IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. DENNIS JAMES DAVIDSON, Defendant-Appellant, Petitioner on Review.	Supreme Court No. S063480 Court of Appeals No. A150292 Marion County Circuit Court No. 11C43121

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

On Review of the Opinion of the Court of Appeals
On appeal from a judgment of the Circuit Court for Marion County
Honorable Dale Penn, Judge

Court of Appeals Opinion filed: June 17, 2015
Author of Opinion: Sercombe, Judge
Before: Hadlock, P.J., Sercombe, J., and Tookey, J.

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

INTRODUCTION

The Oregon Justice Resource Center (OJRC) is a non-profit organization founded in 2011. OJRC works to "dismantle systemic discrimination in the administration of justice by promoting civil rights and enhancing the quality of legal representation to traditionally underserved communities." OJRC Mission Statement, www.ojrc.info/mission-statement. The OJRC Amicus Committee is comprised of Oregon attorneys from multiple disciplines and law students from Lewis & Clark Law School, where OJRC is located.

OJRC wishes to be heard by this Court because the OJRC agrees with defendant and the Court of Appeals that the "true life" sentence imposed by the trial court pursuant to ORS 137.719 violates Article I, section 16, of the Oregon Constitution. ORS 137.719 is a blunt instrument that imposes the second most severe punishment available under Oregon law on recidivist sexual offenders in an unconstitutionally disproportionate way. Specifically, it treats sexual offenders whose conduct has never involved violence of any kind—or even any physical contact at all—exactly the same as serial rapists and other repeat violent sexual offenders.

OJRC urges this court to affirm the Court of Appeals decision reversing the trial court's imposition of an ORS 137.719 true life sentence in this case. *See State v. Davidson*, 271 Or App 719, 721-22, 353 P3d 2 (2015). In doing so, OJRC further urges this court to announce a broader rule limitations imposed by Article I, section 16, of the Oregon Constitution, on the application of ORS 137.719's true life sentence. Namely, this court should announce that, barring some extreme circumstance, a defendant who has never been convicted of any sexual offense involving physical contact with any victim cannot constitutionally be sentenced to life without the possibility of parole. Such a rule would educate prosecutors and trial courts how to avoid sowing the seeds of constitutional error that perpetrates injustice and wastes substantial judicial resources.[1]

ARGUMENT

The trial court sentenced defendant to "true life"—*i.e.*, life without the possibility of parole—based on ORS 137.719. That statute provides, in part, that 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." ORS 137.719(1).

[1] OJRC previously has appeared in support of the defendant on a similar issue in *Oregon v. Althouse*, S062909 (*amicus* brief filed June 18, 2015). OJRC refers the Court to that brief in support of its position in this case as well.

Defendant's sentence arose out of multiple incidents of public masturbation. *See Davidson*, 271 Or App at 731-34 (describing defendant's conduct). That conduct produced multiple convictions for "public indecency" under ORS 163.465. Ordinarily, a single incident of public indecency constitutes a Class A misdemeanor outside the scope of ORS 137.719. *See* ORS 163.465(2). However, if a defendant previously has been convicted of public indecency, any subsequent conviction for that crime is classified as a Class C felony. *Id.*[2]

As noted, ORS 137.719 asks only whether the defendant "has been sentenced for *sex crimes that are felonies* at least two times prior to the current sentence" (emphasis added); it does not draw any substantive distinction between felony sexual offenses based on the underlying conduct involved. As a result, a person facing their fourth conviction for public indecency is exposed to the same "presumptive sentence" as a person who has forcibly raped another person on three different occasions. *See* ORS 137.719(1); *see also*

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[2] The crime of public indecency is unique among sexual offenses in that it does not appear to require any actual individual "victim." A person commits public indecency if they perform "[a]n act of sexual intercourse," or "deviate sexual intercourse," or "expos[e] the genitals of the person with the intent of arousing the sexual desire of the person or another person," "while in, or in view of, a public place." ORS 163.465. In other words, as long as the defendant engages in the specified conduct (which may, but need not, involve another person), while in, or in view of, a public place, the crime is complete. *See id.* As written, ORS 163.465 does not require that any other person actually observe the conduct, let alone that any other person actually be harmed or offended by observing it. *See id.*

ORS 163.375 (defining first-degree rape, and providing that that crime is a Class A felony). As also noted, the presumptive sentence prescribed by ORS 137.719 is life, without the possibility of parole; the second most severe criminal punishment authorized by Oregon law. *See* ORS 137.719(1).

Article I, section 16, of the Oregon Constitution does not allow nonviolent public masturbators, even repeat offenders, to be sentenced to life without any possibility of release. As explained in greater detail below, the fact that ORS 137.719(1) draws no distinction between nonviolent and violent sexual offenders appears to derive from the fact that the legislature enacted ORS 137.719 without much rational consideration at all. Instead, it made true life the presumptive sentence for an extraordinarily broad swath of repeat offenders, regardless of the specific nature of their conduct, apparently based on highly-publicized anecdotes of egregious incidents of sexual violence. In reality, however, nonviolent sexual offenders recidivate at lower rates than violent offenders and, when they do, they are more likely to engage in additional nonviolent conduct, not to escalate to the sort of sexual violence that inspired the enactment of harsh sentencing laws like ORS 137.719.

In light of that, it is unremarkable that the Court of Appeals concluded—following a thorough analysis of the factors this court articulated in *State v. Rodriguez/Buck*, 347 Or 46, 58, 217 P3d 659 (2009)—that the trial court lacked constitutional authority to impose an ORS 137.719 true life sentence on the

defendant in this case. *See Davidson*, 271 Or App at 735-45. This court should affirm that decision. But it should also go further. This court should announce a broader rule that ORS 137.719's presumptive true life sentence cannot, in all but the rarest of cases, constitutionally be applied to a defendant who has never been convicted of a sexual offense involving physical contact with any victim. Such a ruling would be consistent with this court's decision in *Rodriguez/Buck*, it would be consistent with the empirical data regarding nonviolent sexual offender recidivism, and it would provide much needed guidance to the bench and bar by educating prosecutors and trial courts how to avoid sowing the seeds of constitutional error at the expense of both justice and substantial judicial resources.

A. The legislature enacted ORS 137.719 hastily, without careful consideration, and based on concerns regarding sexual offender recidivism unsupported by empirical evidence.

ORS 137.719 is a product of legislation by anecdote. It is clear from the legislative history of ORS 137.719 that the Oregon legislature did not discuss or debate the recidivist sex offender provisions of that bill in any depth prior to its passage. Tape Recording, Senate Committee on Judiciary, SB 370, May 10, 2001, Tape 132, Side B (statement of committee counsel Craig Prins). The legislative history discloses no specific purpose behind setting the presumptive sentence for a third felony sexual offense at life without possibility of parole. There was no discussion regarding the decision to define sexual offenses by

reference to the expansive list of crimes designated by ORS 181.805(5). In short, the legislature enacted ORS 137.719 without any meaningful discussion regarding the purpose of its presumptive sentence or the broad scope of conduct to which that sentence would apply.

Oregon's harsh sentencing scheme appears to be the product of the national "tough on sex crime" movement that swept the nation in the 1990s. *See* Christina Mancini, *et al.*, *It Varies from State to State: An Examination of Sex Crime Laws Nationally*, 24 Crim Just Policy Rev 166, 185 (2011). Despite the broad appeal of that movement, the purported concerns that undergird it cannot be explained by any actual increase in sexual offense rates. *Id.* Instead, support for severe sentencing legislation like ORS 137.719 generally arises from highly publicized cases of victimization that ultimately are atypical of the average case. Alex Ricciardulli, *The Broke Safety Valve: Judicial Discretion's Failure to Ameliorate Punishment Under California's Three Strikes Law*, 41 Duq L Rev 1, 3-5 (2002) (explaining origin of three-strikes legislation in response to the rape and murder of Polly Klaas).

For example, in a national study surveying 61 state senators and representatives historically involved in sexual offender legislation and 25 legal practitioners with expertise in state sexual offender laws, the vast majority of respondents viewed such anecdotes of egregious conduct as central to the creation of sexual offender laws. Michelle Meloy, *et al.*, *Views from the Top*

and Bottom: Lawmakers and Practitioners Discuss Sex Offender Laws, 38 Am J Crim Just 616, 621-22, 633 (2013). Both groups pointed to highly publicized cases of victimization as the catalyst for state legislation, often citing cases that did not occur in the respondent's state of residence. *Id.* at 633. The most frequently mentioned cases were those involving stranger attacks upon white, female children, despite the "statistical rarity of a stranger attack against a child." *Id.*

On a national level, scholars have not discovered significant reductions in sexual offenses as a result of harsh sentencing laws like ORS 137.719. *See* Mancini, *et al.*, 24 Crim Just Policy Rev at 171. The inefficacy of those laws has left their supporters undeterred, however. *See* Justin T. Pickett *et al.*, *Vulnerable Victims, Monstrous Offenders, and Unmanageable Risk: Explaining Public Opinion on the Social Control of Sex Crime*, 51 Criminology 729, 730 (2013). Instead, a number of social science studies have documented widespread support for severely retributive and stigmatizing sex offender laws, despite the absence of evidence that such policies effectively reduce the rate of sex offending. *Id.*

B. ORS 137.719's unitary treatment of both nonviolent and violent sexual offenders is inconsistent with empirical data regarding nonviolent sexual offender recidivism.

The anecdotal basis for harsh sexual offender sentencing laws results in laws that fail to draw appropriate distinctions between different types of sexual offenders. As Professor Franklin Zimring has explained,

> "[states'] polic[ies] toward sex offenders are often based on monolithic images of alien pathologies [that are] rarely based on facts. The extraordinary heterogeneity of sex offenders and sex offenses is almost never appreciated in the legislative process. Policies are crafted in fearful haste, often as symbolic gestures to honor the crime victims whose suffering has inspired them. The factual foundations for major shifts in policy are often slender; once laws are passed they are rarely evaluated."

Michael Vitiello, *Punishing Sex Offenders: When Good Intentions Go Bad*, 40 Ariz St L J 651, 676 (2008) (quoting Franklin E. Zimring, *An American Travesty: Legal Responses to Adolescent Sexual Offending*, at xiii (2004)).

ORS 137.719 is flawed in precisely that way. ORS 137.719 applies to an extraordinarily broad range of sexual offenses. In providing a single presumptive sentence for recidivist sexual offenders, ORS 137.719 treats the most egregious sexual offenses, such as forcible rape, the same as the nonviolent (and potentially victimless) sexual offense of public indecency. As the Court of Appeals observed, "few statutes make such a broad swath of conduct subject to the same penalty, let alone such a severe penalty." *Davidson*, 271 Or App at 737. Indeed, ORS 137.719 is unique among Oregon laws in failing to draw distinctions between sexual offenses based on the substantive

conduct involved. *See id.* at 737 n 11 (noting that ORS 137.719 applies the same presumptive sentence to crimes that are and are not considered "major felony sex crime[s]," that are and are not subject to Measure 11 mandatory minimum sentences, and that are assigned to a multitude of differing Crime Seriousness categories under the sentencing guidelines).

ORS 137.719's extreme overbreadth is perhaps unsurprising in light of the legislature's failure to give the law much, if any, substantive consideration. Such a failure is unfortunately an all-too-common oversight attendant to harsh sentencing laws for sexual offenses: While "experts understand that sex offenders display a wide variety of behaviors and profiles, legislation often collapses these various distinctions into one monolithic group." Bonita M. Veysey, *Sex Offenses and Offenders Reconsidered: An Investigation of Characteristics and Correlates Over Time*, 37 Crim Just & Behav 583, 583 (2010).

That failure is particularly problematic in the context of this case because defendants convicted of public indecency do not pose the same risk of violence or sexual recidivism when compared either to sexual offenders as a group or to criminal offenders in general. For example, researchers studying sexual offenders as a broad class for a five- to six-year period documented rates of 14 percent, 25 percent, and 36.9 percent for violent nonsexual recidivism, violent recidivism (sexual or nonsexual), and general recidivism respectively.

Heather Y. Bersot & Bruce A. Arrigo, *Responding to Sex Offenders: Empirical Findings, Judicial Decision Making, and Legal Moralism*, 42 Crim Just & Behav 32, 34 (2015). A different study focusing on those classified as "exhibitionists"—*i.e.*, individuals diagnosed with exhibitionism by a psychiatrist, convicted of indecent exposure, or self-referred—revealed that within a seven-year period, the percentage of subjects convicted of sexual, violent, or other criminal acts was 12.6 percent, 18.9 percent, and 29.1 percent respectively. Phillip Firestone, et al., *Long-Term Follow-up of Exhibitionists: Psychological, Phallometric, and Offense Characteristics*, 34 J Am Acad Psychiatry Law 349, 353 (2006). That study further revealed that out of those "exhibitionists" who went on to commit a sexual offense within the mean study period of 13.24 years, only 38.8 percent escalated to a "hands-on" sexual offense, such as sexual touching or sexual assault, while the rest remained "hands-off" offenders. *Id.* at 355.

In sum, of the small percentage of nonviolent sexual offenders that actually do recidivate, only a small percentage of that subset of repeat offenders escalate their conduct to violent sexual offenses. *See id.* Put a different way, when exhibitionists *do* recidivate (which they do at lower rates than other sexual offenders), they do not generally graduate to the egregious sexual offenses that inspired the enactment of harsh sentencing laws like ORS 137.719; instead, they generally continue engaging in nonviolent sexual

offenses. Thus, the empirical data is directly contrary to the notion that recidivist nonviolent sexual offenders are likely to escalate to the sort of violent sexual misconduct that inspired the enactment of harsh sentencing laws like ORS 137.719.

Importantly, ORS 137.719's overbroad treatment of all sexual offenders as a single class also risks affecting individuals with serious mental illness disproportionately. When individuals with serious mental illness engage in behaviors such as lewd proposals, indecent exposure, or other "nuisance" sexual behavior, the broad designation of "sex offender" fails to distinguish between those whose behavior indicates a heightened risk of sexual violence and those who engage in these behaviors because of "poor impulse control or social inappropriateness caused by the treatable symptoms of psychiatric illness." Harris et al., *Sex Offending and Serious Mental Illness: Directions for Policy and Research*, 37 Crim Just & Behav 596, 601 (2010). Individuals with mental illness also face an increased chance of being subjected to Oregon's recidivist sexual offender laws, because recidivism rates have been linked to the absence of stable housing, employment, and social support—challenges shouldered at a much higher rate by persons with mental illness. *Id.* at 606.

C. ORS 137.719's "true life" sentence cannot constitutionally be imposed on a defendant who has never been convicted of any sexual offense involving physical contact with any victim.

To summarize, ORS 137.719 appears to have been enacted without serious discussion of its purpose or scope, in response to highly-publicized anecdotes of egregious—and atypical—sexual violence. ORS 137.719 prescribes the same extreme presumptive penalty for both the egregious and violent sexual conduct that inspired its enactment and an extraordinarily broad range of other conduct, including nonviolent conduct involving no physical contact with any victim at all. ORS 137.719's failure to distinguish substantively between violent and nonviolent sexual offenders is directly contrary to empirical data, which shows that "sexual offenders" as a unitary class do not pose a monolithic danger, and, more importantly, that recidivist nonviolent sexual offenders do not ineluctably escalate to the sort of violent sexual misconduct that inspired the enactment of harsh sentencing laws such as ORS 137.719.

Although it may not be this court's role to correct the flawed logic that too frequently underlies anecdotally motivated criminal sentencing legislation, it is most certainly the role of this court to intervene when such flawed logic precipitates sentences that violate the Oregon Constitution. In this case, the prosecutor sought, and the trial court imposed, a sentence of life without the possibility of parole on a man who has never been convicted of any sexual

offense involving force or violence. The analysis articulated by this court in *Rodriguez/Buck* readily supports the conclusion that such a sentence "shock[s] the moral sense of reasonable people"; the Court of Appeals decision to reverse the trial court's imposition of that sentence—following a thorough and thoughtful analysis of the *Rodriguez/Buck* factors—should be affirmed. *See Davidson*, 271 Or App at 735-45.[3]

But this court also should take this opportunity to make a broader statement regarding the limits imposed by Article I, section 16. This court should announce that, in the vast majority of cases, Article I, section 16, prohibits sentencing to life without the possibility of parole a defendant who has never been convicted of a sexual offense involving physical contact with any victim. That broader pronouncement is consistent with this court's analysis in *Rodriguez/Buck* and it also is consistent with the empirical data regarding nonviolent sexual offender recidivism.

Most importantly, a broader pronouncement from this court regarding the limits imposed by Article I, section 16, on ORS 137.719's presumptive true life sentence will educate prosecutors and trial courts how to avoid sowing the

[3] In ascertaining the "moral sense of reasonable people" in the context of this case, it is helpful to note that, in a poll conducted by the *Oregonian*, more than 60 percent of respondents believed that it "seems unjust" to "permanently lock[] away sex offenders who haven't actually touched their victims[.]" *See* Aimee Green, "Should brain-damaged serial masturbator get life in prison? Appeals court says no," *The Oregonian*, June 17, 2015, *available at* http://www.oregonlive.com/pacific-northwest-news/index.ssf/2015/06/brain-damaged_one-eyed_man_who.html (last accessed April 6, 2016).

seeds of reversible constitutional error. As a result, injustice will be avoided, and the substantial judicial resources spent correcting those constitutional errors will be conserved.

CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Appeals decision reversing the imposition of a true life sentence on defendant. In doing so, OJRC urges this Court to announce that, barring some exceptional circumstance, Article I, section 16, of the Oregon Constitution prohibits imposing an ORS 137.719 true life sentence on a defendant who has never been convicted of a sexual offense involving physical contact with any victim, let alone violent physical contact.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief on the merits complies with the word-count limitation in ORAP 8.15(3) n 5 and ORAP 5.05(2)(b)(i)(B) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 3,156 words.

Type size

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

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CERTIFICATE OF FILING AND SERVICE

I certify that on April 7, 2016, I filed the original of this BRIEF ON THE MERITS OF *AMICUS CURIAE* OREGON JUSTICE RESOURCE CENTER with the State Court Administrator by the eFiling system.

I further certify that on April 7, 2016, I served a copy of the BRIEF ON THE MERITS OF *AMICUS CURIAE* OREGON JUSTICE RESOURCE CENTER on the following parties by electronic service via the eFiling system:

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