IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. MATTHEW EUGENE RICHARDS, Defendant-Appellant, Petitioner on Review.	Multnomah County Circuit Court Case No. 120833582 CA A155895 **S063979**

BRIEF ON THE MERITS – PETITIONER ON REVIEW

Review of the decision of the Court of Appeals on an appeal from a judgment of the Circuit Court for Multnomah County
Honorable Angel Lopez, Judge

Opinion Filed: March 23, 2016
Author of Opinion: De Muniz, Senior Judge
Concurring Judges: Sercombe, Presiding Judge, and DeHoog, Judge

Review Allowed: June 16, 2016

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PETITIONER'S BRIEF ON THE MERITS

Introduction

Defendant was serving concurrent terms of probation and post-prison supervision (PPS), violated conditions of his supervision, and completed an administrative sanction of three days in jail for the PPS violations. The trial court then sought to revoke probation for the same violations. Defendant argued that ORS 137.593(3) precluded the court from revoking his probation based on the previously-sanctioned violations. The trial court disagreed and revoked probation. The Court of Appeals affirmed, and this court allowed review.

Question Presented and Proposed Rule of Law

Question Presented

When a defendant is on probation and PPS, violates conditions of his supervision, and completes an administrative sanction for the violation of his PPS conditions, does ORS 137.593(3) preclude the trial court from revoking probation based on the conduct that resulted in the PPS sanction?

Proposed Rule of Law

ORS 137.593(3) provides that a trial court may not revoke probation whenever the defendant has completed an administrative sanction imposed "pursuant to rules adopted under ORS 137.595." Those rules are codified in

OAR chapter 291, division 58, which governs administrative sanctions for both probation and PPS violations. It provides that only one sanction may be imposed when a probationer violates multiple terms of supervision and that the completion of any administrative sanction precludes the trial court from revoking probation. Accordingly, probationers who complete an administrative sanction for a probation *or* PPS violation have completed a sanction imposed "pursuant to rules adopted under ORS 137.595," and ORS 137.593(3) precludes a court from revoking probation based on the previously-sanctioned conduct.

Summary of Historical and Procedural Facts

The state charged defendant with four counts of burglary in the first degree and three counts of theft in the first degree. *Indictment*, TCF. On November 1, 2012, defendant pleaded guilty to Count 2, burglary in the first degree, and Count 5, theft in the first degree. The trial court sentenced him to three years of probation on those counts and dismissed the other counts. *Judgment* (November 2, 2012), TCF. On March 20, 2013, the court revoked probation on Count 5 and imposed 60 days in jail and 12 months of PPS. The court continued probation on Count 2. *Judgment* (March 20, 2013), TCF.

Deschutes County Probation and Parole Officer Gregory Choate supervised defendant for both probation and PPS. Defendant's conditions of supervision required him not to change his residence without the permission of

his supervising officer and to report to his supervising officer as directed. On May 17, 2013, Choate asked the court to issue an arrest warrant based on an allegation that defendant had changed his residence without permission. *Affidavit of Probable Cause*, TCF; *Revocation Recommendation*, TCF.

On May 23, 2013, the court issued a warrant. *Bench Warrant*, TCF. Defendant later failed to report to his supervising officer as directed. Tr 11-12.

On October 28, 2013, defendant voluntarily surrendered to Choate. With defendant's consent, Choate imposed an administrative PPS sanction of three days in jail for changing residence without permission and failing to report as directed. Tr 11; *Violation and Structured Sanction Reporting Form*, TCF.

On November 12, 2013, the court held a probation violation hearing. Defendant did not dispute that he had violated the conditions of his probation, but he argued that under ORS 137.593(3), ORS 137.599, and OAR 291-058-0045(3)(b), his completion of an administrative PPS sanction precluded the court from revoking his probation. Tr 3-7, 9.

The state argued that the statutes defendant relied upon applied only to administrative probation sanctions, not PPS sanctions, so they did not preclude the court from revoking probation. *State's Memorandum of Law*, TCF.

The court agreed with the state, revoked probation on Count 2, and imposed 17 months in prison and three years of PPS. Tr 15-19; *Judgment* (November 18, 2013), TCF.

Summary of Argument

ORS 137.593(3) provides that a trial court may not revoke probation after the defendant "has completed a structured, intermediate sanction imposed by the Department of Corrections or a county community corrections agency pursuant to rules adopted under ORS 137.595." The text, context, and legislative history of the statute show that the legislature intended to delegate to the Department of Corrections (DOC) the authority to establish a policy for administrative probation violation sanctions. And the legislature intended that DOC's authority over probation sanctions would limit a court's traditional discretion over probationers, including the court's ability to revoke probation.

Although probation and PPS ultimately fall under the jurisdiction of different entities, the actual day-to-day supervision is handled by the same officers at the same offices—DOC and community corrections agencies. And the rules that DOC has adopted apply equally to administrative probation *and* PPS sanctions. They provide that a defendant who is on both kinds of supervision and violates a condition of supervision may receive only one sanction. They also provide that the completion of a probation *or* PPS sanction will preclude the trial court from revoking probation. Consequently, a probationer who serves an administrative PPS sanction "has completed a structured, intermediate sanction imposed by the Department of Corrections or

a county community corrections agency pursuant to rules adopted under ORS 137.595" and thus cannot have his probation revoked. ORS 137.593(3).

The legislature might not have anticipated that outcome, or even the scenario presented by this case, but DOC's policy resolves this case in a manner well within the discretion that the legislature gave DOC. In ORS 137.593(3), the legislature provided that DOC's rules would limit a court's authority to revoke probation. Although the statute's text suggests that the legislature contemplated administrative probation sanctions when it drafted the statute, nothing in the statute's text reflects that the legislature intended to *limit* its applicability to probation sanctions. Rather, the context and legislative history of the statute show that the legislature wanted to prioritize the imposition of administrative sanctions and reduce the number of probation revocations, and that the legislature deliberately gave DOC the authority to achieve those goals. And the legislature knew that DOC was involved in the imposition of administrative sanctions for other kinds of supervision. Because DOC's policy is consistent with the legislature's goals and delegation of authority, this court should give effect to that policy and hold that the completion of an administrative PPS sanction precludes a trial court from revoking probation.

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Argument

Probation and PPS are two kinds of supervision that a trial court can impose as part of a criminal sentence. Typically, probation is imposed in lieu of incarceration, whereas PPS follows an initial jail or prison sentence. Both kinds of supervision involve conditions that the offender must follow. Both often involve a supervising officer who oversees the offender on a day-to-day basis, gives instruction and guidance, receives reports about the offender's activities, and determines whether the conditions of supervision have been violated.

Offenders on probation and PPS are ultimately under the jurisdiction of different authorities—the trial court governs probation, the parole board governs PPS terms that follow prison sentences, and county corrections officials govern PPS terms that follow jail sentences. ORS 137.540; ORS 137.545; ORS 144.101. But both kinds of supervision are usually supervised by the same officers in the same offices—either DOC or a county corrections agency, depending on the county.[1] ORS 137.593(1); ORS 144.104(1). And both kinds of supervision allow for administrative sanctions, which are penalties for minor violations of the conditions of supervision that the supervising officer can

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[1] Currently, DOC supervises offenders only in Douglas County and Linn County. *See* Oregon Department of Corrections, *DOC Community Corrections*, https://www.oregon.gov/DOC/CC/pages/index.aspx (accessed August 4, 2016). Other counties have evidently opted to run their own community corrections agencies under OAR 291-031-0150.

impose only with the offender's consent. ORS 137.595; ORS 144.106; ORS 144.107. Offenders usually will not return to the trial court or parole board unless they commit a violation that warrants harsher punishment than an administrative sanction. ORS 137.593(2)(c); ORS 144.108. The penalties for probation and PPS violations can be summarized and contrasted as follows:

	Probation	**PPS**
Offender is under the jurisdiction of...	Trial court	Parole board or county
Offender is supervised by an officer at...	DOC or community corrections agency	DOC or community corrections agency
Minor violations are punished by...	Administrative sanction (up to 60 days' jail)	Administrative sanction (up to 30 days' jail)
Which is imposed by...	Supervising officer	Supervising officer
More serious violations are punished by...	Other sanctions (up to 180 days' jail)	Other sanctions (31 to 90 days' jail)
Which is imposed by...	Trial court	Hearings officer, parole board, or county
Most serious violations are punished by...	Revocation (up to presumptive prison term)	Revocation (up to 12 months' jail)
Which is imposed by...	Trial court	Parole board or county

This case concerns the intersection of those two forms of supervision. When an offender is serving concurrent terms of probation *and* PPS, violates conditions of both terms of supervision, and receives an administrative sanction for the PPS violation, may the trial court impose an additional, harsher punishment for the probation violation?

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I. Together, ORS 137.593(3) and Department of Corrections rules provide that the completion of an administrative sanction precludes a court from revoking probation, regardless of whether the sanction is imposed for a probation or post-prison supervision violation.

In 1993, the legislature enacted ORS 137.592 to ORS 137.599, which govern administrative probation violation sanctions for probationers who are supervised by DOC or a community corrections agency. As part of that statutory scheme, the legislature prohibited trial courts from revoking the probation of offenders who have completed administrative sanctions:

> "In no case may the sentencing judge cause a probationer to be brought before the court for a hearing and revoke probation or impose other or additional sanctions after the probationer has completed a structured, intermediate sanction imposed by the Department of Corrections or a county community corrections agency pursuant to rules adopted under ORS 137.595."

ORS 137.593(3).[2] The question in this case is whether that statute applies to offenders who have completed administrative PPS sanctions, or whether it is limited to offenders who have completed administrative probation sanctions.

Ordinarily, this court resolves questions of statutory interpretation by attempting to discern the legislature's intent. This court does so by applying the framework set forth in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859

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[2] ORS 137.599 duplicates the provisions of ORS 137.593(2)(c) and (3). Defendant has been unable to find any indication that the legislature intended the statutes to have different meanings, so his construction of ORS 137.593(3) applies equally to ORS 137.599. As this court has recognized, "nothing prohibits the legislature from saying the same thing twice." *Thomas Creek Lumber and Log Co. v. Dept. of Rev.*, 344 Or 131, 138, 178 P3d 217 (2008).

P2d 1143 (1993), and modified in *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). That framework uses the statute's text, context, and legislative history as evidence of the legislature's intent. *Gaines*, 346 Or at 171-72. If that evidence does not resolve an ambiguity in how to apply the statute, the court may resort to maxims of statutory construction. *Id.* at 172.

But not every statute represents a complete expression of legislative intent—sometimes the legislature enacts laws that it deliberately leaves incomplete. For example, in statutes that govern administrative agencies, the legislature can use "delegative terms" that "express non-completed legislation which the agency is given delegated authority to complete." *Springfield Education Assn. v. School Dist.*, 290 Or 217, 228, 621 P2d 547 (1980). Delegative terms can give an agency the ability to apply a statute to scenarios that the legislature might not have foreseen. *Id.* at 228-29. When a statute contains a delegative term, the reviewing court does not determine its meaning but instead whether the agency's application of it "is within the range of discretion allowed by the more general policy of the statute." *Id.* at 229.

Whether the legislature intended to delegate authority to an agency, and how much authority it intended to delegate, are questions of legislative intent for the court to decide. *OR-OSHA v. CBI Services, Inc.*, 356 Or 577, 588, 341 P3d 701 (2014). In this case, the text, context, and legislative history of ORS 137.593 show that the legislature intended to delegate to DOC the authority to

establish rules governing administrative probation violation sanctions. The legislature also intended DOC's rules to circumscribe a trial court's traditional authority over probationers, unless the court expressly reserves its authority or the probationer does not consent to an administrative sanction. And DOC's rules apply to both probation and PPS violations and permit only one sanction to be imposed on an offender who is serving multiple terms of supervision, so the completion of an administrative probation *or* PPS sanction precludes a court from revoking probation.

A. The legislature delegated authority to DOC to establish and enforce rules for administrative probation violation sanctions.

The text of ORS 137.593(3) expressly references a delegation of policymaking authority. The trigger for the statutory restriction on probation revocation is the completion of a sanction imposed "pursuant to rules adopted under ORS 137.595." ORS 137.593(3).

The context of ORS 137.593 includes ORS 137.595, which was enacted as part of the same bill. Or Laws 1993, ch 680, §§ 8, 10. And ORS 137.595 unambiguously delegates authority to DOC to create a policy for the imposition of administrative probation violation sanctions:

> "(1) The Department of Corrections shall adopt rules to carry out the purposes of chapter 680, Oregon Laws 1993, by establishing a system of structured, intermediate probation violation sanctions that may be imposed by the Department of Corrections or a county community corrections agency, taking into consideration the severity of the violation behavior, the prior

> violation history, the severity of the underlying criminal conviction, the criminal history of the offender, protection of the community, deterrence, the effective capacity of the state prisons and the availability of appropriate local sanctions including, but not limited to, jail, community service work, house arrest, electronic surveillance, restitution centers, work release centers, day reporting centers or other local sanctions.
>
> "(2) Rules adopted by the Department of Corrections under this section shall establish:
>
> "(a) A system of structured, intermediate probation violation sanctions that may be imposed by the Department of Corrections or a county community corrections agency on a probationer who waives in writing a probation violation hearing, admits or affirmatively chooses not to contest the violations alleged in a probation violation report and consents to the sanctions; [and]
>
> "* * * * *
>
> "(g) Such other policies or procedures as are necessary to carry out the purposes of chapter 680, Oregon Laws 1993."

ORS 137.595.

In addition to delegating policymaking authority, the legislature supplied a statement of its policy goals. The bill stated that the legislature intended to promote the use of "swift, certain and fair punishments" for probation violations and ensure that probation revocation decisions are made on a "systematic basis" that reserves prison space for serious offenders:

> "The Legislative Assembly finds that:
>
> "(1) To protect the public, the criminal justice system must compel compliance with the conditions of probation by responding to violations with swift, certain and fair punishments.
>
> "(2) Decisions to incarcerate offenders in state prisons for violation of the conditions of probation must be made upon a

> reasonably systematic basis that will insure that available prison space is used to house those offenders who constitute a serious threat to the public, taking into consideration the availability of both prison space and local resources."

ORS 137.592.

Finally, legislative history confirms that the legislature intended to delegate authority to DOC. Oregon Laws 1993, chapter 680, was enacted as Senate Bill (SB) 139 (1993), but the provisions of ORS 137.592 to ORS 137.599 originated in SB 138 (1993). Tape Recording, Senate Judiciary Committee, SB 139, April 21, 1993, Tape 120, Side B (statement of Legislative Counsel Bill Taylor); *see also* SB 139 (1993), -2 amendments (April 21, 1993). The Criminal Justice Council drafted SB 138 at the behest of DOC, the bill's sponsor. Tape Recording, Senate Judiciary Committee, SB 138, Feb 3, 1993, Tape 14, Side B (statement of DOC Assistant Director Elyse Clawson).

The Oregon Criminal Defense Lawyers Association objected to SB 138 and argued that it violated the constitutional separation of powers requirement by delegating judicial sentencing power and legislative policymaking authority to DOC. Tape Recording, Senate Judiciary Committee, SB 138, Feb 3, 1993, Tape 15, Side B (statement of OCDLA representative Ross Shepard).

In response to those objections, Multnomah County Circuit Court Judge James Ellis, who introduced the bill on behalf of the Council, agreed that it delegated authority from the legislature and judiciary to DOC but argued that

the delegation was lawful. Tape Recording, Senate Judiciary Committee, SB 138, Feb 3, 1993, Tape 16, Side A (statement of Judge James Ellis). Judge Ellis noted that the traditional understanding of probation—where a court suspended imposition or execution of sentence and retained jurisdiction over the case—had been supplanted by the sentencing guidelines, which make probation a sentence. *Id*. Because DOC is tasked with executing sentences, the legislature can give DOC the authority to make rules governing a sentence of probation. *Id.* DOC also submitted a letter from the Department of Justice explaining that the bill's delegation of policymaking authority to DOC was constitutional. *See* Exhibit N, Senate Judiciary Committee, SB 138, April 14, 1993 (statement of Assistant Attorney General Jefry Van Valkenburgh).

Thus, the text, context, and legislative history of ORS 137.593 confirm that the legislature intended to delegate policymaking authority regarding administrative probation sanctions to DOC. Of course, the authority to create rules governing agency action does not necessarily amount to the authority to limit trial court action. But ORS 137.592 to ORS 137.599 do more than delegate policymaking authority. They also transfer supervisory authority over a probationer from the trial court to DOC and community corrections agencies, and that delegation limits the court's ability to act.

B. DOC's authority over probation limits the court's authority, including the authority to revoke probation after the probationer has completed an administrative sanction.

Traditionally, probation was considered "a matter of grace which rests entirely within the sole discretion of the trial court." *State v. Montgomery*, 237 Or 593, 594, 392 P2d 642 (1964). But by 1993, that discretion had been limited by a number of statutes. *See, e.g., State v. Martin*, 282 Or 583, 588, 580 P2d 536 (1978) (discussing statutes that "limit that discretion as to the permissible conditions of probation").

ORS 137.593 places additional limits on a trial court's discretion. It provides that when the court sentences an offender to probation and places the offender under the supervision of DOC or a community corrections agency, that agency "*shall* impose structured, intermediate sanctions" for violations of conditions of probation. ORS 137.593(1) (emphasis added).[3] Accordingly, the

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[3] ORS 137.593(1) provides:

> "Except as otherwise provided in subsection (2) of this section, when a court suspends the imposition or execution of sentence and places a defendant on probation, or sentences a defendant to probation under the rules of the Oregon Criminal Justice Commission and orders a defendant placed under the supervision of the Department of Corrections or a county community corrections agency, the Department of Corrections or the county community corrections agency shall impose structured, intermediate sanctions for the violation of conditions of probation in accordance with rules adopted under ORS 137.595. Under no circumstances may the Department of Corrections or a county community corrections agency revoke probation."

default response to a probation violation is for the supervising agency to impose administrative sanctions, rather than for the matter to return to the court.

The statute does reserve certain authority for the trial court, but it requires the court to take timely, affirmative steps to retain that authority. For example, the court may retain authority to impose intermediate sanctions for probation violations, but it must do so on the record during sentencing or else the authority is transferred to the supervising agency. ORS 137.593(2)(b).[4] And the court may retain authority to revoke probation after an administrative sanction has been completed, but it must bring the probationer to a hearing

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[4] ORS 137.593(2) provides, in part:

> "Notwithstanding ORS 137.124 and 423.478 and any other provision of law, the sentencing judge shall retain authority:
>
> "(a) To revoke probation and receive recommendations regarding revocation of probation from the supervising officer made in accordance with rules adopted under ORS 137.595;
>
> "(b) To determine whether conditions of probation have been violated and to impose sanctions for the violations if the court, at the time of sentencing, states on the record that the court is retaining such authority;
>
> "(c) To cause a probationer to be brought before the court for a hearing upon motion of the district attorney or the court's own motion prior to the imposition of any structured, intermediate sanctions or within four judicial days after receiving notice that a structured, intermediate sanction has been imposed on the probationer pursuant to rules adopted under ORS 137.595 and to revoke probation or impose such other or additional sanctions or modify the conditions of probation as authorized by law[.]"

before the sanction is imposed or within four days of receiving notice regarding the sanction. ORS 137.593(2)(c). If the court fails to hold a hearing before the sanction is completed, the court loses the authority to revoke probation. ORS 137.593(3).

The statute does not divest a court of its authority over probation, but it does change the default arrangement to supervision—and sanctioning—by DOC or a community corrections agency. If a court wants to retain its traditional authority over the probationer, it must do so affirmatively under ORS 137.593(2).[5] If the court fails to do so, then the probationer will be supervised by DOC or a community corrections agency. The agency will wield the power to sanction violations, and the completion of an administrative sanction will preclude the court from revoking probation. ORS 137.593 thereby diminishes the court's authority over probationers.

C. Because DOC's rules apply equally to probation and PPS violations and permit only one sanction for a violation of multiple terms of supervision, the completion of any administrative sanction precludes revocation of probation.

The trial court loses its authority to revoke probation "after the probationer has completed a structured, intermediate sanction imposed by the Department of Corrections or a county community corrections agency pursuant to rules adopted under ORS 137.595." ORS 137.593(3). Because the statute

[5] In 2009, the legislature enacted ORS 137.540(7), which provides that "[t]he court may order that probation be supervised by the court."

references the rules that have been adopted under ORS 137.595, it is necessary to examine those rules to see how they interact with the statute.

DOC has adopted rules under ORS 137.595 to govern sanctions imposed by both DOC and community corrections agencies. OAR ch 291, div 58. When an offender violates a condition of supervision, the supervising officer must give the offender a report describing the alleged violation, the offender's right to a contested hearing, and the sanction that will be imposed if the offender waives a hearing. OAR 291-058-0040(1), (2)(a) - (c). If the offender admits or does not contest the violation, waives a hearing, and consents to the sanction, then the officer must impose the sanction. OAR 291-058-0040(2)(g). Depending on the violation's severity and the offender's supervision level, sanctions can range from zero to 90 days of jail, house arrest, community service, work crew, or inpatient treatment. *See* OAR ch 291, div 58, attachments A, B. If the violation is too serious for an administrative sanction, then the officer may return the offender to the trial court or parole board. OAR 291-058-0045(3)(h). Similarly, if the offender disputes the violation, refuses to waive a hearing, or refuses to consent to the sanction, then the officer must notify the court, board, or county. OAR 291-058-0040(2)(e), (f), (h).

DOC's rules treat probation and PPS sanctions as coextensive. The rules apply to felony offenders on both probation and PPS. OAR 291-058-0030(1), (4). They define "administrative sanctions" broadly to include *all* "structured,

intermediate sanctions" imposed by DOC or a community corrections agency for violations of probation or PPS conditions. OAR 291-058-0020(1).[6] They require that any administrative sanction be reported to the sentencing court if the offender is on probation. OAR 291-058-0050(1).[7] They require that any administrative sanction be reported to the board or county if the offender is on PPS or parole. OAR 291-058-0060(1). They also provide that offenders serving multiple terms of supervision who violate the conditions of their supervision are subject to only one sanction:

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[6] OAR 291-058-0020(1) provides:

> "Administrative Sanctions: Local structured, intermediate sanctions, as those terms are used in ORS 137.592, 137.593, 137.595.144.106, and 144.346 and in Criminal Justice Commission and Board of Parole and Post-Prison Supervision administrative rules, imposed by the Department of Corrections or a county community corrections agency for violation(s) of conditions of supervision. Administrative sanctions are less than a revocation action and include, but are not limited to local confinement in jails, restitution centers, work release centers, treatment facilities, or similar facilities or community services work, work crew and house arrest."

[7] OAR 291-058-0050(1) provides:

> "Whenever administrative sanction(s) are imposed, the sentencing court(s) and the district attorney(s) on probation cases shall be notified utilizing the Department of Corrections Violation Report/Sanction Reporting form. When a probation intervention/sanction involves modifying conditions of probation, the court must sign and return the request before the amended condition(s) is in effect, unless specific authority has been granted to the community corrections agency by the sentencing court."

> "If the offender has violated conditions of supervision imposed in more than one case (i.e., multiple cases from a single jurisdiction, cases from multiple jurisdictions, or on supervision for parole/post-prison supervision and probation), determine the grid block section that applies to the criminal conviction(s) in the case to which the administrative sanction(s) will be imposed. An administrative sanction or intervention at the agency level cannot be imposed on more than one case at a time and cases cannot be sanctioned separately for individual violations arising from a series of violations."

OAR 291-058-0045(3)(b).

Finally, DOC's rules duplicate the provisions of ORS 137.593, but with an important clarification: they allow the trial court to override "any administrative sanction(s)" if the court acts within the allotted time, and they preclude the court from revoking probation after the completion of any administrative sanction. OAR 291-058-0050(3).[8]

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[8] OAR 291-058-0050(3) provides:

> "Prior to the imposition of any administrative sanction(s) or within four judicial days after receiving notice that a structured, intermediate sanction(s) has been imposed on a probationer, the court, upon motion of the district attorney or on its own motion, may cause the offender to be brought before the court for a hearing, and may revoke probation or impose such other of additional sanction(s) or modify the conditions of probation as authorized by law. In no case may the sentencing judge cause an offender to be brought before the court for a hearing and revoke probation or impose other or additional sanction(s) after the probationer has completed a structured, intermediate sanction(s) imposed by the Department of Corrections or a county community corrections agency."

The process for imposing an administrative sanction under DOC's rules can be summarized as follows:

Offender on probation	**Offender on PPS**	**Offender on both**
1. Offender begins serving probation under trial court jurisdiction	1A. Offender begins serving prison or jail term	1A. Offender begins serving probation *and* prison or jail term
	1B. Offender released to PPS under parole board or county jurisdiction	1B. Offender released to PPS; continues serving probation
2. Offender is supervised by an officer at DOC or community corrections		
3. Offender violates a condition of supervision		
4. Supervising officer decides whether an administrative sanction is adequate		
5A. If admin sanction is inadequate, officer notifies trial court; end of admin process	5A. If admin sanction is inadequate, officer notifies parole board or county; end of process	5A. If inadequate, officer notifies court *and* board/county; end of admin process
5B. If admin sanction is adequate, officer asks offender to consent to it		
6A. If offender does not consent, officer notifies trial court; end of admin process	6A. If offender does not consent, officer notifies parole board or county; end of admin process	6A. If offender does not consent, officer notifies court *and* board/county; end of admin process
6B. If offender does consent, offender begins serving sanction		
7. Officer notifies court about the sanction	7. Officer notifies board or county about sanction	7. Officer notifies court *and* board/county
8. Trial court may override sanction only if it acts within four days of receiving notice	8. Board or county may impose harsher sanction under their own administrative rules	8. Court may override only if it acts within four days; board/county may act under own rules

Thus, whenever a probationer completes an administrative sanction imposed by DOC or a community corrections agency, that probationer has necessarily "completed a structured, intermediate sanction imposed by the Department of Corrections or a county community corrections agency pursuant to rules adopted under ORS 137.595." ORS 137.593(3). Under DOC's rules, an

offender who is simultaneously on PPS and probation can receive only one sanction for violations of the conditions of supervision. And DOC's rules further provide that the completion of *any* administrative sanction precludes the trial court from revoking probation—whether or not the sanction was imposed specifically for a probation violation.

In this case, defendant was serving concurrent terms of probation and PPS. He was supervised by the same officer at the same agency for both terms of supervision. He violated conditions of both terms of supervision, and he agreed to serve an administrative sanction. Although the administrative sanction was technically for a PPS violation and not a probation violation, it had the same legal effect as a probation sanction. Both kinds of sanctions are imposed under the same rules, and the application of those rules is what limits the court's authority. Consequently, when defendant completed the administrative sanction, the court lost its authority to revoke defendant's probation.

II. The text, context, and legislative history of ORS 137.593(3) confirm that DOC's policy of allowing only one sanction for a violation of multiple terms of supervision is consistent with the legislative policy behind administrative probation sanctions.

The Court of Appeals concluded that the legislature intended ORS 137.593(3) to limit a trial court's authority to revoke probation only when an administrative sanction is imposed specifically for a probation violation on the same count that the court seeks to revoke. But nothing in the text, context, or

legislative history of ORS 137.593(3) shows that the legislature meant to limit the statute in that manner. Rather, they show that the legislature enacted an open-ended statute with the broad goals of prioritizing the imposition of administrative sanctions and reducing the number of probation revocations—and the resulting stress on state prison capacity. The legislature delegated the authority to complete that policy to DOC, and DOC's policy of treating probation and PPS sanctions as coextensive achieves the legislature's goals in a scenario that the legislature likely did not anticipate. Finally, to the extent that any ambiguity remains after considering the statute's text, context, and legislative history, the legislature's express statement of its policy goals allows this court to determine that DOC's policy is what the legislature would have adopted if it had considered the issue.

A. The text of ORS 137.593(3) shows that the legislature intended all sanctions imposed under DOC's rules to limit a court's authority to revoke probation.

The text of ORS 137.593(3) shows that the legislature intended DOC's rules to establish what kinds of sanctions would limit the trial court's authority. Again, the statute provides:

> "In no case may the sentencing judge cause a probationer to be brought before the court for a hearing and revoke probation or impose other or additional sanctions after the probationer has completed a structured, intermediate sanction imposed by the Department of Corrections or a county community corrections agency pursuant to rules adopted under ORS 137.595."

The statute expressly makes the completion of a sanction imposed under DOC's rules the trigger for the court's loss of authority to revoke probation. Hypothetically, the legislature could have enacted a statute that provided that a court would lose its authority "after the probationer has completed a structured, intermediate sanction imposed by the Department of Corrections or a county community corrections agency." Interpreting that hypothetical statute would involve a review of its text, context, and legislative history—and later-adopted administrative rules might not be relevant to that inquiry. But in the statute that the legislature enacted, it included the phrase "pursuant to rules adopted under ORS 137.595." Giving meaning to that phrase requires looking at the rules that DOC has adopted. Whereas ignoring those rules would improperly omit what the legislature inserted. *See* ORS 174.010 ("In the construction of a statute," the court must not "omit what has been inserted * * *.").

Moreover, nothing in the statute's text shows that the legislature meant to preclude PPS sanctions from limiting a court's authority to revoke probation. True, the statute refers to the person being sanctioned as a "probationer." But that is a natural way to refer to someone who is on probation. The statute applies only to people who are on probation, because it serves only to limit a court's authority to revoke probation. Indeed, defendant was a probationer. The fact that he was *also* on PPS did not make him any less of a probationer.

The legislature's choice to use a narrower term instead of a broader one can sometimes show a legislative intent to narrow a statute. But here, the legislature's decision to describe the class of affected persons by the most obvious name for them does not indicate that the legislature meant to limit the class to people who can be described *only* by that name. In fact, elsewhere in the bill the legislature used the broader term "offender" to refer to the same class. ORS 137.592(2) (discussing "[d]ecisions to incarcerate offenders in state prisons for violation of the conditions of probation"); ORS 137.593(2)(d) (authorizing a court to "require an offender to serve a period of incarceration not to exceed 180 days as a sanction for revocation of probation"); ORS 137.595(1) (providing that DOC's rules for probation sanctions should consider "the criminal history of the offender"). The legislature's use of the word "probationer" confirms that it meant the statute to apply to probationers, but it does not support a construction that applies only to *some* probationers and excludes others.

Nor does anything in the statute's text reflect that the legislature intended to limit its scope to administrative sanctions imposed for the same count on which a trial court seeks to revoke probation. Rather, the statute expresses its scope with the phrase "[i]n no case," which suggests that the legislature intended the statute to apply to the entire case. The statute also states that a court may not revoke probation after the completion of "a" sanction—if the

legislature had meant only the sanction imposed for the same count, then it likely would have used the definite article "the" and not the indefinite article "a." *See, e.g.*, *Wyers v. American Medical Response Northwest, Inc.*, 360 Or 211, 224, ___ P3d ___ (2016) (noting that "the use of the definite article can signify a narrowing intent"). And the statute states that the court may not revoke probation or "impose other *or* additional sanctions," which further suggests that the legislature meant to preclude a court from imposing any sanctions whatsoever after the probationer completes an administrative sanction. ORS 137.593(3) (emphasis added). The text of ORS 137.593(3) is inconsistent with an interpretation that limits its effect to a single count.

Finally, the statute refers to the completion of a "structured, intermediate sanction." All of the sanctions imposed under DOC's rules are structured and intermediate, because they are all imposed as intermediate punishments instead of revocation and follow a policy with a definite structure. *See Webster's Third New Int'l Dictionary* 1180 (unabridged ed 1993) ("intermediate" can mean "lying or being in the middle place or degree" or "coming or done in between"); *id.* at 2267 ("structured" can mean "having definite structure" or "exhibiting organized structure or differentiation of parts"). Indeed, DOC's rules provide that any administrative sanction is a "structured, intermediate sanction." OAR 291-058-0020(1). And ORS 137.593(3) references DOC's rules. Nothing about the phrase "structured, intermediate sanction" suggests that the legislature

meant to exclude sanctions that are literally structured and intermediate and that DOC considers to be structured and intermediate.

B. Context confirms that DOC's policy is consistent with the legislature's goals and that the legislature knew that DOC could adopt a unified policy for all administrative sanctions.

The context of ORS 137.593 shows that DOC's policy advances the legislature's policy goals. As part of the same bill, the legislature expressly identified its goals: "responding to violations with swift, certain and fair punishments" and requiring that probation revocation decisions "be made upon a reasonably systematic basis that will insure that available prison space is used to house those offenders who constitute a serious threat to the public, taking into consideration the availability of both prison space and local resources." ORS 137.592. And the legislature directed DOC to establish rules governing administrative probation sanctions *and* "[s]uch other policies or procedures as are necessary to carry out the purposes of chapter 680, Oregon Laws 1993." ORS 137.595(2)(g).

DOC's policy, which precludes a court from revoking probation after the probationer completes an administrative probation or PPS sanction, serves both of the legislature's goals. It encourages the probationer to submit to the administrative sanction by promising that it will be the end of the matter, and it limits the use of revocation to cases where the probationer's conduct exceeds what an administrative sanction can adequately punish.

On the other hand, treating administrative PPS and probation sanctions as distinct—and permitting a court to revoke probation even though an adequate PPS sanction has been completed—would undermine both of the legislature's goals. If offenders serving multiple terms of supervision knew that an administrative PPS sanction would not preclude a later probation revocation, they would be less likely to accept the "swift, certain and fair" administrative sanction. And if a court could revoke probation for conduct that had already been adequately punished by an administrative PPS sanction, it would thwart the legislature's attempt to have revocation decisions made systematically and economically. In short, DOC properly completed the legislature's general policy decision "by specifically applying it at retail to various individual fact situations." *Springfield Education Assn.*, 290 Or at 228-29.

Context also includes the statutes and rules governing PPS. When the legislature gave DOC the authority to establish rules governing administrative probation sanctions and the authority to impose those sanctions, the legislature would have known that DOC already had the same authority with respect to administrative PPS sanctions. Although the parole board has jurisdiction over most offenders on PPS, it is DOC and community corrections agencies that handle the actual day-to-day supervision of offenders. ORS 144.104(1) (1993), *amended by* Or Laws 1995, ch 423, § 24 ("Upon release from prison, the person shall be supervised by the Department of Corrections or the corrections agency

designated by the department."). And offenders on PPS are subject to administrative sanctions, for which DOC is authorized to establish rules. ORS 144.106(1) (1993), *amended by* Or Laws 1997, ch 525, § 4; Or Laws 2013, ch 649, § 31 (providing that, subject to DOC and board rules, the supervising agency is required to "use a continuum of administrative sanctions for violations of the conditions of post-prison supervision").[9]

Accordingly, the end result here—that DOC would establish one set of rules to govern both kinds of sanctions, and the completion of an administrative PPS sanction would preclude a court from revoking probation—is one that the legislature could have anticipated. Yet the legislature did nothing to preclude DOC from adopting unified rules for administrative sanctions, nor did the legislature provide that trial courts would retain authority to revoke probation after a PPS sanction had been imposed.

Finally, context includes the sentencing guidelines, which provide a salient example of the legislature limiting a court's sentencing authority based on subsequently-adopted administrative rules. *See* ORS 137.010(1) (giving courts a "duty" to pass sentence "in accordance with rules of the Oregon

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[9] In 1997, the legislature directed DOC and the board to "jointly adopt" rules governing administrative PPS sanctions. ORS 144.107. DOC subsequently adopted such rules—the very rules at issue in this case—and the board adopted a rule requiring that administrative parole and PPS sanctions be imposed "in accordance with" DOC's rules. OAR 255-075-0067(5).

Criminal Justice Commission"). And the guidelines evince a legislative policy to treat multiple terms of supervision as coextensive. The guidelines provide that offenders who are sentenced to multiple PPS terms will serve them "as a single term" and have their maximum sanction calculated as though they were serving a single term. *Former* OAR 253-12-040(1) (1993), *renumbered as* OAR 213-012-0040 (1997). The guidelines also provide that offenders serving multiple terms of probation who commit a single violation of those terms must receive concurrent revocation sanctions. *Former* OAR 253-12-040(2)(a) (1993), *renumbered as* OAR 213-012-0040 (1997). Thus, DOC's policy of treating concurrent terms of PPS and probation as subject to only one administrative sanction—and precluding revocation of probation after the completion of any administrative sanction—is consistent with the legislature's policy decisions regarding multiple PPS terms and multiple probationary terms.

C. Legislative history confirms that, although the legislature may not have anticipated this scenario, it intended to limit judicial authority and give DOC the authority to fulfill its policy goals.

Legislative history reflects that the legislature intended to give DOC a significant amount of authority over probation violation sanctions and reduce the authority of judges to revoke probation. As noted above, SB 138 was sponsored by DOC and the Criminal Justice Council. Judge Ellis, representing the Council, told the legislature that the bill would create a "fairly radical change" in Oregon law regarding probation. Tape Recording, Senate Judiciary

Committee, SB 138, Feb 3, 1993, Tape 14, Side A (statement of Judge James Ellis). At the time, judges had "virtually completely unfettered discretion" in how to respond to probation violations. *Id.* For example, a judge could revoke probation and send someone to prison for five years simply for being a day late filing a monthly report. *Id.* SB 138 would "limit or eliminate that discretion" by giving the authority to sanction violations to the supervising agency based on rules that specified the appropriate sanction under the circumstances. *Id.*

Judge Ellis argued that administrative rules would provide a better means of sanctioning probation violations than judicial discretion. He explained that, because most probationers admit to alleged violations, probation violation hearings usually concern only the disposition. Tape Recording, Senate Judiciary Committee, SB 138, Feb 3, 1993, Tape 15, Side B (statement of Judge James Ellis). He opined that lawyers and judges are trained to deal with questions of fact and law, which rarely arise at probation violation hearings, but they have no special expertise in deciding an appropriate disposition. *Id.* And different judges impose vastly different dispositions—another example he gave was that some judges in his county would not even hold hearings for violations like driving with a suspended license, because such violations were common, whereas other judges would revoke probation for the same conduct. *Id.* A system of administrative sanctions would provide for greater consistency. *Id.*

Legislative history also confirms that the legislature was aware that administrative sanctions existed for other forms of supervision and that DOC was responsible for enforcing them. Judge Ellis explained that the bill was based on a system of administrative parole sanctions that the board had recently implemented successfully. Tape Recording, Senate Judiciary Committee, SB 138, Feb 3, 1993, Tape 14, Side A (statement of Judge James Ellis). And DOC Assistant Director Elyse Clawson repeatedly referenced DOC's positive experience implementing administrative parole sanctions in her testimony supporting the bill. *See*, *e.g.*, Tape Recording, House Appropriations Committee, Corrections Subcommittee, SB 139, May 11, 1993, Tape 13, Side A (statement of DOC Assistant Director Elyse Clawson). Clawson explained that parole and probation officers received admissions to violations 90 to 95 percent of the time. Tape Recording, Senate Judiciary Committee, SB 138, Feb 3, 1993, Tape 14, Side B (statement of DOC Assistant Director Elyse Clawson). She opined that most probationers would consent to administrative sanctions once they understood the process. *Id.*

It does not appear that the legislature anticipated the scenario presented in this case. Judge Ellis did note that many offenders were serving multiple terms of supervision, and he expressed a preference that violations of multiple terms should be consolidated into a single proceeding. Tape Recording, Senate Judiciary Committee, SB 138, Feb 3, 1993, Tape 14, Side B (statement of Judge

James Ellis). Yet no one considered what would happen if a probationer serving multiple terms of supervision completed an administrative sanction for a PPS or parole violation. Indeed, the provisions of ORS 137.593(3) and ORS 137.599 were seldom mentioned, let alone discussed.

Although the legislature might not have anticipated this scenario, the legislature was well aware that DOC supervised both probation and parole, that DOC had already implemented administrative sanctions for parolees, and that DOC favored the use of administrative sanctions instead of revocation. And the legislature intended to give DOC discretion to create a policy that would limit judicial authority over probationers. Because the policy that DOC adopted addresses the scenario in this case, and DOC's policy is consistent with the legislature's goals, DOC's policy should control the outcome of this case.

D. If any ambiguity remains, this court should consider what the legislature would have done if it had considered the issue.

One maxim of statutory construction is that, when legislative history suggests that the legislature did not consider an issue, the court will attempt "to determine how the legislature would have resolved the issue if it had considered it." *State v. Tannehill*, 341 Or 205, 211, 141 P3d 584 (2006). The court may draw guidance from the statute's context as well as the "manifest purpose" of the statute. *State v. Gulley*, 324 Or 57, 66, 921 P2d 396 (1996).

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That maxim is pertinent here because the legislature has supplied a statement of the purposes behind ORS 137.593. Again, as part of the same bill, the legislature enacted ORS 137.592, which identified the legislature's goals as responding to probation violations with "swift, certain and fair punishments" and ensuring that probation revocation decisions would be made on a systematic basis that would reserve prison space for offenders who constitute serious threats to the public.

In this case, those goals point to a single resolution of the issue. The legislature decided to achieve those goals by providing that probationers who complete administrative sanctions cannot have their probation revoked. If the legislature had considered what to do with a probationer who is also on PPS, those goals would have led to the same conclusion: probationers who complete administrative sanctions should not have their probation revoked, regardless of whether the sanction happens to be imposed for a probation or PPS violation. As explained above, extending the protection of ORS 137.593(3) to all probationers will encourage all probationers to submit to the "swift, certain and fair" punishment of an administrative sanction, and it will ensure that all revocation decisions are made systematically and economically.

But limiting the protection of ORS 137.593(3) to those probationers who are *only* on probation, or who are serving concurrent terms of probation and PPS but happen to receive an administrative probation sanction rather than a

PPS sanction, would undermine both goals. It would discourage probationers from accepting administrative PPS sanctions, because they would still be at risk of revocation. And it would lead to arbitrary revocation decisions. Consider a hypothetical offender whose circumstances are identical to defendant's except that her supervising officer decides to impose an administrative probation sanction instead of an administrative PPS sanction. That offender could not have her probation revoked—not because of any difference in her conduct, but simply due to the happenstance of which form her supervising officer filled out.

Treating two similarly-situated offenders differently—one gets three days in jail, the other gets 17 months in prison—would be contrary to the legislature's policy goals. Fortunately, nothing about ORS 137.593(3) requires that outcome. DOC's policy of treating the offenders identically is consistent with the legislature's intent and well within DOC's delegated authority. This court should give effect to that policy and hold that, in this case, the trial court was precluded from revoking defendant's probation after he completed an administrative PPS sanction.

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CONCLUSION

Defendant respectfully requests that this court reverse the decision of the Court of Appeals and reverse the trial court's judgment revoking probation.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief length

I certify that (1) this brief on the merits complies with the word-count limitation in ORAP 9.05(2)(b), and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 8,130 words.

Type size

I 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(4)(f).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on August 16, 2016.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Petitioner's Brief on the Merits will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Benjamin Gutman, #160599, Solicitor General, and Shannon Terry Reel, #053948, Assistant Attorney General, attorneys for Respondent on Review.

Respectfully submitted,

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