

**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 Kmetec.

1 JUDGE SUSIE L. NORBY (*Writing with unanimous concurrence.*)

2 These criminal cases are before the court for sentencing. The State of Oregon
3 requests that the court impose sentences consistent with BM57. The defendants all request that
4 the court impose reduced sentences pursuant to HB 3078 (2017).

5 The State urges this court to conclude that the sentence reduction provisions for
6 Identity Theft and Theft in the First Degree in HB 3078 are unenforceable, because the law was
7 not passed by the 2/3rd majority vote required by Article IV §33 of the Oregon Constitution.
8 Defendants urge this court to conclude that HB 3078 sentences are enforceable, and supersede
9 those in BM57. Defendants argue that HB 3508 (2009) disabled the constitutional protection of
10 Article IV §33 that ensures a 2/3rd majority vote, and revived the legislature's option to lower
11 sentences by a simple majority, which it did in HB 3078.

12 The Partnership for Safety and Justice (PSJ) and the American Civil Liberties
13 Union (ACLU) appear as Amici Curiae, to join in and supplement the defendants' arguments in
14 favor of the enforceability of HB 3078.

15 I. BACKGROUND

16 Mandatory minimum sentences for certain repeat property offenders were referred
17 to Oregon voters in 2008 as SB 1087, which is familiar to Oregonians by another name: Ballot
18 Measure 57 ("BM57"). Oregonians resoundingly approved BM57, and it went into effect on
19 January 1, 2009. Before that, in 1994, the voters approved an initiative to amend the Oregon
20 Constitution to include Article IV §33, which specifically protects voter-approved criminal
21 sentences from legislative interference, by insuring that the legislature cannot reduce such
22 sentences by anything less than a 2/3rd majority vote.¹

¹ This constitutional amendment initiative was passed contemporaneously with Ballot Measure 11.

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

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

17 HB 3078 was effective on August 8, 2017.

18 II. CONSTITUTIONALITY ANALYSIS

19 Article IV §33 of the Oregon Constitution created a perpetual shield to protect
20 voter-approved criminal sentences from legislative reduction. Only a 2/3rd majority legislative
21 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.”

1 resuscitate the legislature's power to reduce voter-approved sentences by a simple legislative
2 majority vote.

3 The defendants, the PSJ and the ACLU argue that HB 3508 (2009), which was publicized
4 as a bill to perpetuate BM57, paradoxically nullified BM57 instead. They argue that even
5 though it was promoted as an extension of the legislative voter referendum mandate, in fact HB
6 3508 terminated the referendum, removed the constitutional shield, and reincarnated BM57 as its
7 identical twin – except that it became vulnerable to legislative reduction by a simple majority
8 vote.

9 Documents provided to the court with the briefs of the defendants and Amici Curiae
10 indicate that their arguments are propelled by their conviction that budgetary savings from
11 HB 3078 (2017) sentence reductions are urgently needed, not by dispassionate reflection on the
12 content and context of HB 3508's embodiment of BM57 in 2009. We understand that a
13 legislative majority apparently supported the sentence reductions in HB 3078. But, a conclusion
14 that its 2009 precursor (HB 3508) appeared harmonious with the 2/3rds majority constitutional
15 shield in Article IV §33, while quietly deactivating that protective safeguard, is counter-intuitive
16 at best and duplicitous at worst. Such a conclusion would contradict the constitutional
17 protections afforded to voters under Article IV §3 (voter reserved referendum powers) and
18 Article IV §33. Further, it would erode the political accountability so essential to a democracy,
19 as HB 3508 was clearly portrayed as a temporary suspension of BM57 sentences, not a
20 revocation.³ A court endorsement of such governmental maneuvers would justifiably weaken

³ 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.

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

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

8 **III. CONCLUSION**

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

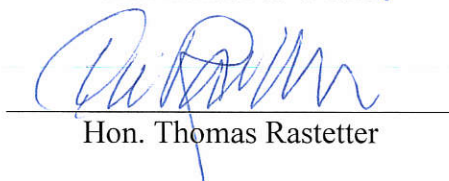
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12 **IT IS SO ORDERED, this 14th day of February, 2018.**

13

14 
15 Hon. Susie L. Norby

16 
17 Hon. Michael C. Wetzel

18 
19 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.