IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, v. GREGORY ALLEN BOWEN, Defendant-Appellant.	Curry County Circuit Court Case No. 02CR0019 SC S061149

APPELLANT'S OPENING BRIEF AND EXCERPT OF RECORD

Appeal from the Judgment of the Circuit Court
for Curry County
Honorable Jesse C. Margolis, Judge

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STATEMENT OF THE CASE

Nature of the Proceeding

This capital case is on automatic and direct review arising from the second amended judgment of conviction and sentence of death imposed on defendant in Curry County Case No. 02CR0019 after a second remand from this court in *State v. Bowen*, 352 Or 109, 282 P3d 807 (2012) (*Bowen II*).[1] (For the court's convenience, a copy of the opinion appears in the Appendix to this brief.) Defendant seeks reversal and remand for resentencing.

Defendant was charged in an 18-count indictment with crimes that occurred in two different courses of conduct in two locations against different victims on December 29, 2001. The first group of charges alleged crimes against a friend of defendant, , and the second group alleged crimes against his ex-domestic partner, .

With respect to the indictment alleged two counts of aggravated murder, ORS 163.095, one based on the theory that defendant intentionally and personally caused the death during a robbery (Count 1), and

[1] This court's first decision appears at *State v. Bowen*, 340 Or 487, 135 P3d 272 (2006) (*Bowen I*), a copy of which is provided in the Excerpts of Record at ER-43-73.

the other that defendant intentionally and personally caused the death during a burglary (Count 2). Based on the same conduct, Count 3 alleged that defendant committed intentional murder, ORS 163.115. The indictment also alleged that defendant committed theft in the first degree (Counts 11, 12, and 13), ORS 164.055, and theft in the second degree (Count 18), ORS 164.045.

The second group of charges alleged that he committed eleven crimes against : attempted murder with a firearm (Count 4), ORS 161.405; ORS 163.115; assault in the second degree (Count 5), ORS 163.175; kidnapping in the second degree (Counts 6 and 7), ORS 163.225; coercion (Counts 8 and 9), ORS 163.275; theft in the first degree (Count 10), ORS 164.055; assault in the fourth degree (Counts 14 and 15), ORS 163.160; and menacing (Counts 16 and 17), ORS 163.190.

A copy of the indictment appears in the Excerpts of Record ("ER") at ER-1-6.

Nature of the Judgment

Defendant pled guilty to the charges concerning and not guilty to the charges concerning After a jury trial on the allegations concerning defendant was found guilty of the remaining charges in the indictment. Additional evidence was presented to the jury in a penalty phase proceeding pursuant to ORS 163.150 "to determine whether the defendant shall be sentenced to life imprisonment, as described in ORS 163.105

(1)(c), life imprisonment without the possibility of release or parole, as described in ORS 163.105 (1)(b), or death." ORS 163.150(1)(a). The jury answered "yes" to each of the four statutory questions under ORS 163.150(1)(b)[2] as to both counts of aggravated murder.

At sentencing, the trial court imposed a sentence of death for each of the aggravated murder counts, a separate a 300-month sentence with lifetime post-prison supervision for the conviction for intentional murder, and these sentences for the remaining counts:

- On Count 4, Attempted Murder (the court found that the conviction fell into guidelines grid block 9-A. Pursuant to ORS 137.700, it imposed a sentence of 90 months of incarceration plus 36 months of PPS and a unitary assessment of $605. It ordered that sentence to be served consecutively to the sentence on Count 3. Tr. 2062; 2068.
- On Count 5, Assault in the Second Degree (the court found that the conviction fell into guidelines grid block 9-A. Pursuant to ORS

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[2] Those questions are:

> "(A) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that death of the deceased or another would result;
>
> "(B) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;
>
> "(C) If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased; and
>
> "(D) Whether the defendant should receive a death sentence."

137.700, it imposed a sentence of 70 months of incarceration plus 36 months of PPS. It ordered that sentence to be served consecutively to the sentence on Count 4. Tr. 2062.

- On Count 6, Kidnapping in the Second Degree (the court found that the conviction fell into guidelines grid block 9-A. Pursuant to ORS 137.700, it imposed a sentence of 70 months of incarceration plus 36 months of PPS and a unitary assessment of $605. It ordered that term to be served consecutively to the sentences on Counts 3, 4, and 5. Tr. 2062.

- On Count 7, Kidnapping in the Second Degree (the court found that the conviction fell into guidelines grid block 9-A. Pursuant to ORS 137.700, it imposed a sentence of 70 months of incarceration plus 36 months of PPS and a unitary assessment of $605. It ordered that term to be served consecutively to the sentences on Counts 3, 4, 5, and 6. Tr. 2063.

- On Count 8, Coercion (the court found that the conviction fell into guidelines grid block 7-A. It imposed a guidelines sentence of 36 months of incarceration plus 36 months of PPS and a unitary assessment of $605. It ordered that term to be served concurrently with the sentence on Count 4. Tr. 2063; 2068.

- On Count 9, Coercion (the court found that the conviction fell into guidelines grid block 7-A. It imposed a guidelines sentence of 36 months of incarceration plus 36 months of PPS and a unitary assessment of $605. It ordered that term to be served concurrently with the sentence on Count 5. Tr. 2063; 2068.

- On Count 10, Theft I (the court found that the conviction fell into guidelines grid block 2-A. It imposed a dispositional departure guidelines sentence of 6 months of incarceration plus 12 months of PPS and a unitary assessment of $105. It ordered that term to be served concurrently with the sentence on Count 6. Tr. 2064.

- On Count 11, Theft I (the court found that the conviction fell into guidelines grid block 2-A. It imposed a dispositional departure guidelines sentence of 6 months of incarceration plus 12 months of PPS. It ordered that term to be served concurrently with the sentence of Count 7. Tr. 2064-65.

- On Count 12, Theft I (the court found that the conviction fell into guidelines grid block 2-A. It imposed a dispositional departure

guidelines sentence of 6 months of incarceration plus 12 months of PPS and a unitary assessment of $105. It ordered that term to be served concurrently with the sentence on Count 4. Tr. 2065.

- On Count 13, Theft I (the court found that the conviction fell into guidelines grid block 2-A. It imposed a dispositional departure guidelines sentence of 6 months of incarceration plus 12 months of PPS and a unitary assessment of $105. It ordered that term to be served concurrently with the sentence on Count 4. Tr. 2064-65.

- On Count 14, Assault IV (a Class A misdemeanor, the court imposed a sentence of 6 months to be served consecutively to the sentence on Count 5 and a unitary assessment of $565. Tr. 2065-66.

- On Count 15, Assault IV (a Class A misdemeanor, it imposed a sentence of 6 months to be served concurrently with the sentence on Count 14 and a unitary assessment of $565. Tr. 2066.

- On Count 16, Menacing (a Class A misdemeanor, it imposed a sentence of 6 months to be served consecutively to the sentences on Counts 14 and 15 and a unitary assessment of $565. Tr. 2066.

- On Count 17, Menacing (a Class A misdemeanor, it imposed a sentence of 6 months to be served concurrently with the sentence on Count 16 and a unitary assessment of $565. Tr. 2065-66.

- On Count 18, Theft II (a Class A misdemeanor, it imposed a sentence of 6 months to be served concurrently with the sentence on Count 10 and a unitary assessment of $65. Tr. 2067.

A copy of the original judgment is attached at ER-7 through ER-42.

In 2006, on automatic and direct review pursuant to ORS 138.012, this court this court affirmed defendant's convictions for aggravated murder and the imposition of the death penalty, but concluded that the trial court erred in failing to merge two aggravated murder verdicts and one intentional murder verdict against defendant into a single conviction set out in a single judgment

that imposed one sentence of death. It remanded to the circuit court for further proceedings. *Bowen I*, 340 Or at 527, 529.

On remand, the trial court denied several defense motions and entered a corrected judgment. This court reviewed that judgment in a second automatic and direct review pursuant to ORS 138.012. It affirmed the denial of defendant's motions and affirmed the merged conviction and the sentence of death. However, it reversed the corrected judgment and remanded with instructions to again merge the aggravated murder and intentional murder convictions, and to separately enumerate the aggravating factors underlying the merged aggravated murder convictions. *Bowen II*, 352 Or at 121.

On resentencing after remand by this court in *Bowen II*, the circuit court held a hearing on defense motions, denied those motions, and entered a corrected judgment reflecting the merger of two counts of aggravated murder on the theories that the death was caused during a burglary and a robbery, and merging the verdict for intentional murder with the merged verdicts for aggravated murder. A copy of the judgment entered March 5, 2013, is attached at ER-74-75.

Jurisdiction

This court has jurisdiction pursuant to ORS 138.012, ORS 138.040, ORS 138.222(4)(a), and ORS138.222(5)(b).

Notice of Appeal

Appeal from the final judgment entered in Curry County Circuit Court on March 5, 2013, is based on automatic and direct review under ORS 138.012(1).

Questions Presented

1. When an appellate court reverses and remands for the trial court to merge guilty verdicts in a judgment that includes sentences on convictions for felony offenses, must the court on remand resentence the defendant pursuant to ORS 138.222(5)?

2. Is a defendant entitled to appear personally for allocution, when an appellate court reverses and remands a judgment for resentencing?

Summary of Argument

First Question Presented

In *Bowen I*, this court's disposition in the body of the opinion correctly reversed and remanded for the trial court to merge the verdicts for aggravated murder and intentional murder and for resentencing -- as defendant requested on appeal without specifying the statutory basis for that request -- as the resolution of the merger issues and based on its decisions on the merits. *Bowen I*, 340 Or at 527, 529. However, the "tag line" in the opinion did not direct the trial court to resentence after entering a single count of aggravated murder and sentence of death.

On remand, the trial court denied various motions, including defendant's motion for resentencing pursuant to ORS 138.012(1), and only corrected the judgment as to the merged homicide verdicts, without resentencing on the remaining felony convictions. On appeal from that judgment, in *Bowen II*, defendant argued that the trial court erred by denying the motions made in the trial court, and again requested reversal and remand for resentencing, or alternatively, resentencing pursuant to ORS 138.012(1). *Bowen II*, App Br at 72.

Defendant concedes that he did not specify the statutory basis for his request for resentencing in either *Bowen I* or *Bowen II*, other than for the alternative request citing ORS 138.012(1). However, in *Bowen II*, the court effectively held that the disposition ordering resentencing after merger was incorrect, and *sua sponte* ordered the trial court to enter a corrected judgment reflecting the separate theories for the merged aggravated murder verdicts without ordering resentencing of any kind. On remand, the trial court relied on that disposition to deny defendant's motion for resentencing of the remaining felony counts.

Defendant here respectfully asks this court to once again reverse and, as it ordered in *Bowen I*, remand for resentencing as is required after reversal of any convictions in a judgment that includes at least one felony conviction pursuant to ORS 138.222(5).

Second Question Presented

Assuming that this court reverses and remands for resentencing on the remaining felony convictions, because the issue is likely to arise again on remand, defendant respectfully asks this court to review the court's denial of defendant's motion to appear for resentencing and direct the trial court that, on remand for resentencing, defendant must be permitted to appear personally for allocution.

SUMMARY OF FACTS[3]

Summary of Historical Facts

In December 2001, defendant and Mike spent several days traveling in 1987 Isuzu Trooper along the Oregon coast unsuccessfully looking for work and illegal drugs. Tr 1012-15; 1213-22.[4] When they returned to Gold Beach, they went to the home of defendant's ex-girlfriend,

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[3] This court's opinions in *Bowen I* and *Bowen II* appear in Excerpts of Record beginning at ER-43 and ER-76, and the prior transcripts and briefs are part of the court's record. However, for the court's convenience, defendant here presents a brief (compared to the other available sources) summary of the historical and procedural facts and matters at issue in the previous appeals with citations, where appropriate, to the transcripts, briefs, and opinions in the prior proceedings.

[4] Citations to "Tr" pages refer to the transcript of the original trial proceedings.

for defendant to retrieve some clothing. The Trooper was having starter problems, so went to find a place to park the on a hill, while defendant went inside. Tr 1016-17.

Defendant and argued. Defendant struck pulled her hair, held a knife to her throat, and took her into the bedroom. He picked up muzzle-loaded black powder pistol and struck her with it, then pointed it at her. Tr 315-20, 325. She grabbed the barrel of the pistol and cut her hand on the two gun sights. Tr 325. When someone knocked at the front door and defendant left the room, escaped through the bedroom window. Tr 327-28.

Defendant took the pistol, and he and fled to a friend's house to listen to a police scanner, but they heard nothing about the incident. Then they went to buy heroin, but the supplier was not home. Next they went to the home of defendant's friend, . Tr 768-69, 1019-23, 1093, 1022-23; 1230. By that time, was in heroin withdrawal. Tr 1023, 1043.

invited the men inside. They went to the kitchen, and defendant set the pistol on the kitchen table. Defendant and drank beer and talked. Tr 1024, 1028, 1047. testified that "everything seemed cool. I mean, they're like old buddies." Tr 1028.

Defendant asked whether he had any money, and said no. Tr 1028. had left the Trooper's engine running, and when it began making strange noises, he went outside to check on it. Tr 1030, 1047-48. Defendant testified that he told about the altercation with and encouraged defendant to turn himself in. offered to call the police, and as he began dialing the phone, defendant picked up the pistol and said, "If you call 911[,] I may as well just shoot myself and get it over with." tried to take the gun away from defendant and it discharged. Tr 1233-37.

heard the shot and went inside. was on the floor, and defendant was saying, "It will be over shortly. I got you in the heart." Tr 1031. asked what happened, and defendant replied something like he was supposed to call defendant's dad but was calling 9-1-1. Tr. 1032.

testified that he went to the car and defendant later came out carrying guns and a box with a phone in it. Tr 1033. Defendant testified that he went outside first, got sick, and sat down and cried. later came out and said that they needed to go. Later he noticed the guns in the back seat of the Trooper. Tr 1237-39.

The first officers at the scene found body lying face down. They rolled the body over, cut open the shirt and tee shirt with a pair of scissors to determine whether he had committed suicide, and then rolled it onto its front

or onto its side. Tr 441, 470, 512-13. They lifted the body onto a tarp, passed it "basically hand-to-hand" out of the area of blood spatter and placed it in a body bag. Tr. 517. The body was transported in the back of a patrol car to Sacred Heart Hospital in Eugene. Tr 476, 477, 493.

The medical examiner who performed the autopsy testified that the lead ball entered polo shirt just above the breast pocket. He found two little scratches above the entrance wound, which he thought might have been caused by the toothpicks or the eyeglasses found undamaged in breast pocket. Tr 785, 795. The lead ball traveled "essentially straight down," staying in the fat just under the skin, struck the sixth rib on his left side, fractured that rib and then deflected to the right, traveled through the heart and liver, and came to rest on the right side of his chest. Tr 785-88, 819-20. In other words, he explained, if the decedent was standing erect when he was shot, the gun was overhead pointing almost straight down toward his feet when it was fired. Tr 820, 1146. Jim Pex of the Oregon State Police Crime Lab testified that the lack of gun powder residue on the blood soaked clothing demonstrated that the pistol was fired from a distance greater than five feet. Tr 888.

Summary of Evidence Presented in the Penalty Phase Trial

Dennis Ray an inmate who had been incarcerated with defendant, testified that defendant confessed to pistol whipping, raping, and choking in 1989, because she threatened to testify against the brothers concerning an arson charge. Tr 1558-63. Nevada authorities had incarcerated defendant for almost three years while they investigated.

body was found strangled in a bathtub in a house that she rented from her boyfriend, . Tr 1578; 1583. Police found two hairs consistent with defendant's hair, but no evidence that was pistol whipped or sexually assaulted. Tr 1584, 1590, 1790, 1808. A footprint in the bathroom was made by a foot smaller than defendant's. Tr 1793. In addition, defendant had had shoulder surgery about eight months earlier. Tr 1551. The night before trial, the Nevada District Attorney accepted defendant's plea of guilty to accessory to murder after the fact, and defendant was released. Tr 1574, 1794; 1796; Exhibit 188.

testified that defendant told her that had asked him to kill and he arranged for the 28th Street Gang to do it. Tr. 1547. also testified that defendant told her that had beaten a guy, and that he helped take the guy to the dessert and throw him over a cliff. Tr 1518-21. Defendant pled guilty to manslaughter for his role in that crime. Tr 1783-84; Exhibits 123, 124.

also testified that one time defendant "backhanded" her sister, struck her brother in the face, and choked her because he thought that she had arranged for the Bloods gang to shoot his son. Tr 1544-55.

In 2001, defendant and robbed in home. They repeatedly struck on the head, twisted his arm, and compelled him to open his safe to obtain prescription drugs. Tr 1495-1501. threatened to kill if he contacted the police. Tr 1498.

was married to another man while having an affair with defendant. She testified that defendant once held a knife to her throat, saying that "he was tired of the games," that he "couldn't handle it any more," and wanted her to choose what she was going to do. Tr 1510. In spite of everything, she said, she still has strong feelings for defendant, that he was good with her grandchildren, and she still writes letters to him. Tr 1514.

and defendant lived together "on and off" for a couple of years. Tr 1478. During an argument, he broke her nose, and on another occasion, he broke the windshield and headlights on their wood truck, because he was angry. Tr 1449, 1481. She said that he was wonderful with her children, explaining, "He's kind and gentle and loving and caring and he just got messed up. The drugs make him messed up." Tr 1490.

The First Appeal (*Bowen I*)

On automatic and direct review pursuant to ORS 138.012(1), this court summarily rejected defendant's challenges to the constitutionality of Oregon's death penalty statute, ORS 163.150. It rejected assignments of error to the trial court's admission of photographs of injuries in the trial concerning the 340 Or at 492-94; the denial of his motion to dismiss Count 1, aggravated felony murder during a burglary for failure to identify the crime defendant intended to commit when he entered or remained in the residence, and to the trial court's jury instructions on the elements of burglary and robbery. 340 Or at 497.

The court also rejected as unpreserved for review defendant's assignment of error to the trial court's exclusion of testimony by an expert witness that the bullet would not have caused death if it had not deflected off a rib, 340 Or at 497, and the argument that the trial court made an improper comment on the evidence when it opined in the jury's presence that the evidence was not even relevant to a lesser-included offense. 340 Or at 497-501.

The court similarly rejected as unpreserved assignments of error to trial court rulings arising from the state's question that disclosed an inadmissible conviction that was more than 15 years old. 340 Or at 507-08. It further concluded that the curative instruction explaining to the jury precisely why the evidence was inadmissible was, in combination with the final instructions,

sufficient to protect defendant from prejudice, and therefore the trial court did not abuse its discretion by denying the motion for mistrial. 340 Or at 508-09.

The court rejected defendant's assignments of error to the trial court's refusal to instruct the jury that murder and manslaughter were lesser-included offenses of aggravated murder, reasoning that any error was harmless because the jury was instructed on the elements of intentional murder and manslaughter with respect to the count charging intentional murder, and the jury is presumed to follow the general instruction to "consider all of the jury instructions as a whole." 340 Or at 514-17.

With respect to the penalty phase trial, this court affirmed rulings that the evidence concerning the murder was relevant to the question of defendant's future dangerousness, that it was not unfairly prejudicial, and that defendant's claim that defense counsel was unprepared to present a defense in a trial of defendant's guilt in the matter was without merit. 340 Or at 517-20. It added that defense counsel was prepared to present evidence, because he introduced testimony of Christopher Bubel, a public defense investigator from Nevada, concerning his investigation in the original case. It affirmed the trial court's order excluding Bubel's testimony that a doctor's report stated that defendant's shoulder surgery made defendant incapable of committing the murder, holding that the issue was not preserved for

review because defense counsel failed to make an offer of proof. 340 Or at 520-21.

The trial court denied defendant's request for an instruction to limit the jury's consideration of defendant's involvement in the murder only for its relevance to the question of defendant's future dangerousness, concluding that the requested instruction was an incorrect statement of law. 340 Or at 521-23.

This court also affirmed the trial court's ruling excluding testimony of defendant's ex-girlfriend that she felt that defendant should not receive the death penalty, because defense counsel did not except to the trial court's instruction to the jury to disregard it and made no offer of proof to lay foundation for the testimony. 340 Or at 523-25.

Defendant sought plain error review of the circuit court's requirement that defendant wear a "stun belt" throughout the trial without first holding a hearing and finding that such control was necessary to prevent defendant from disrupting the proceedings. Defendant invoked this court's jurisprudence governing the use of shackles during trial and asked the court to review the issue as plain error on the face of the record. Although this court acknowledged that the rationale for the rule prohibiting unnecessary shackling was that restraint during trial "*inevitably* tends to confuse and embarrass [a defendant's] faculties[] and thereby materially abridge and prejudicially affect his

constitutional rights of defense," 340 Or at 493-95 (emphasis added), it rejected defendant's request for plain error review, explaining that defendant had presented no evidence that the jury could see the device and that defendant pointed to nothing on the record that demonstrated that the stun belt adversely affected his ability to assist in his defense. 340 Or at 496.

The court rejected defendant's assignments of error to the trial court's imposition of consecutive sentences on the convictions on counts pertaining to the matter without discussion other than to state that they "are not well taken." 340 Or at 517.

Finally, this court concluded that the trial court erred by failing to merge the aggravated murder verdicts. It the body of the opinion, this court ordered:

> "[W]e reverse the judgments of conviction for aggravated murder on counts one and two, *vacate the sentences of death* imposed on those convictions, and remand to the trial court for entry of corrected judgments *and resentencing*."

Bowen I, 340 Or at 527 (emphasis added). It further held that the trial court erred by not merging the aggravated murder verdicts and the intentional murder verdict into a single conviction: "We therefore conclude that the trial court erred in not merging defendant's conviction for intentional murder with his convictions for aggravated murder[.]" *Bowen I*, 340 Or at 529. In the body of the opinion, this court also ordered:

> "[W]e reverse the judgment of conviction for intentional murder on count three, vacate the sentence imposed on that conviction and

> remand to the trial court for entry of a corrected judgment *and resentencing*."

Bowen I, 340 Or at 529 (emphasis added). The "tag line" of the opinion, however, affirmed the judgments of conviction and sentences of death, and "remanded to the circuit court *for further proceedings*." *Bowen I*, 340 Or at 529 (emphasis added).

The Second Appeal (*Bowen II*)

On remand from *Bowen I*, defendant made three motions, which the circuit court denied, and he objected to the trial court's entry of the corrected judgment *nunc pro tunc* the date of the original judgment. In the second automatic and direct review under ORS 138.012(1), this court affirmed the court's rulings on the motions, but it reversed the corrected judgment and remanded with specific instructions. *Bowen II*, 352 Or at 121.

First, defendant challenged the trial court's denial of his motion to follow ORS 138.012, arguing that, in *Bowen I*, this court necessarily found prejudicial

error in sentencing within the meaning of ORS 138.012(2)(a),[5] because it *vacated* the sentences of death and remanded for resentencing. *See, e.g., Bowen II*, Appellant's Brief at 6 (First Question Presented: "When this court concludes that the Circuit Court erred by failing to merge multiple verdicts of aggravated murder for a single death, *vacates the death sentences*, and remands for entry of a single conviction and for resentencing, must the Circuit Court on remand

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[5] ORS 138.012(2) provides:

> "Notwithstanding ORS 163.150 (1)(a), after automatic and direct review of a conviction and sentence of death the following apply:
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> "(a) If a reviewing court finds prejudicial error in the sentencing proceeding only, *the court may set aside the sentence of death and remand the case to the trial court*. No error in the sentencing proceeding results in reversal of the defendant's conviction for aggravated murder. Upon remand and at the election of the state, the trial court shall either:
>
> "(A) Sentence the defendant to imprisonment for life in the custody of the Department of Corrections as provided in ORS 163.105 (1)(c); or
>
> "(B) Impanel a new sentencing jury for the purpose of conducting a new sentencing proceeding to determine if the defendant should be sentenced to:
>
> "(i) Death;
>
> "(ii) Imprisonment for life without the possibility of release or parole as provided in ORS 163.105 (1)(b); or
>
> "(iii) Imprisonment for life in the custody of the Department of Corrections as provided in ORS 163.105 (1)(c)."

(Emphasis added.)

apply the terms of ORS 138.012(2)?" (Emphasis added)). After correctly quoting the passages from the prior opinion, 352 Or at 114, this court declined to address the portion of its prior opinion directing that the death sentences were "*vacated*," responding to the matter this way:

> "Defendant is correct that some of the wording in Bowen I may be ambiguous. For example, after concluding that the trial court erred in failing to merge the aggravated murder convictions,[6] the court stated that the judgments were 'reverse[d]' and remanded for entry of corrected judgments 'and resentencing.' [*Bowen I*, 340 at 527.] The court repeated that wording when it concluded that error also had occurred in the failure to merge the intentional murder conviction with the aggravated murder convictions. [*Bowen I*, 340 at 529.]

Bowen II, 352 Or at 115. It then explained that, taken in context, the court's intention was clear that the circuit court should enter a corrected judgment reflecting merged convictions, and discussed authorities for that disposition. 352 Or at 115-16.

The court then addressed defendant's argument that resentencing was required because merger after the jury's determination of the sentences would be contrary to ORS 161.067(1). 352 Or at 117. The court explained, "Defendant is correct that, in the event of an error under ORS 161.067(1), a renewed sentencing determination may be required, depending on the

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[6] The briefs and decisions in *Bowen I* and *Bowen II* were written before this court clarified that it would use the more accurate term "merger of verdicts," rather than "merger of convictions." *State v. White*, 346 Or 275, 211 P3d 248 (2009).

circumstances of the case." *Id*. It then distinguished the imposition of two death sentences from a situation in which the two sentences "would have resulted in a longer period of incarceration," such as the consecutive life sentences imposed in *State v. Barrett*, 331 Or 27, 10 P3d 901 (2000), which required a new sentencing determination in addition to the corrected judgment.[7] *Bowen II*, 352 Or at 117. It then *sua sponte* ordered that the case nevertheless required entry of a new corrected judgment that separately enumerates each aggravating factor. 352 Or at 119.

On remand from *Bowen I*, defendant also filed a motion for a new trial based on the trial court's requirement that defendant wear a R.E.A.C.T. stun belt device during the trial. The circuit court had denied the motion on the ground that it was untimely. *Bowen II*, 352 Or at 119. This court rejected defendant's assignment of error to that ruling, holding simply that that "defendant was not permitted to relitigate the stun device issue on remand." *Id*.

Lastly, the court affirmed the denial of the motion to dismiss based on the contention that the long delay between the decision in *Bowen I* and the trial court's proceeding violated defendant's "speedy trial" rights under Article I,

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[7] The court did not address defendant's argument that merger of the verdicts required resentencing because the state had not established that the jury's determination of whether death should be imposed for two aggravated murder convictions rather than one was harmless beyond a reasonable doubt. *Bowen II*, App Br at 30-31; *Bowen II*, Reply at 10-11.

section 10, of the Oregon Constitution and the Sixth Amendment to the United States Constitution. *Bowen II*, 352 Or at 120. Although it noted that the state acknowledged that the lengthy delay "was the result of inadvertence and neglect by the parties and the court, and is neither chargeable to defendant nor excusable," it held that defendant suffered no prejudice from the delay, because the remand was only for a corrected judgment. *Id*.

Circuit Court Proceedings on Remand from *Bowen II*

After this court's decision issued in *Bowen II*, the circuit court appointed counsel for defendant and directed the state to prepare a new corrected judgment based on this court's decision. R Tr[8] 5.

Defendant also filed a motion to transport him for personal appearance at resentencing, ER-84-86, and a Motion for Resentencing Hearing with Defendant Present and supporting Memorandum. ER-87-112. The prosecutor responded: "I think – I think it seems like he wouldn't need to be here, but since the -- since the defendant does have a right to be present at sentencing in all felony cases, perhaps that would be -- that might be prudent." R Tr 9.

The court did not agree. It said: "I'm not going to resentence. That sentence has already been affirmed. I'm simply going to enter a corrected

[8] Citations to "R Tr" refer to the transcript of proceedings on remand from *Bowen II*.

judgment, as the Supreme Court has directed me to do." R Tr 10. It then set a date to review the state's revised form of corrected judgment and denied defendant's motion to transport for attendance at that hearing. R Tr 11-12.

On February 7, 2013, the court held a hearing on defendant's motion for resentencing and the state's new proposed form of judgment. Defendant argued that, because the judgment included consecutive sentences for felony convictions arising from the same indictment, the merger of the verdicts for the convictions for homicide required resentencing of the entire case. R Tr 18-20. The court denied the motion, reasoning that resentencing was outside the scope of this court's remand order. R Tr 22.

ASSIGNMENT OF ERROR NO 1

The trial court erred by denying defendant's motion for resentencing on the felony convictions.

Preservation of Error

Defendant filed a motion for resentencing: "Comes now the Defendant, Gregory Allen Bowen, * * *, and moves this Court for an order allowing resentencing hearing with the Defendant present." He identified five points for the motion supported by arguments made in the attached memorandum, including: "Defendant's rights to be sentenced in both the and

matters at one time." In support of the motion, he presented arguments in a memorandum, which is attached at ER-90-112.

The court denied the motion:

> "The motion for resentencing will be denied. It's clear upon this court's reading of the Supreme Court's decision that the Supreme Court intended this case to be remanded specifically for the purpose of correcting the judgment and not for resentencing, and this court intends to follow the Supreme Court's directive."

R Tr 22.

Standard of Review

Interpretation of statutes and constitutional provisions are questions of law. *See, e.g., PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993).

Argument

In this court's decision in *Bowen I*, in the body of the opinion, this court reversed the judgments of conviction for the counts of aggravated murder and intentional murder and remanded to the trial court for entry of a corrected judgment "and resentencing." *Bowen I*, 340 Or at 527. That was the correct disposition.

Defendant concedes that, on remand from this court in *Bowen I*, defendant moved the trial court to resentence him on the aggravated murder conviction pursuant to ORS 138.012(1) or hold a new penalty phase trial, but

did not separately address resentencing otherwise. The court denied that motion. It then simply entered a corrected judgment. It did not resentence defendant on the affirmed felony convictions.

On appeal from the corrected judgment, defendant expressly requested resentencing, even if the court affirmed the trial court's rejection of the request for application of ORS 138.012. Defendant confesses failure to identify the statutory source of authority for resentencing apart from ORS 138.012. However, ORS 138.222(5)(b) provides that authority, and it does not make remand for resentencing a matter of discretion with the appellate court. *See, e.g., State v. Sanders,* 189 Or App 107, 112, 74 P3d 1105 (2003), *rev den,* 336 Or 657 (2004) (where verdicts for two counts were ordered remanded for merger, the court held that the state was correct that "the only plausible interpretation of ORS 138.222(5) is that, in such situations, the statute requires remand of the entire case.").

ORS 138.222(5)(b) provides:

> "(b) If the appellate court, in a case involving multiple counts of which at least one is a felony, reverses the judgment of conviction on any count and affirms other counts, *the appellate court shall remand the case to the trial court for resentencing on the affirmed count or counts.*"

(Emphasis added.) The provisions of ORS 138.222 apply to all felonies committed on or after November 1, 1989. ORS 138.222(1). Defendant's crimes were felonies alleged to have occurred on December 29, 2001.

When construing a statute, this court's task is to discern the intent of the legislature. ORS 174.020; *PGE,* 317 Or at 610. In order to ascertain what was intended by the legislature, this court examines the statute's (1) text; (2) context; and (3) where appropriate, relevant legislative history and canons of statutory construction. *State v. Glushko/Little*, 351 Or 297, 305, 266 P3d 50 (2011).

Nothing in the text of the ORS 138.222(5)(b) expressly provides an exception or otherwise indicates that the resentencing requirement does not apply when the reversal on appeal is for merger of aggravated murder and murder verdicts or when the sentence on the merged conviction is a sentence of death. Indeed, the terms of the statute are unambiguous. It applies in "a case involving multiple counts of which at least one is a felony," and this case involves numerous felony convictions in addition to the homicide convictions. The word "shall" imposes a non-discretionary obligation on the appellate court. *State ex rel Engweiler v. Felton*, 350 Or 592, 621, 260 P3d 448 (2011) ("The statute uses the mandatory word 'shall' and contains no exceptions"). To exclude the present case from the reach of the statute because the reversed convictions were for aggravated murder and intentional murder would require the court to do what the legislature expressly has prohibited by ORS 174.010, which provides:

> "In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all."

Accordingly, the court correctly remanded for resentencing within the text of its opinion in *Bowen I*, and the omission of that requirement from the tag line was either error or oversight.

In *Bowen II*, the court *sua sponte* reversed the judgment on the merged aggravated murder conviction without expressly ordering resentencing on the felony convictions. It ordered:

> "The corrected judgment is reversed and remanded with instructions to again merge the aggravated murder and intentional murder convictions, and to separately enumerate the aggravating factors underlying the merged aggravated murder convictions. The conviction and the sentence of death are otherwise affirmed."

352 Or at 121. On remand, defendant moved the court for resentencing on the felony counts, albeit without citing the statutory source of authority for the request. The trial court erred by denying the request, interpreting the order in *Bowen II* to preclude that which was required by ORS 138.222(5)(b).

This court was required by law to remand the case to the trial court for resentencing on the every count other than the aggravated murder and murder convictions that were reversed, and the trial court erred by interpreting this court's order to do otherwise. Therefore, this court should reverse the trial court's order on defendant's motion and remand for resentencing.

ASSIGNMENT OF ERROR NO 2

The trial court erred by denying defendant's motion to be physically present for the proceedings on remand from *Bowen II*.

Preservation of Error

Defendant filed a motion to transport defendant for resentencing:

> "Comes now the Defendant, Gregory Allen Bowen, by and through his attorney, Steven H. Gorham, and moves this Court for an order transporting Defendant from the Oregon State Penitentiary to the Curry County Court for his resentencing hearing, to be housed in the Curry County Jail until the resentencing hearing, and returned to the Oregon State Penitentiary when his resentencing is completed."

Motion to Transport for Resentencing. A copy of the motion is attached at ER-84-86. Defendant also filed a motion for resentencing: "Comes now the Defendant, Gregory Allen Bowen, * * *, and moves this Court for an order allowing resentencing hearing with the Defendant present." He identified five points for the motion supported by arguments made in the attached memorandum, including "[d]efendant's constitutional rights to be present in Court at all critical phases of the criminal proceeding," and "[d]efendant's statutory right to be present in Court at all of the critical phases of his criminal proceeding." A copy of the motion is attached at ER-87-89. In support of the motions, he presented arguments in a memorandum, which is attached at ER-90-112.

The court denied the motions to allow defendant to be present, but allowed defendant's alternative motion to allow defendant to appear by video transmission: "All right. I'll allow the video appearance. I'm not going to order that he be transported[.]" R Tr 12.

Standard of Review

The appellate court reviews for legal error whether a trial court erred in amending a judgment outside the defendant's presence. *State v. Rickard*, 225 Or App 488, 490, 201 P3d 927 (2009).

Argument

ORS 137.030(1) provides, in part, "For the purpose of giving judgment, if the conviction is for * * * [a] felony, the defendant shall be *personally present*." (Emphasis added.) Article I, section 11, of the Oregon Constitution provides, in part, "In all criminal prosecutions, the accused shall have the right * * * to be heard by himself and counsel * * *." Under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, no person shall be deprived of "life, liberty or property, without due process of law."

When construing a statute, this court's task is to discern the intent of the legislature. ORS 174.020; *PGE*, 317 Or at 610. In order to ascertain what was intended by the legislature, this court examines the statute's (1) text; (2)

context; and (3) where appropriate, relevant legislative history and canons of statutory construction. *Glushko/Little*, 351 Or at 305.

This court has explained that those provisions vindicate a defendant's right of allocution, by which the defendant may present mitigating circumstances to the sentencing court in the hope of receiving leniency. *DeAngelo v. Schiedler*, 306 Or 91, 94–95, 757 P2d 1355 (1988) ("right * * * to be heard" under Article I, section 11, includes "right to speak at sentencing" encompassing "the right to make any statements relevant to existing sentencing and parole practices"). Accordingly, defendant has a right to appear at resentencing and explain reasons that he believes the court should be lenient in imposing sentences on the felony convictions.

The text of ORS 137.030(1) provides that "the defendant shall be *personally* present." The plain and ordinary meaning of the word "personally" is that an incarcerated defendant has a right to be transported to the place where resentencing is held so that he may personally present his allocution to the court. Although the statute undoubtedly was intended to be a right that a defendant may waive in favor of appearance by remote video, the trial court in this case erred by denying defendant's request to be transported so that he would be permitted to appear in person for allocution.

Although the Court of Appeals held in *Rickard* that denial of allocution may be deemed not prejudicial on review, when changes in a sentence are

"administrative" in character, that approach is a *backward looking* resolution of the issue. That is, this court cannot determine in advance what sentences the trial court will impose on resentencing. Accordingly, it cannot determine in advance that denial of defendant's right to be present necessarily will be harmless. Therefore, defendant respectfully requests that this court direct the trial court that he must be permitted to appear personally at the resentencing proceeding.

CONCLUSION

For the foregoing reasons, defendant respectfully asks this court to reverse and remand for resentencing and reverse the trial court's ruling that his personal presence is not required.

Respectfully submitted,

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ESigned

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

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 7,466 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).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Appellant's Opening Brief to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on October 7, 2013.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Appellant's Opening Brief will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Anna Joyce, #013112, Solicitor General, attorney for Plaintiff-Respondent.

Respectfully submitted,

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_____

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