defendant in this case, ORS 137.719's presumptive life sentence is unconstitutionally disproportionate under Article I, § 16. *Davidson*, 271 Or App at 745. Yet ORS 138.222 precludes review. In any event, defendant's sentence is constitutional.

A. Defendant's life sentence is a presumptive sentence prescribed by the Oregon Criminal Justice Commission's rules, and ORS 138.222(2)(a) therefore precludes direct appellate review of his constitutional challenge.

(The argument in this section is taken from the state's brief in *State v. Althouse* S062909. The only difference between the state's briefing in *Althouse* and the state's brief in this case, with respect to the reviewability issue, appears at pages 20-21 of this brief. There, the state discusses—at greater length than it did in *Althouse*—whether, if direct appellate review is unavailable, a defendant could pursue a post-conviction challenge to his or her sentence.)

The Oregon sentencing guidelines were approved by the 1989 Oregon Legislature. Or Laws 1989, ch 790, § 87. ORS 137.667, also adopted in 1989,

authorized the State Sentencing Guidelines Board—since replaced by the Oregon Criminal Justice Commission—to "adopt * * * amendments to the sentencing guidelines" and to submit them to the legislature; such "amendments do not become effective unless approved by the Legislative Assembly by statute."[3] Or Laws 1989, ch 790, § 94a. In addition, the 1989 Legislature adopted ORS 138.222(2)(a). Or Laws 1989, ch 790, § 21. ORS 138.222(2)(a) generally provides that, when a felony conviction is appealed, "the appellate court may not review * * * [a]ny sentence that is within the presumptive sentence prescribed by the rules of the Oregon Criminal Justice Commission."[4]

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[3] The 1995 Legislature replaced the State Sentencing Guidelines Board with the Oregon Criminal Justice Commission. *See* Or Laws 1995, ch 420, § 1 (creating the Oregon Criminal Justice Commission); Or Laws 1995, ch 420, § 6 (amending ORS 137.667 to reflect that change).

[4] As adopted in 1989, ORS 138.222 (2)(a) read as follows:

> (2) On appeal from a judgment of conviction entered for a felony committed on or after November 1, 1989, the appellate court shall not review:
>
> (a) Any sentence that is within the presumptive sentence prescribed by the rules of the State Sentencing Guidelines Board.

Or Laws 1989, ch 790, § 21. ORS 138.222 (2)(a) currently provides:

> (2) Except as otherwise provided in subsection (4)(c) of this section, on appeal from a judgment of conviction entered for a felony committed on or after November 1, 1989, the appellate court may not review:

Footnote continued...

Hence, review of defendant's sentence is unavailable if (1) the Oregon Criminal Justice Commission's rules deem the sentence a "presumptive" sentence; and (2) those rules "prescribed" the sentence. Because both criteria are satisfied, defendant's sentence is unreviewable.

1. The Oregon Criminal Justice Commission's rules define defendant's life sentence as a "presumptive sentence," as that phrase is used in ORS 138.222(2)(a).

OAR 213-003-0001(16)[5] defines "presumptive sentence"[6] as including a sentence that is statutorily designated as a presumptive sentence:

(...continued)

> (a) Any sentence that is within the presumptive sentence prescribed by the rules of the Oregon Criminal Justice Commission.

ORS 138.222(4)(c) provides that "In any appeal, the appellate court may review a claim that * * * [t]he sentencing court erred in failing to impose a minimum sentence that is prescribed by ORS 137.700 or ORS 137.707."

ORS 138.222 (4)(a) provides that "[i]n any appeal, the appellate court may review a claim that * * * [t]he sentencing court failed to comply with requirements of law in imposing or failing to impose a sentence," but in cases in which a court imposes a presumptive sentence prescribed by sentencing guidelines rules, ORS 138.222 (2)(a) constitutes the more particular provision, and dictates that (4)(c) claims alone are reviewable. *See* ORS 174.020(2) ("a particular intent controls a general one that is inconsistent with the particular intent"). Indeed, defendant has not suggested that ORS 138.222 (4)(a) authorizes review in this case.

[5] OAR 213-003-0001 appears in the appendix to this brief. The appendix also contains OAR 213-008-0001, ORS 137.667, ORS 137.719, and ORS 138.222.

[6] The current version of the rule was adopted in 2006. The 2007 Legislature approved the change. Or Laws 2007, ch 171.

> "Presumptive sentence" means the sentence provided in a grid block for an offender classified in that grid block by the combined effect of the crime seriousness ranking of the current crime of conviction and the offender's criminal history or a sentence designated as a presumptive sentence by statute.

Because defendant's life sentence is "designated as a presumptive sentence by statute," Oregon Criminal Justice Commission rules—via OAR 213-003-0001(16)—deem it a "presumptive sentence." Defendant's sentence thus qualifies as a "presumptive sentence" for ORS 138.222(2)(a)'s purposes.

When the 1989 Legislature adopted ORS 138.222(2)(a), the guidelines identified just one type of "presumptive" sentence—the sentencing range dictated by an offender's "grid block" placement:

> "Presumptive sentence" means the sentence provided in a grid block for an offender classified in that grid block by the combined effect of the crime seriousness ranking of the current crime of conviction and the offender's criminal history.

OAR 253-03-001(16) (1989). Significantly, however, ORS 138.222(2)(a)'s text precludes direct appellate review of "*any* * * * presumptive sentence" that the sentencing guidelines rules might prescribe. Accordingly, the statutory text precludes review of any sentence that the sentencing guidelines rules define as "presumptive" and then prescribe, even if the sentence would not have qualified as presumptive when ORS 138.222(2)(a) first was adopted.

The sentencing guidelines rules define "presumptive sentence" as including sentences designated as such by statute. Because defendant's life

sentence is designated by ORS 137.719 as a presumptive sentence, it constitutes a "presumptive sentence" for ORS 138.222(2)(a)'s purposes.[7]

2. The commission's rules "prescribe" the presumptive life sentence described by ORS 137.719.

The remaining question is whether the Oregon Criminal Justice Commission's rules "prescribed" the presumptive sentence that defendant received. They do.

OAR 213-008-0001 requires that a sentencing court "*shall impose* the presumptive sentence provided by the guidelines, unless the judge finds substantial and compelling reasons to impose a departure." (Emphasis added.) That rule thus directed the sentencing court to impose the life sentence

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[7] In 1999 the legislature amended ORS 137.717 so that it prescribed a "presumptive" prison sentence for repeat property offenders. Or Laws 1999, ch 1022, §§ 2, 4, 7. In response, the Oregon Criminal Justice Commission amended OAR 213-003-0001(16), so that the definition of "presumptive sentence" encompassed "sentence[s] * * * established in ORS 137.717." OAR 213-003-0001(16) (1999). In 2001, the legislature adopted ORS 137.719, which identifies "[t]he presumptive [life] sentence" at issue in this case. Or Laws 2001, ch 884, §4. In 2003, the Oregon Criminal Justice Commission amended OAR 213-003-0001(16), so that the guidelines definition of "presumptive sentence" expressly encompassed ORS 137.719's presumptive sentence; the 2003 Legislature then approved that amendment. *See* Or Laws 2003, ch 453 (approving amendment to OAR 213-003-0001(16) so that it read, "'[p]resumptive sentence' means the sentence provided in a grid block for an offender classified in that grid block by the combined effect of the crime seriousness ranking of the current crime of conviction and the offender's criminal history or the sentence otherwise established in ORS 137.717 **or 2001 Oregon Laws, Chapter 884**") (bold in original, denoting change).

designated as "presumptive" by ORS 137.719, unless the court found a basis to depart downward. Because the sentencing guidelines rules directed the court to impose that sentence (absent findings justifying a departure), the rules "prescribed" the presumptive sentence that defendant received. *See Webster's Third New Int'l Dictionary* (unabridged ed 1993) at 1792 (identifying meaning of "prescribe" as including "to lay down a rule: give directions: DICTATE, DIRECT"); *Merriam-Webster Online Dictionary*, merriam-webster.com, defining "prescribe," in part, as "to lay down a rule: DICTATE," as "to lay down as a guide, direction, or rule of action: ORDAIN," and as "to specify with authority").

Although the legislature, in adopting ORS 137.719, also "prescribed" a life sentence for offenders such as defendant, that cannot preclude the conclusion that the Oregon Criminal Justice Commission's current rules prescribe that same presumptive sentence. In fact, mutual agreement by the commission and the legislature is a prerequisite for *any* sentence to qualify as a presumptive sentence that is prescribed by the commission. *See* ORS 137.667(2) (the commission's amendments to sentencing guidelines "do not become effective unless approved by the Legislative Assembly by law").

In short, the sentencing guidelines rules provide that (1) for a felony sex offender who has been sentenced twice before for felony sex crimes, the "presumptive sentence" is—consistent with the legislature's approach in

ORS 137.719—life without parole; and (2) because that sentence is a presumptive sentence under the guidelines, sentencing courts "shall impose" it. The sentencing guidelines rules thereby prescribed the presumptive sentence that defendant received. ORS 138.222(2)(a) precludes direct-appeal review of his constitutional challenge.

3. Legislative history supports the conclusion that ORS 138.222(2)(a) precludes review.

As this court has recognized, "[t]he purpose of ORS 138.222, as revealed in the legislative history, was to curtail appellate review and reduce the number of appeals." *State ex rel Huddleston v. Sawyer*, 324 Or 597, 607, 932 P2d 1145 (1997). The *Huddleston* court quoted State Senator Springer—in statements on the Senate floor preceding passage of the 1989 bill that included ORS 138.222—explaining that the drafters "worked very closely to limit those circumstances in which an appeal may be taken," "that 30 to 35 percent of the Court of Appeals' substantial workload then involved sentencing-related criminal cases," and that "the drafters intended to be sensitive to that workload." *Huddleston*, 324 Or at 606.

Construing ORS 138.222(2)(a) as the state urges, so that it precludes direct-appeal review of the presumptive sentence imposed here, furthers the legislature's objective of reducing the number of appeals. Construing the provision so that direct-appeal review is available conflicts with that purpose.

Legislative history supports the conclusion that defendant's presumptive life sentence is not reviewable.

4. Nothing in *State ex rel Huddleston v. Sawyer* compels a different conclusion.

Some of this court's other statements in *Huddleston* appear, on their face, to support the conclusion that ORS 138.222(2)(a)'s reference to "presumptive" sentences encompasses *only* sentences that fall within the presumptive sentencing range dictated by an offender's "grid block" placement:

> [f]rom the text and context of ORS 138.222 (2)(a), we conclude that the phrase "[a]ny sentence that is within the presumptive sentence prescribed by the rules of the Oregon Criminal Justice Commission," found in that statute, refers only to "the sentence provided in a grid block for an offender classified in that grid block by the combined effect of the crime seriousness ranking of the current crime of conviction and the offender's criminal history." OAR 253-03-001(16). By definition, then, "[a]ny sentence that is within the presumptive sentence prescribed by the rules of the Oregon Criminal Justice Commission" refers to a specified number of months of incarceration for a conviction that has been placed in the proper grid block.

324 Or at 605 (emphasis omitted). When read in context, however, those statements do not compel the conclusion that defendant's sentence is reviewable on direct appeal.

The *Huddleston* court was not asked to address whether a sentence that is statutorily described as "presumptive" could qualify—in ORS 138.222 (2)(a)'s words—as a "presumptive sentence prescribed by" sentencing guidelines rules. No such sentence was involved in *Huddleston*. Moreover, the *Huddleston*

decision predated the amendment of the guideline rules to define "presumptive sentence" as encompassing "a sentence designated as a presumptive sentence by statute." The *Huddleston* court's narrow understanding of a "presumptive sentence," as that phrase is used in ORS 138.222, simply reflected the nature of the sentencing guidelines rules at the time.

The *Huddleston* court had no occasion to consider whether the 1989 Legislature, in adopting ORS 138.222 (2)(a), intended to preclude direct-appeal review not only of presumptive sentences that are determined by a defendant's grid-block placement, but other types of sentences that the commission might later define as "presumptive." *Huddleston*'s description of the phrase "presumptive sentence" is, for purposes of this case, dictum. Nothing in that description controls the outcome here.

5. Although ORS 138.222 (2)(a) precludes review on direct appeal, Oregon appellate courts nonetheless may review challenges to ORS 137.719's presumptive life sentence.

ORS 138.222 precludes direct-appeal review of defendant's constitutional challenge to his sentence. Nonetheless, Oregon's appellate courts possess the power to review constitutional challenges to life sentences imposed under ORS 137.719. As *Huddleston* demonstrates, when direct appellate review or other remedies are unavailable, this court will possess authority to review, in a mandamus proceeding, the constitutionality of sentences mandated by statute. *See Huddleston*, 324 Or at 600 (noting that mandamus relief is

available if no "plain, speedy, and adequate remedy" is otherwise available); *id.* at 630 (holding, in mandamus case, that ORS 137.700's mandatory sentencing requirements did not violate various state and federal constitutional provisions). Alternatively, Oregon appellate courts may possess authority, when considering appeals in post-conviction cases, to review the constitutionality of sentences imposed under ORS 137.719. *See* ORS 138.530(1)(c) (authorizing post-conviction relief based on a "[s]entence in excess of, or otherwise not in accordance with, the sentence authorized by law for the crime of which petitioner was convicted; or unconstitutionality of such sentence").[8]

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[8] In *Althouse*, the state filed a memorandum of additional authorities noting that *Palmer v. State of Oregon*, 318 Or 352, 354, 867 P2d 1368 (1994) can be read as suggesting that, if a post-conviction petitioner "was able to pursue his constitutional challenge while in the criminal trial court, the constitutionality of his sentence could not provide a basis for post-conviction relief." (*State v. Althouse* S062909, Respondent's Memorandum 1); *see Palmer* 318 Or at 354 (holding that a post-conviction petitioner's constitutional challenge to the statute that he was convicted under provided no basis for relief, because the petitioner "reasonably could have been expected to raise that issue in the trial court").

Even so, *Palmer* does not necessarily bar defendant (or the defendant in *Althouse*) from challenging the constitutionality of his sentence in a post-conviction-relief petition. *Palmer* might be read more narrowly, as precluding only those post-conviction claims that could have been raised (and thus preserved) in the trial court *and then challenged on appeal.* That is, *Palmer* can be read as permitting a post-conviction challenge to a sentence if the petitioner—due to statutes governing direct appellate review—preserved his objection in the trial court but was unable to obtain direct appellate review. *See Palmer*, 318 Or at 360 (relying on *North v. Cupp*, 254 Or 451, 461 P2d 271 (1969), and noting that "[t]he governing rationale in *North*" was based on "the

Footnote continued...

Oregon Criminal Justice Commission rules define defendant's life sentence as a "presumptive sentence," and they "prescribed" that sentence here. ORS 138.222(2)(a) thus precludes appellate review in this case.

B. As applied to defendant, ORS 137.719's presumptive life sentence complies with Article I, § 16, of the Oregon Constitution.

The Court of Appeals held that ORS 137.719's presumptive true-life sentence, as applied to defendant in this case, is unconstitutionally "disproportionate" under Article I, § 16, of the Oregon Constitution, which provides that "all penalties shall be proportioned to the offense." *Davidson*, 271 Or App at 745. Even if defendant's constitutional challenge to that sentence is reviewable, this court should affirm.

1. ORS 137.719 constitutes some evidence that a life sentence for defendant's particular combination of felony sex crimes is not "so disproportionate" that it would "shock the moral sense" of reasonable people.

A statutorily required sentence violates Article I, § 16, as applied to a particular case, if it is "so disproportionately severe that it constitutes one of those 'rare circumstances' that requires reversal." *Rodriguez/Buck*, 347 Or at 58. The question is whether the punishment "is so disproportionate, when

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(...continued)
usual procedural rule requiring that an error be preserved in the trial court *in order to be raised on appeal*"; emphasis added).

compared to the offense, as to 'shock the moral sense' of reasonable people." *Id.*

In answering that question, the legislative conclusion reflected in ORS 137.719—that a true-life sentence is suitable for those who commit particular combinations of sex crimes, including defendant's particular combination—is pertinent, albeit not dispositive. This court "consistently has adhered to the view that '[i]t is the province of the legislature to establish the penalties for the violations of the various criminal statutes.'" *State v. Wheeler*, 343 Or 652, 671, 175 P3d 438 (2007), quoting *Jensen v. Gladden*, 231 Or 141, 146, 372 P2d 183 (1962). In assessing whether sentences are disproportionate, "respect for the separation of powers and the legislature's authority to set criminal penalties means that the court's role is a limited one." *Wheeler*, 343 Or at 672. Statutes are the product of a deliberative legislative process, and they generally express sentiments shared by a significant portion of the community at large. Hence, this court regularly has "looked to the legislative enactment of the particular penalties at issue as an external source of law to assist in determining whether those penalties would shock the moral sense of reasonable people." *Id.* at 670-71.

ORS 137.719—which has existed since 2001—itself is evidence that, to a significant number of reasonable people, a true-life sentence for a person's third felony sex crime does not "shock the moral sense." The statute was enacted by

those who were elected to represent the state's citizens, and the 2001 Legislature, in adopting the statute, necessarily understood that the crimes triggering a true-life presumptive sentence included public indecency crimes. Moreover, the statute was enacted by an overwhelming margin. *See Final Status Report for Senate and House Measures, Regular Session (2001)* at S-71 (showing that SB 370 (2001) ultimately was approved by the Senate by a vote of 20 to 2 (with 1 excused and 7 attending legislative business) and that the House approved it by a vote of 47 to 5 (with 1 absent and 7 excused for business of the House)). In sum, the statute's adoption reflects that a substantial majority of those voting on the bill believed that commission of a felony sex crime, by an offender who had been sentenced twice before for a felony sex crime, justifies a true-life sentence. That constitutes strong evidence that a presumptive true-life sentence for defendant's particular combination of felony sex crimes does not shock the moral sense of reasonable people.

Moreover, case law discussing recidivist statutes, including ORS 137.719, reflects that the legislature's likely rationale in adopting ORS 137.719 was itself reasonable. First, ORS 137.719—as is generally true of recidivist statutes—reflects societal recognition that those who commit felonies despite prior felony convictions and sentences have demonstrated that "normal" criminal sanctions do not deter them from criminal activity. Such offenders pose a particularly serious threat to public safety, such that lengthier

prison sentences are required to sufficiently protect the community. As the United States Supreme Court has observed, "a recidivist statute['s] * * * primary goals are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time." *Rummel v. Estelle*, 445 US 263, 284, 100 S Ct 1133, 63 L Ed 2d 382 (1980). As a result, "the proportionality provision permits the imposition of penalties for repeat offenders that might not be permissible for a single offense." *Wheeler*, 343 Or at 671; *see also Tuel v. Gladden*, 234 Or 1, 7, 379 P2d 553 (1963)) (rejecting Article I, § 16 challenge to a statute that required "life imprisonment without parole" upon a fourth felony conviction, after noting that "the odds of true and permanent reformation of one who has already committed four felonies are so outweighed by the odds that a four-time repeater will continue to be a menace to a community" if released).

Second, the legislature likely concluded that sex offenders in particular pose a significant risk of re-offending. *See Wheeler*, 343 Or at 678 (noting that ORS 137.719 may reflect the legislature's concern with "the possibility of recidivism by sex offenders"). The United States Supreme Court has cited a study concluding that "when convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *McCune v. Lile*, 536 US 24, 33, 122 S Ct 2017, 153 L Ed 2d

47 (2002). Sex offenders often re-offend even when their re-entry into the community has been delayed by a lengthy prison term. *See Smith v. Doe*, 538 US 84, 104, 123 S Ct 1140, 155 L Ed 2d 164 (2003) ("[e]mpirical research on child molesters * * * has shown that, '[c]ontrary to conventional wisdom, most reoffenses do not occur within the first several years after release,' but may occur 'as late as 20 years following release'"), quoting Prentky, Knight, & Lee, US Dept of Justice National Institute of Justice, Child Sexual Molestation: Research Issues 14 (1997). Similarly, the legislature reasonably could have concluded that, with respect to sex offenders who have *already* re-offended, the only way to guarantee the community's protection is by imprisonment. *See Wheeler*, 343 Or at 679-80 ("the legislature is entitled to presume * * * that lengthy sentences are necessary to protect the public from further harm by [sex-offender] recidivism").

Third, ORS 137.719, reflects societal recognition that the victims of sex offenses are often young citizens or otherwise particularly vulnerable citizens, and that the harms inflicted by felony sex crimes—even when psychological and not physical—generally are significant. In *Wheeler*, 343 Or at 679-80, this court suggested that the legislature, in adopting ORS 137.719 and in deeming "the repeated sex crimes at issue * * * deserving of a greater presumptive penalty" than other recidivist conduct, may have recognized "the severity of the

impact of such crimes on the victims." (Emphasis added.); *see id.* (noting that sex crimes create "potential for both physical and psychological injury").

Fourth, by adopting a statutory scheme that imposes a presumptive true-life sentence on those with defendant's particular criminal history, the legislature recognized—at least implicitly—that public indecency is not a "victimless" crime. If an adult masturbates in public in full view of others, that conduct can easily traumatize those who witness it, particularly if the perpetrator is physically larger or stronger than the victims. Such conduct also has the effect of deterring members of the public from wanting to re-visit the scene of the crime, despite its status as a public place. Unsurprisingly, and as academic studies and other states' criminal codes reflect, public indecency is widely recognized as a serious and troubling offense. *See* Sharon Riordan, *Indecent Exposure: The Impact Upon the Victim's Fear of Sexual Crime*, Journal of Forensic Psychiatry Vol 10, No. 2 at pp 309, 313, 315 (1999) (finding that, for 28.6% of public-indecency victims studied, their "fear of sexual crime had been increased" and their "movements/social activities [had] been affected," and concluding that "[i]ndecent exposure is not in any sense a trivial offence"). Thirty other states appear to define public indecency, indecent exposure, or similar conduct as a felony under certain circumstances. (App 10-13, citing statutes). Under recidivist statutes in nine states, a public-indecency or indecent-exposure conviction can help support a life sentence; in at least two

of those states, a public-indecency or indecent-exposure conviction can help trigger a "true life" sentence. (App 13-14).

ORS 137.719 itself constitutes evidence that, as a general proposition, a life sentence for a person who commits felony public indecency, after being sentenced for felony public indecency twice before, does not shock the moral sense of reasonable people.

2. The three factors applied in *State v. Rodriguez/Buck* apply here (albeit with different relative weights than in non-recidivist cases), and show that defendant's sentence is constitutional.

The legislature's adoption of ORS 137.719 reflects that, at least in the abstract, it does not shock the shock the moral sense of reasonable people to impose a true-life sentence for a third felony sex crime, regardless of the particular crimes at issue. The question then becomes whether the particular circumstances presented by this case demonstrate that defendant's sentence is so "disproportionately severe" that it reflects "one of those 'rare circumstances' that requires reversal under Article I, section 16." *Rodriguez/Buck*, 347 Or at 58.

In *Rodriguez/Buck*, 347 Or at 49, this court held that 75-month prison terms mandated by Ballot Measure 11 (1994) for first-degree sexual abuse violated Article I, § 16, as applied to the defendants. It explained that, in assessing whether a punishment "is so disproportionate, when compared to the offense, as to 'shock the moral sense' of reasonable people, * * * at least three

factors * * * bear upon that ultimate conclusion: (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. Although those same factors apply here, they show that defendant's sentence is constitutional.

As had the *Rodriguez/Buck* court, the Court of Appeals began with those first two categories and emphasized them the most. *See Davidson*, 271 Or App at 735-43 (discussing first two factors); *id.* at 743-45 (discussing third factor). Under each of the first two categories, the court paid particular attention (following the *Rodriguez/Buck* court's lead) to comparing defendant's sentence to sentences that would be imposed for other crimes or combinations of crimes. *See Davidson*, 271 Or App at 737-38, 739 (noting, under first factor, that "similarly to *Rodriguez/Buck*, * * * ORS 137.719(1) encompasses conduct that reasonable people would consider extremely harmful" compared to defendant's conduct, and noting—while again citing *Rodriguez/Buck*—that "[w]e are considering his behavior on the scale of conduct subject to a true life sentence"); *Davidson*, 271 Or App at 741 (noting, under second factor, that some sex crimes "never trigger the application of ORS 137.719(1)"). The Court of Appeals also noted that "[i]n *Rodriguez/Buck*, [this] court found it constitutionally significant that the Measure 11 sentence was more than twice as long as the guidelines sentence" that the defendants otherwise would have

received, and noted that "[a] similar comparison is even more stark in this case," as defendant's true-life sentence likely will last over four times longer than his sentence would last if ORS 137.719 did not exist. *Davidson*, 271 Or App at 740-41.

But because *Rodriguez/Buck* was not a recidivism case, the Court of Appeals erred by following the *Rodriguez/Buck* court's lead as closely as it did. Under ORS 137.719, the basis for defendant's life sentence is not just the crimes for which defendant was convicted in this case, but those crimes *combined with* his prior public-indecency crimes, and on the legislature's presumption that someone with such a history will—if again released from prison—simply commit another felony sex crime that requires additional incarceration. As a result, the appropriate starting place for the analysis, and the factor that requires the most attention, is defendant's criminal history, and his unbroken pattern of offending against the community each time that he is released from confinement. Although sentences that apply to other crimes or combinations of crimes are pertinent to the overall analysis, their significance diminishes greatly in a case such as this, where the challenged sentence is triggered by the defendant's status as a recidivist.

This court's comments in *Jensen*, another case involving a public indecency offense, support that conclusion. The *Jensen* court assessed whether the indeterminate life sentence required by *former* ORS 167.050 was

unconstitutional as applied to the defendant, who had committed indecent exposure after previously being convicted for contributing to the delinquency of a minor. *Jensen*, 231 Or at 142-45, 147. In deeming the sentence constitutional, the court explained that whether the sentence "would so shock the moral sense would, of course, depend upon the seriousness of repetitive sexual conduct of this kind and the danger that it forecasts for others unless the defendant is segregated from society." *Id.* at 144-45. As that comment reflects, the key to whether a sentence under a recidivist statute is unconstitutional is the defendant's particular history and what it says about the likelihood that, if released from prison, he will re-offend and further harm the community. Accordingly, this court's primary focus should be defendant's particular criminal history. That history, as discussed below, justified a true-life sentence.

a. Defendant's criminal history—along with other information about the risk that he poses—shows that his sentence is constitutional.

"An enhanced sentence (even a life sentence) is appropriate, and not disproportionate, when a defendant is 'an incorrigible criminal.'" *Wheeler*, 343 Or at 673, quoting *State v. Smith*, 128 Or 515, 525-26, 273 P 323 (1929). To assess whether defendant is "incorrigible," and to assess the danger that his repetitive sexual conduct "forecasts for others unless [he] is segregated from society" (in the *Jensen* court's words), courts should consult his criminal history and other pertinent information, including conduct that did not result in

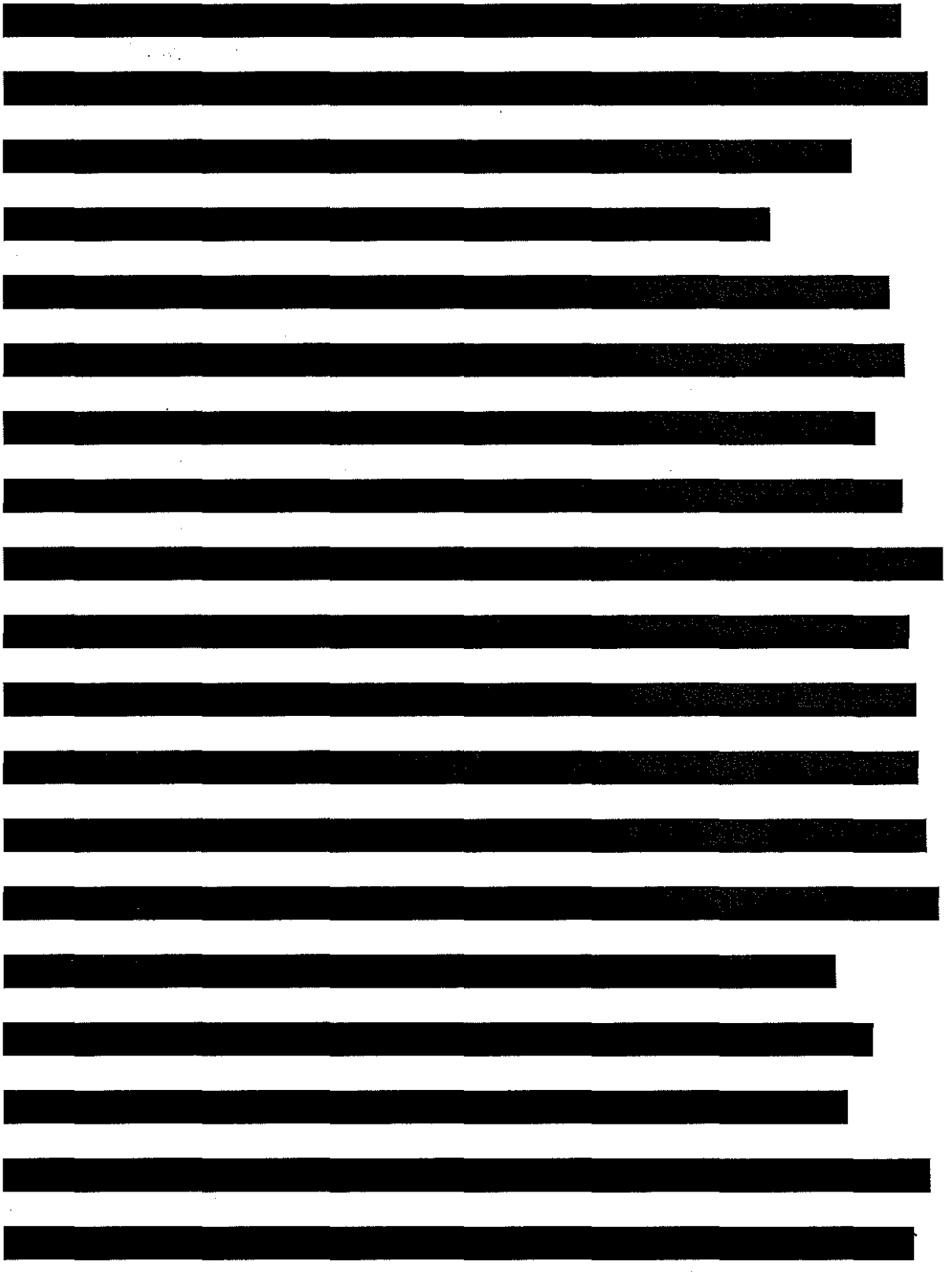
criminal prosecution. *See Rodriguez/Buck*, 347 Or at 78("[t]raditional understandings of proportionality, as well as this court's cases, require [this court] to consider whether a defendant is a repeat offender by considering previous criminal convictions *and* whether there is evidence of multiple instances of uncharged wrongful conduct"; emphasis added). Information about defendant's success or failure with prior treatment opportunities, along with professional assessments of his likelihood to re-offend, are also appropriate parts of the analysis.

Defendant's history entitled the trial court to conclude, as it did, that ORS 137.719's true-life sentence, as applied to defendant, does not shock the moral sense of reasonable people.

[redacted]

[redacted] At sentencing in this case, the prosecutor noted that the woman had attended defendant's trial for his current crimes and that the woman, although "she has since moved out of state," "wanted to support him being incarcerated for as long as possible."

(Tr 124). The woman is "horrified at the thought that this has continued to happen," and "is still in touch with our office to this day." (Tr 124). [redacted]



[redacted]

On April 17, 2011, defendant committed the two public indecency felonies in this case. testified that she, her 12-year-old sister, her 10-year-old sister, her mother, and her three-year-old daughter were at River Road Park when defendant walked "close to our picnic table, * * * looked at us kind of strange, and waved at us." (Tr 36-38). Other children were playing on a nearby play structure at the time. (Tr 39). subsequently saw defendant "peeking out from behind [a] tree," and she could see that he was masturbating. (Tr 41). His penis was erect and defendant "was looking at [her]." (Tr 42).

"called 9-1-1 in a panic." (Tr 42). [redacted] When asked at trial, "[w]ere you

scared," she replied, "Yes." (Tr 45). At sentencing, the prosecutor noted that even at trial, had been "very emotional" and "very distraught." (Tr 124).

After police responded to 9-1-1 call, a police officer found defendant in someone's back yard. (Tr 53-54). Defendant was masturbating with his pants open. (Tr 54). The yard was bordered by a chain-link fence that provided "no privacy." (Tr 54). Defendant was "facing directly towards the park," which is a public area. (Tr 53).

In sum, defendant's public indecency crimes show that:

- [redacted] in April 2011, he waved at and then masturbated in a way that enabled her to see him.

- [redacted] and at least two saw him masturbating in April 2011. Moreover, children were within defendant's

sight [redacted] for his first April 2011 crime.

- Defendant consistently alarmed and frightened his victims. The woman who saw him masturbate in August 2006 filled out a victim's impact statement and feared that defendant would "come after me for turning me in." The woman whose porch defendant had occupied obtained a stalking protective order against him. "called 9-1-1 in a panic" after seeing defendant masturbate and testified that she was "scared" by his behavior.

Defendant's public indecency crimes show that he repeatedly and intentionally has traumatized the community in disturbing ways. Defendant did not behave in a passive manner that just happened to be viewed by others; he instead acted aggressively toward vulnerable victims, and inflicted psychological harms that must be deemed serious. In *Wheeler*, 343 Or at 679-80, this court held that a true-life sentence under ORS 137.719 was constitutional as applied, despite the defendant's argument that his sex crime felonies "did not involve a physical assault" or "permanent physical injury." As the court noted, although "[s]ex crimes may or may not result in permanent physical injury, * * * the legislature is entitled to presume that they are a serious matter in light of the potential for both physical and psychological injury and that lengthy sentences are necessary to protect the public from further harm by recidivists." *Id.* at 679-80. Here, the record demonstrates that defendant's crimes undoubtedly are "a serious matter," and that they warrant permanent imprisonment to prevent future harm.

(2) [redacted]

Defendant's other acts—that is, criminal behavior that did not result in a public-indecency conviction—further support the conclusion that he poses a risk to the community when not confined. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Defendant's own comments at sentencing support the conclusion that he continues to lack insight into the harm that his crimes cause, and that he does

not accept responsibility for his actions. His comments reflect that any release in the future would simply result in commission of new crimes, and in additional harm to the community. At sentencing, defendant asserted that, [redacted], "there was no children" present (Tr 142), [redacted] As for the 2011 offense that witnessed, defendant—rather than expressing remorse or acknowledging the harms that his behavior can cause—merely claimed that it occurred on his birthday, that he "was drunk," that "I didn't try to show her," and that "I guess my pants * * * fell down or something." (Tr 142-43).

[redacted]

[redacted]

In light of defendant's history, the trial court's decision to impose ORS 137.719's presumptive true-life sentence does not shock the moral sense of reasonable people. That sentence, as applied to this defendant, is constitutional.

b. Comparing defendant's sentence to the gravity of "the crime" and to sentences for similar crimes does not show that his sentence is disproportionate as applied to him.

In determining whether the defendants' sentences violated Article I, § 16, the *Rodriguez/Buck* court, in part, compared their crimes to other conduct that could have resulted in the same sentence (as part of the comparison between

"the severity of the penalty and the gravity of the crime") and compared the defendants' sentences to "the penalties imposed for other, related crimes." *Rodriguez/Buck*, 347 Or at 58. Yet in cases such as this one, in which a defendant is sentenced under a recidivist statute, those comparisons are of extremely limited value.

When a defendant is sentenced under a recidivist statute, "the crime" at issue, and its gravity, must be assessed in the light of the prior offenses that helped trigger the statute's application. The United States Supreme Court has reached that same conclusion under the Eighth Amendment. *See Ewing v. California*, 538 US 11, 29, 123 S Ct 1179, 155 L Ed 2d 108 (2003) ("[i]n weighing the gravity of Ewing's offense," to assess whether his sentence under California's "three-strikes" statute was disproportionate, "we must place on the scales not only his current felony, but also his long history of felony recidivism"). That conclusion is consistent, of course, with the intent behind ORS 137.719: ORS 137.719 reflects a legislative determination that a felony sex crime should be considered particularly serious if it occurs after the offender has already served sentences for prior felony sex crimes.

[redacted]

[redacted]—shows that his true-life sentence, as applied to him, is not "so disproportionate" that it shocks the moral sense of reasonable people.

The Court of Appeals thus erred in this case by placing undue emphasis on the fact that other arguably more egregious combinations of sex crimes either would either result in the same true-life sentence that defendant received or would result in something less than a life sentence. *Davidson*, 271 Or App at 737, 741-42. The state acknowledges that those kinds of comparison are helpful in certain cases—for example, such comparisons are useful in cases (such as *Rodriguez/Buck*) when the defendant's most recent crime is seemingly innocuous, and in which nothing in his or her history suggests that imprisonment will fail to deter future crimes. *See Rodriguez/Buck*, 347 Or at 49, 51, 77-78 (in which defendant Rodriguez committed first-degree sexual abuse by bringing the back of a 13-year-old boy's head "into contact with her clothed breasts for about one minute"; in which defendant Buck committed first-degree sexual abuse by making contact between the back of his hand and a 13-year-old girl's clothed buttocks; and in which neither defendant had a prior criminal conviction). Under those circumstances, comparing the sentence at issue with sentences for similar crimes, or for similar combinations of crimes, may be the only meaningful basis for ultimately determining whether a sentence is constitutionally "proportionate."

But the value of such comparisons diminishes dramatically when a defendant's criminal history shows—as defendant's history shows here—that (1) the particular crimes that triggered the sentence in question traumatized and harmed the community; and (2) that the defendant has an unwavering pattern of swiftly re-offending, of again damaging the community, and of requiring further prosecution and incarceration following his release from prison. The Court of Appeals erred by unduly emphasizing those comparisons.

For essentially the same reasons, this court also should reject the Court of Appeals' emphasis in this case on comparing defendant's life sentence under ORS 137.719 to the sentence that he would have received for public indecency in this case if he was *not* a recidivist. The Court of Appeals noted that, if ORS 137.719 did not apply, defendant likely would serve roughly one-fourth of the time in prison that he likely will serve under ORS 137.719. *Davidson*, 271 Or App at 740-41. But as *Wheeler* reflects, when the sentence at issue is required by a recidivist statute, and when the record establishes that prison does not deter the defendant in question from new felonies, that type of comparison is not particularly helpful. In *Wheeler*, this court noted that, had the defendant not been subject to ORS 137.719's presumptive true-life sentence on each of the 18 sex felonies at issue, the sentencing guidelines minimum sentence for each count would have ranged "from 70 to 100 months." *Wheeler*, 343 Or at 677-78. Although the difference between a 70-month sentence and the

defendant's true-life sentence was undoubtedly significant, this court rejected the defendant's as-applied challenge under Article I, § 16. *Wheeler*, 343 Or at 679-80. The court instead emphasized that the constitution, as construed by the court, "permit[s] lengthy sentences, including life imprisonment, as a response to recidivism." *Id.* at 679.

Defendant's particular history shows that he is a classic recidivist, that future release from prison will result in future harm to the community and in future re-imprisonment. As applied to defendant, ORS 137.719's true-life sentence is constitutional.

CONCLUSION

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

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on February 5, 2016, I directed the original Redacted Brief on the Merits of Petitioner on Review State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet, attorney for respondent on review, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 11,128 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(2)(b).

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