IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. DAVID FRANK LANE, Defendant-Appellant, Respondent on Review.	Marion County Circuit Court No. 07C49819 CA A148507 SC S062045

BRIEF ON THE MERITS OF PETITIONER ON REVIEW STATE OF OREGON

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the District Court for Marion County
Honorable JOSEPH V. OCHOA, Judge

Opinion Filed: January 2, 2014

Before: Armstrong, Presiding Judge
and Nakamoto, Judge and Egan, Judge

Continued . . .

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Constitutional & Statutory Provisions

Administrative Rules

Other Authorities

BRIEF ON THE MERITS OF
PETITIONER ON REVIEW STATE OF OREGON

STATEMENT OF THE CASE

Petitioner on Review State of Oregon asks this court to reverse the decision of the Court of Appeals in *State v. Lane,* 260 Or App 549, 318 P3d 750, *rev allowed*, 355 Or 317 (2014), and to affirm the judgment of the circuit court. Article I, section 44(1)(b), of the Oregon Constitution provides: "No law shall limit a court's authority to sentence a defendant consecutively for crimes against different victims." The sentencing court in this case revoked probationary sentences imposed on felony convictions that are based on crimes defendant committed against different victims. The court then imposed prison terms on those convictions and ordered him to serve some of those terms consecutively. This court should hold that Article I, section 44(1)(b), authorized the sentencing court to order defendant to serve those prison terms consecutively.

The Court of Appeals held in this case that a term of incarceration imposed on a felony conviction upon revocation of probation is not a "sentence" within the scope of Article I, section 44(1)(b). On that basis, the court held that OAR 213-012-0040(2)(a) limited the sentencing court, upon revocation of defendant's

probationary sentences, to imposing only concurrent terms of imprisonment.[1] *Lane*, 260 Or App 557. That decision erroneously limits the scope of Article I, section 44(1)(b). When, as in this case, a court revokes multiple probationary sentences imposed on felony convictions and imposes terms of incarceration, those terms are "sentences" within the scope of section 44(1)(b) and hence, if the crimes involved different victims, the court has authority to order the defendant to serve those sentences consecutively, despite OAR 213-012-0040(2)(a).

STATEMENT OF FACTS

The relevant facts are straightforward and undisputed. *See Lane*, 260 Or App at 550-51. Defendant was charged by an indictment with four counts of the felony offense of encouraging child sexual abuse in the first degree, in violation of ORS 163.684, based on crimes that he committed between January 1 and May 21, 2004. (App Br 1 & ER 1). He pleaded no contest to the four charges and stipulated that each offense involved a different victim, and the court imposed a probationary sentence on each conviction. (App Br 1-3 & ER 3-13; *see* Tr 14).

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[1] That rule, which is quoted in full in the text below, provides: "If more than one term of probationary supervision is revoked for a single supervision violation, the sentencing judge shall impose the incarceration sanctions concurrently."

Among the conditions of probation was that he "abstain from the use of intoxicants." (App Br, ER 11).

Two years later, defendant was back before the court on an allegation that he had violated his probation by consuming alcohol. (App Br 1-2). He admitted that allegation, and the court found him in violation and revoked his probation on each of the convictions. (App Br 2-3). Defendant then argued that because the court found only a single violation of probation, OAR 213-012-0040(2)(a) precluded the court from imposing consecutive sentences upon revocation. In response, the state argued that because the parties had stipulated that the underlying crimes of conviction involved different victims, the court had authority under Article I, section 44(1)(b), to impose consecutive sentences. The court agreed with the state, and it imposed an 18-month sentence on each conviction and ordered defendant to serve the sentences imposed on the convictions based on counts 3 and 4 concurrently with each other but consecutively to the sentences imposed on the convictions based on counts 1 and 2, for a total sentence of 36 months. (Tr 36-39; App Br, ER 14-18).

On appeal, defendant's only claim of error was that the court erred by ordering him to serve some of those sentences *consecutively*, and the sole legal basis for that claim is his assertion that OAR 213-012-0040(2)(a) precluded the

court from imposing consecutive sentences.[2] (App Br 5-10). That rule provides:[3]

> When an offender is serving multiple terms of probationary supervision, the sentencing judge may impose revocation sanctions for supervision violations as provided by OAR 213-010-0002 for the violation of each separate term of probationary supervision.
>
> (a) *If more than one term of probationary supervision is revoked for a single supervision violation, the sentencing judge shall impose the incarceration sanctions concurrently.*
>
> (b) If more than one term of probationary supervision is revoked for separate supervision violations, the sentencing judge may impose the incarceration sanctions concurrently or consecutively.

(Emphasis added.) Defendant also relied on *State v. Stokes*, 133 Or App 355, 358-59, 891 P2d 13 (1995)—in which the Court of Appeals held that the limitation in this rule on a court's authority to impose consecutive sentences on revocation displaces the general authority granted by ORS 137.123 to impose consecutive sentences—and on *State v. Newell*, 238 Or App 385, 242 P3d 709 (2010) (same). In response, the state argued that Article I, section 44(1)(b), trumped the limitation in OAR 213-012-0040(2)(a) because defendant committed the underlying crimes

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[2] Defendant did not challenge the revocation of his probation, nor did he contend that even if the court had authority under Article I, section 44(1)(b), to impose consecutive sentences its decision to do so was an abuse of discretion.

[3] This rule was enacted in 1989 with the original sentencing guidelines, as *former* OAR 253-12-040(2)(a) (1989). It has since been renumbered as OAR 213-012-0040(2)(a), but the text has remained the same.

against different victims.[4]

The Court of Appeals agreed with defendant and held that Article I, section 44(1)(b), does not apply to a term of imprisonment imposed upon revocation of probation, because such a disposition is only a "revocation sanction" and not a "sentence" within the scope of the constitutional provision. The court concluded:

> In sum, our consideration of Article I, section 44(1)(b)'s text and context leads us to conclude that the provision does not apply to the imposition of sanctions for the violation of multiple probationary terms where those terms were originally imposed as part of a felony sentencing. Because defendant committed only one probation violation, the trial court was required, under OAR 213-012-0040(2)(a), to impose the incarceration terms concurrently and erred in doing otherwise.

Lane, 260 Or App at 557-58 (some citations omitted). In the course of its analysis, the Court of Appeals also asserted that when a sentencing court imposes a term of imprisonment on a conviction after revoking probation that term is not a punishment for the underlying crime: "the express purpose of imposing sanctions

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[4] The state previously has argued that the limitation in OAR 213-012-0040(2)(a) does not apply when the underlying convictions are based on crimes the defendant committed during separate criminal episodes or when ORS 137.123 otherwise authorizes the imposition of consecutive sentences. But the Court of Appeals has rejected both of those arguments. *See, e.g., State v. Lewis*, 257 Or App 641, 644-46, __ P3d __ (2013). The state does not pursue either those arguments before this court—here, the state argues only that the limitation in the rule does apply in this case because it is trumped by Article I, section 44(1)(b).

for probation violations is * * * to punish the conduct constituting the probation violation, not the underlying crimes of conviction." *Id.* at 555.

QUESTION PRESENTED AND PROPOSED RULE

Question Presented: OAR 213-012-0040(2)(a), which was enacted in 1989, provides: "If more than one term of probationary supervision is revoked for a single supervision violation, the sentencing judge shall impose the incarceration sanctions concurrently." Article I, section 44(1)(b), which was enacted in 1999, provides: "No law shall limit a court's authority to sentence a defendant consecutively for crimes against different victims." If a defendant was serving probationary sentences that were imposed on multiple felony convictions that are based on crimes he committed against different victims, and the court revokes his probation on those convictions based on a finding of a single violation of probation, does the court have authority under section 44(1)(b) to impose consecutive sentences despite the limitation in OAR 213-012-0040(2)(a)?

Proposed Rule: Yes. A term of incarceration imposed on a conviction for a felony upon revocation of probation is a "sentence" that is within the scope of Article I, section 44(1)(b).

ARGUMENT

A. Introduction

Article I, section 44(1)(b), provides that whenever a court "sentences" a defendant "for crimes against different victims," it has authority to impose consecutive sentences—*i.e.*, that "[n]o law shall limit" the court's authority to do so. OAR 213-012-0040(2)(a) is a "law" that does "limit" a trial court's authority to impose consecutive terms of incarceration. If a term of incarceration imposed upon revocation of probation is a "sentence" within the scope of section 44(1)(b), then that limitation would be trumped by section 44(1)(b), if the underlying crimes involved different victims. But the Court of Appeals held that a term of imprisonment imposed on revocation of probation is not such a "sentence," and it held, on that basis, that the consecutive sentences that the trial court imposed in this case violated OAR 213-012-0040(2)(a).

Article I, section 44, was enacted by the voters at the November 1999 general election when they approved Ballot Measure 74 (1999) (hereafter "Measure 74"), which was a referendum. *See* House Joint Resolution 94 (1999) (hereafter "HJR 94"). Consequently, the issue that is presented here reduces to what the voters intended when they approved Measure 74—*i.e.*, whether they intended that the authority granted in section 44(1)(b) should apply when the court imposes terms of incarceration upon revocation of probation. Resolution of that

issue requires examination of the text and context of Measure 74, and perhaps the history of that provision, to discern the voters' intent.

> In interpreting a constitutional provision adopted through the initiative process, our task is to discern the intent of the voters. The best evidence of the voters' intent is the text of the provision itself. The context of the language of the ballot measure may also be considered; however, if the intent is clear based on the text and context of the constitutional provision, the court does not look further.

Stranahan v. Fred Meyer, Inc., 331 Or 38, 56, 11 P3d 228 (2000) (ellipses omitted) (quoting *Roseburg School Dist. v. City of Roseburg*, 316 Or 374, 378, 851 P2d 595 (1993)); *see also State v. Algeo*, 354 Or 236, 246, __ P3d __ (2013) (similar, construing Article I, section 42—a companion victims' rights provision).

B. Text and Context of Section 44(1)(b) Use the Term "Sentence" in its Ordinary Meaning.

The term "sentence" is not defined in Article I, section 44, nor is there a general definition of that term included elsewhere within the Oregon Constitution or in the Oregon Criminal Code.[5] As will be demonstrated below, nothing in the legislative history to HJR 94 or in the voters' pamphlet regarding Measure 74 suggests that the term "sentence" was intended to have has an arcane meaning that

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[5] Although the criminal code does not *define* the word "sentence," it uses the term dozens, if not hundreds, of times throughout, always with the meaning of the final disposition—usually a term of incarceration—that is imposed on a defendant's conviction for a crime. *See, e.g.*, ORS 137.010; ORS 137.071; ORS 137.120; ORS 161.605.

is different from or more limited than the common meaning for that term. Consequently, the voters who approved Measure 74 necessarily would have contemplated that the term would be applied in accordance with its ordinary definition.[6] *See, e.g., Algeo*, 354 Or at 246-48 (construing "restitution" in Article I, section 42(1)(d), according to the ordinary meaning as it existed in 1999, when that provision was approved by the voters).

As used generally in the law and in the common parlance, the term "sentence" means the disposition, including the punitive consequence, that is imposed on a conviction for a crime.[7] *See, e.g., State v. McFarland/Chappel*, 10 Or App 90, 92, 497 P2d 1243 (1972) ("A sentence is part or all of the judgment of the court."); *Ballentine's Law Dictionary*, p 1160 (3d ed. 1969) ("**sentence.** A judgment in a criminal case denoting the action of the court in formally declaring to the accused the legal consequences of the guilt which he has confessed or of which he has been convicted."); *Webster's Third New Int'l Dictionary*, p 2068 (**1.** *adv*.: to decree, decide or announce judicially. **2 a.**: to pronounce

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[6] Article I, section 44(1)(b), uses the phrase "to sentence"—*i.e.*, in the verb form, rather than in the noun form—but nothing in the text, context, or history suggests that that phrase means anything other than "to impose a sentence."

[7] *Accord* ORS 137.071, which prescribes the minimum requirements for a judgment entered in a criminal case and provides, in subsection (1)(g), that if the judgment includes a conviction, it shall include "all other sentences and legal consequences imposed by the court."

sentence on : to contemn to penalty or punishment."). No common definition of "sentence" differentiates between a punishment that is imposed on a conviction at the original sentencing and one that is imposed later, upon revocation of probation.

Therefore, unless something in the statutory context or legislative history establishes that the term "sentence" in Measure 74 was intended to have a specific meaning that is more narrow than the common definition, then that common definition should apply to Article I, section 44(1)(b). *See Ogle v. Nooth*, 355 Or 571, 578, __ P3d __ (2014) ("We give words of common usage their plain, ordinary meaning. However, when words are used in the context of a legal proceeding * * *, they may be used as legal terms of art, and, if so, we give precedence to their legal meanings." (citation omitted)).

C. Statutes and Rules Do Not Create a Distinction Between a Sentence and a Revocation Sanction

The Court of Appeals concluded that when a court revokes a probationary sentence and imposes a term of incarceration, that disposition is only a "sanction" and is not a "sentence" within the scope of Article I, section 44(1)(b), because "the law has long observed a distinction between sentencing and revocation sanctions." *Lane*, 260 Or App at 557. Consequently, the issue presented may be narrowed further to whether the voters in November 1999 would have understood that there is a significant "distinction between sentencing and revocation sanctions" such that they would have intended the term "to sentence" not to include imposition of a

term of incarceration upon revocation of probation.

In discerning the intent of the voters who approved Measure 74, it is helpful to examine the laws that were in force in 1999 that addressed what is and is not a "sentence." At that time, there was only scant support in the statutes, rules, or case law for the proposition that a term of incarceration imposed upon revocation of probation is only a "sanction" and not a "sentence." Although ORS 137.545(5)(b) and OAR 213-012-0040(2) use the term "sanction"—rather than "sentence"—to describe such a disposition,[8] that rule also refers to the court at the dispositional hearing, following revocation of probation, as the "sentencing judge." And the general rule in the sentencing guidelines that describes the authority of a "sentencing judge" upon revocation of probation—*viz.*, OAR 213-010-0002—specifically and repeatedly uses the term "sentence" to describe such a disposition:

> (1) For those offenders whose presumptive sentence was probation, *the sentence upon revocation* shall be to the supervisory authority for a term up to a maximum of six months.
>
> (2) For those offenders whose probationary sentence was either a departure from a presumptive prison sentence or sentence imposed pursuant to OAR 213-005-0006, *the sentence upon revocation* shall be a prison term up to the maximum presumptive prison term which

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[8] In 1999, ORS 137.545(5)(b) provided: "For defendants sentenced for felonies committed on or after November 1, 1989, the court that imposed the probationary sentence may revoke the probation supervision and impose *a sanction* as provided by the rules of the Oregon Criminal Justice Commission." (Emphasis added.)

> could have been imposed initially, if the presumptive prison term exceeds 12 months. For those presumptive terms 12 months or less, *the sentence upon revocation* shall be to the supervisory authority, up to the maximum presumptive prison term.

(Emphasis added.)[9]

Moreover, OAR 213-010-0002(4) provides that when a court revokes probation on a felony conviction and imposes a prison term, it "shall also set a term of post-prison supervision in accordance with OAR 213-005-0002." Subsection (1) of the latter rule provides: "A term of community supervision is part of the *sentence* for any felony offender who is *sentenced* to the legal and physical custody of the Department [of Corrections] or to the supervisory authority." (Emphasis added.) In short, although OAR 213-012-0040(2)(a) uses the term "sanction," rather than "sentence," when it refers to a term of incarceration imposed upon revocation, various other rules in the guidelines specifically use the term "sentence" to describe such a disposition.

Furthermore, other statutes throughout the criminal code that refer a disposition imposed upon revocation of probation on a felony conviction refer to such a disposition as a "sentence," not as a "revocation sanction." *See*, *e.g.*,

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[9] This rule originally was enacted in 1989, with the original sentencing guidelines, as *former* OAR 253-10-002 (1989). The rule has since been renumbered to OAR 213-010-0002, but the pertinent terms have remained the same.

ORS 137.712(5).[10] And the general statutes that govern the disposition of an offender on whom a court has imposed a term of incarceration and that prescribe the calculation of the term of imprisonment, the eligibility for credits and early release, and appellate review of such a disposition refer only to a "sentence"—they do not make reference, either in addition or instead, to a "revocation sanction." *See, e.g.*, ORS 137.120; ORS 137.124; ORS 137.320 to 137.390; ORS 137.750 to 137.752; ORS 138.222. If a term of imprisonment that is imposed upon revocation of probation is only a "revocation sanction," and is not also a "sentence," then none of those statutes would apply to such a disposition. Before the decision in this case, no reported appellate court decision ever had suggested that any of those statutes do not apply with equal force to a term of imprisonment imposed upon revocation of probation.

Finally, ORS 138.053 and ORS 138.222(7) permit an appeal in these circumstances based only on the "sentence," and neither authorizes an appeal or appellate review when a court has imposed only a "revocation sanction."

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[10] ORS 137.712 was enacted in 1997—*i.e.*, before Measure 74 was approved by the voters—and it provides a means for a sentencing court to depart from a minimum sentence prescribed by Measure 11 (ORS 137.700) and to impose instead a probationary sentence. ORS 137.712(5) provides that if a court imposes such a probationary sentence and the defendant later commits a new crime, "the court shall revoke the probation and impose the presumptive *sentence* of imprisonment" prescribed for that conviction. (Emphasis added.)

ORS 138.053(1), which was first enacted in 1989, provides, in pertinent part:

> A judgment, or order of a court, if the order is imposed after judgment, is subject to the appeal provisions and limitations on review under ORS 138.040 and 138.050 if the disposition includes any of the following:
>
> (a) Imposition of a *sentence* on conviction.
>
> * * * * *
>
> (e) Imposition or execution of a *sentence* upon revocation of probation or sentence imposition.

(Emphasis added.) This statute makes no reference to a "revocation sanction," and it does not specifically authorize an appeal from a judgment that imposes such a disposition following revocation of probation.

Similarly, ORS 138.222, which was enacted in 1986 and governs appeals in felony cases, provides, in pertinent part:

> (1) Notwithstanding the provisions of ORS 138.040 and 138.050, a *sentence* imposed for a judgment of conviction entered for a felony committed on or after November 1, 1989, may be reviewed only as provided by this section.
>
> * * * * *
>
> (7) Either the state or the defendant may appeal a judgment of conviction based on the *sentence* for a felony committed on or after November 1, 1989, to the Court of Appeals subject to the limitations of chapter 790, Oregon Laws 1989. The defendant may appeal under this subsection only upon showing a colorable claim of error in a proceeding if the appeal is from a proceeding in which:
>
> (a) A *sentence* was entered subsequent to a plea of guilty or no contest;

> (b) Probation was revoked, * * * or a *sentence* suspension was revoked[.]

(Emphasis added.) Nothing in ORS 138.222 makes any reference to "revocation sanction," and it does not specifically authorize an appeal from or appellate review of such a disposition following revocation of probation.[11]

It is important to reiterate that the issue presented here is whether an ordinary voter back in November 1999 who examined Measure 74 together with the statutes and rules in the sentencing guidelines reasonably would have concluded that a term of incarceration imposed upon revocation of probation is a "sentence" for purposes of the that measure. For the reasons set forth above, such a voter would have had no reason to conclude from a review of those statutes and rules that a "revocation sanction" is not a "sentence."

The question then becomes whether voter who examined the established case law as it existed in November 1999 would have had a reason to conclude that the term "sentence" as used in Measure 74 does not include a revocation sanction. The only reported pre-1999 decision that the Court of Appeals cited in support of holding that a "revocation sanction" is not a "sentence" was its decision in *Stokes*,

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[11] Consequently, if this court concludes that the 36-month prison term imposed in this case is not a "sentence," then it would seem that the appropriate disposition would be to dismiss this appeal, because neither ORS 138.053 nor ORS 138.222 would provide this court with appellate jurisdiction over this appeal.

which was decided in 1995.[12] *Lane*, 260 Or App at 552-53. But *Stokes* did not hold—or even suggest—that a term of incarceration imposed upon revocation of probation is not a "sentence."

The issue in *Stokes* was whether OAR 213-012-0040(2)(a), which was enacted in 1989 and limits a court's authority to impose a consecutive sentence upon revocation, controls over ORS 137.123, which was enacted in 1987 and grants a court general authority to impose a consecutive sentence. The Court of Appeals held that the specific limitation in the rule controls over the general authority granted by the statute.[13] *Stokes*, 133 Or App at 358-59. Although the court, in its opinion, did use the term "revocation sanction" to describe the disposition at issue, it also repeatedly used the term "sentence" when referring to that disposition:

> The court then revoked defendant's probation and *sentenced* him to two prison terms of 24 months each, to be served consecutively. Defendant appeals from the consecutive *sentences*.

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[12] The Court of Appeals also appeared to rely on its more recent decision in *Newell*. *See Lane*, 260 Or App at 554-55. But even if *Newell* were dispositive on that point—which it is not—it cannot be relevant to the inquiry here, because that decision was not issued until long after Measure 74 had been approved by the voters. Nor does *Newell* rely on a pre-1999 decision that could have caused a voter back in 1999 to conclude that such a "revocation sanction" is not a "sentence."

[13] See ORS 174.020(2) ("When a general and particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent.").

Stokes, 133 Or App at 357 (emphasis added). In short, a voter back in 1999 who examined that applicable case law, including *Stokes*, would not have had a reason to conclude that a "revocation sanction" is not a "sentence."

In summary: Neither the Oregon Constitution nor the Oregon Criminal Code provides a definition of the term "sentence," much less one that applies specifically to Article I, section 44. But the ordinary definition of that term is any punitive disposition that is imposed on a conviction for a crime, which is entirely consistent with how the term "sentence" is used throughout the criminal code and in the sentencing guidelines. Although ORS 137.545(5)(b) and OAR 213-012-0040(2)(b) use the term "revocation sanction," instead of "sentence," when referring to a term of incarceration that is imposed upon revocation of probation, a wide variety of other similar statutes and rules—specifically including OAR 213-010-0002—specifically use the term "sentence" when referring to such a disposition. Finally, there is no reported appellate decision before November 1999 that suggested, much less held, that a term of incarceration imposed upon revocation of probation is not a "sentence." Therefore, a voter in November 1999 would not have had a reason to assume that the term "sentence" as used in Measure 74 does not include a term of incarceration imposed upon revocation of probation.

D. A Prison Term Imposed on Revocation of Probation Is a "Sentence" Even Though Laws Limit the Term That May Be Imposed on Revocation.

As noted above, the Court of Appeals stated in its opinion that "the law has long observed a distinction between sentencing and revocation sanctions." *Lane*, 260 Or App at 557. The court cited its previous decision in *Stokes* for the proposition that, despite the general authority to impose consecutive sentences that is granted by ORS 137.123, the authority of a sentencing court when imposing a disposition after revocation of probation is limited by OAR 213-012-0040(2)(a). *Lane*, 260 Or App at 553. To be sure, the statutory scheme does create "distinctions" between the nature and form of a disposition that may be imposed at the original sentencing and the disposition that may be imposed upon revocation. But those distinctions do not provide a basis to conclude that, as a result, a term of incarceration imposed upon revocation of probation is not a "sentence."

Some statutes and rules in the sentencing guidelines prescribe specific limitations on the length of the term of incarceration that a court may impose upon revocation of probation, and thereby create a "distinction" between the court's authority at the original sentencing and upon revocation. The statutes and sentencing guidelines prescribe numerous limitations on the form or length of a

disposition that may be imposed in a wide variety of particular circumstances.[14] The mere fact that some of those limitations apply in some specific circumstances and not in others does not mean that a disposition that is so limited is, as a result, not a "sentence." In short, even though OAR 213-012-0040(2)(a) may limit a court's authority to impose a consecutive term of incarceration upon revocation in some circumstances—and thus creates a "distinction"—that does not mean that such a term of incarceration is, as a result of that distinction, not a "sentence."

But perhaps more to the point, even if a voter in 1999 might have been aware that some statutes and rules prescribe limitations on the form or length of a term of incarceration that may be imposed upon revocation, he or she would not have concluded from that distinction that such a disposition is not, for that reason, a "sentence." The issue here is not whether lawyers and judges, in their day-to-day application of the statutory scheme and the sentencing guidelines, may have to pay attention to distinctions between the various types of criminal dispositions that are permissible when applying those statutes and rules to particular circumstances. Rather, the issue here is only whether an average voter back in 1999 who examined Measure 74 would have assumed that the unqualified term "sentence" would

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[14] For example, OAR 213-010-0002(2) (quoted above) precludes a sentencing court, upon revocation of probation, from imposing a term of incarceration that is longer than the presumptive sentence—*i.e.*, the rule precludes the court from imposing an upward-departure sentence upon revocation.

include a term of incarceration that is imposed upon revocation of probation. Even if one assumes that the average voter would have been aware of distinctions in the law between a term of incarceration that may be imposed at the original sentencing and one that may be imposed upon revocation of probation, there is no reason to assume that such a voter would have concluded from those distinctions that the latter is not a "sentence" for purposes of Measure 74.

E. A Sentence Imposed on Revocation of Probation Is Punishment for the Underlying Crime, Not for the Violation.

At bottom, the essential premise of the decision of the Court of Appeals in this case is that "the express purpose of imposing sanctions for probation violations is—and was, at the time the voters enacted Measure 74—to punish the conduct constituting the probation violation, not the underlying crimes of conviction." *Lane*, 260 Or App at 555. Even if that were correct—which it is not, as will be explained below—that would not provide a basis for concluding that Article I, section 44(1)(b), does not apply to a "revocation sanction." That provision does not state—or even fairly imply—that the only purpose of the authority that it grants to a sentencing court to impose consecutive sentences is to enable the court to punish the defendant for the underlying crimes. The authority granted by the provision is stated in absolute terms and is triggered whenever the defendant committed the crimes "against different victims"; that authority is not qualified or limited with respect to purpose. A voter in 1999 who considered Measure 74 could

not reasonably have interpreted that provision to be qualified in the respect suggested by the Court of Appeals.

In any event, the Court of Appeals erred when it asserted that, under current law, the purpose of the disposition imposed upon revocation of probation is to punish the defendant for his or her *violation of probation* rather than to punish the underlying crime. The rule always has been, and still remains, that the purpose of the imposition of a sentence upon revocation "is to punish the crime of conviction, not the probation violation." *State v. Barajas*, 254 Or App 106, 113, 292 P3d 636 (2012), *rev den*, 353 Or 747 (2013) (citing several pre-1999 decisions); *State v. Montgomery*, 3 Or App 555, 557-58, 474 P2d 760, *rev den* (1970). Although the Court of Appeals acknowledged that always had been the rule, it concluded that the guidelines effectively have displaced that basic principle for felony convictions. It concluded that the law now provides that, for a felony conviction, a revocation sanction is punishment only for the conduct that constituted the violation of probation. *Lane*, 260 Or App at 556-58. That conclusion is untenable.

No rule in the guidelines and no related statute specifies that the disposition upon revocation is to punish only the conduct that constituted the violation of probation. To the contrary, as noted above, OAR 213-010-0002(2) provides that "the sentence upon revocation shall be a prison term up to the maximum

presumptive prison term which could have been imposed initially."[15] That means that the punishment prescribed by the guidelines for a probation violation is based on the *presumptive sentence* for the underlying conviction—which is based only the nature of the underlying *crime*, not the nature of the violation.[16] Moreover, neither the guidelines nor any related statutes limit the sentencing court's discretionary authority to determine the length of a term of incarceration to be imposed upon revocation by requiring that the term imposed relate to the nature or seriousness of the conduct that constituted the violation of probation.[17] In short,

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[15] In that respect, the rule continues the practice that existed before enactment of the sentencing guidelines in 1989. Previously, if the court suspended imposition of sentence on a felony conviction and placed a defendant on probation and then it later revoked probation, the court could "sentence the convicted person to any term in the penitentiary for which he could have been sentenced upon the original conviction." *Barker v. Ireland*, 238 Or 1, 3, 392 P2d 769 (1964). That is still the rule that applies for a misdemeanor conviction. ORS 137.545(5)(a).

[16] For most offenses, the "presumptive sentence" is based on the crime-seriousness ranking of the crime of conviction and the defendant's criminal-history score, which then are applied to determine the appropriate gridblock. *See* OAR 213-003-0001(16) (defining "presumptive sentence"); OAR 213-004-0001 (describing guidelines grid). The crime-seriousness ranking, as the name implies, is based on the relative seriousness of the crime of conviction. *See* OAR 213-004-0002. When a court revokes a probationary sentence on a felony conviction, nothing in the guidelines allows adjustment or recalculation of the presumptive sentence prescribed for that conviction—in particular, nothing allows recalculation of that ranking based on the relative seriousness of the conduct that provided the basis for the revocation.

[17] Moreover, a rule that the revocation sanction is punishment only for the violation, and not the underlying crime, would raise serious concerns under

Footnote continued…

when a court revokes a probationary sentence on a felony conviction and imposes a term of incarceration in accordance with ORS 137.545(5)(b) and OAR 213-010-0002(2), the court has authority to impose any term up to the maximum presumptive sentence, which is determined by the crime-seriousness ranking of the *underlying crime*, and the court's discretion with respect to the prison term it chooses to impose is not limited at all by the nature or seriousness of the conduct that constituted the violation of probation.

The Court of Appeals nonetheless concluded that a revocation sanction imposed under the guidelines is punishment only for the violation of probation because OAR 213-012-0040(2)(a) limits a court's authority to impose a *consecutive* incarceration term upon revocation unless the court finds that the defendant committed more than one violation. *Lane*, 260 Or App 554-55. That conclusion misses the point for two reasons.

(…continued)
Article I, section 16, of the Oregon Constitution in cases, such as this one, in which the court has imposed a lengthy *prison sentence* upon revocation for a relatively minor or technical violation of probation. The decision in this case, if allowed to stand, also would create serious constitutional issues in another context. The rule that the sentence imposed on revocation is punishment for the underlying crime, not punishment for the violation, is the basis of the well-established principle that relying on criminal conduct as a basis to revoke probation and to impose punishment on the revocation does not constitute "jeopardy" with respect to that conduct—*i.e.*, that such a revocation does not trigger the constitutional double-jeopardy clauses to bar a subsequent, separate criminal prosecution for that same conduct. *See, e.g., State v. Maricich*, 101 Or App 212, 214, 789 P2d 701 (1990).

First, by its express terms, OAR 213-012-0040(2) limits a court's authority only when it imposes a *consecutive* term of incarceration upon revocation. The rule imposes no limitation at all on the court's sentencing authority when it determines what term of incarceration to impose on any individual conviction. As explained above, when a court revokes probation on an individual felony conviction and imposes a term of incarceration, that decision is governed by OAR 213-010-0002, which bases the court's authority on the nature of the underlying *crime*, not on the nature of the *violation*. Given that the applicable statutes and rules clearly provide that the term of incarceration that may be imposed on an individual conviction is governed only by the seriousness of the underlying crime and not by the nature of the violation, it is untenable to conclude that a *separate* limitation in the rules that applies only to the court's authority to order the defendant to serve those terms *consecutively* somehow cancels out that basic principle and converts a revocation sanction into punishment only for the violation.[18]

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[18] Moreover, if a court finds that the defendant violated two or more conditions of probation—even if they are only "technical" violations—and revokes on that basis, OAR 213-012-0040(2)(b) (quoted in full above) provides that the court then has unlimited authority to impose consecutive incarceration terms. That rule does not impose any limitation either on the length of those terms or on the number of consecutive terms—*i.e.*, it does limit at all the court's sentencing authority based on the nature or number of the violations that the court had found.

Footnote continued…

Second, nothing in the guidelines or implementing legislation suggests that the limitation in OAR 213-012-0040(2)(a) on imposing consecutive incarceration terms was enacted to eliminate the well-established rule that the purpose of a sentence imposed on revocation is to punish the underlying offense and to replace it with a new rule that the purpose of such a term is only to punish the violation.[19] Rather, the evident purpose of that particular limitation on the imposition of consecutive terms upon revocation is to help to reduce the strain on prison resources by making it a bit more difficult for a court, in the probation-revocation

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(…continued)
In other words, OAR 213-012-0040(2) simply governs the court's authority to impose *consecutive* incarceration terms and it does not otherwise limit the court's sentencing authority to determine the appropriate term of imprisonment for any individual conviction.

[19] In its opinion, the Court of Appeals cited a single-sentence comment in the *Oregon Sentencing Guidelines Implementation Manual* 170 (1989) that said, in reference to the rule that is now OAR 213-010-0002: "The sanctions described by this rule are penalties for supervision violation and do not directly relate to the crime of conviction." *See Lane*, 260 Or App at 555. But that single statement is inherently ambiguous in context, and it does not establish that the purpose of a sentence imposed on revocation is punishment only for the conduct that constituted the violation and not for the underlying crime. Moreover, as this court noted in *State v. Bucholz*, 317 Or 309, 317-18, 855 P2d 1100 (1993), the commentary in that training manual was promulgated by staff after the guidelines already were enacted and hence it is "unofficial" and does not have any controlling authority. But perhaps more to the point for purposes of this case, there is no basis for this court to assume that a voter in 1999 would have been aware of that single sentence buried deep in the training manual and inevitably would have concluded from that comment that a term of incarceration imposed upon revocation of probation is not a "sentence" as that term is used in Measure 74.

context, to impose a lengthy series of consecutive prison sentences. *See* OAR 213-002-0001(3)(a) (noting that among "the basic principles which underlie these guidelines" is avoid a "corrections system that overruns its resources").

For the reasons explained above, there is no support in the applicable statutes, guideline rules, or the case law for the proposition that the guidelines fundamentally changed or displaced the well-established principle that a term of incarceration imposed upon revocation of probation is punishment for the criminal offense underlying the conviction and is not punishment for the conduct that constituted the violation of probation. Such a disposition always has been, and still remains, a punishment for the crime. But even if that point were debatable among lawyers and judges under the *current* state of law, nothing in the statutes, guideline rules, or the case law would have caused a voter in 1999 considering Measure 74 to have assumed that the guidelines had overruled the well-established rule that the purpose of the sentence imposed on revocation is to punish the underlying crime and then to have further deduced from that conclusion that a term of incarceration imposed upon revocation of probation is not a "sentence."

F. Legislative History of Article I, section 44, Shows It Applies To Sentences Imposed on Revocation

Even if there were some ambiguity in the text or context of Article I, section 44(1)(b), regarding how broadly the voters intended the term "sentence" to be construed, that ambiguity would evaporate when the history of that provision is

considered. The express purpose of section 44—which was enacted as a "victims' rights" measure—is to afford victims equal dignity by trumping any law that would limit a sentencing court's authority to impose consecutive sentences on convictions that are based on crimes the defendant committed against different victims. The policy underlying that provision applies with equal force whether the sentences are imposed at the original sentencing or later, upon revocation of probation.

The provision that is now in Article I, section 44(1)(b), was originally included, as section (1)(k), within the victims' rights initiative that became Ballot Measure 40 in 1996. *See Armatta v. Kitzhaber*, 327 Or 250, 252-56, 291-93 959 P2d 49 (1998) (discussing history and content of Measure 40). When this court in *Armatta* invalidated Measure 40, several of the provisions were then resubmitted to the voters through House Joint Resolutions 87 to 94 (1999). As noted above, the provision that became Article I, section 44, was approved by HJR 94, and it was submitted to the voters as referendum Measure 74 at the 1999 general election.

At the hearings in the legislature on HJR 94, there was almost no discussion of the provision in section (1)(b)—almost all the discussion was about the provision that appears in Article I, section 44 (1)(a), that ensures that a term of

incarceration that is imposed in open court will not be set aside.[20] But there was one relevant exchange regarding section (1)(b) that occurred during a public hearing on HJR 94 before the Senate Judiciary Committee on June 8, 1999. After an extended discussion of section (1)(a), Representative Kevin Mannix and Chair Neil Bryant had the following exchange:

> **Representative Mannix**: There is a second part of this, though, I do need to mention, it's important. And that is, "No law shall limit a court's authority to sentence a criminal defendant consecutively for crimes against different victims." That's very important. This does not say the judge must do so, but it does say that if the judge wants to do so the judge must be allowed to. The court must be allowed to. And we do have laws that have restricted the court's ability to do that. And this says no, the law may not restrict the court's ability to do that.
>
> **Chair Bryant**: Can you give me an example of a current law that restricts a judge's ability?

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[20] Article I, section 44(1)(a), of the Oregon Constitution provides:

> "(1)(a) A term of imprisonment imposed by a judge in open court may not be set aside or otherwise not carried out, except as authorized by the sentencing court or through the subsequent exercise of:
>
> "(A) The power of the Governor to grant reprieves, commutations and pardons; or
>
> "(B) Judicial authority to grant appellate or post-conviction relief."

> **Representative Mannix**: Mr. Chairman, *my recollection under sentencing guidelines is there are restrictions on consecutive sentences under a number of circumstances* and I — those who are dealing with them on a daily basis would probably come up with specific case examples. *But my understanding is that sentencing guidelines contain an inherent bias against consecutive sentences and the judge has to jump* through some loopholes—well, or excuse me *jump over some obstacles. This says unh, uh, you can't limit the judge's authority to sentence for different victims consecutive sentences and so if the sentencing guidelines any such provisos they would be rendered ineffective*.

(Sen. Jud. Comm., June 8, 1999, Tape 121, side B, at 145-50; emphasis added).

Back in 1999, OAR 213-012-0040(2)(a) was the only "law" in force that precluded a sentencing court from imposing consecutive sentences on convictions based on crimes against different victims. The statute that generally governs consecutive sentences is ORS 137.123, which was enacted in 1987. Or Laws 1987, ch 2, § 12. Under ORS 137.123(5)(b), a court has unlimited authority to impose a consecutive sentence on a conviction if the underlying crime "caused or created a risk of causing loss, injury or harm to a different victim." As noted above, the Court of Appeals held in 1995, in *Stokes*, that the enactment of OAR 213-012-0040(2)(a) in 1989 had displaced ORS 137.123(5) as a source of authority to impose consecutive sentences when the court revokes probation on felony convictions. Consequently, as Representative Mannix correctly noted, the only "law" in existence as of 1999 that limited a court's authority to impose

consecutive sentences on crime against different victims was in the guidelines, and that law was OAR 213-012-0040(2)(a).[21] Consequently, the enactment of Article I, section 44(1)(b), would not have effected any change at all in Oregon law unless it is construed to apply to trump the limitation in OAR 213-012-0040(2)(a).

When Measure 74 was submitted to the voters, the ballot title in the Voters' Pamphlet did not describe the provision in section (1)(b) except to repeat it verbatim. The statements in support and in opposition of the measure that were included in the pamphlet primarily addressed the provision in section (1)(a), but there were two comments relating to section (1)(b) that are relevant here. In his "Argument in Favor," Representative Mannix wrote: "This measure helps preserve and protect the right of crime victims to justice, and to ensure that a fair balance is struck between the rights of crime victims and the rights of criminal defendants in the course and conduct of criminal proceedings." Official 1999 November Special Election Voters' Pamphlet, p 39. And Steve Doell, on behalf of Crime Victims United, wrote in his "Argument in Favor":

> Measure 74 also prohibits the Legislature from passing laws that limit the authority of the sentencing judge from imposing consecutive

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[21] Another rule in the guidelines, OAR 213-012-0020(2), imposes a limitation, in some narrow circumstances, on the *length* of a consecutive sentence that may be imposed on a secondary conviction entered in a single case. But subsection (5) of that rule provides that that durational limitation does not apply "to consecutive sentences imposed for crimes that have different victims."

> sentences from crimes committed against different people. In other words, *there will be no "freebies" for criminals who go on a crime spree. Criminals will be subject to a more severe sentence for each victim they injure*.

Id. at 39 (emphasis added). None of the statements in support of or in opposition to the measure suggested that the authority granted to a sentencing court by section (1)(b) would not apply with equal force to a term of incarceration imposed upon revocation of probation.

In summary, the expressed purpose of section 44 is to afford victims equal dignity by trumping any law that would limit a sentencing court's authority to impose consecutive sentences on convictions that are based on crimes the defendant committed against different victims. The proponents wanted to ensure that a defendant who commits multiple crimes against different victims would not get "freebies" as a result of a law that imposed "obstacles" or limitations on the court's authority to impose consecutive sentences on the resulting convictions. The only law in existence in 1999 that so limited a sentencing court's authority to impose consecutive sentences was OAR 213-012-0040(2)(a). Nothing in the history of Measure 74 suggests that anyone—whether proponent or opponent—assumed that the provision in section (1)(b) would not apply with equal force to a term of imprisonment imposed upon revocation of probation. And the basic policy underlying that provision—to ensure the rights and dignity of each victim is protected—applies with equal force whether the sentences are imposed at the

original sentencing or later, upon revocation of probation. Therefore, the history of Measure 74 confirms what was set forth above—*i.e.*, Article I, section 44(1)(b), applies when a court, after revoking probation, imposes terms of imprisonment upon felony convictions that are based on crimes the defendant committed against different victims.

For all the reasons, the sentencing court in this case correctly ruled that it had authority under Article I, section 44(1)(b), to impose consecutive sentences on defendant's convictions.

CONCLUSION

This court should reverse the decision of the Court of Appeals, and affirm the judgment of the circuit court.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on June 13, 2014, I directed the original Brief on the Merits of State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Peter Gartlan and Daniel C. Bennett, attorneys for appellant, by using the court's electronic filing system.

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

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 7968 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(2)(b).

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