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Attorney for Mary Jones

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

STATE OF OREGON,

Plaintiff,

-VS-

MARY JONES,

Defendant

CASE No. 20-11-XXXX

MEMORANDUM OF LAW IN SUPPORT OF A NON-MEASURE 11 SENTENCE

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I. INTRODUCTION

This Memorandum sets forth the law applicable to the defense request that Mrs. Jones be spared a Measure 11 sentence on Counts One and Two. Further arguments regarding sentence will be made at the conclusion of the sentencing hearing, scheduled for February 2012, where the Court has agreed to receive additional evidence. The following mitigation materials, all previously provided to the State, accompany the Court's Copy of this Memorandum, and are tendered now as trustworthy and reliable evidence for the Court's sentencing determination, in order to expedite the defense case at the hearing:

These materials document that Mrs. Jones, 38, comes from a middle-class, crime-free family; that she had no substance abuse issues until sustaining injuries that caused chronic pain; and that she was the last person anyone who knew her would have ever suspected of committing robberies to feed a drug addiction. To evaluate her criminal culpability in arriving at a fair resolution, it is important to understand why this happened. The tendered mitigation materials provide the answer.

In brief, much fault lies with her pain management physician whose staff over-prescribed the powerful opiates, oxycodone and Oxycontin. According to Dr. Julien, whose report chronicles the errors made by Mrs. Jones's doctor, when she committed the robberies "[s]he had developed a huge dependence on oxycodone; far in excess of any reasonable use in pain management. Opioid dependency is a brain-related medical disorder that can be effectively treated." However, her "addiction was supported, unrecognized, and untreated" by her doctor. "She was incapable of recognizing it herself. Dependence is insidious to the user and permeates all facets of life, with the user oriented only to obtaining drug, regardless of the consequences." Dr. Julien concluded, "This whole episode was totally preventable with careful care by her prescribers."

Dr. Northway determined Mrs. Jones "does not appear to have an underlying antisocial personality disorder or evidence of criminological thinking. She presents as a very compassionate, caring individual . . . .

There are other important facts that should be considered in mitigation.

Mrs. Jones was very cooperative with police when apprehended, providing a complete confession, consenting to searches, and expressing remorse. She detoxed "cold turkey" at the Lane County Jail. After several weeks her family and friends raised bail, and she started residential treatment at Serenity Lane, including a pain management program where she learned ways of dealing with chronic pain without narcotics. She has successfully completed in-patient treatment, and is fully participating in the intensive 10-week outpatient program that should be completed at or near time of sentencing; that is followed by a 2-year recovery support program. All of her UA's have been clean

Mrs. Jones has strong family support, is dealing with her chronic pain through non-narcotic means, and is extremely motivated to make the necessary changes so that there will be zero risk of her getting in trouble with the law again. She continues to express remorse and prays for the opportunity to repay her debt to society here in the community, rather than being warehoused in prison for 70 months or longer.

II. A HISTORICAL OVERVIEW OF THE APPLICATION OF MEASURE 11 SENTENCES

In March 2011, the Criminal Justice Commission published a statistical analysis of the application of Measure 11 in Oregon, based on 15 years of data. Longitudinal Study of the Application of Measure 11 and Mandatory Minimums in Oregon (hereafter referenced as "The Study"), available on-line at www.ocjc.state.or.us, under "Current Topics" heading, link identified as "Measure 11 Analysis 2011" (last accessed 1/16/12)(copy included as Defendant's Exhibit 101, with Court's Copy of this Memorandum). The study tracked how cases indicted for Measure 11 sentences were prosecuted and sentenced, and "provides a comprehensive examination of the differences between Oregon counties, crime types and other factors in the disposition of M11 indicted cases." Id., *Executive Summary,* p. *vi*.

> The analyses of these dynamics show that M11 did not eliminate tough individual sentencing choices, rather it continued the transfer of discretion from judges to prosecutors which started when Sentencing Guidelines were passed by the legislature. . . . [Measure 11] furthered the power and discretion of prosecutors to control sentences through charging practices and plea bargaining process. This sentencing discretion is now controlled, to a large degree, by how the various prosecutors in the state choose to apply M11. Id.

The Study yielded statewide historical results showing a Measure 11 sentence was "only arrived at in the minority of cases where a prosecutor, not a judge, decided it was appropriate and necessary," finding that in 70 percent of the cases indicted on Measure 11 charges, prosecutors used that "leverage" to plea bargain for a non-Measure 11 conviction. Id., at *ix*. For example, prior to enactment of Measure 11, only 1 out of 8 convictions for crimes now classified as Measure 11 offenses was for an

attempt. After enactment of Measure 11, more than 1 in 3 such convictions was for an attempt. "This does not show an increase in the actual number of attempted crimes, it shows a change in how cases were disposed of by prosecutors." Id., at 31.

The Study found that Measure 11 was applied differently across counties. Id., at *x*. For example, the odds of a prison sentence for an offender in Lane County were about 60% higher than the odds for an offender in a rural county; in Multnomah and Washington Counties, the odds were more than double for those in a rural county. Id., at 23. Measure 11was applied differently across demographics. Id., at *x*. For example, with similarly indicted crimes, younger offenders and female offenders were less often convicted of a Measure 11 offense and less likely to receive a prison sentence. Id., at 24.

Measure 11 is also applied differently depending on the specific Measure 11 crime that is charged. For example, defendants whose most serious indicted offense was first-degree robbery were the least likely to be convicted of that offense, whereas defendants whose most serious indicted offense was second-degree robbery were most likely to be convicted of that offense, although they did not necessarily receive a 70-month Measure 11 sentence due to the opt-out provision in ORS 137.712. But even defendants indicted for Robbery II as the most serious offense, were only convicted of that crime in 37% of those cases statewide in 2008. Id., at 9-10 (the percentage of the 37% in 2008 who did not receive the M11, 70-month sentence is not stated).

The Study found that the odds of receiving a prison sentence (not necessarily a Measure 11 sentence) increased with the number of Measure 11 charges in the indictment, with the defendant's number of prior felony convictions, and with the defendant being convicted by jury trial versus plea, among other factors. Id., at 22-23. First time offenders were more often offered a non-Measure 11 plea agreement. Id., at 25.

The Study concluded:

> From 1995-2008, only 28 percent of offenders indicted for a M11 offense were convicted of the most serious offense for which a grand jury returned an indictment. In only 28 percent of the cases indicted did M11 accomplish the goal of assuring the judge imposed the sentence the chief petitioner (for Ballot M11) claimed was the minimum necessary for justice to society and the victim. M11 altered how the other 72 percent of cases were handled: it shifted control of the sentencing process from the judge to the prosecutor, but gave no guidance as to what sentence was appropriate. The critical decision became whether to seek conviction for the charge in the indictment that carried the mandatory minimum sentence. M11 left the decision about what sentence to seek in thousands of the most serious cases up to the individual district attorneys and their deputies, in Oregon's 36 counties. It provided no rules, guidelines, or law about how that decision should be reached. It did not list specific factors that should be weighed in determining whether or not the minimum sentence was required in a specific case. . . . It marginalized the role of the judge in the sentencing process. Id., at 41-42.

Additional data from The Study, specific to the application of Measure 11 to female offenders with no prior felony convictions, indicted for 2-4 counts of Robbery II, will be discussed below under the section of this Memorandum addressing the constitutional "as applied" challenge to Measure 11.

III. THE ORS 137.712 STATUTORY EXCEPTION TO MEASURE 11

ORS 137.712 authorizes the Court to impose a non-Measure 11 guidelines sentence on a defendant charged with certain Measure 11 crimes who meets certain criteria set forth in the statute. Subsection (1) provides:

> [T]he court may impose a sentence according to the rules of the Oregon Criminal Justice Commission that is less than the minimum sentence that otherwise may be required by ORS 137.700 or 137.707 if the court, on the record at sentencing, makes the findings set forth in subsection (2) of this section and finds that a substantial and compelling reason under the rules of the Oregon Criminal Justice Commission justifies the lesser sentence.

The statute was first enacted in 1997, two years after the passage of Measure 11. The subsection (2) exception for Robbery in the Second Degree is set forth in ORS 137.712(2)(d), and is met upon proof that:

> (A) That the victim did not suffer a significant physical injury;
>
> (B) That, if the defendant represented by words or conduct that the defendant was armed with a dangerous weapon, the representation did not reasonably put the victim in fear of imminent significant physical injury;
>
> (C) That, if the defendant represented by words or conduct that the defendant was armed with a deadly weapon, the representation did not reasonably put the victim in fear of imminent physical injury; and
>
> (D) That the defendant does not have a previous conviction for a crime listed in subsection (4) of this section.

(Emphasis supplied to the single criteria expected to be at issue in Mrs. Jones's case).

The no "previous conviction" requirement includes the crimes of Robbery in the Third Degree; Robbery in the Second Degree; and any attempt to commit Robbery in the Second Degree. As applied to Mrs. Jones's case, that requirement precludes

application of the statutory exception to Measure 11 to Count 2, Robbery in the Second Degree. See, *State v. Isbell*, 178 Or.App. 523 (2001)(defendant eligible for guidelines sentence on first count of second-degree robbery, but ineligible on second and third counts committed in separate criminal episode).

A. Did Mrs. Jones's representations in Count One reasonably put the victim in fear of imminent significant physical injury?

The defense has found no case law interpreting ORS 137.712(2)(d)(B), concerning whether a defendant's representation of being armed reasonably put the victim in fear of imminent significant physical injury. Subsection (6)(c) defines "significant physical injury" to mean "a physical injury that:

> (A) Creates a risk of death that is not a remote risk;
> (B) Causes a serious and temporary disfigurement;
> (C) Causes a protracted disfigurement; or
> (D) Causes a prolonged impairment of health or the function of any bodily organ."

This definition is very similar to that of "serious physical injury," defined in ORS 161.015(8), as "physical injury which creates a substantial risk of death or which causes serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ." Thus, it may be instructive to look at other statutes that prohibit threats of serious physical injury that reasonably put the victim in fear.

The requirement that a victim <u>reasonably</u> be in fear of imminent serious physical injury is an implicit element of the crime of Menacing, ORS 163.190, which requires an objective rather than subjective assessment of the fear caused by a defendant: "A person commits the crime of menacing if by word or conduct the person intentionally

attempts to place another person in fear of imminent serious physical injury. ORS 163.190(1). The Court of Appeals has opined that the operative issue under ORS 163.190(1) is whether "a reasonable person [in the victim's position] would have been placed in the requisite state of fear." *State v. Anderson,* 56 Or.App. 12, 15 (1982). See also*, State v. Moyle,* 299 Or. 691, 704 (1985))("[T]he danger that the message will be followed by action must be found from the evidence to be objectively probable from the perspective of the factfinder, not only subjectively from the perspective of the addressee.")(interpreting crime of harassment by threats to inflict serious physical injury, ORS 166.065).

While in no way minimizing the subjective fear the victim pharmacy clerk in Count 1 experienced from her interactions with Mrs. Jones, the defense will present additional facts at the sentencing hearing from which this Court may find that imminent significant physical injury was not objectively probable, and thus that fear of such injury was not "reasonable" as required by law.

Qualifying for the statutory exception is a matter for the trial court to determine at sentencing by a preponderance of the evidence. ORS 137.712(2); see also, *State v. Crescencio-Paz,* 196 Or.App. 655 (2004)(The ORS 137.712 criteria are not elements the State must plead and prove at trial).

B. Assuming Count 1 meets the prerequisites for a non-M11 sentence, is there "a substantial and compelling reason" for the Court to impose a lesser sentence?

Neither any statute nor the sentencing guidelines define "substantial and compelling," but a departure must further the purposes of the guidelines. *State v. Wilson*, 111 Or. App. 147, 150 (1992). The primary objectives of sentencing "are to punish each offender appropriately, and to insure the security of the people in person and property, within the limits of correctional resources." OAR 213-002-0001(1). The guidelines are intended to forward those objectives by defining presumptive punishments, "subject to judicial discretion to deviate for substantial and compelling reasons," OAR 213-002-0001(2).

In developing the guideline grid blocks, the Guidelines Board considered the Oregon parole matrix, the guidelines systems of Minnesota and Washington, and the federal sentencing guidelines. See Oregon Sentencing Guidelines Implementation Manual, Commentary, Chapter 2, page 12, available online at www.oregon.gov/CJC/SG.shtml (last accessed 1/15/12). By expressly providing for departure sentences, the guidelines recognize that the two factors that go into the presumptive sentence—the general seriousness of the offense and the specific offender's criminal history—may not always capture either the seriousness of a particular offense or all the relevant aspects of an offender's character. *See* Oregon Criminal Justice Council, *Oregon Sentencing Guidelines Implementation Manual* 123–25 (1989)(so stating).

The guidelines provide a nonexclusive list of mitigating and aggravating factors that will justify a departure sentence. OAR 213-008-0002. The enumerated mitigating factors that may apply in Mrs. Jones's case include diminished capacity, cooperation with the State in the investigation and prosecution, having lived conviction free within the community for a significant period, and amenability to treatment available in the community that will reduce the likelihood of recidivism.

By expressly making the list of departure factors nonexclusive, "the guidelines recognize that case-specific factors may arise in individual cases that bear on either the seriousness of the offense or the character of the offender that the Criminal Justice Commission did not anticipate." *State v. Speedis*, 350 Or. 424, 428 (2011). Evidence will be presented at the sentencing hearing to support additional grounds for a downward departure, including post-arrest rehabilitation, and the contributing role of third parties in the commission of Mrs. Jones's crimes: But for Mrs. Jones's involuntary addiction to prescription narcotics that was "supported, unrecognized, and untreated" by her pain management physician's staff, she would still be a law-abiding citizen and free member of our community.

Once the statutory exception to Measure 11 applies, the determination of sentence reverts to the rules of the Oregon Sentencing Guidelines. ORS 137.712(1)(b) authorizes the Court to further depart from the presumptive guideline sentence—here a range of 34-36 months imprisonment—to a probationary sentence.

> (b) In order to make a dispositional departure under this section, the court must make the following additional findings on the record:
> (A) There exists a substantial and compelling reason not relied upon in paragraph (a) of this subsection;

(B) A sentence of probation will be more effective than a prison term in reducing the risk of offender recidivism; and
(C) A sentence of probation will better serve to protect society.

ORS 137.712(1)(b).

C. What procedural rules govern the Court's determination of sentence?

The Oregon Evidence Code has limited application to sentencing proceedings. OEC Rule 101(4)(d). However, the Court must follow three procedural statutes in imposing a departure sentence. The first is ORS 137.080(1), which provides:

> After a plea or verdict of guilty, or after a verdict against the defendant on a plea of former conviction or acquittal, in a case where discretion is conferred upon the court as to the extent of the punishment to be inflicted, the court, upon the suggestion of either party that there are circumstances which may be properly considered in aggravation or mitigation of the punishment, may, in its discretion, hear the same summarily at a specified time and upon such notice to the adverse party as it may direct.

The second procedural statute is ORS 137.090, stating:

> (1) In determining aggravation or mitigation, the court shall consider:
> (a) Any evidence received during the proceeding;
> (b) The presentence report, where one is available; and
> (c) Any other evidence relevant to aggravation or mitigation that the court finds trustworthy and reliable.

The requirement that evidence be "trustworthy and reliable" appears to be a codification of the constitutional confrontation clause requirements that hearsay meet those standards. The next procedural statute is ORS 137.100:

> If the defendant consents thereto, the defendant may be examined as a witness in relation to the circumstances which are alleged to justify aggravation or mitigation of the punishment; but if the defendant gives testimony at the request of the defendant, then the defendant must submit to be examined generally by the adverse party.

Regardless of whether a defendant testifies at sentencing, she retains the right of allocution, and "should be able to state any reason why he or she feels sentence should not be pronounced and . . . be given an opportunity to make any relevant personal comments to the court. This includes, but is not limited to, statements of remorse, apology, chagrin, or plans and hopes for the future." *DeAngelo v. Schiedler*, 306 Or. 91, 95-96 (1988).

Aggravated departure factors generally must be submitted to a jury using the reasonable-doubt standard, see, e.g., *State v. Speedis, supra,* and are not foreseen to be an issue in Mrs. Jones's case.

D. What is the statistical application of ORS 137.712 statewide?

Second-degree robbery was included in the original enactment of the statutory exception to Measure 11, in 1997. According to The Study, analyzing statewide data from 2005-2009, showed "Robbery II and Assault II are the most common crimes receiving an 'opt out' sentence, accounting for 86 percent (of the total opt-outs) over the five year period." For that time period, 48% of Robbery II convictions statewide were sentenced under the statutory exception. The Study, p. 38. Note that this does not reflect the number of cases where defendants were indicted for Robbery II, but convicted of a lesser offense. Of the 48% sentenced under ORS 137.712, only 65% received prison sentences, with the average length of stay 30.8 months. Many received a non-prison sentence through a downward dispositional departure. Id.

According to The Study:

> Offenders who were previously being convicted of attempts were now being convicted more often of the M11 offense but receiving a guidelines

> sentence that was similar to the previous plea down sentence. So the prison impact of the law on offenders indicted where the most serious offense was a second degree M11 crime in [ORS 137.712] seems to be negligible. Id., at p. 39.

IV. THE "UNCONSTITUTIONAL AS APPLIED" CHALLENGE TO MEASURE 11

In *State v. Rodriguez/Buck*, the Oregon Supreme Court held that trial judges could properly find a Measure 11 sentence was unconstitutional as applied to a defendant, under Article 1, Section 16 of the Oregon Constitution. 347 Or. 46 (2009)(*en banc*). The standard is whether the Measure 11 sentence is so disproportionate to the offense as to "shock the moral sense" of reasonable people as to what is right under the circumstances. 347 Or at 57-58. This standard is intended to "find a penalty to be disproportionately severe for a particular offense only in rare circumstances." Id., at 58 (citation omitted). Nonetheless, the Court "has an independent duty to consider whether the specific sentences imposed pursuant to that statute are consistent with the constitutional proportionality requirement of Article I, section 16." Id., at 62.

Indeed, the Court's authority to hold a Measure 11 sentence unconstitutional if, based on the facts of the particular case, the sentence violated Article I, section 16, is "essential if the judicial branch were to retain its appropriate constitutional role." Id. *Rodriguez/Buck* set forth a series of factors for the Court to consider in applying this otherwise nebulous "shock the moral sense" standard.

A. Consideration of the "Penalty" and "Offense".

Determining the constitutionality of a Measure 11 sentence as applied in a particular case "requires a weighing of the 'gravity of the offense' against the 'severity of the penalty'." 347 Or at 59. In *Rodriguez/Buck*, the Court elaborated on the way in which the trial judge should examine the severity of the penalty, the gravity of the offense, and the relationship between the two. "As to the relevant penalty, in contemporary criminal justice systems, including Oregon's, the primary determinant of the severity of a penalty is the amount of time that the wrongdoer must spend in prison or jail, if convicted of that offense." Id., at 60.

The defense submits that the denial of any good time credit and denial of participation in prison rehabilitative programs that provide for early release, see ORS 137.700(1), makes Measure 11 sentences more severe than simply "the amount of time that the wrongdoer must spend in prison," and should be considered by this Court in determining the "severity of the penalty." By denying good time and rehabilitative program participation, Measure 11 sentences serve only to punish and incapacitate the offender for the maximum period of time.

The Supreme Court held that determining the "gravity of the offense" called for a broader, fact-specific inquiry, finding "that a defendant's 'offense,' for purposes of Article I, section 16, is the specific defendant's particular conduct toward the victim that constituted the crime, as well as the general definition of the crime in the statute." 347 Or. at 62.

In considering the general definition of the crime, the Supreme Court found relevant the "wide swath of conduct" included in the crime of First-degree Sex Abuse, along with the pre-Measure 11 penalty for that crime. 347 Or. at 68-70. Robbery in the Second Degree applies to both attempts and completed acts of theft, by use of force or threat or force, when the defendant represents, by word or conduct, that he is armed with what purports to be a dangerous or deadly weapon; or is aided by another person actually present. ORS 164.405. Thus, Robbery II likewise applies to a wide array of conduct: It can involve bodily harm, i.e., the "use of force," or merely the "threat of force"; it can be committed with an unloaded or inoperable firearm, or by simply stating "I have a gun" when none exists; it can be committed in broad daylight at a drive-in window of a commercial establishment simply by making the requisite threat and leaving, without accomplishing the theft; it can be committed by shoving a victim against a wall on a dark street and threatening to rape her and cut her with a knife while taking her purse.

Robbery in the Second Degree is a Class B felony, punishable by a maximum of 10 years imprisonment. Prior to the adoption of Measure 11, the presumptive sentence was for Robbery II, then classified as a category 6 offense, was probation for a first offender, with a maximum range of 25-30 months prison for an offender ranked "A" on the Criminal History scale. An offender with a single prior person felony faced a presumptive 10-12 month prison sentence. See 1993 Sentencing Guidelines, available online at www.ocjc.state.or.us/CJC/SG.shtml (last accessed 1/16/12). This classification continued after the adoption of Measure 11, until 1997, the year in

which the statutory exception to Measure 11 was enacted. See 1995 Sentencing Guidelines, available online, id. In 1997, Robbery II was reclassified as a category 9 offense (exactly the same as Robbery I), and the presumptive guideline sentence increased to 34 months for a first offender, to a maximum of 72 months for an offender ranked "A" on the Criminal History scale. See 1997 Sentencing Guidelines, available online, Id. This dramatic, post-Measure 11 increase in the penalty for Robbery II is similar to the increase in the penalty for Sex Abuse I, discussed in *Rodriguez/Buck*. 347 Or at 68.

In *Rodriguez/Buck*, the limited extent and comparatively minimal nature of the defendant's sexual conduct was highly relevant. See 347 Or at 70-71. Here, Mrs. Jones's conduct in Count 2 was likewise comparatively minimal and limited in duration to a few seconds:

> During daylight hours on September 7, 2011, Defendant Mary Jones robbed the Bi-Mart store located at 1680 W. 18th Avenue, Eugene, Lane County, Oregon. Mrs. Jones walked up to the outside counter and threatened the male clerk at the Bi-Mart pharmacy window by telling him she had a gun and wanted him to get the items on a note demanding Oxycontin. He stepped to the right out of view of the window and announced to rest of staff they were being robbed. A few seconds later he and another clerk went back to the window to make contact with Mrs. Jones, but she had left. Stipulated Facts, p. 2.

B. Considering the Harm Caused and Offender Culpability

Once having identified the "penalty" (here, 70 months imprisonment with no early release or programs), and the "offense," the Court must then consider whether the penalty is "proportioned" to the offense. 347 Or. at 62. The inquiry into proportionality involves "[c]omparisons . . . made in light of the harm caused or

threatened to the victim or society, and the culpability of the offender." Id., at 63. The Court went on to explain:

> In considering a defendant's claim that a penalty is constitutionally disproportionate as applied to that defendant, then, a court may consider, among other things, the specific circumstances and facts of the defendant's conduct that come within the statutory definition of the offense, as well as other case-specific factors, such as characteristics of the defendant and the victim, the harm to the victim, and the relationship between the defendant and the victim. Id., at 62.

In *State v. Wilson*, 243 Or.App. 464 (2011), the Court of Appeals held that "characteristics of the defendant" include a defendant's diminished capacity to conform his conduct to the requirements of the law. In so holding, the Court rejected the State's more narrow view that only characteristics of the defendant relevant to the relationship between the defendant and victim could be considered.

In the case at bar, the defense will offer additional evidence at the sentencing hearing bearing on Mrs. Jones's diminished capacity and culpability. Clearly, the role of her pain management doctor and staff in helping create and support her opiate addiction must be assessed in measuring her culpability. The State may offer additional evidence as to the harm she caused to the victim in Count 2, or to society in general.

C. Considering the Penalties for Related Offenses

In determining whether the penalty is proportioned to the offense, the Court may also consider the sentences provided for other crimes in the same statutory scheme, or otherwise "related crimes." 347 Or at 64-65. Robbery III is a Category 6 crime, with a guideline range of probation for first offenders to a maximum of 30

months prison. Robbery III, ORS 164.395, is committed by the use or threat of force in committing or attempting to commit theft. Thus, a defendant who assaults a victim, but does not cause serious physical injury, to obtain the victim's property is spared a Measure 11 sentence, whereas Mrs. Jones, by attempting to obtain drugs by stating she had a gun, causing no physical injury to the victim, faces a Measure 11 sentence. Indeed, Mrs. Jones's conduct in Count 2 also meets the statutory definition of Coercion, a Class C felony and Category 6 crime. See ORS 163.275. But for her demand for drugs—made and abandoned seconds later—her conduct could be viewed no worse than Menacing, a Class A misdemeanor, ORS 163.190, or Harassment, a Class B misdemeanor, ORS 166.065.

The Court may consider the historical fact of the presumptive guideline sentence for the crime that applied before Measure 11 was enacted. 347 Or. at 73. That factor was discussed above.

The defense submits the Court may also consider how often the Measure 11 penalty has been imposed on offenders convicted of the same Measure 11 offense as the defendant, as well as how often the Measure 11 penalty has been imposed on offenders indicted for same Measure 11 offense as the defendant, in determining proportionality. This information, now available through The Study, was not available when *Rodriguez/Buck* was decided. The Study revealed that all defendants indicted for Robbery II as the most serious offense, were only convicted of that crime in 37% of those cases statewide in 2008. Id., at 9-10. The percentage of the 37% who did not receive the M11, 70-month sentence in 2008 is not stated. However, 48% of Robbery

II convictions statewide between 2005 and 2009 were sentenced under the statutory exception. Id., at 38. Thus, one could extrapolate that roughly half of the 37% who were convicted of Robbery II received a Measure 11 sentence. In other words, for all defendants indicted for Robbery II as the most serious offense, less than 20 percent were sentenced to the mandatory 70 months prison term.

Based on information obtained from Michael Wilson, an economist with the Statistical Analysis section of the Criminal Justice Commission, this Court may consider the penalty imposed on similarly situated defendants. Mr. Wilson extracted data for all cases between 1995 and mid-2010 where the offender was a female with no prior Oregon felony convictions, the most serious indicted offense was Robbery II, and there were 2 to 4 Measure 11 counts in the indictment. The findings are set forth in his Declaration, defense Exhibit 101-A, attached to this Memorandum. Based on counsel's calculations, there were 100 such defendants over the 15-year period. Only 42 (42% of similarly situated defendants) received a prison sentence of any type; only 10 (10% of similarly situated defendants) received a sentence greater than 60 months, the presumption being those were Measure 11 sentences rather than long prison sentences under ORS 137.712. For the 32 (32% of similarly situated defendants) who received lesser prison sentences, the average length of sentence was about 20 months imprisonment.

When 90% of similarly situated defendants in Oregon have not received a Measure 11 sentence, the question becomes whether Mrs. Jones's offense in Count 2

is proportionate to the 10% who did; i.e., is her criminal conduct among the most egregious ways of committing Robbery II?

D. Considering the Risk of Recidivism

The third factor identified by *Rodriguez/Buck* to consider in determining proportionality is the offender's criminal history as it bears on recidivism. 347 Or. at 65-67. The Supreme Court observed that substantial penalties for recidivists are constitutionally permissible, because the State may "rid itself of depravity when its efforts to reform have failed." Id., at 77. Both defendants in *Rodriguez/Buck* had no prior convictions or arrests. Mrs. Jones has no convictions of any type, making her criminal history virtually indistinguishable from those defendants.

The defense submits that the Court may consider additional facts that are relevant to the risk of recidivism. Those include the offender's post-arrest rehabilitative efforts and amenability to rehabilitation, as well as age, substance abuse history, employment history, marital history, and family support. Based on the mitigation materials submitted to the Court, and other evidence that will be offered at the hearing, Mrs. Jones presents virtually no risk of recidivism. A 70-month Measure 11 sentence is disproportionate when it will do no more than warehouse a wife and stepmother with no prior convictions, who did little more than make a threat of being armed before walking away, while suffering from diminished capacity, but now is well on her way to recovery.

Only one reported case has dealt with an "as applied" challenge to a second-degree robbery conviction, *State v. Johnson*, 244 Or.App. 574 (2011). There, the

defendant appealed his 70-month Measure 11 sentence. He argued that he was 17 at the time, had no criminal history, and suffered from an undiagnosed mental illness. 244 Or. App. at 583. He was indicted on two counts of robbery in the first degree, but found guilty of robbery in the second degree with a firearm, a Class B felony. Id., at 578. The Court of Appeals found no error in the trial court's finding that Measure 11 was constitutional as applied, explaining:

> Here, defendant walked into a store wearing a ski mask and holding a gun. Defendant pointed the gun at the employee and told her to put the money in the bag. The employee testified at trial that she was afraid for her safety. We conclude that, in weighing the "gravity" of the offense under its statutory definition and defendant's conduct in committing robbery in the second degree, a reasonable person's conscience would not be shocked by the 70–month penalty. Id., at 584.

Johnson has little bearing on Mrs. Jones's case, because her offense conduct did not involve a firearm, much less pointing a firearm at anyone; nor did it involve her ever entering the store to confront a clerk. There was also no evidence offered in *Johnson* that the defendant acted under a "diminished capacity" in committing the offense, or had a very low risk of recidivism; nor does the opinion reveal that Johnson presented any of the other evidence, legal arguments, or statistical analysis submitted on behalf of Mrs. Jones.

CONCLUSION

For the reasons aforesaid, and such other grounds and authorities as may be offered by way of supplemental memoranda or orally at the sentencing hearing, the defense requests this Court find that Mrs. Jones qualifies for the statutory exception to Measure 11, ORS 137.712, as to Count 1, and that Measure 11 is unconstitutional as applied to Count 2, in violation of Article 1, Section 16 of the Oregon Constitution; and that the Court impose a fair and just non-Measure 11 sentence as to both Counts.

RESPECTFULLY SUBMITTED this 20th day of January, 2012.

TERRI WOOD, OSB 88332
ATTORNEY FOR DEFENDANT