

SUPREME COURT

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Case decided October 7, 2021.

State of Oregon v. David Ray Bartol, (CC 14C46903) (SC S064485)

On automatic and direct review of the judgment of conviction and sentence of death imposed by the Marion County Circuit Court, Tracy A. Prall, Judge. The judgment of conviction is affirmed. The sentence of death is vacated, and the case is remanded to the circuit court for resentencing. Opinion of the Court by Justice Rebecca A. Duncan.

Today, the Oregon Supreme Court affirmed the aggravated murder conviction of David Ray Bartol, but reversed his death sentence and remanded his case to the Marion County Circuit Court for resentencing. The Court concluded that, in light of changes to the death penalty statutes enacted by the legislature in 2019, maintaining Bartol's death sentence would violate the proportionality requirement of Article I, section 16, of the Oregon Constitution.

A Marion County jury found Bartol guilty of committing a murder while confined in a penal or correctional facility, a crime that, at the time, constituted aggravated murder -- the only crime punishable by death in Oregon. Based on additional jury findings, Bartol was sentenced to death.

In 2019, while Bartol's automatic and direct appeal of his conviction and death sentence was pending in the Oregon Supreme Court, the legislature enacted Senate Bill (SB) 1013 (2019), which amended the death penalty statutes such that, among other things, all the forms of murder that previously had constituted aggravated murder -- including the one for which Bartol had been convicted -- were reclassified as murder in the first degree and were no longer subject to the death penalty. SB 1013 provided that, regardless of the date of the crime, the changes it made to the death penalty statutes would apply to crimes that were the subject of sentencing proceedings occurring on or after the bill's effective date, September 29, 2019. Because Bartol had been sentenced to death before September 29, 2019, the enactment of SB 1013 did not directly affect his

death sentence.

At the point when SB 1013 was enacted, Bartol already had filed a brief in his direct appeal, raising numerous challenges to his conviction and death sentence. After the bill's enactment, he and *amicus curiae* Oregon Capital Resources Center (OCRC) filed supplemental briefs, arguing, among other things, that maintaining his death sentence -- when his criminal conduct no longer constituted aggravated murder and, thus, no longer was subject to the death penalty -- did not comport with current standards of decency and, therefore, violated the Eighth Amendment to the United States Constitution and Article I, section 16, of the Oregon Constitution. In an even later round of briefing, Bartol and OCRC further argued that there was a national consensus against carrying out death sentences that could not have been handed out under current law. Thus, in addition to challenging his conviction, Bartol's direct appeal challenged his death sentence on a number of constitutional theories, including various arguments that upholding a death sentence that could not be imposed under current law would be unconstitutional.

In a unanimous opinion authored by Justice Rebecca A. Duncan, the Supreme Court affirmed Bartol's conviction without discussion, but reversed his sentence of death, concluding that maintaining that sentence for criminal conduct that is not punishable by death under SB 1013 would be disproportionate and, thus, would violate Article I, section 16.

On appeal, Bartol relied on the prohibitions on disproportionate punishment in both Article I, section 16, and the Eighth Amendment to the United States Constitution. The Court began with an overview of those provisions and the connections between them. As to the Eighth Amendment, the Court noted that, although that provision contains no express proportionality requirement, it has long been held to prohibit disproportionate sentences. And, the Court continued, federal case law makes it clear that, for purposes of the Eighth Amendment, what is excessive or disproportionate in a sentence is determined by "evolving standards of decency," *i.e.*, the societal standards that currently prevail, not those that prevailed when the Eighth Amendment was adopted. Thus, when presented with a claim that a sentence is disproportionate under the Eighth Amendment, the Court explained, a court's task is to determine whether the sentence comports with contemporary standards of decency, looking to a number of factors to make that determination.

Turning to Article I, section 16, the Court noted that the provision expressly requires that sentences be proportionate. Then, after examining its own cases that have construed and applied that express proportionality requirement, the Court summarized the key principles: that proportionality in that context means that more serious crimes should receive more severe sentences than less serious crimes, and that, like the Eighth Amendment's implied proportionality requirement, the express proportionality

requirement in Article I, section 16, looks to current societal standards of decency.

Next, the Court observed that Eighth Amendment case law has held that the death penalty is unique in its severity and finality, and therefore, it must be reserved for a narrow category of the "worst of crimes," and eligibility for its application must be based on fundamental, moral distinctions that justify its imposition. The Court concluded that those special proportionality requirements of the Eighth Amendment were consistent with and equally applicable to Article I, section 16.

Applying its conclusions about Article I, section 16, to Bartol's contention that his death sentence was disproportionate, the Court began by noting that, in enacting SB 1013 in 2019, the legislature had been specifically concerned with the constitutional requirement that the death penalty be reserved for the "worst of the worst" crimes, whether committed before or after the bill's effective date. The Court then explained that the legislature's reclassification of crimes that previously had been "aggravated murder," such that they are no longer subject to the death penalty, reflected a legislative determination that those crimes were not the "worst of the worst" and were not distinguishable from other noncapital crimes to the extent required to justify the death penalty. Given those determinations, the Court concluded that -- although the legislature had not made SB 1013 retroactive as to sentences imposed before its effective date -- the legislature's enactment of the bill itself reflected a moral judgment that conduct previously classified as "aggravated murder" does not fall within the narrow category of conduct that can be punished by death, as opposed to lesser sentences, including life imprisonment. Consequently, the Court concluded, maintaining Bartol's death sentence would violate the special proportionality requirements that, under Article I, section 16, apply to the death penalty -- the requirement that the death penalty be reserved for the worst of the worst crimes, and the requirement that there be a fundamental, moral distinction between crimes that are punishable by death and crimes that are not. Accordingly, the Court concluded, Bartol's death sentence must be reversed.