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9  
10 IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR BENTON COUNTY

11 STATE OF OREGON,  
12 Plaintiff,

13 -VS-

14 CHRISTOPHER XX,  
15 Defendant

CASE No. DV-09-

MOTION TO REQUIRE JURY FINDINGS  
ON WHETHER MEASURE 11 SENTENCE  
IS PROPORTIONATE TO GRAVITY OF  
DEFENDANT'S CONDUCT  
(Oral Argument Requested)

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17 COMES NOW the Defendant and hereby moves the Court to require the jury to  
18 make findings beyond a reasonable doubt as to whether the Measure 11 minimum  
19 mandatory sentence of 70 months imprisonment is proportionate to the gravity of his  
20 conduct on the charge of Second-degree Kidnap, pursuant to Article I, Sections 11  
21 and 16 of the Oregon Constitution. The defense proposes the following special jury  
22 instruction for that purpose:

23 "If you find the defendant guilty of kidnapping in the second-degree, you must  
24 then determine whether the minimum mandatory 70-month sentence of imprisonment  
25 for that crime is so harsh, in comparison to the defendant's conduct, as to shock the  
moral sense of reasonable people. In making this finding, you should consider the

1 specific circumstances and facts of the defendant's conduct that caused you to find  
2 him guilty of this charge, as well as the characteristics of the defendant and the  
3 victim, the harm to the victim, and the relationship between the defendant and the  
4 victim.”

5 This motion is made in good faith and not for the purpose of delay. It is  
6 supported by the points and authorities below and by such other grounds and  
7 authorities as may be offered at hearing on this motion.

8 Moved this 15<sup>th</sup> day of March 2010.

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TERRI WOOD OSB 88332  
Attorney for Defendant

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13 **POINTS & AUTHORITIES**

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15 1. Article I, Section 16 of the Oregon Constitution provides:

16 Excessive bail shall not be required, nor excessive fines  
17 imposed. Cruel and unusual punishments shall not be inflicted,  
18 but all penalties shall be proportioned to the offense. In all  
19 criminal cases whatever, the jury shall have the right to  
20 determine the law, and the facts under the direction of the  
21 Court as to the law, and the right of new trial, as in civil cases.  
(Emphasis supplied).

22 The Oregon Supreme Court discussed the underlined portion of Section 16 in *State v.*  
23 *Walton*, 53 Or. 557, 565 (1909): “The verdict of a jury in a criminal case necessarily  
24 includes both law and fact, and it is therefore within its power to determine the law as  
25 well as the facts . . . . The jury are required to find the law and the facts, ‘under the  
direction of the court, as to the law,’ and should receive and accept the law as given

1 by the court . . . .” The defense submits that whether a Measure 11 sentence applied  
2 to the circumstances of an individual case would shock the moral sense of reasonable  
3 people is a mixed question of law and fact, and therefore properly within the province  
4 of the jury to make findings, under the direction of the court as to the law, pursuant  
5 to the right to jury trial as guaranteed under Article 1, Section 11.  
6

7         2. In *State v. Rodriguez*, 347 Or 46 (2009)(*en banc*), the Court reiterated that  
8 Measure 11 sentences are subject to the proportionality requirement of Article I,  
9 Section 16, as applied to the facts of an individual case, and that the mandatory  
10 sentence could not be applied if it would “shock the moral sense’ of reasonable  
11 people.” The Court explained that constitutional proportionality requirement  
12 necessitates a comparison of the gravity of the offense and the harshness of the  
13 penalty, among other factors. The Court held that determining the “gravity of the  
14 offense” is a fact-specific inquiry:  
15

16                 We therefore conclude that a defendant's “offense,” for  
17 purposes of Article I, section 16, is the specific defendant's  
18 particular conduct toward the victim that constituted the  
19 crime, as well as the general definition of the crime in the  
20 statute. In considering a defendant's claim that a penalty is  
21 constitutionally disproportionate as applied to that  
22 defendant, then, a court may consider, among other things,  
23 the specific circumstances and facts of the defendant's  
24 conduct that come within the statutory definition of the  
25 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.

3. While the trial judge must ultimately decide the constitutional issue, which  
involves making other legal determinations, including a comparison of penalties

1 imposed for related crimes, and the defendant's criminal history, no law prohibits the  
2 Court from using the jury to make factual findings related to the imposition of an  
3 aggravated sentence. *See State v. Upton*, 339 Or 673 (2005)(holding that courts had  
4 inherent authority to submit sentencing guideline aggravating factors to jury to make  
5 predicate factual findings beyond a reasonable doubt); *State v. Burns*, 213 Or App 38,  
6 47 (2007)(the Sixth Amendment applies to determinations of *fact* that affect the  
7 defendant's sentence, but not to determinations of *law* about whether the facts  
8 justify departures from presumptive sentences).

9  
10 4. The defense asserts that, given the jury's right to decide mixed questions of  
11 law and fact, as guaranteed by Article 1, Section 11, Mr. DuBois has the constitutional  
12 right to such findings; furthermore, that the Court should give an appropriate jury  
13 instruction on this issue, even if it rejects the specific instruction proffered by the  
14 defense.  
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17 CERTIFICATE OF SERVICE

18 I hereby certify that I have made service of the foregoing MOTION FOR JURY TO  
19 MAKE FINDINGS, by depositing in the U.S. Mail at Eugene, Oregon, with postage paid, a  
20 full and exact copy thereof on March 15, 2010 addressed to the Benton County  
21 District Attorney Office, 120 NW 4<sup>th</sup> Street, Corvallis, Oregon, attorney for plaintiff.  
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Terri Wood, OSB 88332  
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## MEASURE 11 JURY FINDINGS

If you find the defendant guilty of kidnapping in the second-degree, you must then determine whether the minimum mandatory 70-month sentence of imprisonment for that crime is so harsh, in comparison to the defendant's conduct, as to shock the moral sense of reasonable people. In making this finding, you should consider the specific circumstances and facts of the defendant's conduct that caused you to find him guilty of this charge, as well as the characteristics of the defendant and the victim, the harm to the victim, and the relationship between the defendant and the victim.