IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Appellee,

v.

KENNETH MARION DUNHAM,
Appellant.

A178148, A178153, A178154, A178155

APPELLANT'S OPENING BRIEF AND EXCERPTS OF RECORD

Appeal from Orders of the Circuit Court for Washington County,
Honorable Oscar Garcia,
C083014CR, D082487V, C040376CR, D043244M

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STATEMENT OF THE CASE

I. Nature of the Proceeding and Relief Sought

Appellant Kenneth Marion Dunham seeks a reversal of the Washington County Circuit Court's orders denying his motion to waive fines and costs imposed in four separate criminal cases: case numbers C083014CR, D082487V, C040376CR, and D043244M.

II. Nature of Order Sought to Be Reviewed

Mr. Dunham seeks review of four identical orders filed in the above-mentioned cases denying his motion to waive fines and costs.

III. Statutory Basis for Appellate Jurisdiction

This Court has jurisdiction under ORS 19.205(5), which provides that "[a]n appeal may be taken from the circuit court in any special statutory proceeding under the same conditions, in the same manner and with like effect as from a judgment or order entered in an action, unless appeal is expressly prohibited by the law authorizing the special statutory proceeding." ORS 19.205(5).

Here, the appealed orders were rendered in special statutory proceedings conducted under ORS 161.665(5) and ORS 161.685(5). Under the first provision, a defendant ordered to pay costs who "is not in contumacious default in the payment of costs may at any time petition the court that sentenced the defendant for remission of the payment of costs or of any unpaid portion of costs."

ORS 161.665(5). Under the second, a defendant may petition the court to reduce or waive outstanding fines. ORS 161.685(5); *see also State v. Hart*, 299 Or 128, 141 & n 10, 699 P2d 1113 (1985) ("The defendant has a right to petition to have all or part of the [fines] order set aside [under] ORS 161.685(5).").

The orders below are properly appealable because they are separate from Mr. Dunham's criminal case. Although "a special statutory proceeding cannot be a part of but, instead, must be separate from, any other proceeding," the Oregon Supreme Court has cautioned that "separateness" must be defined "in functional terms, *i.e.*, in terms of whether a proceeding 'depends' on another for its existence and whether an appeal from one proceeding will disrupt the other proceeding." *State v. Branstetter*, 332 Or 389, 398, 29 P3d 1121 (2001). Thus, even if a statutory proceeding "formally depends on a criminal action for its existence," it is still sufficiently separate if it "does not arise out of the criminal action, resolve any controversy in the criminal action, or otherwise affect or depend on the substance of the criminal action." *Id.* at 398–99.

Those hallmarks of separateness exist here. Proceedings under ORS 161.665(5) and ORS 161.685(5) arise not from the criminal case but from a defendant's later-filed motion to waive or reduce debt. These proceedings do not involve any challenge to the underlying conviction or sentence. They are therefore

sufficiently separate and constitute appealable special statutory proceedings under ORS 19.205(5).

IV. Other Relevant Jurisdiction Information

None.

V. Questions Presented for Review

1. Whether the trial court erred in denying Mr. Dunham's motion to waive costs and fines because the amount of costs and fines imposed against him violates Article I, section 16, of the Oregon Constitution and the Excessive Fines Clause of the Eighth Amendment to the U.S. Constitution.

2. Whether the trial court abused its discretion under ORS 161.665(5) and ORS 161.685(5) in denying Mr. Dunham's motion to waive costs and fines.

SUMMARY OF ARGUMENT

Appellant Kenneth Dunham is a forty-seven-year-old Oregon resident. For years, Mr. Dunham struggled with severe addiction and mental illness, experienced homelessness, and struggled to maintain employment. During this time, he was charged with and convicted of various minor crimes. Now, Mr. Dunham—who has maintained sobriety since 2008, received mental health treatment, and lives happily with his wife and three young children—seeks to expunge his past convictions and start anew.

To qualify for expungement, however, Mr. Dunham must have "fully complied with and performed the sentence of the court." ORS 137.225(1)(a). And although Mr. Dunham has completed all other portions of his sentences, those sentences also include at least $3,019.26 in fines and costs imposed against him. But Mr. Dunham cannot pay off this debt. Because of a physical disability, Mr. Dunham cannot work as a mechanic, his prior trade, so his family survives off only public assistance and his wife's part-time wages, which are dwarfed by his family's expenses.

Fortunately, Oregon law permits defendants like Mr. Dunham to petition a court to waive this debt. And he did so: Using the statutory procedures outlined under ORS 161.665(5) and ORS 161.685(5), Mr. Dunham explained his difficult financial circumstances and asked the trial court to waive his debt. But the trial court summarily denied his motion from the bench, noting only that the fines came from "very old cases." ER 34.

The trial court's decision violates the prohibition on excessive fines in Article I, section 16, of the Oregon Constitution and the Eighth Amendment of the U.S. Constitution. It also contravenes the Oregon Legislature's intent to provide defendants with an avenue for relief from unpayable criminal fines and costs. This Court should therefore reverse the denial of Mr. Dunham's motion and direct the trial court to waive his outstanding criminal debt.

STATEMENT OF MATERIAL FACTS

I. Mr. Dunham's criminal history

From 2004 to 2008, Mr. Dunham struggled with severe addiction and undiagnosed post-traumatic stress disorder. During this time, Mr. Dunham was convicted of various minor crimes. In 2004, Mr. Dunham pleaded guilty to second-degree theft and third-degree robbery charges after he stole goods to support his drug addiction. ER 1, 3–4. Then, in 2008, Mr. Dunham pleaded guilty to possession of less than an ounce of marijuana. ER 6. And later that year, Mr. Dunham was charged with second-degree criminal mischief. ER 7. Unfortunately, Mr. Dunham was unaware of this last charge until 2017. ER 13. Arrested on an outstanding warrant in Montana, where he and his family were living, Mr. Dunham returned to Oregon and pleaded guilty in August 2017. ER 7.

Along with terms of probation, which have otherwise been completed, Mr. Dunham was sentenced to pay various fines and costs, financial obligations

that have accumulated to an overall court debt of at least $3,019.26.[1] *See* ER 10. At no time did a sentencing court consider Mr. Dunham's ability to pay.[2]

II. Mr. Dunham cannot pay his court debt

Mr. Dunham regrets this past period of his life and has accepted full responsibility for these crimes. Other than his court debt, he has completed all parts of his criminal sentences. And as he explained before the trial court, Mr. Dunham has maintained his sobriety and treatment program since 2008. ER 13. He now lives with his wife and three children, who are 11, 13, and 16 years old, and the family has finally found stable housing after spending three years together unhoused. ER 14.

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[1] Two points regarding Mr. Dunham's outstanding debt bear mention. First, the actual amount of Mr. Dunham's debt is unclear. Oregon's eCourt Case Information system does not tally the interest accruing on court debt, *see* ORS 82.010(2) (imposing a 9 percent rate of interest on outstanding judgments). Second, when Mr. Dunham's motion to waive fines and costs was filed in the trial court, his outstanding debt was at least $200 greater. *See* ER 10. This amount has since been reduced by $200 in accordance with a recent Chief Justice Order waiving certain fees. *See* CJO 21-043.

[2] Oregon law requires courts to consider a defendant's ability to pay before imposing fines and costs. *See* ORS 161.645 ("In determining whether to impose a fine and its amount, the court shall consider . . . [t]he financial resources of the defendant and the burden that payment of a fine will impose, with due regard to the other obligations of the defendant."); ORS 161.665 ("The court may not sentence a defendant to pay costs under this section unless the defendant is or may be able to pay them.").

But Mr. Dunham continues to be burdened by the fines and costs imposed against him. He has, at times, attempted to pay off this debt but has made little progress.[3] That is because, like many Oregonians, Mr. Dunham and his family already struggle to make ends meet. The family largely subsists off his wife's part-time salary from working at Dollar General, where she earns roughly $800 a month, depending on the hours she is called to work. ER 14. His family's expenses outstrip this income, even with help from Supplemental Security Income, Supplemental Nutrition Assistance Program benefits, and the Oregon Health Program. ER 14. Worse yet, Mr. Dunham suffers from three herniated discs, a physical disability that prevents him from working in his prior trade as a mechanic. ER 11. Jobs that Mr. Dunham can physically perform are unavailable to him because of his criminal history. ER 11. As a result, Mr. Dunham and his family are unable to financially cover their daily needs, let alone make further payments on his outstanding debt.

III. Mr. Dunham moves for relief in accordance with special statutory proceedings under ORS 161.665(5) and ORS 161.685(5)

Oregon law provides circuit courts with authority to waive court debt after conviction. Fines and costs are each governed by separate statutory provisions.

[3] Mr. Dunham made about $150 in payments in 2017 and 2018, before he became disabled. *See* ER 56.

For costs, which are covered by ORS 161.665, a defendant who cannot afford to pay outstanding costs "may at any time petition the court that sentenced the defendant for remission of the payment of costs or of any unpaid portion of costs" as long as the defendant "is not in contumacious default in the payment of costs." ORS 161.665(5). If the court finds that "payment of the amount due will impose manifest hardship on the defendant or the immediate family of the defendant, the court may enter a supplemental judgment that remits all or part of the amount" the defendant owes in costs. *Id.*

For fines,[4] which are covered by ORS 161.685, "the court may enter an order allowing the defendant additional time for payment, reducing the amount of the payment or installments due on the payment, or revoking the fine . . . in whole or in part" as long as "it appears to the satisfaction of the court that the default in the payment of a fine . . . is not contempt." ORS 161.685(5); *see also Hart*, 299 Or at 141 & n 10.

Together, ORS 161.665(5) and ORS 161.685(5) provide a statutory proceeding under which defendants may petition a circuit court for relief from financial sanctions, whether they be costs or fines.

Using these statutory provisions, on January 14, 2022, Mr. Dunham moved the Washington County Circuit Court to waive his outstanding court debt. ER 10.

[4] ORS 161.685(5) also applies to restitution, which is not at issue here.

In his motion, he explained his difficult financial circumstances and how his criminal history prevented him from finding work. ER 14–15. He also argued that the trial court should waive this debt because the large amount of financial penalties he faced violates the Excessive Fines Clauses of the Eighth Amendment to the U.S. Constitution and Article I, section 16, of the Oregon Constitution. ER 24–25.

IV. The trial court denies Mr. Dunham's motion

On February 18, 2022, the Honorable Oscar Garcia held a hearing on Mr. Dunham's motion to waive fines and costs. Mr. Dunham again explained his difficult financial circumstances and the barrier that his criminal history posed to rehabilitation. ER 29. The government objected to the motion, arguing that "these fines were appropriate sentences." ER 30.

At first, the court questioned whether it had "any authority anymore on this case," because "these fines were sent off to the Department of Revenue for collection many, many years ago." ER 30. After being reassured of its statutory authority, however, the court inquired further into the basis of the motion. *See* ER 32 ("So why should I do that?"). Mr. Dunham explained that, as a practical matter, he would "never be able to pay these fines off." ER 33. But the court rejected this argument, concluding that "these [were] very old cases" that, in the

court's view, "were just neglected" and "weren't paid for."[5] ER 34. According to the court, "part of the obligations in order to successfully complete a probation, for the record, is to . . . pay your fines and fees." ER 34. The court refused to hear further argument, *see* ER 34, and did not address Mr. Dunham's current financial situation or his claim that the outstanding fines violated Article I, section 16, or the federal Excessive Fines Clause.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

The trial court erred in denying Mr. Dunham's motion to waive fines and costs. Mr. Dunham's outstanding debt violates Article I, section 16, of the Oregon Constitution and the federal Excessive Fines Clause because the amount owed is grossly disproportional to the seriousness of his offenses and is likely to deprive him of his livelihood.

I. Preservation of Error

In his motion to waive fines and costs, Mr. Dunham argued specifically that the fines and costs imposed against him violated the Excessive Fines Clauses of the state and federal constitutions. ER 23–24.

[5] As noted above, this is untrue. Mr. Dunham has—albeit unsuccessfully—made efforts to chip away at his debt. *See supra* note 3.

II. Standard of Review

This Court has not yet addressed the appropriate standard of review for an appeal from special statutory proceedings under ORS 161.665(5) and ORS 161.685(5). Generally, however, this Court reviews a trial court's interpretation of constitutional and statutory provisions for errors of law. *State v. Rangel*, 328 Or 294, 298, 977 P2d 379 (1999).

III. Argument

Identically phrased, the Excessive Fines Clauses of the state and federal constitutions, protect against "excessive fines imposed." Or Const, Art I, § 16; *accord* US Const, Amend VIII. In so doing, the Clauses "limit[] the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *United States v. Bajakajian*, 524 US 321, 328, 118 S Ct 2028, 141 L Ed 2d 314 (1991) (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 US 257, 265, 109 S Ct 2909, 106 L Ed 2d 219 (1989)); *see also State v. Goodenow*, 251 Or App 139, 147, 282 P3d 8 (2012).

These constitutional provisions "trace[] [their] venerable lineage back to at least 1215, when Magna Carta guaranteed that '[a] Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenement.'" *Timbs v. Indiana*, 139 S Ct 682, 687, 203 L Ed 2d 11 (2019) (citation omitted). Put in modern terms, Magna

Carta required that monetary penalties "be proportioned to the wrong" and "not be so large as to deprive [an offender] of his livelihood." *Browning-Ferris, Inc.*, 492 US at 271.

As the Ninth Circuit has noted, despite the Clauses' ancient origins, the "right to be free from excessive governmental fines is not a relic relegated to the period of parchments and parliaments, but rather it remains a crucial bulwark against government abuse." *Pimentel v. City of Los Angeles*, 974 F3d 917, 925 (9th Cir 2020). Indeed, "[t]here is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence," given that "fines are a source of revenue." *Harmelin v. Michigan*, 501 US 957, 978 n 9, 111 S Ct 2680, 115 L Ed 2d 836 (1991) (opinion of Scalia, J.).

Here, the over $3,000 in fines and costs imposed against Mr. Dunham plainly violates the federal and Oregon Constitutions because he is indigent and lacks the ability to pay. In denying Mr. Dunham's motion, the trial court altogether failed to address this argument, even though it was specifically raised in Mr. Dunham's motion to waive costs and fines. ER 23–24; *see also* ER 34 (denying Mr. Dunham's motion solely on grounds that "these [were] very old cases"). Although the lower court failed to address it, this Court "may resolve the

issue on appeal" because "the record is sufficiently developed and permits only one conclusion." *State v. Hall*, 166 Or App 348, 359, 999 P2d 509 (2000).

A. The Excessive Fines Clauses apply to all $3,019.26 in financial sanctions, even if the penalties are not expressly labeled "fines"

In sentencing Mr. Dunham, the trial court imposed several financial sanctions beyond those labeled "fines." Although Oregon law does not expressly refer to these assorted fees and costs as "fines," the state and federal Excessive Fines Clauses apply to them.

Applying constitutional scrutiny to all of these penalties is critical because these penalties often dwarf the penalty that Oregon law actually calls a "fine." For example, in Mr. Dunham's 2004 robbery conviction (case number C040376CR), the only so-called "fine" imposed was $476. ER 51. As part of the sentence, however, the court also imposed a $107 unitary assessment, $390 in court-appointed attorney fees, a $22 jail assessment, and a $2 medical assessment. ER 51. And after this initial sentence, Mr. Dunham was assessed three more unspecified penalties of $50.00, $157.00, and $180.12. ER 44–45.[6] Even worse, Mr. Dunham's actual debt may be much higher, since Oregon court records do not

[6] From the eCourt Case Information register of actions, it appears that the $50 charge was assessed for placing Mr. Dunham on a payment plan, *see* ER 42 (entry for "Judgment – Payment Schedule Assessment" on June 1, 2004), and the $157 charge was imposed when his debt was referred to collections, *see* ER 44 (entry for "Recordation – Collection Referral Judgment" on January 17, 2006). There is no indication of why the $180.12 charge was imposed. *See* ER 45.

reflect interest accrued . *See supra* note 1; *see also* ORS 82.010(2). The accrual of interest and postsentence addition of fees means that, in Oregon, the total amount of debt can become unconstitutionally excessive later, even if the initial sentence would have been constitutionally permissible.

The U.S. Supreme Court has held that any monetary sanction should be considered a "fine" under the Excessive Fines Clause if it is at least partially punitive. No court has addressed whether a similar test would apply under Article I, section 16, of the Oregon Constitution, but given the shared historical origins of both the state and federal provisions, Article I, section 16, should be interpreted the same way. *See State v. Wheeler*, 343 Or 652, 665, 175 P3d 438 (2007) (noting that, like the federal Excessive Fines Clause, Oregon's Article I, section 16, "has origins in Magna Carta").

In *Austin v. United States*, 509 US 602, 113 S Ct 2801, 125 L Ed 2d 488 (1993), the U.S. Supreme Court held that, to constitute a fine, an economic sanction need only be partially punitive. *Id.* at 610. Applying that test, the Court concluded that civil forfeiture is a fine subject to the protections of the federal Excessive Fines Clause. *Id.* at 604. In so doing, the Court expressly rejected the government's argument that civil forfeiture was not a fine because it served other nonpunitive purposes, such as "protecting the community from the threat of continued drug dealing" or "compensat[ing] the Government for the expense of

law enforcement activity and for its expenditure on societal problems such as urban blight, drug addiction, and other health concerns resulting from the drug trade." *Id.* at 620. "[S]anctions frequently serve more than one purpose," the Court explained. *Id.* at 610. And "[a] . . . sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term." *Id.* at 621 (quoting *United States v. Halper*, 490 US 435, 448, 109 S Ct 1892, 104 L Ed 2d 487 (1989)). Applying *Austin*'s reasoning, this Court in *Goodenow* similarly concluded that "the Excessive Fines Clause applies to the *in personam* criminal forfeiture of the proceeds of crimes." *Goodenow*, 251 Or App at 152.

Although no Oregon court has yet applied the *Austin* test to costs like the ones imposed against Mr. Dunham, other courts have concluded that similar penalties should be considered "fines" that fall within the Excessive Fines Clause's protections. In *City of Seattle v. Long*, 198 Wash 2d 136, 493 P3d 94 (2021), for example, the Washington Supreme Court held that the federal Excessive Fines Clause applied to impoundment fees assessed against a defendant whose vehicle was towed for parking violations. *Id.* at 163, 493 P3d at 109. To be sure, the *Long* court acknowledged, "[t]he associated costs were intended to reimburse the city for towing and storage fees." *Id.* But because "the plain language" of the

impoundment statute "show[ed] that one purpose of the ordinance is to penalize violators," the court concluded that "[w]hile the costs may be remedial, they are also punitive," thereby triggering the Excessive Fines Clause's protections. *Id.*

Similarly, in *People v. Cowan*, 47 Cal App 5th 32, 260 Cal Rptr 3d 505 (2020), the California Court of Appeal rejected the state's argument that certain "court facilities and court operations assessments [were] nonpunitive." *Id.* at 45, 260 Cal Rptr 3d at 518. As the *Cowan* court recognized, the assessments were imposed "on every conviction for a criminal offense." *Id.* (quoting Cal Penal Code § 1465.8). "Because these assessments are 'conditioned on the commission of a crime,'" the court concluded, "they can only be explained as serving, in part, to punish." *Id.* (quoting *Dep't of Revenue v. Kurth Ranch*, 511 US 767, 781, 114 S Ct 1937, 128 L Ed 2d 767 (1994)).

In sum, because the financial penalties levied against Mr. Dunham should be "understood at least in part as punishment," *Austin*, 509 US at 610, they must be evaluated for excessiveness under the federal and state Excessive Fines Clauses.

B. The financial penalties imposed against Mr. Dunham are grossly disproportional to his crimes, violating the state and federal Excessive Fines Clauses

In *Goodenow*, this Court explained that "[i]n order to determine whether a [fine] violates the Excessive Fines Clause, a court must assess the gravity of the defendant's crime and the severity of the [fine] and compare the two." 251 Or App

at 152. *Goodenow* interpreted only the federal Constitution, *see id.* at 142 n 2, and no Oregon court has set forth the appropriate standard for Article I, section 16, of the Oregon Constitution, *cf. State v. Branstetter*, 181 Or App 57, 61, 45 P3d 137 (2002) (rejecting an Article I, section 16, argument when the defendant "offer[ed] no authority").

Still, given the Oregon Supreme Court's preference to "address[] state constitutional claims before federal ones," this Court should apply Article I, section 16, of the Oregon Constitution, which, unlike the Eighth Amendment, "expressly prohibits disproportionate punishments." *State v. Bartol*, 368 Or 598, 613, 621, 496 P3d 1013 (2021). Indeed, the Oregon Supreme Court has strongly indicated that Article I, section 16, is more protective than the Eighth Amendment, repeatedly applying the Oregon Constitution to invalidate sentences that likely would not have violated the federal analogue. *See, e.g.*, *id.* at 623–24 (invalidating death sentence for aggravated murder); *State v. Rodriguez*, 347 Or 46, 79, 217 P3d 659 (2009) (invalidating 75-month sentence for sexual abuse of a minor); *State v. Shumway*, 291 Or 153, 164, 630 P2d 796 (1981) (similar); *cf. Harmelin*, 501 US at 995 (upholding, under the Eighth Amendment, a life-without-parole sentence for possession of cocaine).

The upshot is that a punishment violates either the federal Excessive Fines Clause or Oregon's Article I, section 16, "[i]f the [penalty] is 'grossly

disproportional' to the gravity of the defendant's crime." *Goodenow*, 251 Or App at 152 (quoting *Bajakajian*, 524 US at 334). And applying Article I, section 16, this Court may hold a fine unconstitutional even if the same penalty would not violate the federal Excessive Fines Clause. *See Bartol*, 368 Or at 623–24.

Here, however, under both the federal and state Excessive Fines Clauses, there is no question that, when weighed against each other, the harsh effect of the $3,019.26 penalty imposed on Mr. Dunham is "grossly disproportional" to the seriousness of the offenses he committed over a decade ago. *Goodenow*, 251 Or App at 152.

Start with the penalty. In weighing the severity of the penalty, this Court has held that courts "must consider the amount of the [fine] and the effect of the [fine] on the defendant." *Id.* at 153. In other words, courts must consider whether the defendant is personally able to pay the fine in question. "Whether an otherwise proportional fine is excessive can depend on, for example, the financial resources available to a defendant, the other financial obligations of the defendant, and the effect of the fine on the defendant's ability to be self-sufficient." *Id.*

This individualized assessment makes sense. Fines are inherently regressive—that is, they "have a disproportionate, adverse impact on low-income people." Am. Bar Ass'n, *Ten Guidelines on Court Fines and Fees* 3 (2018), *available at*

https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/aba-ten-guidelines_.pdf (accessed Oct. 11, 2022). To measure the true effect of a fine, then, courts must consider a defendant's ability to pay. As the Indiana Supreme Court has explained, "to hold the opposite would generate a new fiction: that taking away the same piece of property from a billionaire and from someone who owns nothing else punishes each person equally." *State v. Timbs*, 134 NE 3d 12, 36 (Ind 2019).

Here, when measured against Mr. Dunham's financial circumstances, the $3,019.26 in fines and fees are unquestionably harsh. As Mr. Dunham explained before the trial court, he "lives with his wife and three children, ages 11, 13, and 16, and the family is finally housed after spending three years homeless together." ER 14. Mr. Dunham's family of five "survives on his wife's $800/month part time salary from Dollar General, $796/month SSI, and $464/month in Food Stamps." ER 14. This income—about $9,600 in earnings annually—falls far below the 2022 federal poverty level, which is $32,470 for a family of five, even with about $15,000 annually in public assistance. *See Federal Poverty Level (FPL)*, HealthCare.gov, https://www.healthcare.gov/glossary/federal-poverty-level-fpl/ (last accessed Oct. 11, 2022).

What's more, researchers have recognized that the federal poverty level is "simply too low" because it "does not adequately account for the real costs of

meeting basic needs." Annie Kucklick & Lisa Manzer, Worksystems, *The Self-Sufficiency Standard for Oregon 2021*, at 4 (2021), *available at* https://selfsufficiencystandard.org/wp-content/uploads/2021/11/OR2021_SSS.pdf (last accessed Oct. 11, 2022). After accounting for everyday expenses like "housing, child care, food, health care, transportation, miscellaneous items, and taxes," researchers calculate that a two-parent family with two children (one less than Mr. Dunham's family) in Douglas County, where Mr. Dunham's family lives, would require at least $65,832 per year to be fully self-sufficient. *Id.* at 4, 20. That conclusion is fully consistent with the lived experience of the Dunham family, whose "expenses . . . surpass the family's income at the end of each month," with Mr. Dunham's "medications at $170/month," along with "$567 in rent, [a] $65 phone bill, $600 in groceries, $300 for fuel and insurance, $108 for internet, $181 for electric, and $180 for storage," among other expenses. ER 14.

Mr. Dunham's difficult financial circumstances therefore compel the conclusion that the $3,019.26 in fines and fees imposed against him is an exceptionally harsh punishment.[7] In all likelihood, as Mr. Dunham noted before

[7] In fact, the penalty here would likely be difficult for a large swath of everyday Americans to pay. A recent report by the Federal Reserve found that over 30 percent of adults would be unable to immediately cover an unexpected $400 expense. Bd. Governors of the Fed. Reserve Sys., *Report on the Economic Well-Being of U.S. Households in 2021*, at 21 (2022), https://www.federalreserve.gov/publications/files/2021-report-economic-well-being-us-households-202205.pdf (last accessed Oct. 11, 2022).

the trial court, "he will *never* be able to pay these fines off," especially given that his debt continues to grow with the accruing interest. ER 33 (emphasis added); *see supra* note 1. And that, in turn, means that Mr. Dunham can *never* expunge his record, leaving him permanently in the shadow of his criminal history.

Nor does the gravity of Mr. Dunham's offenses justify this severe penalty. As *Goodenow* explained, in weighing the seriousness of the crime, courts should consider "the specific characteristics of the defendant's conduct." 251 Or App at 152. Those characteristics include "the actual harm risked and caused by the conduct, as well as any mitigating or aggravating circumstances, such as the defendant's motive and criminal history." *Id.*

Here, as noted above, Mr. Dunham committed his crimes at a very different stage of his life, during which he struggled with addiction and mental illness. *See* ER 12–13. Although Mr. Dunham takes responsibility for the harm that he caused, it bears mention that he was sentenced only to probation, not incarceration, for his crimes, thus indicating that sentencing courts did not consider his crimes particularly serious.[8] And for some his crimes, there can be no serious argument that the "gravity of his offense" exists at all. His marijuana possession is no longer a crime under Oregon law, *see* Ballot Measure 91 (2014), and Mr. Dunham's 2008

[8] Mr. Dunham did serve six months in jail after his probation was revoked, but that punishment was not part of his original sentence.

criminal mischief charge was so slight that the state did not seek to prosecute him for nearly a decade, *see* ER 54.

And, as noted above, much of the debt that Mr. Dunham owes—such as the fee imposed for being placed on a payment plan, the fee for debt referred to collections, and accrued interest—was imposed after sentencing. *See supra* Section III.A. Those penalties were triggered only by Mr. Dunham's inability to immediately pay his debt and thus bear no relationship to the crimes he committed. Professor Beth Colgan, a leading scholar on the federal Excessive Fines Clause, has aptly referred to these additional financial sanctions as "poverty penalties." Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L Rev 2, 7 (2018). As Professor Colgan explains, "[t]he comparative disproportionality of both immediate and postsentencing poverty penalties is readily apparent because they are triggered by a defendant's inability to pay rather than her culpability for the underlying offense." *Id.* at 55. Here, then, the extra fees and still-accruing interest imposed on Mr. Dunham further exacerbate the disproportionality between the severe penalty and underlying crimes.

In short, the gravity of Mr. Dunham's crimes is grossly outweighed by the severity of his fines. The fines imposed against him therefore violate Article I, section 16, and the federal Excessive Fines Clause.

C. The financial penalties imposed against Mr. Dunham violate the Excessive Fines Clauses' prohibition on depriving a defendant of his livelihood

Although *Goodenow* considered only the Excessive Fines Clause's prohibition on grossly disproportional fines, the Clause also prohibits any fine that deprives a defendant of the ability to pay for the necessities of life. The state and federal Excessive Fines Clauses stem from Magna Carta's principle that fines "not be so large as to deprive [an offender] of his livelihood." *Browning-Ferris*, 492 US at 271. As Professor Colgan has noted, Magna Carta recognized that this principle—that a fine should not financially ruin a defendant—"is a separate and distinct consideration from the proportionality between the harm caused and the penalty imposed." Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Calif L Rev 277, 321 (2014). "Magna Carta treated a fine that would impoverish a defendant as per se disproportionate," no matter how serious the offense. *Id.*

For the reasons already discussed, the prospect that paying these fines would deprive Mr. Dunham of his livelihood is not merely hypothetical. He and his family already struggle to make ends meet, and given their financial needs, it is unlikely that Mr. Dunham will ever be able to repay his court debt without substantial hardship to him and his family.

* * *

In sum, the $3,019.26 in fines and costs imposed against Mr. Dunham violates Article I, section 16, and the federal Excessive Fines Clause. The amount owed is grossly disproportional to the seriousness of his crimes and will likely deprive Mr. Dunham of his livelihood. This Court should therefore reverse the trial court's order denying Mr. Dunham's motion to waive fines and costs.

SECOND ASSIGNMENT OF ERROR

The trial court abused its discretion in denying Mr. Dunham's motion to waive fines and costs by failing to consider the appropriate factors outlined by ORS 161.665(5) and ORS 161.685(5).

I. Preservation of Error

Mr. Dunham preserved this argument by filing his motion to waive fines and costs, which the trial court denied on February 18, 2022.

II. Standard of Review

As noted above, this Court has not addressed the appropriate standard of review for a denial of a motion to waive fines and costs under ORS 161.665(5) and ORS 161.685(5). But both ORS 161.665(5) and ORS 161.685(5) contemplate that the circuit court has discretion over whether to waive or reduce outstanding debt. *See* ORS 161.665(5) ("[T]he court *may* enter a supplemental judgment that remits all or part of the amount due in costs . . . .") (emphasis added); ORS 161.685(5) ("[T]he court *may* enter an order allowing the defendant additional time for

payment, reducing the amount of the payment or installments due on the payment, or revoking the fine or order of restitution in whole or in part.") (emphasis added). Thus, this Court should review a lower court's denial of a motion under ORS 161.665(5) and ORS 161.685(5) for an abuse of discretion. *See State v. Johnson*, 339 Or 69, 75, 116 P3d 879 (2005) (noting that the term "may" is "wording that connotes discretion").

III. Argument

ORS 161.665(5) and ORS 161.685(5) provide discretion to the circuit court on whether to waive outstanding costs. But "discretion is bounded by the text" of the statute, and a decision that considers factors outside of those bounds is not a permissible exercise of discretion. *Eklof v. Persson*, 369 Or 531, 537, 508 P3d 468 (2022). In denying Mr. Dunham's motion, the trial court abused its discretion by relying on considerations not contemplated by the relevant statutes.

Here, the statutory text sets forth the relevant factors that a circuit court may consider in exercising discretion over whether to waive fines or costs. First, a circuit court should consider whether nonpayment of the outstanding fines or costs is willful. ORS 161.685(5) provides that a court may waive or reduce fines "[i]f it appears to the satisfaction of the court that the default in the payment of a fine or restitution *is not contempt*." ORS 161.685(5) (emphasis added). Similarly, ORS 161.665(5) notes that "[a] defendant who has been sentenced to pay costs

under this section and who is *not in contumacious default* in the payment of costs may at any time petition the court that sentenced the defendant for remission of the payment of costs or of any unpaid portion of costs." ORS 161.665(5) (emphasis added). In this context, "contempt" and "contumacious" refer to willful refusal to pay. *See Contempt*, Black's Law Dictionary (11th ed 2019) ("Conduct that defies the authority or dignity of a court or legislature."); *Contumacy*, Black's Law Dictionary (11th ed 2019) ("Contempt of court; the refusal of a person to follow a court's order or direction."). Thus, under these statutory proceedings, courts are expressly authorized to consider the defendant's reasons for failing to pay.

Second, a court may consider whether alternatives to repayment are appropriate. Neither statute is an all-or-nothing proposition, and courts have discretion in determining the appropriate remedy when a defendant is willing yet unable to pay. For costs, a court may consider whether "payment of the amount due will impose manifest hardship on the defendant or the immediate family of the defendant," and if so, "the court may enter a supplemental judgment that remits all or part of the amount due in costs, or modifies the method of payment." ORS 161.665(5). And for fines, a court may consider whether "allowing the defendant additional time for payment, reducing the amount of the payment or installments due on the payment, or revoking the fine or order of restitution in whole or in part" is appropriate. ORS 161.685(5).

Thus, even if a defendant's failure to pay is not willful, a court need not waive the debt. Instead, ORS 161.665(5) and ORS 161.685(5) contemplate that courts will have discretion to determine the best path forward to ensure that defendants will complete their sentences. Indeed, the statutes do not even require a reduction in debt, if all that is required is "additional time for payment." *Id.*; *accord* ORS 161.665(5) (authorizing the court to "modif[y] the method of payment").

Here, however, the trial court considered none of these factors, considered no alternatives, and denied Mr. Dunham's motion with little reasoning. At best, three factors—none of which are contemplated by the statutory text—can be gleaned from the court's curt reasoning. First, the court reasoned that "these [were] very old cases" that "were just neglected" and "weren't paid for." ER 34. The court noted, "I don't know if he was working, or what his situation was." ER 34. To the contrary, however, Mr. Dunham's motion specifically noted that he has always been indigent and unable to pay these fines and costs. *See* ER 24 ("He had no ability to pay these fines at the time of his sentencing and neither does he today."). And as noted above, the eCourt record shows that Mr. Dunham did make efforts to pay down his debt before he became disabled. *See supra* note 2; *see also* ER 56.

Second, the court appeared to consider that Mr. Dunham only recently became disabled. *See* ER 33–34. But neither ORS 161.665(5) nor ORS 161.685(5)

prohibit a court from waiving court debt based on recent changes in circumstances, such as a new disability. To the contrary, the statutory text suggests the opposite by providing defendants the ability to petition the court "at any time," thus indicating that future developments might require changes to the defendant's financial obligations. ORS 161.665(5).

Third and finally, the court emphasized that "part of the obligations in order to successfully complete a probation for the record, is to, you know, pay your fines and fees." ER 34. True enough. But in enacting ORS 161.665(5) and ORS 161.685(5), the Oregon Legislature also recognized that some defendants will, through no fault of their own, be unable to complete this part of probation. In refusing to abide by this statutory scheme, the trial court substituted its own views of accountability for those of the Legislature. That was error.

CONCLUSION

For the reasons stated above, Mr. Dunham requests that this Court reverse the trial court's order and grant his motion to waive fines and costs.

Date: October 13, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify that (1) this brief complies with the word-count limitation set forth in ORAP 5.05(1)(b)(ii)(A) and that (2) the word-count of this brief, as described in ORAP 5.05(1)(a) is 6,479 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(3)(b)(ii).

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 12th day of October 2022, I filed the original Appellant's Opening Brief and Excerpt of Record electronically by using the court's electronic filing system. I certify that service of a copy of this brief will be accomplished on the following participant(s) in this case, who are registered users of the appellate courts' eFiling system, by the appellate courts' eFiling system at each participant's email address as recorded this date in the appellate eFiling system, as well as by email:

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