



February 25, 2021

Rep. Janelle Bynum, Chair, House Committee on the Judiciary  
Rep. Karin Power, Vice Chair, House Committee on the Judiciary  
Rep. Ron Noble, Vice Chair, House Committee on the Judiciary  
Members, House Committee on the Judiciary

RE: House Bill 2002

Dear Chair Bynum, Vice Chair Power, Vice Chair Noble, and members of the House Committee on the Judiciary:

On behalf of the Office of Public Defense Services (OPDS), thank you for the opportunity to provide testimony on House Bill 2002. At OPDS, we believe that every Oregonian accused of crime deserves access to a justice system best situated to reach a fair outcome. Thus, we seek to provide context within which committee members consider the mandatory sentencing provisions of this bill.

First, we emphasize the disparate impact mandatory minimum sentencing has had on Black, Indigenous, and communities of color. Second, we seek to correct a legal error in a recent report asserting that broad judicial discretion exists across the existing Measure 11 framework.

As a general matter, mandatory minimum sentencing is one of the most problematic structural flaws in our criminal legal system. It turns criminal case resolution over to the sole discretion of the district attorney — the same person who reviewed the allegations, determined which criminal charges to file, and sought a conviction. It applies a one-size-fits-all approach to sentencing that does not consider the individual circumstances that drove the alleged behavior of the individual accused of crime. Further, as persons with lived experience will describe during testimony, mandatory minimum sentencing fuels racial disparities. Because low-income, Black and brown Oregonians are more likely to be arrested and face criminal charges, these inequities are starkly clear for Oregon's public defense providers who serve these clients.

Given the importance of this issue to the Oregon Legislature, it's critical that committee members have a complete understanding of existing law when



considering how to address the problems associated with mandatory minimum sentencing.

A recent report published by the Oregon District Attorney's Association (ODAA), titled "Understanding Measure 11 and Proposed Changes," submitted to this committee for the legislative record, contains an inaccuracy that, given the weight of the policy considerations before you, warrants correction in the legislative record of this bill.

On page 1 of the report, the ODAA asserts:

"Measure 11 sentences allow for judicial discretion. Under current Oregon law, judges may reduce any Measure 11 sentence if they determine that justice requires it or certain circumstances are present."

On page 2 of the report, the ODAA asserts:

"Measure 11 sentences are not truly 'mandatory.' Judges often have the power and ability to use their discretion to impose a lesser sentence provided they make particular findings in open court."

In so stating, the ODAA cites to *State v. Rodriguez/Buck*, 347 Or 46, 217 P3d 659 (2009), an Oregon Supreme Court case addressing how courts review mandatory sentences under the Oregon Constitution. To state that trial court judges have blanket judicial discretion under Measure 11 is not accurate. The case the report cites, *Rodriguez/Buck*, says as much:

"Under [Measure 11], the trial court has no discretion to impose a lesser sentence based on the specific facts of the case, harm to the victim, or characteristics of the defendant. A trial court, however, like this court, has an obligation to consider a claim that a particular sentence is unconstitutional." *Id.* at 52.

There are two issues to untangle here: (1) the limited instances in which courts may depart from Measure 11; and (2) the application of a legal, not discretionary, question of whether a sentence would be unconstitutional.

A judge must apply the mandatory minimum sentence if someone is convicted of a Measure 11 offense, unless the elements of the limited provisions in ORS 137.712 are satisfied. Those provisions apply to a narrow set of Measure 11 crimes and particular factual circumstances in which a judge, applying factors provided in ORS 137.712(1)(b), finds that a substantial and compelling reason exists for departing from a mandatory sentence. ORS

137.712 gives the sentencing court limited discretion to depart from a narrow set of Measure 11 offenses if it finds substantial and compelling reasons to justify a deviation. *State v. Akin*, 125 Or App 351, n 2, 865 P2d 461 (1994). The takeaway is that limited judicial discretion exists for only a subset of Measure 11 offenses.

With regard to all other Measure 11 offenses, no judicial discretion exists. Rather, judges may be required to answer a legal question if a sentence may be unconstitutionally harsh. A criminal sentence violates constitutional principles when it is cruel and unusual under Article I, section 16, of the Oregon Constitution, which requires that “all penalties shall be proportioned to the offense.” The test to determine whether that condition is present is whether the sentence “*shock[s] the moral sense* of all reasonable men as to what is right and proper under the circumstances.” *Rodriguez/Buck*, 347 Or 57 (emphasis added). This legal finding of unconstitutionality is an extremely high bar, and application of a legal standard is not the same as application of judicial discretion.

Whether an outcome is unconstitutional is a question of law, not judicial discretion. *State v. Padilla*, 277 Or App 440, 442, 371 P3d 1242 (2016) (“We review a trial court’s decision under Article I, section 16, for legal error[.]”). Under a discretionary standard, judges may choose an outcome “within the range of legally permissible outcomes.” *Olson & Olson*, 218 Or App 1, 15, 178 P3d 272 (2008). A discretionary standard gives judges far more leeway to determine an appropriate outcome, and upon review, appellate courts give trial courts great deference in determining whether that discretion was abused. *Olson*, 218 Or App at 16 (describing “the measure of deference” to which a trial court’s “discretionary decisions are entitled on appeal”).

By contrast, when reviewing whether a sentence is unconstitutional, a trial court judge may only decide whether it *is* or is *not* constitutional by applying factors that are then subject to review by appellate court for error. This is application of the law, not a judge’s discretion.

To summarize the state of a judge’s discretion under Measure 11, unless the offense at issue is one of the few listed in ORS 137.712, where a judge has limited discretion to apply legal factors and make a determination regarding whether a downward departure is warranted, the judge must apply the mandatory sentence in Measure 11. In cases where imposition of a Measure 11 sentence would be unconstitutional, a judge must determine as much by application of a purely *legal* standard, not application of judicial discretion.



Practically speaking, the circumstances under which a Measure 11 sentence would rise to the very high standard of “shocking the moral senses” is the rare exception, not a commonly applied rule.

We appreciate the opportunity to provide this information as you consider these proposed changes to Oregon’s mandatory sentencing scheme. Should committee members have further questions concerning the concepts discussed herein, we would be happy to help.

Thank you for your time,

Bridget Budbill

Legislative Director, Office of Public Defense Services

Cell: 503-779-7329

Email: [bridget.budbill@opds.state.or.us](mailto:bridget.budbill@opds.state.or.us)