IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. SANTOS CUEVAS, Defendant-Appellant, Respondent on Review.	Malheur County Circuit Court No. 09082394C CA A149668 SC S062464

REPLY BRIEF 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 Malheur County
Honorable J. BURDETTE PRATT, Judge

Opinion Filed: May 21, 2014
Author of Opinion: Garrett, J.
Joined by: Ortega, P.J., and Devore, J.

Continued…

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INTRODUCTION

This court granted review to decide whether the federal constitutional jury-trial right extends to the separate-criminal-episode finding in deciding whether to "shift to I" and to reconstitute criminal history. *See State v. Miller*, 317 Or 297, 855 P2d 1093 (1993) (200-percent and shift-to-I rules do not apply when offenses arose from separate criminal episodes); *State v. Bucholz*, 317 Or 309, 855 P2d 1100 (1993) (reconstitution of criminal history required when offenses arose from separate criminal episodes). In his answering brief, defendant raises—for the first time in this case—unpreserved arguments that the sentencing guidelines do not contain a separate-criminal-episode exception for the shift-to-I rule and do not authorize the reconstitution of criminal history. Defendant asserts that this court's 1993 decisions in *Miller* and *Bucholz*—which held otherwise—were wrongly decided and should be overruled.

This court should decline defendant's invitation to reconsider and overrule that longstanding precedent. Given the procedural posture, it is neither necessary nor appropriate to address defendant's arguments. Defendant failed to preserve his arguments below or raise them in the Court of Appeals. Furthermore, defendant's arguments—advanced in a respondent's brief in this court—are improperly directed at overturning, rather than supporting, the Court

of Appeals' decision. The state is prejudiced by having these momentous issues raised at this late juncture and in this manner, relegating the state's response to a reply brief. Although defendant invokes the "first things first" doctrine, this court should refuse to apply that doctrine when, as here, the state-law issues are unpreserved, fall outside the scope of review, and already are answered by existing caselaw.

Regardless, defendant fails to carry his heavy burden of establishing that this court should reconsider and overrule *Miller* and *Bucholz*. He fails to demonstrate that a principled basis exists for overruling those cases and, instead, rehashes the arguments that this court considered and rejected in those decisions. He also fails to demonstrate that it would be appropriate to overrule those decisions given the pertinent *stare decisis* policy considerations, including the tremendous reliance placed on those decisions and the fact that the legislature has not amended the rules in a way that would justify reconsideration and has rebuffed attempts to overturn those decisions through the legislative process.

ARGUMENT

A. Defendant's arguments are not properly before this court.

1. Preservation principles and the procedural posture preclude review.

As a threshold matter, this court should refuse to consider defendant's arguments that *Miller* and *Bucholz* were wrongly decided, because defendant failed to preserve arguments about the meaning of the rules in the trial court and failed to raise them in the Court of Appeals, and because his arguments on review conflict with the procedural posture of the case.[1]

It is axiomatic that, absent a claim of plain error, a claim will not be considered on appeal unless it was preserved below and properly raised on appeal. ORAP 5.45(1) provides:

> No matter claimed as error will be considered on appeal unless the claim of error was preserved in the lower court and is assigned as error in the opening brief in according with this rule, provided that the appellate court may consider an error of law apparent on the record.

That means that the litigant must have raised the issue in the trial court and have done so with the requisite specificity. *State v. Wyatt*, 331 Or 335, 343, 15 P3d 22 (2000). That also means that the litigant must have raised the specific issue in his opening brief on appeal and presented argument. *Outdoor Media*

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[1] *Amicus* also urges this court to overrule *Miller* but its arguments are flawed for the same reasons that defendant's arguments are flawed.

Dimensions Inc. v. State of Oregon, 331 Or 634, 643-44, 643 n 5, 652-53, 20 P3d 180 (2001); ORAP 5.45(6). If the litigant failed to do either and the claim does not involve plain error, then the claim is unreviewable. *Ailes v. Portland Meadows, Inc.*, 312 Or 376, 380, 384, 823 P2d 956 (1991); *State v. Castrejon*, 317 Or 202, 209 n 9, 856 P2d 616 (1993).

Defendant failed to satisfy those requirements. He failed to preserve arguments about the meaning of the rules in the trial court. He also failed to raise those issues in the Court of Appeals. Nor does he contend that plain error occurred. Consequently, defendant's claims are unreviewable. The state is prejudiced by defendant's attempt to interject these extremely significant issues into this case at this late juncture, relegating the state's responses to a mere reply brief.

Amicus invokes *Stull v. Hoke*, 326 Or 72, 948 P2d 722 (1997), and asserts that this court's duty to correctly interpret statutes provides a basis to reach unraised statutory issues. (Amicus Br 15). But in *Stull*, the party *preserved* an argument about the meaning of a statute below and also properly raised the issue on appeal, and the question on review was whether this court could consider an alternative statutory argument. 326 Or at 75-77. *Stull* stands for the proposition that, if the meaning of a statute is properly before this court, then the court may not be forced by the parties to construe the statute

incorrectly. *Id*. at 77. Defendant's arguments are not properly before this court, because he did not preserve arguments about the meaning of the rules below or raise them in the Court of Appeals. *Stull* is inapposite.

Defendant's arguments also conflict with the procedural posture. The Court of Appeals held that the sentencing procedure violated defendant's federal constitutional jury-trial rights but affirmed on harmless-error grounds. *State v. Cuevas*, 263 Or App 94, 110-15, 326 P3d 1242 (2014). This court granted the state's petition for review of the holding that defendant's federal constitutional jury-trial rights were violated. But the court denied defendant's petition for review—directed at overturning his convictions and sentences—and adhered to that decision in denying his petition for reconsideration. [Notably, defendant did not petition for review on the ground that *Miller* and *Bucholz* were wrongly decided and that the rules at issue did not apply to his case as a matter of legislative intent]. After a further series of motions, this court ruled in an order dated December 16th, 2014, that "[d]efendant, of course, is free to raise arguments in his brief on the merits *in support of the Court of Appeals decision*, and [that] the court will consider those arguments to the extent that they are properly before it." (ACF, Order; emphasis added).

Defendant now is arguing that the trial court violated the sentencing guidelines, that the Court of Appeals erred by affirming his sentences, and that

this court must reverse the Court of Appeals' decision and remand for resentencing. (Resp Br 33, 42-43). Yet those are not arguments "in support of the Court of Appeals decision." The Court of Appeals *affirmed* defendant's sentences. Defendant's statutory arguments are not an attempt to defend that disposition and decision but to overturn it. Defendant's arguments conflict with the procedural posture and—for that additional reason—should not be considered.

2. The "first things first" doctrine does not apply.

Defendant asserts that the "first things first" doctrine is a basis to reach his unpreserved statutory arguments. (Resp Br 22-23). Defendant is mistaken.

Under the "first things first" doctrine, Oregon appellate courts consider state law issues—beginning with subconstitutional issues—before resolving a federal constitutional claim even if the litigant on review raised only a constitutional claim. *See Priest v. Pearce*, 314 Or 411, 414, 840 P2d 65 (1992) ("[a]s is customary under our methodology, we begin with the pertinent sub-constitutional law"); *State v. Kennedy*, 295 Or 260, 262, 666 P2d 1316 (1983) (court will address issues of state law before addressing federal constitutional issues). This court has explained that it will not allow the litigants to force the court to decide federal constitutional issues that are adequately answered by state law. *Kennedy*, 295 Or at 266-67.

The "first things first" doctrine sometimes gives way to other jurisprudential concerns. *See e.g.*, *State v. Bailey*, 356 Or 486, 494-95, 338 P3d 702 (2014). One such concern is the preservation requirement. This court should refuse to apply the "first things first" doctrine when the state-law issue was unpreserved at the trial court level. *See e.g.*, *Empire Wholesale Lumber Co. v. Meyers*, 192 Or App 221, 225 n 1, 85 P3d 339 (2004) ("Oregon appellate decisions do not appear to apply that doctrine when a state constitutional argument has not been asserted at the trial court"). A contrary approach would conflict with this court's characterization of the preservation rule: Oregon appellate courts simply lack authority to address unpreserved issues that do not qualify as plain error. *Wyatt*, 331 Or at 346. A second jurisprudential concern is the doctrine of *stare decisis* which—as explained in the next section—requires that this court presume that its prior cases were correctly decided and overrule them only in exceptional circumstances. This court should refuse to apply the "first things first" doctrine to reconsider state-law issues already answered by long-standing precedent.

Against that backdrop, defendant asks this court to apply the "first things first" doctrine in a novel manner: he asks this court to revisit statutory issues that are both unpreserved and foreclosed by longstanding caselaw. This court should refuse to do so. The combination of the absence of preservation and the

doctrine of *stare decisis* present a compelling jurisprudential reason to not apply the "first things first" doctrine. The fact that defendant's arguments conflict with the procedural posture on review further militates against doing so. This court should refuse to reconsider *Miller* and *Bucholz*.

B. Defendant fails to carry his heavy burden to establish that *Miller* and *Bucholz* should be overruled.

In all events, this court should adhere to *Miller* and *Bucholz*, because defendant fails to demonstrate that it would be appropriate to reconsider and overrule those decisions given *stare decisis* considerations.

A bedrock principle that underlies our legal system is that of *stare decisis*: once an appellate court resolves a rule of law, it is presumed that the established rule is correct and will not be disturbed. *Stare decisis* promotes "[s]tability and predictability" in the law because "individuals and institutions act in reliance on this court's decisions, and to frustrate reasonable expectations based on prior decisions creates the potential for uncertainty and unfairness." *Farmers Ins. Co. v. Mowry*, 350 Or 686, 698, 261 P3d 1 (2011). The doctrine also promotes consistency: "[f]ew legal principles are so central to our tradition as the concept that courts should '[t]reat alike cases alike.'" *Id*. Adherence to *stare decisis* is especially warranted for statutory interpretations because—whereas only courts can correct constitutional interpretative errors—the

legislative power is implicated, and the legislature can and often does amend statutory provisions in response to judicial interpretations. *Id*. at 697.

To that end, although this court will consider arguments that a prior statutory interpretation is incorrect, *stare decisis* considerations dictate that this court "'begin with the assumption that issues considered in [its] prior cases are correctly decided.'" *Id*. at 698. That means that "'the party seeking to change a precedent must assume responsibility for affirmatively persuading [the court] that [it] should abandon that precedent.'" *Id*. The party thus bears the difficult task of identifying a principled basis to overrule the prior interpretation. *Id*. at 698-700. The party also must establish that the pertinent policy considerations—including reliance on the precedent and whether the legislature has modified the provision in a way that would justify reconsideration—support overruling the decision. *State v. Ciancanelli*, 339 Or 282, 291, 121 P3d 613 (2005); *Mowry*, 350 Or at 693 n 3, 700-01; *id*. at 714 (concurring opinion, Durham, J.).

Defendant's arguments fail at each turn. He fails to demonstrate that a principled basis exists to reconsider and overrule *Miller* and *Bucholz*. He also fails to demonstrate that the pertinent policy considerations favor overruling the decisions.

1. Defendant fails to demonstrate that a principled basis exists to reconsider and overrule *Miller* and *Bucholz*.

In *Miller*, this court reviewed the pertinent text (*former* OAR 253-12-020 now OAR 213-012-0020), context, and legislative history and held that the 200-percent and shift-to-I rules do not apply to consecutive sentences when the offenses arose out of separate criminal episodes. 317 Or at 302-07. In *Bucholz*, this court reviewed the pertinent text (*former* OAR 253-04-006(2) now OAR 213-004-0006(2)), context, and legislative history and held that the sentencing guidelines require reconstitution of criminal history when the offenses arose out of separate criminal episodes. 317 Or at 312-19. Those interpretations were, and are, correct for the reasons that this court identified in its decisions. *See also* Commentary, Oregon Criminal Justice Council, OREGON SENTENCING GUIDELINES IMPLEMENTATION MANUAL 114 (1989) (stating rationale for shift-to-I rule that assumes that offenses arose from separate criminal episodes);[2] Or Laws 1993, ch 692, § 1 (adopting amendment to

[2] The commentary to the shift-to-I rule—which *Miller* quoted in a footnote but did not discuss (317 Or at 306 n 3)—provides additional support for the holding. That commentary explains that the rationale for requiring a shift to column I for a consecutive sentence is that the offender's criminal history will be accurately reflected by the presumptive sentence for the primary offense. That necessarily assumes that the offense arose from the same criminal episode. If the earlier-sentenced offense arose from a separate criminal episode, then reconstitution of criminal history is required and the presumptive sentence for the earlier-sentenced offense may well not accurately reflect criminal history for the offense that subsequently is receiving the consecutive sentence.

criminal-history rule further illustrating intent for reconstitution); *State v. Allen*, 151 Or App 281, 289-91, 948 P2d 745 (1997) (discussing amendment).

But whether those decisions were correct ultimately is not the issue. Because of the importance of *stare decisis*, this court will not overrule prior decisions "simply because the personal policy preferences of the members of the court may be different from those of [its] predecessors who decided the earlier case." *Mowry*, 350 Or at 698. Reconsideration of prior statutory interpretations is only appropriate when there is a principled basis to do so, which generally requires a showing either (1) that the prior court failed to apply the customary methodology; (2) that the legal or factual context has changed in a material way; or (3) that the decision is plainly wrong in light of a previously unraised, unconsidered argument. *Id*. at 698-700.

Defendant claims reconsideration is appropriate, because this court failed to apply "the usual framework for decision and to adequately analyze the controlling issue." *Mowry*, 350 Or at 698. That simply is not so. Although the decisions were rendered a few months before *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), the court in *Miller* and *Bucholz* nonetheless engaged in a comprehensive *PGE*-style examination of legislative intent—in each case, beginning with the text and then proceeding to context and legislative history. *Miller*, 317 Or at 302-07; *Bucholz*, 317 Or at 312-19.

In *Bucholz*, the court made that methodology explicit, explaining that the criminal-history rule was enacted by statute, that consequently the "normal procedure for interpreting statutes applies" and that the court "look[s] first to text and then to context" and that "[l]egislative intent is to be derived in that manner, if possible." 317 Or at 314. These cases thus are wholly unlike cases in which a complete failure to apply the customary methodology justifies reconsideration. *Contrast State v. Sandoval*, 342 Or 506, 513, 156 P3d 60 (2007) (reconsidering decision that completely failed to analyze legislature's intent).[3]

Amicus also suggests that the *Miller* court's discussion of the shift-to-I rule was *dictum* and is not authoritative. (Amicus Br 16 n 9). That suggestion is mistaken. In *Miller*, after the court noted that the shift-to-I claim was unpreserved, the court explained that the shift-to-I rule is in the same section as the 200-percent rule, and that the court had just held that that entire section "was applicable only to consecutive sentences arising from a single criminal

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[3] *PGE* did not fashion new rules for determining legislative intent but rather simply synthesized and codified existing principles. *Cf. State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009) (refining methodology). Accordingly, this court has flatly rejected the proposition that cases predating *PGE* should be discounted on that basis or that the absence of a *PGE*-style examination of legislative intent would deprive a prior statutory interpretation of its ordinary affect. *Mastriano v. Board of Parole*, 342 Or 684, 159 P3d 1151 (2007). At any rate, as discussed in the text, the court in *Miller* and *Bucholz did* engage in a *PGE*-like examination of legislative intent.

episode." 317 Or at 306. Hence, the "shift to I" claim would have lacked merit "even if the asserted error had been preserved at trial." *Id*. The court thus rejected the claim on its merits. The court correctly concluded that its 200-percent rule analysis—which was heavily grounded in the statutory context—necessarily applied with equal force to the shift-to-I rule. In short, the shift-to-I discussion was not *dictum* and, even if it was, *Miller*'s authoritative interpretation of the 200–percent rule requires the same result for the shift-to-I rule, as defendant acknowledges (Resp Br 34 n 31). (*See also supra* Reply Br 10 n 2, discussing how shift-to-I rule commentary further supports holding).

Finally, defendant contends that a principled basis exists to overrule *Miller* and *Bucholz*, because, in his view—they were plainly wrong. *See Multnomah County v. Sliker*, 10 Or 65, 66 (1881) (court will adhere to precedent unless plainly wrong); *Aguilar v. Washington County*, 201 Or App 640, 648, 120 P3d 514 (2005), *rev den*, 340 Or 34 (2006) (applying standard). Defendant rehashes the same arguments and points that this court considered and rejected in its decisions in *Miller* and *Bucholz*. *See also* Oregon Briefs 5312, *State v. Miller*, State's Pet Rev 23-26, 31 (asserting that the Court of Appeals erred by relying on economy principle to construe guidelines in a manner to minimize incarceration). Indeed, defendant and *amicus'* challenge to *Miller* primarily consists of laying out the various points and counterpoints

identified in *Miller* and then arguing that the court just reached the wrong conclusion. (Resp Br 19-33; Amicus Br 13-27).

Yet the arguments that this court considered and rejected in *Miller* and *Bucholz* are not a "principled basis" to overturn those decisions. *See Mowry*, 350 Or at 700 (recognizing principle). The issue is not whether this court would reach the same result were it to conduct "a full-blown reexamination of the prior construction." *Engweiler v. Persson*, 354 Or 549, 561 n 7, 316 P3d 264 (2013). The issue is whether defendant has identified a new, previously unraised, unconsidered argument that is so significant that it provides a principled basis to overturn *Miller* and *Bucholz* despite the presumption that those prior interpretations were correct and should not be disturbed. *See id*. at 561-63 (applying that standard). Defendant (and *amicus*) has failed to make that showing. Accordingly, this court should reject his bid to overturn *Miller* and *Bucholz*.

2. Defendant fails to carry his burden of demonstrating that pertinent policy considerations favor overruling the decisions.

"[A] decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided." *Planned Parenthood v. Casey*, 505 US 833, 864, 112 S Ct. 2791, 120 L Ed 674 (1992) (plurality opinion). Otherwise, the doctrine of *stare decisis* would be meaningless. Consequently, a party seeking to overturn existing precedent bears the

additional burden of demonstrating that *stare decisis* related policy considerations support doing so. *Ciancanelli*, 339 Or at 291. Defendant fails to establish that overturning *Miller* and *Bucholz* would be appropriate given the pertinent policy considerations, including reliance on the precedent and the fact that the legislature has not modified the rules in a way that would justify reconsideration and has rejected attempts to legislatively overturn those decisions.

In the wake of the adoption of the sentencing guidelines, this court issued its decisions in *Miller* and *Bucholz* in 1993 construing widely-applicable consecutive-sentencing and criminal-history rules that are cornerstones of our sentencing scheme to this day. In the over two decades that has passed since then, there has been a tremendous amount of reliance on those decisions by the state, by the defense, and by the courts. Thousands of defendants have been sentenced (many based on plea bargains) based on the understanding that it did not matter whether offenses arising from separate criminal episodes were sentenced together or separately. Had the rules been otherwise, the prosecution would have been able to avoid the application of the "shift to I" rule and enhanced criminal history by prosecuting, or at least sentencing, the cases separately and would have done so in a large number of cases.

The lengthy passage of time and substantial reliance on *Miller* and *Bucholz* weigh heavily against overruling those decisions. Doing so would invalidate an extremely large number of sentences—sentences for the most serious offenders—even though the prosecution could have avoided that result by subjecting defendants to a series of separate prosecutions or at least separate sentencing proceedings. Overturning *Miller* and *Bucholz* would trigger yet another onslaught of plain-error claims in this state's appellate courts.

Moreover, the legislature has not modified the holdings of *Miller* or *Bucholz* in a way that would justify reconsideration of those decisions. The legislature has amended OAR 213-012-0020 on two occasions: dangerous-offender sentences and separate-victims crimes, but has left the holding announced in *Miller* undisturbed. Nor has the legislative overruled *Bucholz*. To the contrary, the legislature has adopted language that further cements that holding, Or Laws 1993, ch 692, § 1, and has replicated the reconstitution-of-criminal-history requirement in other provisions. *See e.g.*, ORS 137.717(5)(a) (repeat-property-offender-law provision authorizing reconstitution of criminal history for crimes that arise out of separate criminal episodes).

Furthermore, and significantly, the legislature has *rejected* attempts to legislatively overrule the *Miller* and *Bucholz* decisions. The legislature has rejected attempts to abolish the separate-criminal-exception for the 200-percent

and shift-to-I rules (in the manner that defendant proposes here) and to narrow the scope of the reconstitution-of-criminal-history rule. *See e.g.*, Senate Bill 252 (2009) (bill introduced but died in committee after hearing).

In addition, if this court overruled *Miller* and *Bucholz*, the resulting rules would not make sense and would unnecessarily confuse the law. *See Ciancanelli*, 339 Or at 291 (party seeking to overturn precedent must establish that "overturning the rule will not unduly cloud or complicate the law"). The sentencing guidelines would authorize radically different sentences based on the happenstance of whether the offenses were sentenced together or in different proceedings. That anomaly would lead to attempts by the prosecution and the defense to intentionally manipulate the result one way or the other—either the prosecution seeking to subject a defendant to a series of separate prosecutions or at least separate sentencing proceedings or the defense seeking to combine prosecutions or at least sentencing proceedings. The resulting rules would be unprincipled and inefficient and would lead to widely disparate treatment. This court should not take the extraordinary step of overruling *Miller* and *Bucholz* at this late date.

CONCLUSION

This court should proceed to decide the issues that this court granted review to decide, which were whether the federal constitutional jury-trial right

extends to the application of the shift-to-I and reconstitution-of-criminal-history determinations. This court should decline defendant's request to reconsider this court's holdings in *Miller* and *Bucholz*. Defendant's arguments are not properly before this court and, even if they were, defendant fails to carry his heavy burden of demonstrating that that longstanding precedent could and should be overruled. For the reasons that the state advances in its opening brief, this court should hold that the Sixth Amendment does not attach to either the shift-to-I or the reconstitution-of-criminal-history determination and—with that correction—affirm the Court of Appeals' decision and the trial court's judgment.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on January 6, 2015, I directed the original Reply Brief of Petitioner on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Jesse Wm. Barton, attorney for appellant, and Peter Gartlan and Kyle Krohn, attorney for Amicus Curiae, 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 3,972 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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