John S. Foote, District Attorney for Clackamas County

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September 16, 2019

Senator Floyd Prozanski
Oregon State Capitol
900 Court St NE, S-331
Salem, OR, 97301
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RE: Records Request and Legislative Hearing on HB 3078 Legal Challenge

The Honorable Senator Floyd Prozanski,

This letter is respectfully submitted in response to both your recent public records requests to our office and in anticipation of your hearing scheduled for this Wednesday, September 18, 2019. It is my understanding you are attempting to put certain things on the record concerning recent civil litigation, John S. Foote, Mary Elledge and Deborah Mapes-Stice vs. State of Oregon. The record would not be complete on this subject without a response from me as one of the plaintiffs in the litigation including my role in writing, passing and defending Measure 57 over the past 11 years. This letter is an attempt to do just that.

First, once again for the record, we must object to any attempt by the Oregon legislature to exercise control or oversight over local county finances. In this case, it was only county money that was spent to help defray the costs of the appeal of the civil litigation. No state money was used in that effort. Therefore, we are compelled to object to any interjection into that local process by the Oregon legislature. We believe this sets a dangerous precedent.

Second, no public money of any kind was used to support the civil litigation until the Oregon Department of Justice refused to recognize their professional conflict of interest in both representing the Oregon legislature and our office with directly opposing positions on the constitutionality of HB 3078. Their refusal to recognize their ethical conflict of interest and appoint independent counsel to represent District Attorneys on appeal necessitated our subsequent actions. The Oregon Department of Justice, as represented by Solicitor General Ben Gutman, informed our office that they would "concede error" in our criminal case appeals and not allow DA's Offices to file or argue our own appeals. In effect, his decision silenced not only the voices of his clients (District Attorneys), it also repudiated the decisions by Oregon Circuit Court Judges around the state who had ruled that HB 3078 was passed

unconstitutionally. If we wanted our voice heard in the appellate process, we were forced to continue the civil case on appeal so attorney Tom Christ could advocate our position.

Please find enclosed the written legal opinion by the three-judge panel in Clackamas County at the conclusion of our hearing on the constitutionality of HB 3078 in 2018. This was an exhaustive hearing with many parties represented including; Oregon's Solicitor General Ben Gutman from the Department of Justice representing the Oregon Legislature, attorney Tom Christ representing the three civil plaintiffs, Deputy District Attorney Michael Salvas representing the Clackamas County District Attorney's Office in the thirteen criminal cases that were heard that day and defense attorneys representing the individual criminal defendants in those thirteen criminal cases. In addition, the court permitted the presence with legal counsel of a private non-profit, Partnership for Safety and Justice. Since the issues were similar, both the criminal cases and my civil cases were heard in one hearing and the three circuit judge panel decided the issues for our jurisdiction. I encourage you to read what the judges had to say about how HB 3078 was passed by the legislature. In addition, there were eleven other circuit jurisdictions around the state that also ruled that HB 3078 was passed unconstitutionally.

Finally, as I am sure you remember, in 2007-08 you and I worked very closely together to develop an alternative to the pending ballot measure 61 written by Kevin Mannix. His measure (61) had already gathered enough signatures to be put on the ballot and polling indicated it was very likely to pass. Ballot Measure 61 as proposed by Mr. Mannix contained mandatory minimum sentences for felony property crimes and was written because of the public's concern about very high property crime rates in Oregon that had persisted for years. Together you and I developed what became Ballot Measure 57, which provided stronger sentences for serious repeat felony property offenders but without any mandatory minimums for those crimes. We built Measure 57 on the foundation of the Repeat Property Offender state that was passed by the legislature in 1994. I worked with you on Measure 57 because I was opposed to mandatory minimum sentences for felony property crimes.

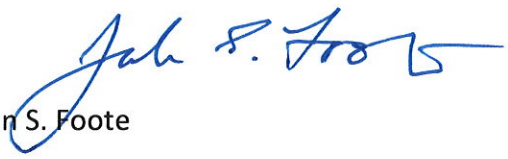
As you also know, Oregon voters by a wide margin passed Measure 57. It defeated Measure 61. As a result, today we do not have mandatory minimum sentences in Oregon for felony property crimes. However, as a sentencing ballot passed by the people, the Oregon constitution clearly states in Article IV §33 that any changes to it had be done with a 2/3 majority of both houses of the legislature. In 2017, after all the public hearings on HB 3078 (which did in fact reduce sentences under measure 57 for identify theft) the legislature decided to pass HB 3078 with less than a 2/3 vote in both legislative chambers. There was no public discussion or debate on the issue before it passed into law.

I believe decisions passed by Oregon voters deserve the highest level of respect and deference by the Oregon legislature. Of course, there can be times when popular prejudice (such as racial animus in our country's history) should be reversed by wiser elected leadership. However, barring such a fundamental moral issue, the Oregon legislature should honor and follow the will of the people they serve. Any decision to do otherwise should be fully and public debated so the voters themselves can be informed and able to draw their own conclusions. That simply did

not happen with the passage of HB 3078. The decision to overturn the vote of the people was reached behind closed doors. The original purpose of our civil lawsuit was to bring a light to shine on that decision. In that sense, despite our disagreements with the final decision of the Oregon Supreme Court, our civil lawsuit was successful.

Thank you for considering my remarks.

Very truly yours,



John S. Foote

Enclosures: General Judgment
Opinion

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF CLACKAMAS

JOHN S. FOOTE, MARY ELLEDGE, and DEBORAH MAPES-STICE, Plaintiffs, v. STATE OF OREGON, Defendant.	Case No. 17CV49853 **General Judgment**

Having granted plaintiffs' motion for judgment on the pleadings, the court now enters judgment in favor of plaintiffs and against defendant, as follows:

(1) the court declares that the amendments to ORS 137.717 by sections 5 and 6 of House Bill 3078 (2017) were enacted in violation of Article IV, section 33, of the Oregon Constitution and, therefore, those amendments are invalid and have no force or effect; and

(2) plaintiffs may petition for costs, disbursements, and attorney fees as provided in ORCP 68.

Signed: 2/20/2018 01:19 PM

Hon. Susie L. Norby

Circuit Court Judge Susie L. Norby

Signed: 2/22/2018 08:29 AM

Circuit Court Judge Thomas J. Rastetter

Submitted by:

Thomas M. Christ, 834064
For Plaintiffs

Signed: 2/20/2018 01:11 PM

Michael C. Wetzel

Circuit Court Judge Michael C. Wetzel

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF CLACKAMAS

JOHN S. FOOTE, MARY ELLEDGE, and DEBORAH MAPES-STICE,
Plaintiffs,

v.

STATE OF OREGON,
Defendant.

17CV49853

DECISION ISSUED FEBRUARY 14, 2018.

Argued and submitted on February 5, 2018.

Before a Special Panel of three judges, on behalf of the Clackamas County Bench: Judge Michael C. Wetzel, Judge Thomas Rastetter, and Judge Susie L. Norby.

Thomas M. Christ of Cosgrave, Vergeer Kester LLP argued the cause for plaintiffs. With him on the briefs was John A. Bennett of Bullivant, Houser Bailey, PC. Plaintiff John Foote appeared at oral argument for the plaintiffs.

Sadie Forzley of the Oregon Department of Justice, argued the cause for defendant. With her was Benjamin Gutman of the Oregon Department of Justice. With her on the briefs was Sarah KayWeston of the Oregon Department of Justice.

The Partnership for Safety and Justice (PSJ) requested intervenor status, and was allowed to argue as an Amicus Curiae pending a decision on its Motion to Intervene. Margaret S. Olney of Bennett, Hartman, Morris & Kaplan LLP argued for the proposed intervenor.

All parties stipulated on the record to allow a decision by this Special Panel on all questions.

Measure 57 ("BM57"). Oregonians resoundingly approved BM57, and it went into effect on January 1, 2009. Before that, in 1994, the voters approved an initiative to amend the Oregon Constitution to include Article IV §33, which specifically protects voter-approved criminal sentences from legislative interference, by insuring that the legislature cannot reduce such sentences by anything less than a 2/3rd majority vote.[2]

Shortly after BM57's effective date, the legislature enacted HB 3508 by a 2/3rd majority vote, and it went into effect on July 1, 2009. That law suspended parts of BM57 between February 15, 2010 and January 1, 2012, to counterbalance the fiscal impact of BM57 increased sentences on reduced budget resources suffered during the Great Recession. That temporary partial suspension ended on January 1, 2012 as promised, and BM57 sentences have remained the law ever since.

Eight years after the BM57 voter referendum culminated in HB 3508, however, a simple majority of the legislature voted to enact HB 3078 (2017), which contains provisions reducing the BM57 mandatory minimum sentences for Identity Theft and Theft in the First Degree. When vetting HB 3078 in June 2017, the Speaker of the House obtained an advisory letter from the Office of Legislative Counsel, which opined that Article IV §33 of the Oregon Constitution no longer restricts the legislature to a 2/3rd majority vote on BM57 sentence reductions, because the adoption of HB 3508 in 2009 eliminated that constitutional limitation. The letter suggested that the implementation lull built into HB 3508 fundamentally changed BM57 by transforming the constitutionally protected, voter-approved BM57 sentences into legislatively enacted sentences susceptible to reduction by a simple majority vote.[3]

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[2] This constitutional amendment initiative was passed contemporaneously with Ballot Measure 11.

[3] The advisory letter hedges from the outset: "**Although our conclusion is not free from all doubt**, we conclude that a court would find a two-thirds vote is not required."

probable and not hypothetical or speculative, based on present facts that are not contingent events; and (c) a direct nexus between the rights to be vindicated and the relief requested.

We recognize that the Supreme Court's opinion in Gortmaker v. Seaton, 252 Or 440 (1969), definitively precludes standing by a District Attorney under the circumstances of this case. However, John Foote, Mary Elledge and Deborah Mapes-Stice also filed the Complaint as voters who approved BM57, and who have a right to meaningful protection of BM57 sentences by governmental obedience to the requirement in Article IV §33 of Oregon's Constitution. In other words, all three voter-plaintiffs credibly suggest that they are presently being deprived of two benefits: (1) safety that they are entitled to under BM57, and (2) enhanced protection from governmental process that they are entitled to under Article IV §33 of Oregon's Constitution.[5]

These claimed deprivations are precisely the kinds of rights, status or harm that can give a party standing to request a declaratory judgment, as the Court of Appeals clarified in deParrie v. State of Oregon, 133 Or App 613, *rev. den.* 321 Or 560 (1995). The court later succinctly summarized its standing conclusion in deParrie this way:

> In *deParrie v. State of Oregon* [*citation omitted*], the plaintiffs challenged a statute that would have invalidated a local ordinance for which the plaintiffs "have had the opportunity to vote." We held that their status as residents of a city whose ordinance would be nullified by the challenged statute gave them standing to challenge the statute. *Id.* Their standing to challenge the statute, in other words, did not stem from the fact that they were deprived of the right to vote; it stemmed from their status as persons who would be deprived of the "benefits" of an altogether different enactment. Morgan v. Sisters School District #6, 241 Or App 483, ftnt. 2, (2011).

As explained in more detail below, the circumstances that gave rise to this claim involve risk that governmental agencies could act unconstitutionally, and evade review, without interested voters

[5] Although a District Attorney does not have standing under Gortmaker, we note that voter John Foote's elected office likely heightens his exposure to the breadth of ramifications of loss of BM57 sentence protection, and may also enhance his sensitivity to the loss of constitutional process protection. Elected officials are people, after all.

exists." *League of Oregon Cities v. State*, 334 Or 645, 652 (2002) (emphasis in original).

DOJ argues that the second prong of the discretionary jurisdiction analysis applies because a host of criminal sentencings across the state will provide forums for more appropriate remedies. It argues that the first prong applies because this court's decision will not bind other courts when made, so it will not terminate the controversy.

Those arguments are inconsistent with one another. A trial court decision never binds other courts, unless and until it is adopted by appellate authorities. But, a definitive appellate decision cannot emerge until a trial court ruling triggers an appeal. Moreover, the parties' shared certainty that various courts will continue to struggle with the impact of this controversy in individual criminal cases indefinitely *underscores* the need for a single streamlined declaratory judgment action to efficiently terminate this controversy, albeit only after it is reviewed on appeal. This is particularly true when the DOJ has proclaimed its intention to neutralize this issue in any criminal appeal.

This case is distinguished from those cited by the DOJ by one pivotal contextual element. That is, this case turns on Article IV §33 of the Oregon Constitution, a narrowly applicable voter protection provision, which gives members of a narrow class of voters (only those whose votes result in approval of a criminal sentencing mandate) the power to restrict legislative reduction of voter-approved criminal sentences by a simple majority vote of the legislature. In general, voters do not gain special constitutional status by casting a ballot. But in this finite context, they do. A declaratory judgment action can protect the interest of voters who achieve this unique constitutional status and wish to defend it, but they cannot become parties to a criminal case.

The even more unusual contextual element here is that government agencies are at odds with one another on the question presented. Some agencies, however, have more control over

at best and duplicitous at worst. Such a conclusion would contradict the constitutional protections afforded to voters under Article IV §3 (voter reserved referendum powers) and Article IV §33. Further, it would erode the political accountability so essential to a democracy, as HB 3508 was clearly portrayed as a temporary suspension of BM57 sentences, not a revocation.[7] A court endorsement of such governmental maneuvers would justifiably weaken public confidence in the integrity of our elected officials' commitment to our Constitution and the rule of law.

We unanimously conclude that a 2/3rd majority vote of the legislature was required to enact the sentence reduction provisions of HB 3078. The legislative simple majority vote the law received failed to pierce the shield created by Article IV §33 of Oregon's Constitution. Consequently, the sentence reduction provisions of HB 3078 are unconstitutional, and BM57 sentences remain in effect.[8]

VI. CONCLUSION

For the reasons set forth in this opinion, we rule as follows:

1. Defendant's Motion to Dismiss is denied.
2. PSJ's Motion to Intervene is denied.
3. Defendant's Alternative Motion for Judgment on the Pleadings is denied.
4. Plaintiffs' Motion for Judgment on the Pleadings is granted.

IT IS SO ORDERED, this 14th day of February, 2018.

Hon. Susie L. Norby | Hon. Michael C. Wetzel | Hon Thomas Rastetter

[7] At the very least, if voters had known that HB 3508 could expose BM57 sentences to less rigorous legislative consensus in the future, they could have written letters to their senators and representatives to express their reactions and attempt to influence the legislative vote against that bill.

[8] All parties agreed that only the sentencing reduction provisions of HB 3078 are being challenged here. All other provisions of HB 3078 are presumed valid and enforceable, and are not affected by this court's rulings.

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF CLACKAMAS

STATE OF OREGON v. JOSE ALVAREZ GUERRERO	16CR81621 16CR47125
STATE OF OREGON v. JUAN ANDARES ABNAL PARRA	17CR19550
STATE OF OREGON v. ARIEL VALDES BATISTA	18CR00350 17CR40676
STATE OF OREGON v. JESSE KIRCHEN CLARK	17CR43632
STATE OF OREGON v. NATHAN CALLOWAY DAVIS	17CR28069
STATE OF OREGON v. ERIC EDWARD DICKSON	17CR33200
STATE OF OREGON v. NATHAN MICHAEL ERWIN	17CR79656
STATE OF OREGON v. TIANNA FORBES	16CR38687 17EX00638
STATE OF OREGON v. JAMES GLENN GREEN	17CR79640
STATE OF OREGON v. DORIAN LYNN KAPPLER	17CR21301
STATE OF OREGON v. MIRANDA JANE LARSEN	17CR70702
STATE OF OREGON v. ESMERALDA LOPEZ-ROMERO	CR0601023
STATE OF OREGON v. ALYSSA ELIZABETH PATTON	17CR50533
STATE OF OREGON v. ALLEN JOHN ROBERSON	17CR58346
STATE OF OREGON v. MATTHEW PHILIP ROWLEY	17CR76135
STATE OF OREGON v. RONALD EMERY RUFFIN	17CR72087
STATE OF OREGON v. JUAN CARLOS SANCHEZ, JR.	16CR47771
STATE OF OREGON v. RICHARD ALAN SASSE	17CR09334
STATE OF OREGON v. MICHAEL CARL SMITH	16CR65467
STATE OF OREGON v. TIMOTHY CLIFFORD SPARGUR	17CR63571
STATE OF OREGON v. CHRISTOPHER PATRICK SPENCER	17CR06060
STATE OF OREGON v. ATIYEH MIESHA TOWNSEND	17CR22078
STATE OF OREGON v. MELODY MICHELLE WHITE	17CR43913 16CR30278

DECISION ISSUED FEBRUARY 14, 2018.

Argued and submitted on February 5, 2018.

Before a Special Panel of three judges, on behalf of the Clackamas County Bench: Judge Michael C. Wetzel, Judge Thomas Rastetter, and Judge Susie L. Norby.

Michael R. Salvas, Clackamas County DA's Office argued the cause for plaintiff.

Bruce Tarbox, Clackamas County Criminal Defense attorney and representative of the Clackamas Indigent Defense Corporation consortium, argued the cause for all defendants.

The Partnership for Safety and Justice (PSJ) appeared as an Amicus Curiae. Margaret S. Olney of Bennett, Hartman, Morris & Kaplan LLP argued for the PSJ.

The American Civil Liberties Union (ACLU) appeared as an Amicus Curiae. Gregory A. Chaimov of Davis Wright Tremaine LLP argued for the ACLU.

All parties listed above, and the following attorneys, stipulated on the record to allow decision by this Special Panel:

Drew Baumchen, Rhett Bernstein, Troy Sandlin, Brian Schmonsees and Shannon Kmetic.

Shortly after BM57's effective date, the legislature enacted HB 3508 by a 2/3rd majority vote, and it went into effect on July 1, 2009. That law suspended parts of BM57 between February 15, 2010 and January 1, 2012, to counterbalance the fiscal impact of BM57 increased sentences on reduced budget resources suffered during the Great Recession. That temporary partial suspension ended on January 1, 2012 as promised, and BM57 sentences have remained the law ever since.

Eight years after the BM57 voter referendum culminated in HB 3508, however, a simple majority of the legislature voted to enact HB 3078 (2017), which contains provisions reducing the BM57 mandatory minimum sentences for Identity Theft and Theft in the First Degree. When vetting HB 3078 in June 2017, the Speaker of the House obtained an advisory letter from the Office of Legislative Counsel, which opined that Article IV §33 of the Oregon Constitution no longer restricts the legislature to a 2/3rd majority vote on BM57 sentence reductions, because the adoption of HB 3508 in 2009 eliminated that constitutional limitation. The letter suggested that the implementation lull built into HB 3508 fundamentally changed BM57 by transforming the constitutionally protected, voter-approved BM57 sentences into legislatively enacted sentences susceptible to reduction by a simple majority vote.[2]

HB 3078 was effective on August 8, 2017.

II. CONSTITUTIONALITY ANALYSIS

Article IV §33 of the Oregon Constitution created a perpetual shield to protect voter-approved criminal sentences from legislative reduction. Only a 2/3rd majority legislative enactment that plainly nullifies the voter mandate can pierce that constitutional shield and

[2] The advisory letter hedges from the outset: "**Although our conclusion is not free from all doubt**, we conclude that a court would find a two-thirds vote is not required."

public confidence in the integrity of our elected officials' commitment to our Constitution and the rule of law.

We unanimously conclude that a 2/3rd majority vote of the legislature was required to enact the sentence reduction provisions of HB 3078. The legislative simple majority vote the law received failed to pierce the shield created by Article IV §33 of Oregon's Constitution. Consequently, the sentence reduction provisions of HB 3078 are unconstitutional, and BM57 sentences remain in effect.[4]

III. CONCLUSION

We rule that the defendants shall be sentenced under BM57. These cases shall be returned to the regular docket for sentencing hearings consistent with this opinion.

IT IS SO ORDERED, this 14th day of February, 2018.

Hon. Susie L. Norby

Hon. Michael C. Wetzel

Hon. Thomas Rastetter

[4] All parties agreed that only the sentencing reduction provisions of HB 3078 are being challenged here. All other provisions of HB 3078 are presumed valid and enforceable, and are not affected by this court's rulings.