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 Case No. 07C49819 CA A148507 SC S062045

BRIEF ON THE MERITS OF RESPONDENT ON REVIEW

Review of the Decision of the Court of Appeals on Appeal from a Judgment of the Circuit Court for Marion County
Honorable Joseph V. Ochoa, Judge

Opinion Filed: January 2, 2014
Before: Armstrong, Presiding Judge, and Nakamoto, Judge, and Egan, Judge

PETER GARTLAN #870467
Chief Defender
DANIEL C. BENNETT #073304
Senior Deputy Public Defender
Office of Public Defense Services
1175 Court Street NE
Salem, OR 97301
Dan.Bennett@opds.state.or.us
Phone: (503) 378-3349
Attorneys for Respondent on Review

ELLEN F. ROSENBLUM #753239
Attorney General
ANNA JOYCE #013112
Solicitor General
TIMOTHY SYLWESTER #813914
Assistant Attorney General
400 Justice Building
1162 Court Street NE
Salem, OR 97301
timothy.sylwester@doj.state.or.us
Phone: (503) 378-4402
Attorneys for Petitioner on Review

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INTRODUCTION

Defendant was on probation for four felony counts. At a hearing, he admitted that he had committed a single violation of his probation – he drank alcohol despite a condition requiring that he not do so. The trial court revoked his probation, imposed 18-month prison sanctions on each count, and ordered that two of those sanctions run consecutively.

Defendant argued in the trial court that the felony sentencing guidelines do not allow consecutive sanctions unless a probationer commits more than one violation. The state did not disagree with that argument, but argued that the general rule was trumped in cases involving separate victims by Article I, section 44(1)(b), of the Oregon Constitution. The parties agreed that this case involves separated victims, but defendant argued that the constitutional provision did not apply to probation revocations.

The trial court agreed with the state, and the Court of Appeals with defendant. *State v. Lane*, 260 Or App 549, 318 P3d 750, *rev allowed*, 355 Or 317 (2014). The state petitioned this court to review the Court of Appeals decision, which this court allowed. The parties now resume a narrow argument: Does Article I, section 44, of the Oregon Constitution, which provides, "No law

shall limit a court's authority to sentence a criminal defendant consecutively for crimes against different victims," apply to probation revocation sanctions?

QUESTION PRESENTED AND PROPOSED RULE OF LAW

Question Presented

Under OAR 213-012-0040(2), a trial court may impose consecutive probation revocation sanctions only when the probation revocation is based on "separate supervision violations." Article I, section 44(1)(b) of the Oregon Constitution provides, "No law shall limit a court's authority to sentence a criminal defendant consecutively for crimes against different victims."

When the voters enacted Article I, section 44, did they intend to displace the limitation on consecutive incarceration sanctions in OAR 213-012-0040(2)?

Proposed Rule of Law

When a trial court revokes a criminal defendant's felony probation and imposes a sanction the court is not sentencing the defendant for a crime. Rather, the trial court is imposing a punitive sanction to vindicate the goals of probation. Because such a procedure is not a sentencing for a criminal conviction, Article I, section 44, of the Oregon Constitution does not apply.

SUMMARY OF ARGUMENT

Probation revocation sanctions are not sentences for criminal convictions. Because Article I, section 44(1)(b), applies only to sentences imposed for

criminal convictions, it has no bearing upon probation revocation sanctions. When a trial court places a person convicted of a felony on probation that person's "sentence" is probation. When a court revokes probation and imposes an incarcerative sanction, that sanction is not a new sentence. It is a consequence that flows from the sentence of probation. Although a trial court previously had the option to suspend the imposition of sentence and impose sentence upon revocation of probation, the Felony Sentencing Guidelines removed that option for people convicted of felonies. Now, a convicted felon is always sentenced upon conviction.

The legislature, the drafters of the Sentencing Guidelines, and appellate courts have all recognized the distinction between sentences and probation violation sanctions. The purpose of providing the authority to impose sanctions is ensure compliance with a valid authority. A trial court may impose intermediate sanctions upon a probationer in order to enforce compliance with the conditions of probation, or it may revoke probation and sanction the person to serve a period of incarceration. The availability of the latter option is powerful tool to make a probationer comply.

The voters who enacted Article I, section 44(1)(b) of the Oregon Constitution as Measure 74 in 1999 would have been aware of the distinction between sanctions and sentences. Nothing in the text, context, or history of that measure would have alerted the voters that the measure would have any impact

upon probation revocation sanctions. Instead, the materials provided to voters made explicit that the purpose of that measure was to prevent the passage of future laws limiting the availability of consecutive sentences for crimes involving separate victims, not to alter current laws or redefine the purpose or role of probation sanctions.

Measure 74 did not overrule current laws because there was no need for it do so – changes had already been made by the legislature two years earlier. Measure 74 was the second time voters enacted a provision limiting laws allowing consecutive sentences for crimes involving separate victims. It also did so in 1996 in Measure 40. Although that measure was later struck down as unconstitutional, the legislature enacted portions of it as Senate Bill 936. That bill *did* alter then-current laws, making several changes to the sentencing guidelines. When Measure 74 was passed those changes had already been made, and its effect was to cement them in the constitution. The voters in 1999 were not seeking to alter the law related to probation revocation sanctions.

SUMMARY OF FACTS

The Court of Appeals summarized the facts:

> "Defendant pleaded no contest to four felony counts of encouraging child sexual abuse. Defendant admitted that the conduct involved four different victims. The judgments of conviction provided that the applicable sentencing gridblock for each count was 8–I, which calls for a presumptive prison sentence of 16 to 18 months. Pursuant to a plea petition, the court imposed a

dispositional departure sentence of 60 months' probation on each of the four counts. One of the probationary conditions prohibited defendant from consuming alcohol.

"A little less than two years after the judgments of conviction were entered, the state requested, and the court signed, an order for defendant to show cause why his probation should not be revoked. The state asserted that defendant had admitted to consuming alcoholic beverages; it also indicated that defendant had visited a bar in violation of his probationary terms.

"The court held a revocation hearing at which defendant admitted that he had imbibed in violation of his probationary terms. The court found defendant in violation of his probation and scheduled a second hearing to determine an appropriate sanction for that violation. In a memorandum filed before the second hearing, defendant argued that the trial court lacked the authority to impose consecutive prison terms for a single probation violation, citing ORS 137.123, OAR 213–012–0040, and *State v. Stokes*, 133 Or App 355, 891 P2d 13 (1995). The state responded that Article I, section 44(1)(b), of the Oregon Constitution provided the court with the authority to sentence defendant to consecutive prison terms because there were four separate victims of the underlying crimes of conviction. The trial court concluded that it did have the authority to impose consecutive prison terms, stating:

> "'I think if this was a case where time was imposed, but not executed, and nothing was on the box checked as consecutive, the Court would have no choice but to run those concurrent. This is not such a case. The imposition of sentence was suspended. Therefore, the Court is at liberty to make that decision now.
>
> "'Second of all, I agree with [the state] that the Court allows—is allowed to give consecutive sentences in this case, based upon the fact that there were four separate victims. That was made clear in the plea petition.'"

> "The court imposed 18 months in prison on each of the four counts. It ordered the prison terms on Counts 1 and 2 to run concurrently to one another, the terms for Counts 3 and 4 to also run concurrently to one another, and the combined term imposed for Counts 1 and 2 to run consecutively to the combined term for Counts 3 and 4. Accordingly, the court imposed a total of 36 months in prison for the probation violation"

Lane, 260 Or App at 550-51 (brackets in *Lane*).

On appeal, defendant argued that the trial court erred in imposing consecutive prison sanctions for a single probation violation in light of OAR 213-012-0040(2), which provides:

> "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."

Lane, 260 Or App at 551 (emphasis added). The state argued that OAR 213-012-0040(2) does not apply in cases where there are multiple victims of the underlying crimes because Article I, section 44(1)(b), of the Oregon Constitution supersedes that rule by providing, "No law shall limit a court's authority to sentence a criminal defendant consecutively for crimes against different victims." *Id.*

The Court of Appeals held that Article I, section 44(1)(b) does not apply to probation revocation sanction because the purpose of such sanctions is "to punish the conduct constituting the probation violation, not the underlying crimes of conviction." *Id.* At 555. The court held that, given the legal framework in place at the time the voters adopted Article I, section 44, they would not have understood the term "sentence" to refer to a probation revocation sanction. *Id.* At 557-58. Therefore, OAR 213-012-0040(2) applied and barred the imposition of consecutive sanctions, requiring a remand. *Id.* At 558.

ARGUMENT

Article I, section 44, of the Oregon Constitution does not apply to felony probation revocation sanctions. Therefore, that provision does not supersede OAR 213-012-0040(2)'s rule that a trial court may impose consecutive probation revocation sanctions only upon a finding that a person has committed multiple probation violations. Article I, section 44, applies only when a court "sentences" a person for a crime, and a probation revocation sanction is not a sentence – or at the very least not a sentence for a crime.

The issue in this case is a narrow one. Defendant does not contest that the underlying crimes of conviction involved multiple victims. *Lane*, 260 Or App at 550. The state does not contest that defendant committed only a single

supervision violation. Pet. Br. at 3. The state advances only one argument: that the limitation in OAR 213-012-0040(2)(a) "does apply in this case because it is trumped by Article I, section 44(1)(b)." Pet. Br. at 5 n 4. Defendant agrees with the state that the sole question in this case is whether Article I, section 44, overrides OAR 213-012-0040(2)(a).

I. When a trial court places a person on felony probation that court is imposing a sentence.

Before addressing what effect the voters' enactment of Article I, section 44, had on the sentencing scheme, defendant briefly discusses the past and present of felony probation, the procedures for punishing probation violations, and what "sentencing" means.

The relevant dictionary definition of "sentence" is "**2 a :** to pronounce sentence on **:** to condemn to penalty or punishment < *the defendant was* sentenced *at the conclusion of the trial*>" *Webster's Third New Int'l Dictionary* 2068 (unabridged ed 1993) (emphasis added). Black's Law Dictionary defines "sentence" as

> "The judgment formally pronounced by the court or judge upon the defendant *after his conviction* in a criminal prosecution, imposing the punishment to be inflicted, usually in the form of a fine, incarceration, or probation * * *. Judgment of court formally advising accused of legal consequences of guilt which he has confessed or of which he has been convicted. * * *."

Black's Law Dictionary 1362 (6th ed 1990) (emphasis added).

Historically, when a court placed a person on probation, that person had not yet been "sentenced" for a crime. As this court explained, "Probation is a release by the court before sentence has commenced." *State v. Ludwig*, 218 Or 483, 486-87, 344 P2d 764 (1959). Prior to the enactment of the sentencing guidelines, a trial court's authority to place a person on probation was contingent upon that court suspending either the "imposition or execution of sentence." *State v. Emmich*, 34 Or App 945, 947, 580 P2d 570 (1978).

Thus, a trial court previously had two choices when it wanted to place a person on probation. The court could "first sentence the defendant and then grant probation or suspend the imposition of sentence and sentence at a later date if probation is violated." *State v. Stevens*, 253 Or 563, 565, 456 P2d 494 (1969). When a court chose the former option, upon revocation of probation the court's authority was limited to the execution of precisely the sentence that had been originally imposed because " a court that has decreed the punishment to be imposed and then placed a defendant upon probation is limited to causing execution of the judgment." *Id.* When it chose the latter option it did not "sentence" the defendant unless and until it later revoked probation. *State v. Carmickle*, 307 Or 1, 6-7, 762 P2d 290 (1988) (judgment suspending imposition of sentence and placing defendant on probation was not a "sentence").

In other words, prior to November 1, 1989, when the court placed a person on probation and suspended *imposition* of sentence, that person had not yet been "sentenced" and the revocation of probation was the event that triggered the imposition of a "sentence" for that criminal conviction. When the court placed a person on probation and suspended the *execution* of the sentence, the person had already been sentenced and the court's subsequent authority was limited to simply executing that sentence. ORS 137.010[1] is the most recent source of the requirement that a court suspend imposition or execution of a sentence before imposing probation. That provision still governs the imposition of probation when a person is sentenced on a misdemeanor or a felony committed prior to November 1, 1989.

The practice of either suspending imposition or execution of a sentence in order to impose probation has been described as one that "often generates

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[1] ORS 137.010 now provides, in part:

> "(3) Except when a person is convicted of a felony committed on or after November 1, 1989, if the court is of the opinion that it is in the best interests of the public as well as of the defendant, the court may suspend the imposition or execution of any part of a sentence for any period of not more than five years. The court may extend the period of suspension beyond five years in accordance with subsection (4) of this section.
>
> "(4) If the court suspends the imposition or execution of a part of a sentence for an offense other than a felony committed on or after November 1, 1989, the court may also impose and execute a sentence of probation on the defendant for a definite or indefinite period of not more than five years. * * * "

confusion." Arthur W. Campbell, *Law of Sentencing* § 5:1, 149 (3d ed 2004). Therefore, the American Bar Association urged that "such semantic distinctions be dropped and 'probation be viewed as a sentence just like any other sentence." *Id.* at 5:1, 149-50 (quoting AMERICAN BAR ASSOCIATION STANDARDS RELATING TO PROBATION 25 (1970).

Oregon has removed the requirement that a trial court must suspend the imposition or execution of sentence to place a person convicted of a felony on probation. Now, probation is a sentence. *Holcomb v. Sunderland*, 321 Or 99, 104, 894 P2d 457 (1995) ("The 1989 and 1993 revisions to the sentencing statutes now make it clear that a judgment of probation is the imposition of a sentence."). Under the guidelines, upon revocation of probation a trial court does not impose or execute a suspended sentence. Instead, a trial court applies up to the presumptive sentence from the defendant's original gridblock as a *sanction*. OAR 213-010-0002. As the Court of Appeals has explained, "Once a probationary sentence is executed, OAR 213-010-0002 limits revocation sanctions to those that flow from the gridblock used at the time of sentencing." *State v. Hoffmeister*, 164 Or App 192, 196, 990 P2d 910 (1999). A trial court revoking a defendant's probation and imposing a sanction does not sentence anew, but rather exercises its "limited authority to impose sanctions on offenders when probation is revoked." *Id.* at 197.

Probation violations under the sentencing guidelines more closely resemble the execution of a suspended sentence. A modern trial court does not "suspend the imposition of sentence and sentence at a later date if probation is violated" as it might have before the guidelines. Instead, a court imposes a *sentence* of probation and, if a defendant violates probation, the court imposes *sanctions* that flow directly from that original sentence. Although the trial court upon revocation may impose a range of sanctions including incarceration up to the maximum presumptive sentence for the defendant's gridblock, the court may not impose a different sentence.

Under each scenario discussed above, a person is "sentenced" only once. *See, e.g.*, *People v. Scott*, 58 Cal 4th 1415, 1423, 324 P3d 827 (2014) (Under California law "a defendant is 'sentenced' when a judgment imposing punishment is pronounced even if execution of the sentence is then suspended. A defendant is not sentenced again when the trial court lifts the suspension of the sentence and orders the previously imposed sentence to be executed."). When a trial court suspended the imposition of sentence and then ultimately revoked probation, it sentenced the defendant for the first time upon revocation. When a trial court suspended execution of sentence, the court sentenced the person immediately following conviction and later executed that sentence. And under the sentencing guidelines, a trial court *sentences* a person to probation

upon conviction, and then later imposes violation sanctions that flow directly from that original sentence.

Although the incarcerative consequences of violating probation may be severe, those consequences are authorized by the original sentence of probation a defendant receives. Thus, a criminal defendant who is given a sentence of probation knows that a violation, even a relatively minor one, may result in the imposition of a sanction of up to the maximum presumptive sentence for the underlying offense. OAR 213-010-0002(2). That does not mean that a person in that position is being "sentenced" for the underlying crime. Rather, it means he or she was given a bigger "break" when sentenced to probation and thus the consequences of failing to comply with probation are potentially more severe.

II. There is a distinction between sentencing upon conviction and the imposition of sanctions upon violation of probation.

In contrast to "sentence," the word "sanction" refers to a mechanism to force compliance with an authority. "Sanction" is defined as "a mechanism of social control that punishes deviancy from or rewards conformance to the normative standards of behavior existing in a society." *Webster's Third New Int'l Dictionary* 2009 (unabridged ed 1993). Or, a "[p]enalty or other mechanism of enforcement used to provide incentives for obedience with the law or with rules and regulations. That part of a law which is designed to secure

enforcement by imposing a penalty for its violation or offering a reward for its observance." *Black's Law Dictionary* 1341 (6th ed 1990).

A. The legislature has consistently used the term "sanction" to refer to the authority to ensure compliance with authority.

The legislature has used the term "sanction" to refer to situations in which a court or other entity may punish a person in order to ensure *compliance*, rather than for purely retributive or reformative reasons. For example, ORS 137.593 impose upon corrections agencies a duty to "impose structured, intermediate sanctions for probation violations." The purpose behind such sanctions is to promote public safety and "*compel compliance with the conditions of probation* by responding to violations with swift, certain and fair punishments." ORS 137.592 (emphasis added).

In another context, courts have contempt power in order to guarantee "effectual exercise of the powers" needed to oversee their work. ORS 1.020. That power includes the ability to impose remedial or punitive *sanctions*. ORS 33.025. In an example further afield from criminal law, if a landscape contracting business fails to comply with statutory requirements, it may be subject to "sanctions" including loss of its business license. ORS 671.613(1). The legislature has used "sanction" to indicate a punishment or other consequence placed upon a person in order to attain compliance with authority. Whether fining a landscaper, jailing an obstreperous party who interrupts a trial

judge, or sanctioning a probationer in order to ensure compliance with a term of probation, "sanctions" serve a different role than "sentences" for crimes.

There is a clear distinction between sentencing a person *to* probation and imposing sanctions following a violation *of* probation. That distinction is made clear in ORS 137.545(5), which provides:

> "(5)(a) For defendants sentenced for felonies committed prior to November 1, 1989, and for any misdemeanor, the court that imposed the probation, after summary hearing, may revoke the probation and:
>
> "(A) If the execution of some other part of the sentence has been suspended, the court shall cause the rest of the sentence imposed to be executed.
>
> "(B) If no other sentence has been imposed, the court may impose any other sentence which originally could have been imposed.
>
> "(b) For defendants sentenced for felonies committed on or after November 1, 1989, the court that imposed the probationary sentence may revoke probation supervision and *impose a sanction* as provided by rules of the Oregon Criminal Justice Commission."

(emphasis added).

ORS 137.545(5) addresses each of the scenarios set out above in the discussion of the history of probation. In each instance, a defendant is "sentenced" once. Subsection (5)(a)(A) applies when a court sentences a defendant upon conviction but suspends execution. That person is not sentenced anew upon revocation, but rather the suspended sentence is executed. Subsection (5)(a)(B) applies when a court does not sentence a person

conviction, but places him or her on probation and suspends imposition of sentence. That person is sentenced upon revocation – for the first time. Subsection (5)(b) governs the scenario at play in the instant case. A defendant is sentenced *to probation* upon conviction and is not sentenced anew upon revocation. Rather, a trial court "impose[s] a sanction." Only under subsection (5)(a)(B) is a person "sentenced" upon revocation. And that section does not apply to post-1989 felonies.

B. Appellate cases have recognized the distinction between "sanctions" and "sentences" for convictions.

The state relies upon *State v. Barajas*, 254 Or App 106, 113, 292 P3d 636 (2012), *rev den*, 353 Or 747 (2013), to argue that "the purpose of the imposition of a sentence upon revocation 'is to punish the crime of conviction, not the probation violation." Pet. Br. at 21. That case involves a defendant's challenge to the sentence imposed upon revocation of probation for a misdemeanor. *Id.* at 108. Accordingly, it dealt with a situation in which the court's revocation of probation led to the defendant being sentenced for the first time, the scenario governed by ORS 137.545(5)(a)(A). In reaching its decision, the *Barajas* court cited *State v. Maricich*, 101 Or App 212, 214, 789 P2d 701 (1990) for the proposition that "a defendant may be convicted for the same conduct that caused his probation to be revoked because the purpose of *the sentence imposed upon revocation* is to punish the original offense, not the violation." 254 Or

App at 106 (emphasis added). It also quoted *State v. Eckley*, 34 Or App 563, 567, 579 P2d 291 (1978) for the proposition that "the function of a probation-revocation proceeding 'is to determine whether to impose or execute a sentence for the offense of which defendant has already been convicted and for which probation was granted'" *Id.* However, the Court of Appeals was careful to cabin its opinion to the question before it. As it explained:

> "Both *Maricich* and *Eckley* involve felonies committed before November 1, 1989, the date on which the felony sentencing guidelines went into effect. We express no opinion regarding their continuing validity with regard to felonies committed after the guidelines went into effect. *See generally State v. Newell*, 238 Or App 385, 395, 242 P3d 709 (2010) (explaining that the *Oregon Sentencing Guidelines Implementation Manual* 170 (1989) 'provides that "[t]he sanctions described by [OAR 213–010–0002] are penalties for supervision violation and *do not directly relate to the crime of conviction*"' (brackets and emphasis in *Newell*)). However, the principle explained in those cases remains effective with regard to misdemeanors, which are not subject to the guidelines."

Barajas, 254 Or App at 113 n 3. This case involves felonies committed after November 1, 1989, and does not involve the "imposition" of a sentence upon revocation. [2]

The distinction between sentencing and probation revocation sanctions under the guidelines was well-established prior to the enactment of Article I,

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[2] The state's reliance upon *State v. Montgomery*, 3 Or App 555, 558, 474 P2d 780 (1970) is similarly misplaced as that case also predates the guidelines.

section 44. The Court of Appeals addressed that distinction in *State v. Newell*, 238 Or App 385, 387, 242 P3d 709 (2010). There, the defendant argued that the trial court could not impose consecutive sanctions upon revocation of probation because it had not made the necessary findings to impose consecutive sentences under ORS 137.123. The state responded by arguing, *inter alia*, that ORS 137.123 "applies only to the imposition of sentences and not to the imposition of probation revocation sanctions." *Id.* at 392.

In an opinion by then-judge Landau, the Court of Appeals agreed with the state. In reaching its conclusion, the court focused on the question of whether "imposing sanctions upon revocation of probation is 'sentencing' within the meaning of" ORS 137.123. *Id.* It found that the relevant statutes, cases, and administrative rules all drew a distinction between sentencing and probation sanctions. *Id.*

First, the court found a statutory distinction between those two types of proceedings:

> "The relevant statutes appear to draw a distinction between sentencing and the imposition of probation revocation sanctions. ORS 137.120(2), for example, refers to sentencing as occurring after a person 'is convicted,' while, in contrast, ORS 137.545(5)(b) provides that the court that imposed a probationary sentence 'may revoke probation supervision and impose a sanction as provided by the rules of the Oregon Criminal Justice Commission.' (Emphasis added.) If the legislature uses different terms in statutes, we generally will assume 'that the legislature intends different meanings' for those terms. *Dept. of Transportation v. Stallcup*, 341

> Or 93, 101, 138 P3d 9 (2006) (citing *State v. Keeney*, 323 Or 309, 316, 918 P2d 419 (1996)).”

Id. at 392-93.

Next, the court examined various Court of Appeals cases, including *Hoffmeister*, 164 Or App at 192. In *Hoffmeister*, the trial court examined the defendant’s criminal history upon probation revocation and determined that the sentencing gridblock has been incorrectly calculated, so the court imposed a sanction based upon the gridblock the defendant should have received. *Id.* at 194. The Court of Appeals held that the trial court should not have corrected the gridblock because the defendant’s probationary sentence “was imposed and executed under gridblock 7-I” and a trial court “has no inherent authority to modify an executed sentence[.]” *Id.* at 197. The court in *Newell* provided *Hoffmeister* as an example of a case that “draws a distinction between sentencing (or resentencing) and proceedings held concerning probation violations, and the sanctions that may be imposed as a result.” 238 Or App at 393.

Next, the *Newell* court examined the relevant administrative rules and noted that they, too, “maintain a distinction between how consecutive ‘sentences’ are handled and how probation sanctions involving consecutive incarceration terms are handled.” *Id.* The court examined the text of OAR 213-012-0040(2) , noted that it was “directly on point,” and explained that “that rule

addresses consecutive 'revocation sanctions' or 'incarceration sanctions,' whereas ORS 137.123 addresses 'consecutive sentences.'" *Id.* at 394. The *Newell* court concluded, "that the Oregon Criminal Justice Commission's rules, like the legislature's statutes, maintain a distinction between a consecutive sentence imposed upon conviction, and a consecutive incarceration sanction imposed as a result of multiple probation violations." *Id.*

The state correctly notes that *Newell* was decided after the voters enacted Article I, section 44. Pet. Br. at 16 n 13. Defendant does not argue that the voters would have been aware of that decision and considered it when voting, as they would have with *Stokes*, discussed below. However, *Newell* did analyze pre-1999 statutes and administrative rules and, in doing so, determined that probation violation sanctions "are penalties for supervision violation[s] and do not directly relate to the crime of conviction." 238 Or App at 395 (internal citations and emphasis omitted). In other words, *Newell* engaged in an examination of the sentencing framework that was in effect before 1999, and that framework provides context to the voters' decision. *Martin v. City of Tigard*, 335 Or 444, 451, 72 P3d 619 (2003) (context includes "relevant statutory framework in effect at the time when the voters adopted the provision").

C. The distinction is important to preserve flexibility in the supervision of probationers and others.

The distinction between the imposition of a sentence upon conviction of a crime and the consequences that flow from that sentence is an important one. The state's argument suggests that a "sentencing" occurs every time a court imposes any consequence upon a defendant." If this were the case, much flexibility that currently exists in the criminal justice system would be lost. At a minimum, this would undermine the reasoning of *State v. Newell* and a court would be required to comply with ORS 137.123 in order to impose consecutive revocation sanctions. In addition, victims of crimes would have a right to notice and to be heard before any hearing concerning probation sanctions. *See* Or Const, Art I, § 42(1)(a) (providing victims right "to be heard at * * * the sentencing"). Further, the same would presumably apply to the post-prison supervision system. *See* OAR 213-011-0004 (describing sanctions for violation of post-prison supervision including incarceration).

Nor is there any reason, under the state's argument, that the rights and rules governing formal sentencing hearings would only apply when incarcerative sanctions are imposed. ORS 137.540(8) provides a trial court authority to "at any time modify the conditions of probation." If a trial court determines that a probationer should complete alcohol treatment or refrain from contact with minors is the new condition a new sentence? Must the victim be

informed before a hearing can occur? No, because that person has been *sentenced* to probation and a later proceeding is merely the exercise of authority to modify, supervise, or in some cases revoke probation.

The state correctly notes that the sentencing guidelines occasionally use the term "sentence" in discussing the sanctions imposed upon revocation. For example, in OAR 213-010-0002 the guidelines use the phrase "the sentence upon revocation."[3] That phrasing does not help the state for two reasons. First, the legislature's use of the terms "sentence" and "sanction" in the same statute, ORS 137.545(5), evinces its intent to give those terms different meanings. *See, e.g.*, *James v. Newberg*, 101 Or 616, 619, 201 P 212 (1921) (rejecting argument that different terms in statute should be accorded same meaning). Second, even if the rules use "sentence on revocation" as a synonym for "sanction," that does not mean that a sentence on revocation is the same as a sentence upon conviction. Article I, section 44(1)(b) governs only the latter, applying by its express terms to a court's authority to "sentence a criminal defendant consecutively *for crimes* against different victims." When a court imposes a sanction upon revocation, it is not sentencing a defendant for *crimes*.[4]

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[3] Although that section uses the phrase "sentence on revocation," the title of that section is "Revocation Sanctions."

[4] In the instant case, defendant's probation was revoked because he consumed alcohol. That violation has no victim or, if it does, the victim is the State of Oregon.

III. The text, context, and history of Article I, section 44, demonstrate that the voters would not have intended that provision to affect probation sanctions.

For the reasons set out above, prior to the enactment of Article I, section 44, there was a clear distinction between sentencing a person to probation and imposing sanctions upon the revocation of probation. However, the people of Oregon have the power to erase such distinctions by adopting constitutional amendments. The question before this court is whether the voters intended to do so when they adopted Measure 74. The answer, according to the text, context, and history of that measure, is that voters did not intend to alter the sentencing guidelines' approach to probation violations.

When this court interprets a constitutional amendment adopted by the voters, its ultimate goal is to "discern the intent of the voters." *Roseburg Sch. Dist. v. City of Roseburg*, 316 Or 374, 378, 851 P2d 595 (1993). This court employs an approach that is similar to the analytical model set out in *PGE v. Bureau of Labor & Indus.*, 317 Or 606, 610-612, 859 P2d 1143 (1993). *Coultas v. City of Sutherlin*, 318 Or 584, 588–589, 871 P2d 465 (1994).

In order to determines the meaning of a referred constitutional amendment to the Oregon Constitution, this court first considers the "text of the provision itself." *Id.* If the text and context of the measure clearly demonstrates the voters' intent, the court need look no further. *Id.* However, this court has cautioned that it "is an unusual case in which the text and context of a

constitutional provision reflect the intent of the voters so clearly that no alternative reading of the provision is possible." *Coultas*, 318 Or at 590 (footnote omitted). Therefore, this court will generally proceed to an examination of the history of the provision. *Stranahan v. Fred Meyer, Inc.*, 331 Or 38, 56, 11 P3d 228 (2000). Although this court has not proceeded beyond an analysis of the history of a constitutional amendment, the Court of Appeals has applied a third level analysis by considering canons of statutory construction. *Kerr v. Bradbury*, 193 Or App 304, 324, 89 P3d 1227, 1237 (2004*), rev dismissed as moot*, 340 Or 241, *opinion adh'd to on recons*, 341 Or 200, 140 P3d 1131 (2006).

Here, the text, context, history, and relevant canons of statutory construction establish that the voters who enacted Article I, section 44, did not intend to alter the rules that govern probation revocation sanctions.

A. The text and context of measure 74 do not indicate an intent to alter probation revocation sanctions.

The first step is to consider the text of the measure. In doing so, "words of common usage that are not defined in the statute typically are to be given their plain, natural, and ordinary meaning. *Ecumenical Ministries of Oregon v. Oregon State Lottery Comm.*, 318 Or 551, 560, 871 P2d 106 (1994). However, when a constitutional amendment includes a term with a "well-defined legal meaning * * * we generally apply that definition." *State v. Bray*, 352 Or 809,

818, 291 P3d 727 (2012). *See also Ester v. City of Monmouth*, 322 Or 1, 9, 903 P2d 344 (1995).

For a constitutional provision adopted by the voters through the initiative process, context includes related ballot measures submitted to the voters at the same election. *Ecumenical Ministries*, 318 Or at 559. Context also includes other constitutional provisions in effect at the time the provision was adopted. *Stranahan*, 331 Or at 62 n15 (citing *Comeaux v. Water Wonderland Improvement Dist*., 315 Or 562, 569, 847 P2d 841 (1993)). Context also includes relevant case law existing at the time the voters enacted the measure. *See Stranahan*, 331 Or at 61 (level one analysis includes "relevant case law interpreting" constitutional provision).

As a threshold matter, it is important to recognize that the state is arguing that the voters who enacted Measure 74 intended to alter the then-current state of the law. It is uncontested that, absent the limitation the state is now urging, OAR 213-012-0040(2)(a) forecloses the imposition of consecutive incarceration sanctions upon probation revocation unless the trial court finds that there are multiple probation violations. *See, e.g.*, *State v. Lewis*, 257 Or App 641, 646, 307 P3d 560 (2013). Therefore, the state's position is that the enactment of Measure 74 had the effect of creating an exception to that rule.

As to the text, Article I, section 44(1)(b) provides, "No law shall limit a court's authority to sentence a criminal defendant consecutively for crimes

against different victims." Article I, section 44, was enacted by the voters in November 1999 as Ballot Measure 74 (1999). That measure was referred to the voters by the voters via legislative referendum. HJR 94 (1999). Article I, section 44 as a whole 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.
>
> "(b) No law shall limit a court's authority to sentence a criminal defendant consecutively for crimes against different victims.
>
> "(2) This section applies to all offenses committed on or after the effective date of this section. Nothing in this section reduces a criminal defendant's rights under the Constitution of the United States. Except as otherwise specifically provided, this section supersedes any conflicting section of this Constitution. Nothing in this section creates any cause of action for compensation or damages nor may this section be used to invalidate an accusatory instrument, ruling of a court, conviction or adjudication or otherwise suspend or terminate any criminal or juvenile delinquency proceedings at any point after the case is commenced or on appeal.
>
> "(3) As used in this section, 'victim' means any person determined by the prosecuting attorney to have suffered direct financial, psychological or physical harm as a result of a crime and, in the case of a victim who is a minor, the legal guardian of the minor. In the event no person has been determined to be a victim of the crime, the people of Oregon, represented by the

> prosecuting attorney, are considered to be the victims. In no event is it intended that the criminal defendant be considered the victim."

Nothing in the text makes reference to a court's authority to impose sanctions upon revocation of probation. Nevertheless, the state argues that the voters, in using the word "sentence" in section (1)(b), would not have differentiated "between a punishment that is imposed on a conviction at the original sentencing and one that is imposed later, upon revocation of probation." Pet. Br. at 10. Such a distinction, the state suggests, would require attaching an "arcane" meaning to the term sentence. Pet. Br. at 10.

The state is incorrect. Following the presumption that voters who enact measures containing legal terms intend to give those terms their well-defined meaning, the voters would have understood precisely that distinction. Although the term "sentence" is not defined either in Article I, section 44, or elsewhere in the Oregon Constitution, it had a well-defined legal meaning at the time of the enactment of Measure 74.

At the time Measure 74 was enacted in 1999, the voters would have been aware of the distinction between sentencing and imposing probation sanctions because the sentencing guidelines unambiguously draw that distinction. As set above, both statutes and administrative rules draw a distinction between sentences and "revocation sanctions" or "incarceration sanctions." For example, OAR 213-012-0020 uses the term "consecutive sentence" five times to refer to

sentences imposed by trial courts upon conviction. By contrast, OAR 213-012-0040 refers exclusively to "sanctions" when discussing the punishment that a judge may impose upon a probation violation. In considering the meaning of the term sentence, the voters are presumed to be familiar with the sentencing guidelines because, "[a]lthough the sentencing guidelines were created as administrative rules, the legislature approved them in 1989, giving them the authority of statutory law." *State v. Langdon*, 330 Or 72, 74, 999 P2d 1127 (2000).

The distinction between imposition of a sentence and imposition of sanctions upon revocation was made express in ORS 137.545. Defendant discussed that statute above. The voters would have been aware of that distinction. The version of that statute in effect in 1999 (then numbered ORS 137.550) contained the same text in subsection (5) as the current statute. 1999 Or Laws, ch 614, § 2.

The voters also would have been aware of the distinction between sentencing and the imposition of sanctions because the Court of Appeals had drawn that precise distinction several years prior in *State v. Stokes*, 133 Or App 355, 891 P2d 13 (1995). In *Stokes*, the sentencing court imposed two consecutive sentences of probation. *Id.* At 347. Later, the defendant's probation was revoked based on a single probation violation. *Id.* The state argued that the

trial court was authorized to impose the sentence based on OAR 253-12-010[5] and ORS 137.123.[6] *Id.* at 357-58.

The Court of Appeals rejected the state's argument. In doing so, it recognized the distinction between imposing a sentence upon conviction and imposing sanctions:

> "The difficulty with the state's position is that, under sentencing guidelines, the requirements for imposition of the initial sentence are not the same as the requirements for imposing sanctions when probation is revoked. Under OAR 253-12-010 and ORS 137.123, the court had the authority to impose consecutive sentences in the first instance. It did so when it imposed consecutive probationary terms as dispositional departure *sentences*. * * * Under OAR 253-10-001, the court had the discretion to revoke those probationary sentences. On doing so, however, the court did not have the discretion to impose *revocation sanctions* other than those provided by the guideline rules"

Id. at 358 (emphasis in original).

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[5] OAR 253-12-010 is now renumbered at OAR 213-012-0010, which provides, "When multiple convictions have been entered against a single defendant, the sentencing judge may impose consecutive or concurrent sentences as provided by ORS 137.123 and ORS 137.370."

[6] ORS 137.123 provides in relevant part:

> "A sentence imposed by the court may be made concurrent or consecutive to any other sentence which has been previously imposed or is simultaneously imposed upon the same defendant. The court may provide for consecutive sentences only in accordance with the provisions of this section. A sentence shall be deemed to be a concurrent term unless the judgment expressly provides for consecutive sentences."

Thus, *Stokes* drew a distinction between the imposition of *sentences* upon conviction and the imposition of *sanctions* upon probation revocation. The state points to no authority for the proposition that the voters would have ignored this established distinction when they enacted Article I, section 44, via Measure 74.

B. The history of Measure 74 does not indicate intent by the voters to alter probation revocation sanctions.

An examination of the history of Measure 74 indicates that the voters intended to bar the enactment of *new* laws limiting the imposition of consecutive sentences for crimes involving separate victims. The history that this court considers in construing a constitutional amendment is that which helps elucidate the intent of the voters who enacted the measure. That includes "the ballot title and arguments for and against the measure included in the voters' pamphlet, and contemporaneous news reports and editorial comment on the measure." *Ecumenical Ministries*, 318 Or at 559 n 8 (citing *State v. Wagner*, 305 Or 115, 131-34, 752 P2d 1136 (1988)).

The ballot title for Measure 74[7] provides:

> "**AMENDS CONSTITUTION: REQUIRES TERM OF IMPRISONMENT ANNOUNCED IN COURT BE FULLY SERVED, WITH EXCEPTIONS.**

[7] A copy of the portions of the 1999 voters' pamphlet relating to Measure 74 is attached at Att-1-4.

> **"RESULT OF 'YES' VOTE:** 'Yes' vote requires terms of imprisonment announced in court be fully served with exceptions; guarantees consecutive sentencing authority.
>
> **"RESULT OF 'NO': VOTE:** 'No' vote retains legislature's power to adopt laws setting aside or modifying terms of imprisonment announced in court and to limit consecutive sentencing authority.
>
> **"SUMMARY:** Amends Constitution. Measure requires terms of imprisonment imposed by judge in open court to be fully served. Effect is to eliminate reductions for good conduct or other reasons unless authorized by sentencing court and permitted by law. Provides exceptions for: reprieves, commutations, or pardons by Governor; relief from appellate or post-conviction court. Measure would bar statutory change reducing imprisonment already imposed. Measure also bars laws limiting consecutive sentences for crimes against certain victims. Defines 'victim' to include people of Oregon, represented by prosecuting attorney, when no person has been determined to be victim. Person accused of crime cannot be considered victim. Applies to offense committed on or after measure's effective date.
>
> **"ESTIMATE OF FINANCIAL IMPACT:** No financial effect on state or local government expenditures or revenues."

Several aspects of the ballot title bear notice.[8] First, as with the text of Measure 74, the ballot title makes no mention of probation violations and the imposition of sanctions. Thus, nothing on the surface of the title would provide a voter notice that a "yes" vote would have any impact on such proceedings. Further, to the extent the title refers to the text that became Article I, section

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[8] The state asserts that "the ballot title in the Voters' Pamphlet did not describe the provision in section (1)(b) except to repeat it verbatim." Pet. Br. at 20. The state is incorrect.

44(1)(b), it suggests a *prospective* limitation on the authority of a future legislature to enact limitations on a sentencing judge's ability to impose consecutive sentences. The section describing the result of a "yes" vote states that such a vote "guarantees consecutive sentencing authority." The use of the word "guarantee" suggests that the purpose of that provision is to *preserve* something which already exists. Similarly, the result of a "no" vote is to preserve the "legislature's power to adopt laws setting aside or modifying terms of imprisonment announced in court and to limit consecutive sentencing authority." Again, this phrasing suggests that purpose of voting no is to allow a future legislature to retain the authority to pass new laws limiting a trial court's authority to impose consecutive sentences.

Next, the summary of the measure does not refer to modifying the probation sanction system. It provides only that the measure "also bars laws limiting consecutive sentences for crimes against certain victims." To "bar" something means to "prevent" that thing from occurring. The dictionary defines "bar," in relevant part, as "**4 a :** to interpose or serve as a sufficient and permanent legal objection to (as an action) or to the claim of (as a person) **b :** PREVENT, HINDER * * * **c :** FORBID, PROHIBIT * * * **d :** to obstruct, block or shut off (as an entrance to a road) by or as if by a barrier * * * ". *Webster's Third New Int'l Dictionary* 174 (unabridged ed 1993). Notably, the voters' summary does not state that the measure would "repeal," "override," "supersede," or

"trump," any currently existing law. Therefore, the voters likely understood that the effect of a "yes" vote would be to bar the enactment of new laws.

The explanatory statement for Measure 74 also describes the effect of the consecutive sentence text as a prospective limitation on the enactment of laws. That portion of the voters' pamphlet states that the "measure also prohibits laws that *would* limit a court's authority to sentence a person consecutively for crimes committed against different victims." (Emphasis added). It, again, does not refer to repealing existing laws or rules.

Only one of the statements in support of Measure 74 address the consecutive sentencing provision. Voters Pamphlet at 39. In his statement in support, Steve Doell, of Crime Victims United makes explicit that the purpose of that provision is to prospectively limit the enactment of new laws:

> "*Measure 74 also prohibits the Legislature from passing laws* that limit that authority of the sentencing judge from imposing consecutive 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. (emphasis added). That statements makes no reference to altering probation violation sanctions. As with the ballot title, it refers only to preventing legislatures from enacting *new* limitations on a trial court's sentencing authority.

The voters may have intended to prevent alterations to a number of statutes. For example, ORS 137.123. That statute requires that sentences be imposed concurrently unless one of several exceptions applies. One exception is ORS 137.123(5)(b), which allows the imposition of consecutive sentences for crimes involving separate victims. That section has not changed since 1995, with the exception of the correction of a typo. Or Laws 2003, ch 14,§ 58 (altering phrase "uninterrupted course or conduct" to read "uninterrupted course of conduct"). The voters may also have intended to constitutionalize several changes made to sentencing guidelines a few years earlier, as discussed in Section IV, below.

In discussing the history of what became Article I, section 44, the state quotes from the testimony of Representative Mannix to argue that the purpose of the legislative referral was to amend unspecified then-extant portions of the sentencing guidelines. Pet. Br. at 27-30.[9] The flaw in the state's argument is that the testimony of legislators in referring a ballot measure is not part of that ballot measure's history. In considering the history of a constitutional amendment this court seeks to determine the intent of the *voters* who enacted that measure. Therefore, "the history that we consider does not include early drafts of the

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[9] As set out below in section IV of this brief, Representative Mannix may have been referring to changes that had already been made by Senate Bill 936 (SB 936) in 1997.

legislative bill that later was referred to the people, nor does it include statements made by legislators in hearings on that matter." *Shilo Inn v. Multnomah County*, 333 Or 101, 129, 36 P3d 954 (2001), *modified on recons*. 334 Or 11, 45 P3d 107 (2002). Those statements do not inform what the voters believed that measure to mean, because "only those materials that were presented to the public at large help to elucidate the public's understanding of the measure and assist in our interpretation of the disputed provision." *Id.* at 129-30. Those materials that *were* presented to the public at large make no reference to altering the framework by which trial court's punish violations of probation.

C. General maxims of construction demonstrate that the voters would not have understood "sentencing" to include probation violation sanctions.

This court has not applied general maxims of construction to constitutional analysis but the Court of Appeals has done so in *Kerr v. Bradbury*. 193 Or App at 324. This court has historically considered maxims at the third level when analyzing legislatively enacted statutes. *PGE*, 317 Or at 612. Defendant acknowledges that traditional maxims of construction may be of limited utility an determining the intent of the voters, but to the extent that they are relevant they favor defendant.

One maxim of construction that this court has employed is a preference to avoid giving a provision an interpretation that is unconstitutional. *State v.*

Kitzman, 323 Or 589, 602, 920 P2d 134 (1996). That presumption is relevant when "one plausible construction of a statute is constitutional and another plausible construction of a statute is unconstitutional[.]" *Id.*

Here, the state's proposed interpretation of Article I, section 44, presents constitutional concerns because, if that provision allows that people may be "sentenced" once for committing a crime and "sentenced" again for violating probation, it violates the Fifth Amendment's bar[10] against multiple punishments for the same offense. *United States v. Dixon*, 509 US 688, 696, 113 S Ct 2849, 125 L Ed 2d 556 (1993) (Fifth Amendment protects against multiple punishments for the same offense).The United States Supreme Court has held that there is no double jeopardy protection "against revocation of probation and the imposition of imprisonment," *United States v. DiFrancesco*, 449 US 117, 137, 101 S Ct 426, 66 L Ed 2d 328 (1980). That is reasonable because the

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[10] The Fifth Amendment to the United States Constitution provides,

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; *nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb*; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation"

(Emphasis Added).

imposition of probation sanctions is not a new, separate sentencing and punishment – it the imposition of penalties that flow from the original sentence imposed at sentencing. The immediate cause of such sanctions is not the underlying crime, but the trial court's determination that "the purposes of probation are not being served." *Barker v. Ireland*, 238 Or 1, 4, 392 P2d 769, (1964). Under defendant's proposed interpretation of Article I, section 44, no Double Jeopardy problem is present because it is clear that a probation violation proceeding is not a separate punishment for the same offense.

IV. The purpose of Article I, section 44(1)(b) was to enshrine within the constitution changes to sentencing law that had already been made in SB 936.

Although the statements of Representative Mannix at the June 8, 1999, Senate Judiciary Committee hearing do not bear upon the decision made by the voters in enacting Measure 74, it may be helpful to clarify what he was likely referring to. The relevant portion of that exchange, set out at page 28-29 of the state's brief, was:

> "Chair Bryant: Can you give me an example of a current law that restricts a judge's ability?
>
> "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.

Pet. Br. at 28-29 (quoting Sen. Jud. Comm., June 8, 1999, Tape 121, side B, at 145-50) (emphasis omitted).

The statement is noteworthy for two reasons. First, Representative Mannix acknowledged that he could not name a specific restriction on the imposition of consecutive sentences in the guidelines – "those who are dealing with them on a daily basis would probably come up with specific case examples." Next, the comment suggests that the representative believed that there were multiple limits on consecutive sentencing authority in the guidelines – "my recollection under sentencing guidelines is there are restrictions on consecutive sentences under a number of circumstances." The state argues that "the only" law that limited consecutive incarcerations for multiple-victim cases in 1999 was OAR 213-012-0040(2)(a). That may be correct. If so, it does not explain why the Representative believed that there were restrictions "under a number of circumstances" or that the guidelines contained "an inherent bias" against consecutive sentencing. Defendant proposes that Mannix was likely simply unaware that the sentencing guidelines had been recently amended to remove the "bias" against consecutive sentencing in cases involving separate victims.

Prior to November 1, 1997, the sentencing guidelines *did* contain a number of such limitations. Those were *former* OAR 213-08-007(3) (1995), which limited the length of a departure sentence on a consecutive sentence, and *former* OAR 213-12-020(2) (1995), which required a sentencing court to "shift" to criminal history score "I" for sentences imposed consecutively. Neither rule contained an exception for crimes involving multiple victims.

However, both of those provisions were amended in 1997 in order to insert exceptions for crimes involving multiple victims. OAR 213-080-007(3) was amended to provide that the limitation on consecutive departure sentences "does not apply to * * * consecutive sentences imposed for crimes that have different victims." OAR 213-12-002 (previously OAR 213-12-020) was amended to provide that the "Shift-to-I" provision did not "apply to consecutive sentences imposed for crimes that have different victims." Thus, although the guideline did not contain limitations on the imposition of consecutive sentences for crimes involving separate victims when Representative Mannix made his statement in 1999, that is because the limitations had been removed less than two years earlier.

Even more telling is *why* those rules were amended in 1997. In 1996, the voters approved Ballot Measure 40. *State v. Fugate*, 332 Or 195, 199, 26 P3d 802, 805 (2001) (discussing history of Measure 40). Measure 40, a constitutional amendment, contained a number of victim's rights provisions,

including Section 11, which provided victims "the right to have convicted criminals sentenced consecutively for crimes against different victims." *Id.* at 200. That provision is similar to Article I, section 44(1)(b). Measure 40 was declared unconstitutional in *Armatta v. Kitzhaber*, 327 Or 250, 252, 959 P2d 49 (1998). However, before *Armatta* was issued, the legislature passed SB 936, which enacted portions of Measure 40 into statute. *Fugate*, 332 Or at 200-01.

SB 936 explicitly directed the Oregon Criminal Justice Commission to make the amendments excluding crimes involving separate victims from the limitations on consecutive sentencing discussed above. Or Laws 1997, Ch 313, §§ 26-27. The bill did not direct the Criminal Justice Commission to amend *former* OAR 213-12-004 (1995).

To summarize: In 1996 the voters passed a constitutional amendment that included "the right to have convicted criminals sentenced consecutively for crimes against different victims." Before that amendment was struck down in *Armatta*, the legislature enacted SB 936 in order to give effect to the voters' wishes. In so doing, they direct the Oregon Criminal Justice Commission to make two changes to the sentencing guidelines, both related to the imposition of consecutive sentences. There is no indication that the legislature considered altering the provisions related to the imposition of probation sanctions on revocation because sanctions on revocation are not the same as sentences upon conviction.

CONCLUSION

The voters in November 1999 would have been familiar with the felony sentencing scheme as it then existed. They would have understood that sentencing following conviction and imposition of sanctions following violation of probation are governed by different processes, regulated by different statutes and administrative rules, and seek to vindicate different interests. That understanding would have been reinforced by appellate decisions making clear the different nature of those proceedings.

When those voters examined Measure 74 they would have seen that it made no reference to altering probation violation proceedings. Therefore, they would have no reason to think that they were enacting such a change. Further, when the publicly available information about that measure describing its purpose referenced only limiting the legislatures ability to pass new laws, the voters would have had no basis to conclude that a “yes” vote would upend the rules governing probation violation sanctions. This court cannot infer, from materials that are silent on the matter, that voters intended to alter the system of sanctioning probation violations.

Defendant was sentenced when the trial court placed him on probation. When the court revoked his probation, it imposed sanctions that flowed from that original sentence. It did not sentence him anew, and the voters who enacted Article I, section 44, of the Oregon Constitution would not have understood the

court to have done so. Accordingly, the rules governing probation revocation sanctions were not altered by the enactment of that measure. This court should affirm the Court of Appeals decision.

Respectfully submitted,

PETER GARTLAN
CHIEF DEFENDER
OFFICE OF PUBLIC DEFENSE SERVICES

ESigned

DANIEL C. BENNETT OSB #073304
SENIOR DEPUTY PUBLIC DEFENDER
Dan.Bennett@opds.state.or.us

Attorneys for Defendant-Appellant
David Frank Lane

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

Brief length

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 9,955 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 Brief on the Merits of Respondent on Review to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on August 14, 2014.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Brief on the Merits of Respondent on Review will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Anna Joyce, #013112, Solicitor General, attorney for Petitioner on Review.

Respectfully submitted,

PETER GARTLAN
CHIEF DEFENDER
OFFICE OF PUBLIC DEFENSE SERVICES

ESigned

_____

DANIEL C. BENNETT OSB #073304
SENIOR DEPUTY PUBLIC DEFENDER
Dan.Bennett@opds.state.or.us

Attorneys for Respondent on Review
David Frank Lane